



# Family ties

Do those without a legal interest in the homes they live in – such as spouses, partners and children – have a right to bring a private nuisance claim?  
**Gregory Jones QC and Rebecca Cluffen investigate**

Six years after the completion of the Canary Wharf tower, a group of local residents complained of interference with their television reception. They took their fight for compensation to the House of Lords. The result was the decision in *Hunter v Canary Wharf* [1997] AC 655, arguably the most well-known 'environmental' case to date. But is it? Is nuisance part of environmental law or a tortious adjunct of real property law?

That was the tenor of the leading opinion given by Lord Goff. It laid down two principles. First, that no action in private nuisance lies for interference with television signal where that interference is the result of the presence of a nearby building. Second, and more importantly, that only those with a legal interest in or exclusive possession of the land could sue in private nuisance, thus preventing from bringing claims those spouses, partners,

children and others who did not have a legal interest in the homes in which they lived.

The rationale of limiting claims in private nuisance to those with a legal interest in or the right to exclusive possession of the affected property was that private nuisance is a tort directed against interference with a claimant's rights over land: if a claimant has no such rights, they cannot have been interfered with, and no action in nuisance can lie. The House addressed the issue of whether it ought to depart from this established principle, but did not consider it appropriate to do so. Given the potential width of the category of people who might then be able to sue (reference was made to lodgers and au pairs, who the majority did not think could be readily distinguished from spouses living in the matrimonial home), it was considered that the effect

of opening up private nuisance to claims would be to "transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land" (per Lord Goff).

This was not considered to be an acceptable way in which to develop the law. The decision was not, however, unanimous, and there was a famous dissent on the point by Lord Cooke of Thorndon, who opened with the comment that, while the opinions of the rest of the committee "achieve a major advance in the symmetry of the law of nuisance", he was "less persuaded that they strengthen the utility or the justice of this branch of the common law".

As in the judgment of the Court of Appeal below, Lord Cooke's view was that the modern-day law ought to allow spouses, children and other resident members of the home standing for claims brought in private nuisance, recognising the sanctity of family life and the home. In doing so, he relied on the special status modern legislation and authorities – including transatlantic authorities – have given to those occupying a marital home without any legal interest in it, and the special protection that international law gives to children in the family home, such as article 12 of the United Nations Convention on the Rights of the Child, article 16 of the Universal Declaration of Human Rights and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

He considered that since it was logically possible for the law to adopt modern, rights-based approach to the question of standing in private nuisance claims, policy suggested that it was the approach that ought to be taken.

### Lost opportunity

The decision in *Hunter* was subject to much criticism, with many commentators arguing – in common with the views of Lord Cooke – that the case failed to give due weight to the rights of those occupying homes without legal interests; in particular, to

women and children. In light of the volume of criticism, it is perhaps surprising that the issue of *Hunter's* continuing application following the commencement of the Human Rights Act 1998 has still not been substantially addressed by the courts. The issue was recognised as being a live one in *McKenna v British Aluminium Ltd* [2002] Env

## “Modern-day law ought to allow spouses, children and other resident members of the home standing for claims brought in private nuisance, recognising the sanctity of family life and the home”

LR 30, where Neuberger J (as he then was) refused an application to strike out a claim in nuisance on the basis that the decision in *Hunter* might not be article 8 compliant, but declined to make any further decision on the issue. Regrettably, though, the matter appears never to have gone any further, and any opportunity for reconsideration of the issue by the courts at the present time appears to have been lost.

The only real encroachment on the scope of the decision appears to have been rather more limited in nature. For example, in 2000, the Court of Appeal was able to distinguish *Hunter* in a case concerning a woman occupying local authority housing

as a ‘tolerated trespasser’ following failure to pay rent arrears in accordance with a court order, who sought to sue the local authority freeholder in private nuisance following an infestation of cockroaches that had affected her enjoyment of the property.

Contrary to the local authority's argument, based on the concurring opinion

of Lord Hoffmann in *Hunter*, that for a tolerated trespasser to have exclusive occupation of land so as to be able to sue in nuisance, “the trespasser's occupation of the land must be such that after the passing of 12 years, that possession will defeat the title of the true owner. In other words, the occupation must be with the intention of possessing the land to the exclusion of others and possessing it in a way which is adverse to the rights of the true owner.”

The court held that such a tolerated trespasser did have sufficient standing to bring a claim in private nuisance on the basis that their possession, while precarious, remained exclusive, and that Lord Hoffmann's concern had in fact been with user of land that was intermittent or otherwise not exclusive.

As the lords noted in *Hunter*, in most cases, it will be possible for the party with a legal interest in land to bring a claim that will benefit all those living at the property. That may be true. They might also have mentioned the possibility of recourse to statutory nuisance under section 82 of the EPA 1990. But it is 13 years since the passing of the Human Rights Act 1998 and much has changed. Those who lack property interests – spouses, lodgers, children (but not cats!) – are among the more vulnerable in society, potentially lacking sufficient funds to bring a claim that would, in all likelihood, go all the way to the Supreme Court.

### JOIN THE DEBATE

The issue discussed in this article will shortly be heard before a different court: the moot court. Students entering Francis Taylor Building's inaugural moot competition, the FTB Kingsland Cup and Moot, will be arguing the issue before a panel of High Court judges and leading environmental silks. The results may not be legally binding, but the debate between opposing counsel should be a lively and stimulating one – much like the academic debate that has preceded it. The ‘access to justice’ issue is also being addressed, with students being asked to consider the relevance of article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, which addresses issues ranging from the expense of environmental proceedings to costs-capping orders made under the Civil Procedure Rules.

The final will take place in the Supreme Court before Lord Brown of Eaton-under-Heywood.

The moot, organised by FTB Francis Taylor Building and sponsored by *Solicitors Journal* honours the late Lord Christopher Kingsland QC, European politician and lawyer and member of FTB. The topics of the Kingsland moot, European, administrative and environmental law, reflect Christopher's own practice at the Bar, and the moot aims to encourage and reward the virtues he possessed – intellectual rigour, clarity and fluency of expression and unfailing courtesy. The moot is open to undergraduates, graduates, GDL, LPC and BTPC students. The closing date for first round entries is 4pm on Friday 18 November 2011.

To find out more or support the moot, visit: [www.ftb.eu.com/home/ftb-student-competitions-and-prizes.asp](http://www.ftb.eu.com/home/ftb-student-competitions-and-prizes.asp)



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