Practice

Legal

A balancing exercise

The law on nuisance relating to commercial premises is complex

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It has taken Rosalind Malcolm and me over two years to write this second edition of our book, first published in 2002. Quite a lot has happened since then. Statutory nuisance remains a complex and difficult area of law, especially when nuisances originating from industrial, trade and business premises are alleged. Here, issues are likely to be complex, solutions elusive, and 'best practicable means' defences may be hard for the local authority to rebut.

To give an example, what rights do the owners or occupiers of commercial premises have in respect of statutory nuisances caused by their neighbours? Some councils do not investigate such alleged nuisances, holding that this situation is a matter for a private nuisance action in the civil courts and that their duties under the Environmental Protection Act 1990 (EPA) are not applicable. A common problem occurring in areas such as the City of London is where one commercial enterprise is causing interference to the personal comfort of its commercial neighbours. Such interference might even amount to a risk to health or a public nuisance. It is unthinkable to conclude that parliament's intention in 1990, when the future EPA was being debated, was to deprive people of rights on the grounds that they were not residents.

Section 79 of the EPA requires every local authority 'to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80... and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint'.

In my view, the meaning of this section requires there to be two elements to the local authority's duty. But it all depends on how you interpret the word 'and' in section 79. Should it be interpreted, as some local authorities seem to think, to mean that there is a single duty, so that the duty to inspect is dependent on a complaint coming from a person living within its area? Or, does 'and' in this context mean that these are alternative routes for the exercise of section 80 powers? If the latter is the correct interpretation of section 79, which I think it is, then it is irrelevant in respect of the first duty whether the complainant is a resident or not, because that duty does not even require a complaint to trigger action by the local authority. The residential status of the complainant is only a requirement for an investigation carried out under the second duty.

Local authorities who refuse to investigate these complaints are acting ultra vires in my opinion

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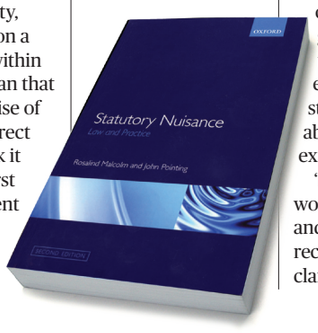

The authority's duty to inspect its area from time to time originated in section 92 of the Public Health Act 1875. There is nothing in that act to restrict the scope of statutory nuisance to the effects only on residential property, or the making of a complaint to residents.

The second duty – to respond to complaints from persons living within the area – originated in the EPA as a way of enhancing local authority duties to investigate noise complaints. Mr David Trippier, a junior government minister, said during the bill's third reading that: 'Of course, one would expect local authorities to take reasonable steps to investigate complaints made to them about noise and most authorities interpret the existing duty in that way.

'It has been suggested, however, that the wording of the existing duty is unduly obscure, and the noise review working party has recommended that action should be taken to clarify the duty on local authorities. The bill therefore makes it clear that local authorities are not only under a duty to inspect their area from time to time to detect statutory nuisances but must take such steps as are reasonably practicable to investigate complaints' (*Hansard*, 6th Series, Vol 178, col 1023, 31 October 1990).

Despite possible ambiguity in the legislation, the government's intention when promoting the bill was clear. The minister's words in the passage from *Hansard* clearly support a two-limbed structure to the local authority duty. Where a complaint of statutory nuisance is made by a person using commercial premises, the local authority is placed on notice that a nuisance may exist in its area and this triggers the first duty to inspect. For this reason, local authorities who refuse to investigate complaints of statutory nuisance coming from complainants in commercial premises are acting *ultra vires* in my opinion.

There is no case law on this particular point because no suitable case has been judged since the EPA came into force in 1990. But it would be an extremely brave local authority that prohibited its officers from investigating an alleged statutory nuisance because the complainant was not a resident. **E www.statutorynuisancesolutions.co.uk**