Untangling our land-based torts: the woes of *Wu v Body Corporate 366611.*

Jordan Grimmer

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I Introduction

Because dispossessions from land have usually coincided with an unlawful entry or presence on the land, trespass has traditionally been the cause of action that dispossessed landowners would use to get compensation for resulting losses.[1] However, an unlawful entry or presence on land did not occur on the facts of *Wu v Body Corporate 366611,*[2] a case involving a landowner who was electronically locked out of his property. This novel fact scenario exposed a gap in the law, making it difficult for the Courts to find a coherent cause of action for the plaintiff within the existing array of land-based torts.

This dissertation surveys the existing causes of action that relate to the scenario in *Wu*, and in particular, explores the mechanism of trespass in scenarios involving dispossession. It concludes that the existing actions cannot be stretched to fit *Wu*'s novel facts, and that the development of a new tort of 'land conversion' would both rationalise the law relating to dispossessed landowners, as well as provide a fitting cause of action for the *Wu* scenario.

A. The Facts of the Case

Mr Wu (the plaintiff)[3] owned a unit in an apartment building in Auckland. The building was purpose-built for student accommodation, and all the unit owners had acquired their units as passive investments. The unit owners, including Mr Wu, leased their units to a building manager, Academic Accommodation Management Ltd (Academic) who was responsible for tenanting the units and collecting the rent. However, Academic was placed in liquidation, and repudiated its obligation to pay the rent to the unit owners. The majority of unit owners subsequently leased their units to a new building manager, Theta Management Ltd (Theta). When the building manager changed from Academic to Theta, Academic reprogrammed the

[1] For an analysis of this proposition, see chapters two and three.

[2] *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC); *Body Corporate 366611 v Wu* [2012] NZCA 614, [2013] 3 NZLR 522; *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215;

[3] Mr Wu was a representative plaintiff on behalf of eight other parties under r 4.24 of the High Court Rules. All had identical interests to Mr Wu. For the purpose of this dissertation, the plaintiffs will be referred to as Mr Wu.

electronic locks to deactivate the unit owners' swipe cards used for entering the building's common property (including the lifts, stairwells, and corridors), as well as the individual units.

Mr Wu decided not to lease his unit to Theta, and instead wanted to find his own tenant and receive his rent directly. However, the Body Corporate and Theta (the defendants) refused to give Mr Wu a new swipe card unless he signed a security and access protocol and paid a personal security deposit. Mr Wu refused. This left him unable to access both the common property and his unit. The defendants persisted in refusing to issue Mr Wu with a new access card because they were convinced that the Body Corporate rules and the Unit Titles Act 1972 gave them the power to make access conditional based on the signing of the protocol. Mr Wu did not believe they had such power, and as a consequence, he remained locked out and unable to tenant his unit for 29 months, after which the defendants complied with a High Court injunction[4] and issued Mr Wu a new swipe card.

Mr Wu then sued the defendants in trespass and nuisance for the rental income he lost while he was unable to enter and tenant his unit. However, in the proceedings, which made it to the New Zealand Supreme Court, it transpired that there was real difficulty in establishing whether the facts of the case conformed to any of the existing land based torts.

B. The Decisions

1 The High Court

In the High Court, Mr Wu made alternative claims in trespass and private nuisance, amongst other matters. Asher J dismissed[5] the trespass claim because he considered that trespass requires a physical intrusion onto the property. He questioned whether an intrusion had

[4] *Wu v Body Corporate 366611* (2009) 10 NZCPR 917 (HC).

[5] In the original decision, Asher J recorded that there was not enough evidence to conclusively determine whether an electronic impulse which changed the locks could be a trespass. However, in the costs judgement (*Wu v Body Corporate 366611* HC Auclkand CIV-2009-404-5756, 4 October 2011 at [5]), Asher J remarks that the trespass action had not succeeded.

occurred in this case because the locks were changed by an electronic impulse, and did not determine the issue because the parties had put no evidence before him on the matter.[6]

Asher J did find that the defendants' alteration of the locks and their refusal to provide working swipe cards to Mr Wu amounted to a private nuisance.[7] After deciding that the defendants had no power to make Mr Wu's access conditional on signing the protocol and paying the deposit and were therefore unreasonable,[8] Asher J reasoned that there is an inherent flexibility in the tort of nuisance,[9] and there is no need for the defendant to be an adjoining owner or for the nuisance to emanate from adjoining land.[10] There is no restriction on the place from which a nuisance may emanate, so long as the plaintiff does not have exclusive control over the area.[11] Therefore, the fact that the nuisance (being the locked doors and lifts) occurred on land owned by Mr Wu did not preclude a private nuisance claim.[12] After concluding the defendant's actions were unreasonable interferences with Mr Wu's ability to use and enjoy his land, Asher J concluded the defendants were liable in private nuisance.[13]

2 The Court of Appeal

The defendants appealed several aspects of the High Court decision to the Court of Appeal, including Asher J's finding of private nuisance.[14] Heath J[15] considered whether the defendants' had the power to impose the Security and Access Protocol on Mr Wu, and held

[6] At [75].

[7] At [34].

[8] At [54].

[9] At [29].

[10] At [30].

[11] At [30].

[12] At [34].

[13] At [54].

[14] *Wu* (CA), above n 2. The Court of Appeal did not consider Asher J's statements about trespass.

[15] The reasons of Arnold and Heath JJ were given by Heath J. Hammond J gave a separate decision concurring on the cause of action but dissenting on the calculation of damages.

that it did not, although it did so on a more limited basis than the High Court.[16] He then considered the "emanation" point, and noted that although it has a high pedigree,[17] it is not an immutable rule that the interference must emanate from the defendant's land.[18] The key issue is whether there was an interference with the plaintiff's rights *by a third party*, and whether the interference was unreasonable and substantial.[19] The Court adopted Asher J's control analysis from the High Court, which allows a claim so long as the plaintiff did not have exclusive control over the area from which the nuisance emanates.[20] On this basis, the elements for private nuisance were met, and the High Court's finding as to the cause of action was upheld.[21]

3 The Supreme Court

Both parties sought leave to appeal in the Supreme Court, which the Court granted in relation to whether, and on what basis, the defendants could be liable in private nuisance, and what damages were appropriate, if any.[22] Elias CJ, McGrath, Glazebrook and Tipping JJ released joint reasons written by Glazebrook J.[23] William Young J released a separate decision dissenting on the issue of mitigation, and chose not to discuss or express a concluded view on the appropriate cause of action.[24]

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[16] At [52]-[89]. This issue pertained to whether the defendants' actions were unreasonable. The more limited basis was that although the defendants did not have the power to exclude Mr Wu on the basis of his refusal to sign the Security and Access Protocol, it did have the power to exclude Mr Wu's licensees. This conclusion reduced the amount of damages the Court of Appeal awarded to Mr Wu.

[17] The Court considered *Hunter v Canary Wharf* [1997] AC 655 (HL) at [90]-[96].

[18] At [95].

[19] At [97].

[20] At [98].

[21] At [99].

[22] *Wu v Body Corporate 366611* [2013] NZSC 46.

[23] *Wu* (SC), above n 2.

[24] At [152]. William Young J proceeded on the basis that the claim lay in nuisance, as held by the High Court and Court of Appeal.

