ROPES & GRAY ALERT

London ▪ Real Estate Investments & Transactions

April 25, 2016

What a Nuisance - Owner Liability for Other Persons

Attorneys
Carol Hopper
Iain C.S. Morpeth
Partha Pal

As an owner of commercial real estate, could you ever be liable for nuisance committed on the property by someone other than you? The recent decision of the Court of Appeal in *Cocking & Anor v Eacott & Anor* [2016] EWCA Civ 140 confirms that, in certain cases, the answer is yes. In this article, we describe the decision of the Court, consider its implications, and note the practical steps that property owners may take to prevent the imposition of liability.

The Facts

The case involved the law of nuisance and concerned a dispute between neighbours. The claimants in the case, the Cockings, alleged that their neighbour, Ms Eacott, had committed two acts of nuisance. The first was allowing her dog to bark excessively, and the second was excessive and abusive shouting. In each case the nuisance was committed over a long period of time. Ms Eacott was, in fact, living in the relevant property. However, she was neither the owner of the property nor a tenant. Rather, she was a licensee, living in the property under a licence granted by her mother, Mrs Waring. Mrs Waring did not live in the relevant property. The claimants' action was brought not just against Ms Eacott, but also against Mrs Waring. The judge in the court of first instance found Mrs Waring liable for the nuisance caused by the barking on the basis that she had knowledge of the barking and did nothing within a reasonable period to abate it, despite having "complete control" of the property. However, Mrs Waring was not liable for the excessive and abusive shouting, as she was not aware of it at the relevant time.

Mrs Waring appealed to the Court of Appeal. The basis of her appeal was that, as a licensor, her position was more akin to that of a landlord and, as licensor, she did not have control and actual possession of the property, as she did not actually reside there.

The Legal Analysis

The judge in the court of first instance recognised that the test of a landlord's liability for nuisance is different from the test of a licensor's liability for nuisance. A landlord has no possession of, or control over, a property, having given possession and control to the tenant. Accordingly, a landlord will only be liable for nuisance if either he or his agents actually, actively or directly participate in the relevant acts, or he expressly authorises the nuisance by letting the property (for example, if the nuisance is certain to result from the purposes for which the letting has been made). A landlord will not be liable for nuisance by virtue of doing nothing to stop or discourage the tenant committing the relevant acts, even if he has the right to do so. A licensor, on the other hand, because he is regarded as being in possession and control over the property, can be liable for nuisance if he was aware of the relevant acts and was able to take steps to stop them, but did not do so within a reasonable time. The difference in approach is based on the different degrees of possession and control.

The Court of Appeal agreed with this distinction, and with the finding that Mrs Waring was indeed a licensor. Vos LJ, who delivered the leading judgment, held that Mrs Waring was both in complete control and possession of the property during her daughter's residence there. She was aware of the barking and had the ability to abate the barking by removing either the dog or her daughter, but did not take reasonable steps to do so. The judge did, however, comment that the conclusion reached was based entirely on the facts of the case. It was possible that an arrangement which was branded as a licence could in fact be a lease, in which case the liability of the licensor for nuisance would be determined in accordance with the test applicable to landlords.

The Implications

In a commercial letting context, licences are generally less common than leases. There are, however, certain types of arrangements where licences may be used. One example of this is the "pop-up" occupant, increasingly prevalent in respect of retail or leisure space. It is conceivable that a pop-up restaurant could undertake acts which give rise to an actionable nuisance. Another example is shared workspaces, where a common space is shared by several individuals as a working area; in increasing numbers, this concept is being utilised for start-up and tech-focussed enterprises. Accordingly, the risk of a property owner being liable for nuisance caused by its licensees based on the more expansive test applicable to licensors cannot be ruled out. It is worth noting too that this is on the basis of what is known, or ought reasonably to have been known, by the licensor.

Clearly, it is open to a property owner to stipulate what a licensee may or may not do during the term of its licence. Achieving protection will, however, necessitate vigilance on the part of the owner during the term of the licence, and actually taking action to intervene. From the perspective of a lender, such protection is similarly important (even prior to taking action to take possession on enforcement), so as to avoid the property owner/borrower (typically a vehicle) being subject to claims by third parties. A lender should require visibility of any licences granted and should be comfortable that the property owner will take steps to police these in the commitments it gives in the documentation with the lender.