Legal

‘The allegation is that the nuisance lies in the prospectively dangerous nature of combustible cladding’

Guy Fetherstonhaugh
Falcon Chambers

On 14 June 2017, a fire engulfed Grenfell Tower in Kensington, the rapid spread enabled by combustible cladding panels on the exterior of the building. Such cladding is still applied to many other tower blocks, causing a degree of apprehension not merely among their occupants but also those of neighbouring blocks.

The view has since been expressed that the presence of such cladding may give rise to a cause of action in nuisance by the owner of a neighbouring property, irrespective of whether any actual physical damage to the neighbouring land is caused. In this article, I give my reasons why I think that view is misplaced.

The law of nuisance was recently reviewed by the Court of Appeal in the Japanese knotweed case *Network Rail Infrastructure Ltd v Williams* [2018] 3 WLR 1105. It was common ground there that, in order for a use of a property to be a nuisance to another, there did not have to be a physical emanation from that property, or any actual damage to the other. It sufficed if there were an interference with the amenity of the neighbouring land.

Network Rail does not come close, in terms of its facts, to the case with which this article is concerned, where the allegation is that the nuisance lies in the prospectively dangerous nature of combustible cladding. In such a case, it is not possible to say that there has been any encroachment on a neighbouring property that carries with it the likelihood of future damage or a diminution in the utility and amenity of neighbouring properties’ owners.

But there is some recent legal learning on this topic, which sheds further light on it. In *Birmingham Development Company Ltd v Tyler* [2008] EWCA Civ 859, the claimant alleged that a wall on the defendant’s property was dangerous, and sought an injunction requiring the defendant to take steps to remedy the nuisance.

Among the authorities analysed by the Court of Appeal, with obvious ramifications for our case, was *R v Lister* (1856) 169 ER 979. In that case, the defendants warehoused excessive quantities of a dangerous explosive fluid, and in the event of a fire there would have been disastrous consequences for the neighbourhood. The defendants were convicted of causing a public nuisance, because the substance was of such a nature and stored in such large quantities and local circumstances as to endanger life and property.

Against the background of *Lister* and other cases, the court in *Birmingham Development* accepted that an honest, perhaps reasonable, fear of danger is not enough; what is required for a nuisance is proof the property is actually dangerous.

So, a contrast must be drawn between a threat that might at any moment materialise, such as a leaning wall on the point of collapse, and a risk that, given a fateful combination of circumstances and the addition of other causative agents, such as fire, a danger might then arise.

Accordingly, the owners of a building near to another with combustible cladding need to do far more than simply point to the presence of the panels; they would have to show that the building is actually dangerous to them.

Given the steps that have been taken since the Grenfell Tower tragedy to institute fire patrols and other protective measures, I would have thought that it would require an extreme combination of circumstances for any potential claimant to be able to point to such actual danger.

In all those circumstances, while I agree that actual physical damage to neighbouring land is not a necessary constituent of a claim in nuisance, I do not agree that the presence of combustible cladding may of itself give rise to a cause of action.

Guy Fetherstonhaugh is the joint head of Falcon Chambers
fetherstonhaugh@falcon-chambers.com

Related competencies include: Legal/regulatory compliance.
Further information: For a full version of this piece, see *rics.org/firesafety.*