After a lengthy discussion about whether the defendants had the power to impose the Security and Access Protocol on Mr Wu,[25] the majority succinctly held that most appropriate cause of action was trespass.[26] After defining trespass as an unjustified and direct interference with land in possession of another, Glazebrook J then referred to the unique legal position of co-owned land.[27] She noted that because all co-owners are entitled to use and possess the land, one co-owner cannot trespass against another unless one co-owner ousts the other from the land or destroys the co-owned property[28]. In this case, the Body Corporate acted on behalf of the co-owners in managing and controlling access to the common property in the apartment block, which was common property. Because the Body Corporate ousted Mr Wu from the common property, Mr Wu had an action in trespass.[29]

Given the finding in trespass, it was strictly unnecessary for the majority to discuss the private nuisance claim. However, Glazebrook J continued on to discuss private nuisance because it had been a focus in the High Court and Court of Appeal.[30] She began by noting two different types of rights that private nuisance protects: the use and enjoyment of land, and rights over and in connection with land.[31] The Courts below seemed to have dealt with this case based on the former limb. She noted that an emanation is usually necessary in cases involving nuisances to the use and enjoyment of land.[32] The emanation is the nexus between the activity done on the defendant's land and the interference with the interference with the plaintiff's right to use and enjoy their land; it is the transportation of the nuisance. The judge noted it was difficult to see how the electronic reprogramming of locks was an emanation,

[25] The majority held that the defendants did not: at [82] and [113].

[26] At [118].

[27] At [115]-[116].

[28] At [116].

[29] At [117].

[30] At [119].

[31] At [120].

[32] At [122].

and thus doubted whether Mr Wu could have sustained a private nuisance action.[33] By restating the element of emanation in this manner, the majority overruled the High Court and Court of Appeal's reshaping of private nuisance.

However, Glazebrook J noted that the second branch of nuisance protects landowners from interference with rights that exist over and in connection with land; these include easements, profits a prendre, as well as natural rights that exist automatically as incidents of the ownership of land.[34] One example of a natural right is the right of a property owner to gain access to and from a public highway from their land.[35] Noting that there is an implied right to access ones land in the Unit Titles Act 1972, Glazebrook J observed that the way Mr Wu had to pass through the common property to reach his unit similar to how someone accesses their land from the highway. By analogy then, an unreasonable interference with this access right should lead to an action in private nuisance.[36] The majority therefore considered that Mr Wu would have succeeded on this ground if he was to bring an action in this form of private nuisance.[37]

C. The Direction of this Dissertation

It is evident that *Wu*'s novel facts led to real difficulty in applying a cause of action which will allow Mr Wu to recover compensation for his lost rental income. This dissertation provides a principled analysis of land-based torts, particularly trespass and possessory actions, and seeks to determine their applicability to the facts of *Wu* as well as other scenarios involving interference with electronic locks. It will look at trespass and the action for possession of land, as well as private nuisance, given that it was the subject of attention at all stages of appeal.

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[33] At [125].

[34] At [126].

[35] At [129].

[36] At [130].

[37] At [131].

The analysis will expose irrationalities and gaps in the historical development of our land-based torts, as well as within the Courts' reasons for their decisions in *Wu*. The development of the new tort of land conversion will better provide remedies in such cases, and will also remove incoherencies in the existing trespass and possessory actions. Finally, an economic analysis will confirm that land conversion facilitates the most efficient outcome in ouster situations.

II Trespass Tangles

A. Trespass by Ouster

1 What is trespass by ouster?

There cannot be an unlawful intrusion, or an unconsented entry between co-owners because each co-owner has a right to be in possession of the entirety of the co-owned property and to use and enjoy it in a proper manner; trespass would prima facie not apply.[38] However, a line of cases has applied a modified form of the trespass cause of action where one co-owner ousts another.[39] This variation of the trespass action is called 'trespass by ouster'. Ouster is an 'antique expression'[40] that describes an "express denial of the title and right to possess of fellow tenants".[41] It is derived from pre-nineteenth century law of adverse possession, and has overtones of a "confrontational, knowing removal of the true owner from possession."[42] The ousting of co-owner can therefore lead to an action in trespass.

2 Can trespass by ouster apply to Wu?

Given the definition of ouster above, it is likely that the defendants ousted Mr Wu from his unit and from the common property by preventing him or his tenants from entering the land. However, the principal difficulty with applying this variation of trespass to *Wu* is that Mr Wu and the defendants are not co-owners of any of the property from which Mr Wu has been ousted. Mr Wu is the sole registered proprietor of his individual unit, and s 9(1) of the Unit Titles Act shows that the Body Corporate has no interest in the common property:

> The common property shall be held by the proprietors of all the units as tenants in common in shares proportional to the unit entitlement in respect of their respective units: provided

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[38] *Bull v Bull* [1955] 1 QB 234 at 237.

[39] *Jacobs v Seward* (1872) LR 5 HL 464; *Bull v Bull,* above n X; *Ferguson v Miller* [1978] 1 NZLR 819 (SC).

[40] *Sitarz v Burke* HC Christchurch AP259/93, 9 August 1993, Tipping J.

[41] *Biviano v Natoli* (1998) 43 NSWLR 695 at 701.

[42] *J A Pye (Oxford) v Graham* [2002] UKHL 30, [2003] 1 AC 419 at [38].

> that nothing in this subsection shall affect the interests among themselves of the proprietors of a stratum estate in an individual unit.

How can the trespass by ouster apply in *Wu* if the parties do not co-own any of the property? A possible solution to this is the approach taken by the Supreme Court, which developed from s 15 of the Unit Titles Act 1972. This section, which lists the duties of a body corporate, states:

The body corporate shall— [...]

> (h) subject to this Act, control, manage, and administer the common property and do all things reasonably necessary for the enforcement of the rules:

Because the Body Corporate has a duty to act on behalf of the owners of the common property in controlling, managing, and administering the common property, one possible way to circumvent the lack of co-ownership is to say that the defendants were acting as agents for the owners of the common property. Therefore, this allows the Body Corporate to be sued as a co-owner.

However, using an agency analysis to hold the Body Corporate liable for its actions done on behalf of the proprietors would require the law of agency to be turned on its head. Agency describes the relationship where one person (the agent) has the authority or capacity to bind another person (the principal) and a third party.[43] In this instance, the agency analysis would view that the Body Corporate as an agent for the co-owners, who are the principal. However, using agency to impose liability on the Body Corporate for acting as an agent on behalf of the co-owners would reverse the flow of authority normally observed in an agency relationship by holding the agent liable for what the principal does. Agency does not make the agent liable for the principal's actions, and it does not flow that agency can put the Body Corporate in the position of a co-owner which is liable for ousting a fellow co-owner.

Any attempt to elevate the Body Corporate to the position of a co-owner capable of being sued for trespass by ouster would overlook the careful distinction the Unit Titles Act makes between control and ownership. The Act completely vests ownership of the common

[43] *L C Fowler & Sons Ltd v Stephens College Board of Governors* [1991] 3 NZLR 304 (HC). See also *Law of New Zealand*, Agency (online ed) at Part 1(1).

property in the proprietors.[44] For example, so long as all the proprietors agree, the Act gives the proprietors the fullest extent of property rights by allowing them to may sell or lease any part of the common property, or grant an easement over it.[45] In contrast, the Body Corporate is a distinct legal entity that exists to allow for efficient management of the common property on behalf of the registered proprietors for the common good of all.[46] Its duties are specifically listed in the Act,[47] and it has wide powers to deal with the property for the purpose of fulfilling those duties.[48] To use a public law analogy derived from Crown ownership of land, the scheme of the Act allows the proprietors to retain the ownership rights of the common property (*dominium*), whilst the Body Corporate has control (*imperium*) of the property.[49] It would be contrary to the carefully laid out scheme of the Act to gloss over this distinction by equating the Body Corporate's power of control with ownership.

It is therefore difficult to equate the Body Corporate's control of the common property with ownership so to make it a co-owner capable of being sued under trespass by ouster. The Supreme Court's finding of a trespass by ouster did not deal with this issue, or provide any further reasoning or analogy for why the Body Corporate's control of the common property should make it a co-owner. It follows that the Supreme Court's finding of liability for trespass by ouster was probably incorrect.

3 Trespass by ouster is a limited solution

Even if the Body Corporate could be construed to be a co-owner who could be liable for trespass by ouster, this result would not provide a remedy in circumstances with relatively minor factual variations from *Wu*. For example, there would be no liability if the Body

[44] Unit Titles Act, s 9(1)

[45] The emphasis on the proprietors acting as a group is to prevent the unruly situation which could develop if the proprietors started dealing with their interest in the common property individually. See *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [96].

[46] Section 15 of the Unit Titles Act 1972; *Body Corporate 188529 v North Shore City Council*, above n X, at [97] – [98].

[47] Unit Titles Act, s 15.

[48] Unit Titles Act, s 16.

[49] *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [27].

Corporate had only deactivated Mr Wu's swipe card in relation to his unit, and continued to let him access the common property. This is because there is no way to construct a co-ownership-like interest for the defendants in the unit itself. Relatedly, it would be of no assistance in cases involving the interference of electronic locks to standalone houses outside of the Unit Titles Act context. It flows that trespass by ouster is unlikely to be a good cause of action for the facts in *Wu*. Not only is it legally dubious, but its utility is confined to the very specific fact scenario of the case.

Trespass by ouster would still not provide a cause of action under the Unit Titles Act 2010, which approaches the understanding of ownership and control of the common property in a different way to the 1972 Act. Under the new legislation, the Body Corporate is the owner of the common property,[50] and the proprietors of the units are beneficially entitled to the common property as tenants in common in shares proportional to their ownership interest in respect of their units.[51] Courts have applied trespass by ouster in situations involving where one owner of the property has a legal interest and the other an equitable interest. Therefore, on first impression, trespass by ouster would be an applicable remedy if the facts in *Wu* had occurred under the 2010 Act. *Bull v Bull*[52] is a case which demonstrates this. A mother and son had both contributed money to purchase a flat for living in together. However, English property law at the time prevented the creation of legal tenancies in common,[53] so the land was only conveyed to the son. The relationship later broke down and the son attempted to remove his mother from the home. The Court of Appeal held that the mother had a beneficial interest in the land from a resulting trust, and was therefore an equitable tenant in common. Therefore, the son could not expel his mother from the land without there being a trespass by ouster.

However, *Bull* is not likely to be sufficiently analogous to make trespass by ouster a cause of action if *Wu* occurred under the 2010 Act. In *Bull*, the mother's exact beneficial interest in the

[50] Unit Titles Act 2010, s 54(1).

[51] Unit Titles Act, s 54(2).

[52] Above, n 38.

[53] Law of Property Act 1925, s 34(1).

property was readily identifiable based on the value of her original contribution. It was possible to exactly what share of the property the mother had in equity and the remaining legal interest the son held unencumbered by his mother's beneficial interest. This means that if the distinction between law and equity were removed the situation would appear to be identical to a tenancy in common. In contrast, under the 2010 Act the Body Corporate has no identifiable share of equitable interest in the property – the entirety would be owned by the unit proprietors. There would be no identifiable tenancy in common. This means that the trespass by ouster principle is not going to be of any use for *Wu* like situations under the 2010 Act.

B. Conventional Trespass

In contrast to trespass by ouster, conventional trespass involves an unjustified direct interference with land that is in possession of another.[54] Some leading commentators give a more specific definition of trespass which requires an unjustified intrusion, or an unconsented entry, onto land in possession of another.[55] In the High Court, Asher J seems to have dealt with the trespass claim under this narrower definition. He questioned whether an electronic impulse changing the lock configuration can be an intrusion, and dismissed the trespass claim on that basis.[56] However, it remains uncertain whether trespass could have been found on the first, broader definition, and whether an intrusion is a necessary element for the tort at all.

Indeed, despite some leading commentaries talking of trespass as *consisting of* the unjustifiable intrusion,[57] some authorities speak less dogmatically about the intrustion, with Lord Hope in the United Kingdom Supreme Court taking a subtly more general tone in saying

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[54] Bill Atkin "Trespassing on Land" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at X; approved in *Wu* (SC), above n 1.

[55] J Murphy "Trespass to Land and Dispossession" in Michael A Jones (ed) *Clerk & Lindsell on Torts* (20th ed, Thomson Reuters, London, 2010) at [19-01].

[56] *Wu* (HC), above n 2, at [75].

[57] J Murphy "Trespass to Land and Dispossession", above n X.

that the trespass *occurs with* the unjustifiable intrusion.[58] When this less dogmatic definition of trespass is read alongside the wider definition, it leaves open a possibility that an intrusion is not an imperative element for trespass, but is merely a legal shorthand for the *direct interference* with land.[59] If this were accepted, it could leave it open for a trespass to occur without an intrusion, potentially opening up *Wu* to the conventional trespass cause of action.

One issue with the broader definition of trespass is that it would leave it unclear exactly what right is protected by trespass and this could lead to conceptual incoherencies. Trespass must protect something more specific than the general concept of possession: it is difficult to conceptualise how merely walking onto a person's property, an obvious trespass, interferes with a landowners' ability to possess their land. If the tort of trespass is framed as protecting the right to control entry by excluding others, a right that has been philosophically linked to being at the core of property and possession, it becomes clearer how trespass functions to protect possession; indeed the control of entry is what Blackstone saw as being the heart of the trespass action.[60] When trespass is understood from the perspective of protecting possessors from violations of their right to control the entry of others, the importance of an intrusion becomes much more salient.

This is the turning point where the facts in *Wu* fail to match the underlying concepts behind trespass: the defendants did not violate Mr Wu's right to exclude others. What the defendants did do, in fact, was appropriate Mr Wu's to exclude others by excluding Mr Wu himself. In light of this appropriation, it is possible to even claim that the defendants' took possession of Mr Wu's land; this point is elaborated in the next chapter. Although this distinction between the broader and narrower definitions of trespass has not been the subject of significant judicial scrutiny, the underlying logic of defining trespass as a narrowly

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[58] *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380 at [6]. The reference to the intrusion in this case could be explained by the fact that the case at had did involve and intrusion.

[59] Indeed, some leading commentators do not mention an "intrusion" as being a key element of trespass at all. See WVH Rogers *Winfield and Jolowicz on Tort* (18th ed, Thomas Reuters, London, 2010) at [13-1] and Bill Atkin "Trespassing on Land", above n 54.

[60] Blackstone *Commentaries on the Laws of England* (note 11, 12) at 3. See also Eric R Claeys "On the "Property" and the "Tort" in Trespass" in John Oberdiek (ed) *The Philosophical Foundations of the Law of Torts* (Oxford University Press, Oxford, 2014) at 128-130.

conceived right to exclude others is persuasive enough to suggest that trespass could not apply to the *Wu* scenario. This seems even stronger in light of the discussions in chapter five, which suggests the development of a new tortious action more specifically protects the right of Mr Wu's that the defendants harmed.

III Dispossession and the Action for Recovery of Land

As suggested at the end of the previous chapter, the defendant's acts of reprogramming the locks and refusing to issue Mr Wu new access cards affected Mr Wu's right to possess his land. This chapter elaborates this point by proving that a dispossession occurred. Although the action for recovery of land is an action that specifically protects and remedies dispossession, it is unable to provide Mr Wu with the award of damages that he wants. A gap in the law thus remains.

A. Wu Involves a Dispossession

The House of Lords in *JA Pye Ltd v Oxford* considered that the term 'ouster' invokes notions of removing someone from possession of land. [61] The difficulty with evaluating whether an ouster entails a dispossession is that a consistent theory of possession is only recently emerging in the common law.[62] However, there have been recent clarifications in the concept of possession following the decision of Slade J in *Powell v McFarlane*.[63] The result of this means that it may be easier to decisively class cases which involve ousters as cases which really involve dispossessions.

Mere use, control, or presence on land does not necessarily give possession. Equally, a person's departure from land or the vesting of its control in someone else does not indicate a lack of possession. The distinction between possession and not having possession often depended on the context in which the concept was discussed.[64] A recent consensus on the principles surrounding possession of land developed following *Powell v McFarlane*[65], which

[61] Above, n 42, at [38].

[62] See Mark Wonnacott *Possession of Land* (Cambridge University Press, Cambridge, 2006).

[63] *Powell v McFarlane* (1977) 38 P & CR 452.

[64] See *Towers & Co Ltd v Gray* [1961] 2 QB 351 at 361. For example, courts have been reluctant to hold that squatters are in possession of land.

[65] *Powell v McFarlane*, above n 63.

the House of Lords later refined in *Graham*.[66] The cases both dealt with claims of adverse possession, and both involved defendants arguing the claimants did not have the requisite possession to substantiate their claim. The principles of land possession, as described in *Powell* and refined by Lord Browne-Wilkinson in *Graham* can be summarised as:[67]

(1) The person with the paper title to the land, or who can establish a title as claiming through the paper owner, can be presumed to be in possession, unless there is evidence to the contrary.

(2) The evidence necessary to prove someone without paper title is in possession is:

    a. A sufficient degree of physical control and custody ("factual possession"), and

    b. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess", or *animus possidendi)*.

(3) Factual possession is singular and exclusive. Apart from the instance of co-ownership, only one person can be in factual possession at the same time. The appropriate degree of physical control and custody depends on the circumstances. Broadly, it involves dealing with the land as an occupying owner might be expected to deal with it.

(4) Intention to possess is having the intention to exercise factual possession. It is the intention, in one's own name, to exclude the world at large including the paper owner, as far as reasonably practicable. This intention may be deduced from the physical acts.

In *Wu*, Mr Wu held paper title to his unit and co-owned paper title to the common property of the apartment complex. This means he can be presumed to be in possession unless there is evidence to the contrary. However, it is likely that the defendant's action of denying Mr Wu access to his unit involved taking possession of Mr Wu's unit, and therefore dispossessed Mr Wu from his land. Firstly, although the defendants did not enter and occupy Mr Wu's unit or

[66] Above n 42. This was accepted by the New Zealand Supreme Court in *Taueki v R* [2013] NZSC 146, [2014] 1 NZLR 235.

[67] At [40].

the common property, they deliberately and intentionally exercised a very high degree of physical control over the property. It was their intention to prevent Mr Wu from accessing the property when he would not sign the security protocol. They deliberately exercised control over who was able to access and enter the land. In *Graham*, Lord Browne-Wilkinson considered the fact the paper owners were physically excluded from the land by hedges and their lack of key to the road gate as evidence that the claimants had taken factual possession.[68] The fact the defendants' actions left Mr Wu completely unable to physically occupy his land is very strong evidence that the defendants' had factual possession of Mr Wu's unit and his interest in the common property.

Secondly, the defendants' actions throughout the dispute are strong evidence of their intention to factually possess Mr Wu's land. Over many months, Mr Wu made multiple demands for the defendants to give him access to his unit, even going to the extent of successfully obtaining a District Court injunction.[69] The defendants consistently refused to grant Mr Wu access to his unit, and knowingly defied the Court's injunction.[70] Indeed, in *Powell*, Slade J observed that locking or blocking the only means of access to land is an act which, in its very nature, is so drastic as to indicate an intention to possess.[71] *Jewish Maternity Society's Trustees v Garfinkle*[72] held that where a building is not occupied, the possession of a key or a method of obtaining entry was evidence of possession; the fact the defendants possessed the means of entry and not Mr Wu here would indicate a dispossession based on *Garfinkle*. Moreover, both *Powell*[73] and New Zealand authorities[74] affirm the dicta in *Seddon v Smith*[75] that "enclosure is the strongest possible evidence of adverse possession". While the

[68] At [41].

[69] See the chain of events at [24] to [57].

[70] At [41] to [45].

[71] *Powell*, above n 63, at 477-478.

[72] *Jewish Maternity Society's Trustees v Garfinkle* (1926) 95 LJKB 766.

[73] *Powell,* above n 63, at 478.

[74] *Sinton Damerell Properties Ltd v King Trounson Trustees Ltd* [2004] 2 NZLR 66 (HC)

[75] *Seddon v Smith* (1877) 36 LT 168 (CA) at 169.

act of enclosure, which involves fencing off pastoral land, may seem incompatible with the reality of *Wu's* setting in an urban apartment block, the fact that both involve the use of physical barriers to exclude the paper owner from the land means the situations are strongly analogous. Mr Wu's lack of control and possession of the land is best indicated in that he can do nothing at all with his land because he cannot enter into the door.

In *Wu*, the defendants deliberately changed the electronic locks to prevent Mr Wu from accessing his unit. These actions evince that the defendants have an unequivocal intention to possess Mr Wu's land. It therefore follows that the defendants took possession of Mr Wu's land. It also follows that any locking out which is coupled with the intention of locking out a paper owner is likely to be a dispossession, given that the extremely high level of control that a person controlling the locks appropriates.

B. The Action for Recovery of Land

An action in trespass requires either possession at the time of the trespass, or, in the case of a trespass by relation, an entitlement to immediate possession at the time of the trespass and actual possession at the time of the claim; the corollary of this is that it leaves a person who has the right to immediate possession of the land, but who has not re-entered and reacquired possession, without access to a trespass action.[76] The action for recovery of land enables the recovery of possession which then would enable a claim in trespass for consequential damages.

One of the reasons why the scope and elements for the action for recovery of land remains undeveloped is that its function in many circumstances is met by statutory provisions. Perhaps the most common instance where someone with a right to possess land will want to recover possession and compensation or mesne profits[77] is where a tenant holds over after a

[76] Bill Atkin "Trespassing on Land", above n 54, at [9.3.01].

[77] Mesne profits is a restitutionary remedy which strips a defendant of gains resulting from their possession of land. It is in contrast to compensation, which is measured by the plaintiff's loss. See *Inverugie Investments Ltd v Hackett* [1995] UKPC 8, [1995] 1 WLR 713 and

lease has finished or been cancelled. For commercial leases, s 251 of the Property Law Act 2007 gives the Court liberal power to make a possession order, to order reasonable compensation for the breach, and to impose any other conditions it thinks fit. Section 60 of the Residential Tenancies Act extends the obligations of the tenants, including rent payments, if they remain in occupation after the tenancy ends, and s 64 gives the Tenancy Tribunal the power to make a possession order. For contractual licences, including those granting exclusive possession, s 9 of the Contractual Remedies Act gives the Court wide powers to grant possession of any real property subject to the contract, and to direct parties to pay any sum the Court thinks just.

However, Mr Wu's case, and its variations, do not fit into the context of a tenant or a licensee holding over. This means that they fall into what Beck describes as a "rump of awkward situations" where the right to immediate possession has to be protected by the common law action for recovery of land.[78] The result of this is that there is significant uncertainty about the scope and effect of the action for recovery of land, with Beck noting that some of New Zealand's leading texts on Tort and Land law only give it scant attention.[79] A further corollary of this is that it is uncertain whether the action could be used in the *Wu* situation, where possession has already been recovered, and the plaintiff wishes to recover mesne profits.

Bill Atkin outlines that a successful claim for an action for recovery of land requires the plaintiff to prove, at the time of bringing the claim, an entitlement to immediate possession of the land, and the denial of such possession by the defendant.[80] This very description would seem to exclude the bringing of an action for recovery of land on the facts in *Wu* because the defendants had already ceased denying Mr Wu his right to possess his land by letting him in.

Moreover, the action for recovery of land's primary remedy is represented by its namesake: the recovery of the land. The current state of the action's procedure is even unclear whether claims for mesne profits and compensation can be joined within the same claim: although

[78] Andrew Beck "Recovery of Land" [2013] NZLJ 367

[79] Andrew Beck "Litigation Section: Recovery of Land" [2013] NZLJ 367.

[80] Bill Atkin "Trespassing on Land", above n 54, at [9.3.01].

former codes of civil procedure in New Zealand allowed claims for mesne profits to be joined into a single action with the action for recovery of land,[81] although there is no corresponding allowance in the current High Court Rules. Atkin argues that rr 1.2 and 1.6 would probably allow a joined claim of trespass to be permitted, and that it would be extraordinary if a plaintiff had to resort to two sets of proceedings. However, this is unlikely to be of assistance to Mr Wu's quest for damages because, as discussed in the previous chapter, Mr Wu would be unable to sustain an independent trespass action without an intrusion. Therefore, the current actions which most specifically relate to the right violated and the harm suffered by Mr Wu appear to be powerless to afford Mr Wu his compensation. A gap in the law is therefore exposed.

The limited nature of the action for recovery of land is comparable to the tort of detinue, which protects chattels from wrongful detention by allowing the owner to recover the chattel.[82] Say a rogue detained a chattel, but returned it before the owner could bring legal proceedings. The owner would not be able to sue the rogue in detinue for consequential loss; this because the chattel has already been returned. The owner would need to make a claim using a different property tort, such as trespass or conversion.[83] However, if the owner was able to make a claim in detinue before the rogue returned the chattel, then the owner could add a claim for consequential damages alongside the detinue action.

Even though the action for recovery of land seems to directly protect the right to possession of land, it cannot to provide a remedy of damages to Mr Wu. Although Gray concludes that every wrongful possession of land will inevitably constitute a trespass,[84] this equation suddenly becomes less inevitable on the facts of *Wu*, where the electronic interference with locks is not a trespass. Even if the defendants' actions were a trespass, it would seem natural to have a course of action which directly vindicates the right of to possess, rather than having

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[81] See *Kirkpatrick & Barclay v Hutchinson* (1904) 23 NZLR 665 (SC) at 673—674.

[82] See Cynthia Hawes "Detinue" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013.

[83] Cynthia Hawes "Detinue" at [12.4.02].

[84] Kevin Gray and Susan Francis Gray *Elements of Land Law* (4th ed, Oxford University Press, Oxford, 2005), at [3.49].

to engage in a tortious double-take by resorting to a less apposite cause of action in order to get a monetary remedy.

IV The Applicability of Private Nuisance

Although trespass and the action for recovery of land are not able to assist Mr Wu in getting his remedy, the tort of private nuisance was proposed at all levels of litigation as being more applicable to the peculiar facts of the case. Although it is outside of the trespass and dispossession paradigm, its potential utility as a backstop cause of action warrants investigation.

A. The Nature of Private Nuisance

Private nuisance is a land-based tort which protects people in possession of land from unreasonable interferences with their right to use or enjoy an interest in land.[85] While trespass applies to intentional and direct interferences with possession itself, the scope of nuisance is less defined, and it generally applies to less direct or intangible interferences with more particular interests in the land than possession.[86] Professor Newark's seminal article "The Boundaries of Nuisance",[87] which Lord Goff quotes as representing a correct account of legal history in *Hunter v Canary Wharf,*[88] describes the historical of interests nuisance protects:[89]

> Disseisina, transgressio and nocumentum [nuisance] covered the three ways in which a man might be interfered with in his rights over land. Wholly to deprive a man of the opportunity of exercising his rights over land was to disseise him, for which he might have recourse to the assize of novel disseisin. But to trouble a man in the exercise of his rights over land without going so far as to dispossess him was a trespass or a nuisance according to whether the act was done on or off the plaintiff's land.

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[85] Bill Atkin "Nuisance" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [10.2.01].

[86] Bill Atkin "Nuisance" at [10.2.02(1)].

[87] FH Newark "The Boundaries of Nuisance" (1949) 65 LQR 480.

[88] *Hunter v Canary Wharf*, above n 17.

[89] At 687-688.

Although Professor Newark's statement is a historical reflection on private nuisance, it clearly demarcates nuisances from actions which disseise (a term roughly equivalent to a dispossession in contemporary legal language)[90] a landowner. The previous chapter's conclusion that the defendant's electronic changing of the locks dispossessed Mr Wu would prima facie suggest the facts of *Wu* are outside the boundaries of private nuisance. Newark's statement would suggest that the tort of private nuisance would be the wrong place to even start looking for a cause of action in *Wu*, and that *Wu* would be best approached with a cause of action which is more connected to dispossession than private nuisance. However, none of the decisions looked at *Wu* from the perspective of a dispossession; they instead focussed on private nuisance and trespass. Although the fact of Mr Wu's dispossession means that private nuisance may not be the ideal cause of action for *Wu*, the Courts' focus on it means that it should warrant some attention here too.

When the Supreme Court applied the tort of private nuisance, it divided private nuisance into two separate limbs which protect different types of land rights from unreasonable interference.[91] The first limb protects the right to use and enjoy land, and the second limb protects rights over or in connection with land. Although there has been little judicial writing to support such a precise division of nuisance into these two limbs,[92] it appears to be used as a convenient way for academics, including Professor Newark,[93] to distinguish the different way the tort private nuisance can apply to varying situations.[94]

Although the Court's adoption of this distinction as strict rule of law is novel, this chapter will proceed on the basis that it is a helpful way to analyse the elements for liability in private

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[90] See Herbert Hausmaninger and Richard Gamauf *A Casebook on Roman Property Law* translated by George A Sheets (New York, Oxford University Press, 2012).

[91] At [120].

[92] See *Read v J Lyons & Co* [1947] AC 156 (HL).

[93] Above, n 87.

[94] This division is not universally applied, and it may not be completely in line with the development of private nuisance in commonwealth case law: see *Antrim Truck Centre Ltd v Ontario (Transportation)* [2013] SCC 13, [2013] 1 SCR 594. However, this dissertation mainly focuses on trespass and torts surrounding possession and the right to possession of land. The Supreme Court's division will be accepted as true for the purpose of this writing, although its validity and consequences for the development of private nuisance may need to be the subject of academic scrutiny in the future.

nuisance. Therefore, the first part will analyse the *Wu* scenario under the first limb, which was accepted by the High Court and the Court of Appeal, but rejected by the Supreme Court. The second part will analyse the *Wu* scenario under the second limb, where the Supreme Court strongly suggested that an action in private nuisance could be sustained. The last section of the chapter will further the proposition that private nuisance not an appropriate cause of action for the *Wu* scenario, apart from doctrinal considerations, by conducting an economic comparison between private nuisance and possession based torts.

B. Interference with the Right to Use and Enjoy Land

When the Supreme Court rejected the possibility of an action in private nuisance for unreasonable interference with the use and enjoyment of land, they did so because they adopted Lord Goff's dicta in *Hunter* that some sort of emanation from the plaintiff's land is normally required for an action in private nuisance.[95] Because it was difficult for the Court to conceive how the reprogramming of electronic keys and the refusal to issue a new one emanated from the common property, it was doubtful that an action for private nuisance under the first limb could be sustained.[96]

The "use and enjoyment of land" is a general way of referring to a multiplicity of amenities which are incidental to the possession of land, and which are not existing property rights, or natural rights (discussed below).[97] However, the Courts have recognised that private nuisance does not protect all amenities relating to the use and enjoyment of land from substantial and unreasonable interference.[98] For example, in *Hunter*, the House of Lords held that the blocking of a television signal, which the Lords acknowledged was an amenity, by a large neighbouring building was not a private nuisance. Even interference with potentially valuable

[95] *Hunter v Canary Wharf,* above n 17, at 685; *Wu* (SC), above n 2, at [122].

[96] At [125].

[97] See Bill Atkin "Nuisance", above n 85, at [10.2.02(1)].

[98] See *Wu* (SC), above n 2, at fn 101.

amenities, such as the obstruction of a view, may not give rise to a successful claim in private nuisance.[99]

It is commonly said, even by the Supreme Court in *Wu,*[100] that the maxim which determines whether a state of affairs is an actionable interference under the first limb is *sic utere tuo ut alienum non laedus*, or use your own property in such a way as not harm that of other.[101] However, Winfield points out that this statement is palpably false.[102] It provides no method for distinguishing whether an action which harms another's land is unlawful. It has already been said that a building that harmfully blocks television signals is not a private nuisance; how can this be distinguished from an uncontroversial nuisance which also harms a neighbour, such as the release of unpleasant stenches?[103] It quickly becomes clear that liability in private nuisance really involves a balancing exercise between "the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with."[104]

When Lord Goff proposed that actions in private nuisance for interference with the enjoyment of land "will generally arise from something emanating from the defendant's land,"[105] it is unlikely that he was establishing an "immutable"[106] requirement of an emanation. Indeed, a strict requirement for an emanation would seem to be an unusual, if not irrelevant and unprincipled, means for establishing liability in private nuisance because it does not clearly correspond with the rights protected and the balancing test required. Indeed, it is notable that none of the other Law Lords in *Hunter* mentioned the requirement for an emanation. Rather, it is likely Lord Goff was proposing a short-hand proxy for this balancing test which could be used to distinguish the facts in *Hunter* from other cases involving private

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[99] *Hunter v Canary Wharf*, above n 17, at 699 per Lord Goff.

[100] Above, n 2, at [124].

[101] WVH Rogers *Winfield and Jolowicz on Tort* (18th ed, Thomas Reuters, London, 2010) at [14-4].

[102] At [14-4].

[103] See *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC).

[104] *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL) at 903, per Lord Wright.

[105] *Hunter v Canary Wharf*, above n 17, at 685.

[106] *Wu* (CA), above n 2, at [95].

nuisance. Thus, the High Court and Court of Appeal in *Wu* attempted to evade Lord Goff's emanation principle by stripping the emanation requirement back to what they saw as its underlying principle, namely the unreasonable interference with the right to use and enjoy land, which arises from a situation which the plaintiff does not have control of.[107] Indeed, the formulation of private nuisance stated by the High Court and the Court of Appeal had been evaluated and welcomed for being in accord with the tort's theoretical basis and the rights it protects.[108] [109]

Therefore, the lack of an emanation in the *Wu* scenario should not, prima facie, prevent it from giving rise to an action in private nuisance under the first limb. Nevertheless, it is difficult to decouple Mr Wu's right of access from his right to possess his land. This brings Professor Newark's statement above back into focus, namely that private nuisance is not for dealing with dispossessions. Even if it was accepted that the *Wu* scenario could result in liability for private nuisance under this limb, it would only a liability that is concurrent with torts relating to dispossession. Under the economic analysis conducted in the last part of this chapter, it becomes clear that private nuisance is not the ideal ground for liability.

However, a foreseeable variation of *Wu* where a private nuisance claim under this first limb might be appropriate is where an owner of land is electronically locked out from only a small area of their land, without resulting in a complete dispossession from the estate. For example, say a landowner is electronically locked out of a garden shed at the rear of a standalone dwelling-house. The landowner still retains enough control over the entirety of their estate

[107] See *Wu* (CA) at [98], HC at [30]-[34]. In the majority of nuisance cases, the right to use and enjoy land has been interfered with from a neighbouring property. In *Wu*, there was a question about whether the defendants' actions of reprogramming the locks and refusing to give away key cards could be a nuisance because the defendants' actions occurred on the common property, which was owned by Mr Wu. An implicit feature of an emanation is that it emanates onto the plaintiff's land from an external source. When abolishing the necessity for an emanation, the High Court and Court of Appeal created a new test for framing nuisance, namely whether the plaintiff had control over the source of the interference.

[108] See Matthew Mazenier "The law of private nuisance following *Wu*: emanation and access" (LLB(Hons) Dissertation, Victoria University of Wellington, 2013).

[109] Indeed, if the emanation requirement is diminished, the Supreme Court's division of private nuisance into two limbs might be rendered moot. This would be an interesting question for further research.

so as to retain possession, [110] but is indirectly prevented from using and enjoying the amenity of this part of their land. It is more conceivable that this scenario could be faithfully seen as an unreasonable, indirect interference with the use and enjoyment of the land without being a deprivation of possession or an unconsented entry. This may more fitting of an action in private nuisance than the *Wu* scenario.

C. Interference with a Natural Right

The Supreme Court thought it was very likely the defendants would be liable in private nuisance because the interference with Mr Wu's access to his apartment is strongly analogous to an interference with the right to access a public highway, a right that is recognised as being protected by private nuisance. The Court used the analogy in recognising the right of access because there has to be a right that is ancillary to the land for there to be a private nuisance to a right over.

There are three sources for such rights. The first is property rights which are obtained by grant or by prescription. Such rights include easements and profits a prendre. The second source is rights created by statute. For example, the Unit Titles Act includes a statutory right for unit owners to receive air and light.[111] The final source are rights existing in common law. Courts have shown pragmatism in recognising such rights in situations, an example includes the right to support.[112] Unlike the first limb, Courts have not tended to require an emanation as for this branch of private nuisance.

The difficulty with the facts in *Wu* is that are no explicit rights from these categories which directly correspond to any nuisance experienced by Mr Wu. He has no easement to ensure his right to pass over common property and enter his unit, the Unit Titles Act does not have an explicit right of access, and common law does not recognise a general right of access to

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[110] See *Powell v McFarlane*, above n 63. To say that an ouster of an owner from a small portion of their estate, such as a shed, is a dispossession of the whole estate would mean that any unauthorised entry onto land could be a dispossession of the whole. For example, an intruder's presence on a driveway is spatially preventing the owner from exercising control over the square of land on which the intruder is standing. However the owner is still in possession of the rest of the property. It therefore flows that the level of control necessary for someone to be in possession of an entire estate must be in some way proportional to the entire estate.

[111] Unit Titles Act, s 11.

[112] See *Brouwers v Street* [2010] NZCA 463, [2011] 1 NZLR 645.

land; for example access to landlocked land has to be dealt with through a special procedure in the Property Law Act.[113]

Although the Unit Titles Act explicitly outlines certain rights incidental to the ownership of units and common property under the Unit Titles Act,[114] the Act also refers to and allows protection for incidental rights which are implied by the Act.[115] The potential for implied rights under the Unit Titles Act allows for the common law to recognise and protect rights over and in connection with land which may be peculiar to the unit titles context without broadening the scope to create a natural right which applies to all land.

1 Difficulties with using implied rights of access

The first difficulty with this approach is that it has very limited applicability. The right to access land to and from a public highway is essentially a right protecting the access to property boundaries.[116] This natural right corresponds well with the facts in *Wu* because the door through which Mr Wu wants to be able to access his unit is also the boundary; they are coincidental. Therefore, the electronic changing of locks to prevent Mr Wu from entering the interior of his unit was also a complete interference with his ability to cross the boundary of his land. It is this fact which makes the defendants' blocking of Mr Wu's access to his unit so analogous to the interference with frontager rights in the access to highway cases.

However, it is not difficult to foresee cases, even within the Unit Titles Act context, where there the boundary to a property is quite different from the entrance. Consider, for example, a block of adjoining flats. Because this type of unit titles development does not involve the

[113] Property Law Act 2007, ss 326 and 327.

[114] Unit Titles Act, s 11.

[115] Unit Titles Act, s 37(6).

[116] Much of the jurisprudence surrounding the right to access land from a public highway developed around cases involving disputed access to the wharves or land abutting rivers: see *Rose v Groves* (1843) 5 Man & G 613, 134 ER 705; *Lyon v Fishmonger's Company* (1876) 1 App Cas 662 (HL); *Attorney General v Conservators of the River* Thames (1864) 1 HM 1, 71 ER 1. For a comprehensive review of the early authorities surrounding the right to access land from a public highway, see *Smith v Wilson* [1903] 2 IR 45 (KB). The right in its modern form was stated in *Marshall v Blackpool Corporation* [1935] AC 16 (HL), and was recently affirmed by dicta in *Cusack v Harrow London Borough Council* [2013] UKSC 40, [2013] 1 WLR 2022. It has been recognised in New Zealand in *Middleton v Takapuna Borough* [1945] NZLR 434 (SC) and *Murray v Wellington City Council* [2013] NZCA 533, [2014] NZAR 123.

same vertical stratification of land into apartment units as *Wu*, the proprietor's land may include gardens which sit within the boundary of the property, but outside the door into the flat's interior.[117] If a Body Corporate were to electronically change the locks to the flat doors in this type of situation, then there would not be any interference with a proprietor's ability to access their property, for they are still able to cross the boundary and enter the garden area of their unit. The situation is even graver outside of the Unit Titles Act context, where a Court would have to resort to developing a general common law right of access to land in order to fashion a remedy under this limb of private nuisance. There has not yet been any indication of judicial willingness to do this, and such a development may be unlikely given the existing schemes such as easements and statutory procedures needed to procure such rights.[118]

This means the Supreme Court's use of the second branch of private nuisance to solve the *Wu* problem may be an acceptable solution to the problem faced on the very specific facts in the case, but it is very limited in its applicability to readily foreseeable variations of the scenario's facts. Moreover, given Professor Newark's remarks at the start of the chapter relating to nuisance an dispossession,[119] it would seem preferable if a cause of action were available to Mr Wu that better coincided with the mischief of the defendant's actions, rather than resorting to rights in land that are more peripherally affected.

D. Conclusions about Nuisance

It is evident that private nuisance cannot provide a conceptually robust, nor a pragmatically flexible remedy for situations where there is a denial of access or possession beyond the Unit Titles Act context. The general gaps in the law pertaining to causes of actions in cases where dispossession has been caused by interference with electronic locks remains. There is therefore scope for the reform of the existing law or development of a new cause of action.

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[117] See *Duncan v Taylor* (2011) 12 NZCPR 235 (HC). The common property managed by the Body Corporate in such situations included surrounding gardens and driveways.

[118] See Property Law Act 2007, ss 326 and 327.

[119] FH Newark "The Boundaries of Nuisance", above n 87.

V Reforming the Torts

Because the existing actions cannot provide a robust way to recover possession of land and monetary awards in *Wu*-like scenarios, chapter proposes a new land-based tort called conversion of land which comprehensively protects the right to possess land, whilst doing minimal damage to the underlying property law concepts and the existing set of land-based torts. Although courts have demonstrated increasing flexibility in their jurisprudence surrounding trespass to land, meaning that an expansion of trespass may be a feasible alternative to the development of a new tort, this approach is rejected on the basis that conversion of land would be a more conservative approach to filling the gap.

However, before the features of conversion of land are discussed, the next section takes an excursus to deconstruct the historical foundations of trespass by ouster as a form of trespass, as well as the historical foundations of the requirement that a claim for damages following an action for recovery of land must be linked in a separate cause of action. This purpose of this is to enhance the plausibility of the new tort by demonstrating that the troublesome features of the existing torts do not sit within deeply entrenched legal principles.

A. Existing Issues

There seems to be an inconsistency between the underlying rights which trespass and trespass by ouster protects. Although ousters between co-owners fall within the law of trespass,[120] trespass protects the right to exclude, whereas trespass by ouster seems to protect something different, namely to protect co-owners from being dispossessed or excluded by their companion.

The inconsistency was pointed out early in the early nineteenth century by Littledale J in the case *Cubitt v Porter*.[121] The case involved the demolition and rebuilding of a commonly owned wall that sat between two adjacent properties. The three judges unanimously held that there was no trespass by ouster because the wall had promptly been rebuilt. However, Littledale J

[120] *Halsbury's Laws of England* (5th ed, reissue, online ed, 2015) vol 97 Tort at [580].
[121] *Cubitt v Porter* (1828) 8 Barnewall and Cresswell 257, 108 ER 1039 (KB).

also delivered a coda on the possible causes of action where there has been interference with common property. He questioned the logic behind trespass claims where there has been an ouster, and observers this should better aligns with the claim of ejectment. His observations are worth quoting in full: [122]

> It has been said that trespass will lie in this case by one tenant in common against the other, because there has been an expulsion amounting to an actual ouster. Now, if there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is a mere aggravation of the trespass. […]The original entry being the gist of the action in trespass, and the expulsion mere aggravation, I doubt much whether trespass can be maintained even for an expulsion.

Littledale J also observed that an action of waste will exist in cases where the common property is destroyed. It naturally flows from his logic that trespass by ouster was not a part of the law of trespass, and that trespass by ouster was not a necessary cause of action when there had been a dispossession or the common property had been destroyed. The actions of ejectment and waste would suffice.

However, Littledale J's observations were rejected by the Court of Common Pleas in *Murray v Hall*.[123] The Court tersely observed that it is difficult to understand why trespass should not exist "if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster." *Murray v Hall* became one of the key cases argued in, and implicitly accepted by, the House of Lords in *Jacobs v Seward,*[124] the leading House of Lords decision that confirmed the acceptability of trespass claims in instances of ouster.

Further evidence of the impromptu manner in which these actions developed is well given in *Goodtitle v Tombs.*[125] *Murray v Hall* cited this case as authority for rejecting Littledale J's claims, however if anything, it indicates the historical flexibility and fluidity around the causes

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[122] At 269, 1043.

[123] *Murray v Hall* (1849) 137 ER 175 (CP).

[124] Above n X.

[125] *Goodtitle v Tombs* (1770) 95 ER 965 (KB). This case was cited by *Murray v Hall*, above n X, for evidence

of actions. In the decision, Wilmot CJ traced the history of trespass and ejectment back to the time of King Henry VII. He noted that ejectment used to only collect damages and could not recover the land. However, ejectment evolved into a real action, which also allowed the collection of nominal damages but not mesne profits. The action of trespass thus needed to be grafted on to ejectment to allow the recovery of mesne profits. Because an action in ejectment was already available on the facts of the case, a judgment in trespass for mesne profits could follow. Gould J, however, simply allowed an award of mesne profits upon the judgment of ejectment, without mentioning trespass.

The ill-explained rejection of Littledale J's coda, the fluidity of the actions' histories explained by Wilmot CJ, and Gould J's pragmatic award of mesne profits in spite of authority all indicate that courts have not approached trespass, ejectment, and ouster with great consideration of logic or coherence. This has likely contributed to the tangle of actions that exists today. Moreover, it indicates that these actions do not rest on logical superstructures which have existed for time immemorial. Rather, it shows the law may have developed in a pragmatic manner, probably to the detriment of rationalisation. It indicates that there is unlikely to be a major policy factor or a carefully crafted rationality behind the current state of the law, meaning that attempts at reform can be attempted without risking undue damage to such matters.

B. Risks of Expanding Trespass

Decisions from New Zealand and England's appellate courts indicate an increasing judicial flexibility around elements of trespass to land. This trajectory of expansiveness could indicate there is a realistic possibility of expanding trespass to protect the right to immediate possession of land in such a way that would provide a clear cause of action in the *Wu* scenario. However, there are considerable conceptual risks in following this trajectory into ouster situations. A tort of ouster would require a comparatively incremental development in the law, and is a preferable alternative to expanding trespass.

1 Two example cases

The first case is the 1994 New Zealand Court of Appeal decision *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd*.[126] Trust Bank was a mortgagee of a piece of land owned by a third party company called Shearer Bros Ltd. Lockwood Buildings had supplied a kitset show home which Shearer built on the mortgaged land. Shearer got into severe financial difficulty and a receiver was appointed. The very next day, before Trust Bank had served the requisite notice to enter into possession and make a mortgagee sale, Lockwood entered the land and removed the show home. Trust Bank sued Lockwood for trespass. After determining that the kitset was a fixture, the Court of Appeal then considered whether its removal was a trespass. The difficulty with this was that because notice had not yet been issued when the show home was removed, Trust Bank had neither possession of the land, nor a right to immediate possession. This meant the claim did not conceptually fit with the remedies of trespass or trespass by relation.

The Court resolved the difficulty by analogising Lockwood's removal of the chattel with a damage a landlord suffers to his reversionary interest. Traditionally, claims for reversionary injury were kept conceptually separate from trespass because it was claimed through an action on the case. However, the Court saw no difficulty or harm in assimilating it with trespass. Therefore, Trust Bank could sue Lockwood in trespass for damage to its security interest. Tipping J's statement is salient:[127]

> While trespass to realty was originally a cause of action available only to protect possessory rather than property rights, the tort has developed to meet the demands of justice and has thereby incorporated trespass by relation and trespass causing permanent damage to a reversionary interest. In neither case is the plaintiff actually in possession at the time of the trespass. It is not the plaintiff's possessory interest which is harmed, rather his economic interest in the land. I would therefore hold that a mortgagee having no immediate right to possession may nevertheless sue in trespass for a loss suffered as the result of permanent damage to the security. There cannot be any doubt in the present case that Lockwood

[126] *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA).

[127] At 35

committed a trespass by removing the showhome and thereby permanently damaged Trust Bank's security in a manner causing it loss.

Trust Bank was thus able to sue in trespass for a loss suffered as a result of damage to its security interest. It is worth noting that the Court of Appeal's approach to the case differs from the way Holland J dealt with the case in the High Court.[128] Holland J found Lockwood liable to Trust Bank by stating that there was "no doubt that trespass is a tort committed against a right to possession",[129] and extending the concept of trespass by relation to the concept of mortgages.[130]

The English Court of Appeal demonstrated great flexibility in relation to trespass and possessory claims in the controversial case *Manchester Airport Plc v Dutton.*[131] Here, a contractor had a licence to enter and occupy an area of woodland for the purpose of carrying out an airport runway extension. The contractor sought a possession order to remove trespassing protesters who entered and occupied the woodland three days before the licence was granted. The main issue was whether a bare licencee without possession had standing to claim possession against, and evict, trespassers. A majority of the Court held they did. While this decision is especially controversial for the way it elevates contractual rights to the status of property rights, it is also contentious because it allows someone with neither possession, nor a right to it, to claim a possession order. In this latter aspect, *Dutton* is similar to *Lockwood* in that it shows a willingness of Courts to take an expansive and pragmatic approach to trespass. The case has not received negative treatment in England,[132] although the New

[128] *Trustbank Canterbury Ltd v Lockwood Buildings Ltd* [1994] 1 NZLR 666 (HC).

[129] At 676.

[130] At XX.

[131] *Manchester Airport Plc v Dutton* [2000] 1 QB 133 (CA).

[132] *Vehicle Control Services Ltd v Her Majesty's Commissioners of Revenue & Customs* [2013] EWCA 186 (Civ); *Hall v Mayor of London* [2010] EWCA 817 (Civ), [2011] 1 WLR 504. *Dutton* was also referred to without criticism by Lord Roger JSC in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780 at [6]. Although the English Court of Appeal is bound by its own decisions, in *Hall*, the Court refused to declare *Dutton* per incuriam based on an argument that it failed to consider contrary binding precedents from the House of Lords.

Zealand High Court showed reticence about adopting it,[133] and has been strongly rejected in Australia.[134]

2 Trespass by relation

Trespass by relation is a well-established modification of trespass which allows claims in instances where the plaintiff was not in possession of their land at the time of the direct interference. It works by using a fiction, which, upon the plaintiff's re-entry to the land, deems the plaintiff to have been in possession of the land back until the moment when the right to immediately possess the land accrued.[135]

However, this fiction really is an extension of trespass beyond its limits of protecting the right of a possessor to exclude. The unprincipled element of re-entry is used to stretch trespass to protect the right to possess land, albeit in instances which still require some entry or intrusion. Lord Nicholls speaks frankly about the unprincipled nature of fictions (in relation to the conversion of intangible chattels) in *OBG Ltd v Allen,* where he states: [136]

> Legal fictions, of their nature, conceal what is going on. They are a pretence. They represent an unacknowledged departure from existing principle. […] I would like to think that, as a mature legal system, English law has outgrown the need for legal fictions.

Applying these observations to trespass by relation would suggest that it would be appropriate to abolish trespass by relation. This could be performed by removing the requirement for re-entry, and thus formally expanding trespass to protect the right to immediately possess land. It could also be performed by fashioning a unique tort which specifically protects this right. The effects of these approaches are discussed below.

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[133] *Sealink Travel Group NZ v Waiheke Shipping Ltd* (2008) 9 NZCPR 505 (HC) at [24] – [32].

[134] *Georgeski v Owners Corporation Strata Plan 49833* [2004] NSWSC 1096, (2004) 62 NSWLR 534.

[135] See *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA) at 32; *Barnett v The Earl of Guildford* (1855) 11 Ex 19, 156 ER 728; *Ocean Accident and Guarantee Corporation* v *Ilford* Gas Co [1905] 2 KB 493 (CA); *Elliott v Boynton* [1924] 1 Ch 236 (CA). See also WVH Rogers *Winfield and Jolowicz on Tort,* above n X, at [13-3].

[136] *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [228]-[229].

3 Following the trajectory, and the consequences

Given the demonstrated pragmatism surrounding certain features of trespass and possession, it would not be an inconceivable development to expand trespass to protect the right to immediate possession as well as possession. Claims of unconsented entry, ouster, the action for recovery of land, and trespass by relation could be rolled into a single trespass action which protects land from interference. With this, the requirement for an intrusion would be less paramount, since the expanded action would protect a much broader interest. The extended action could be distinguished from nuisance and negligence based on the requirement that the interference is intentional, as well as the requirement that the interference be direct rather than indirect.

Such an approach would somewhat mirror the reform surrounding the interference with chattels proposed by the Law Reform Committee of England, Wales, and Northern Ireland, which proposed to rationalise the chattel based torts of trespass, conversion, and detinue, as well as any other negligence-based or tortious damage relating to chattels. It did this by bundling all these actions into a single, statutory based tort of "wrongful interference with goods."[137] Various law reform bodies have made similar proposals in other jurisdictions.[138]

There is a considerable risk of unwarranted conceptual incoherence arising from the expanded conception of trespass. Although arising from a very different context, the difficulties could resemble those with the economic torts following the English Court of Appeal's attempt to develop a unified economic tort theory in *DC Thomas v Deakin*.[139] In *OBG v Allan,*[140] the House of Lords was left to disentangle the torts following five decades of conceptual confusion resulting from the unified theory, despite acknowledging the fact that is difficult to point to any cases which were wrongly decided because of it. Moreover, the United Kingdom Parliament adopted only a very limited version of the Law Reform

[137] Law Reform Committee *Conversion and Detinue* (Cmnd 4774, 1971).

[138] See South Australia Law Reform Committee *Law of Detinue, Conversion, and Trespass to Goods* (SALRC 95, 1987); British Columbia Law Reform Commission *Wrongful Interference with Goods* (LCR 127, 1990).

[139] *DC Thomson & Co Ltd v Deakin* [1952] Ch 646

[140] Above n X.

Committee's proposals relating to chattel torts,[141] and the similar proposals in other jurisdictions have not been acted on. This demonstrates that law-makers may be cautious about making drastic reforms to homogenise and integrate multiple property torts into a single cause of action.

One difficulty with homogenising the protection of several different rights into a single tort is that it creates problems in taxonomising tort law. Taxonomies classify legal rules into categories according to order and clarity so to facilitate legal analysis and communication.[142] Taxonomies allow adjudicators to define specific rationales for their decisions; when legal rules and concepts are pushed into overly expansive categories that cannot be readily taxonomised, it becomes difficult to delineate the specific rules which an adjudicator should apply.[143] Indeterminacy in legal reasoning is likely to result. Stretching trespass even further than its currently strained borders would potentially run a very high risk of doing this.

Therefore, a conservative approach to fixing the lacuna exposed by *Wu* may be more appropriate. The tort of land conversion outlined below protects a single interest: the right to possess land, and therefore is better able to fit into a taxonomy than a nebulous expansion of trespass. Moreover, it retains the existing structure of the existing tort law, and does not seek to create new rights, interests, or remedies. Instead, it is a tidying of the existing law which has the effect of removing anomalies which hindered the ability of Mr Wu to obtain his compensation under the existing actions.

C. The New Tort of Land Conversion

1 Key features of the new tort

The "conversion of land" represents a relatively conservative development in land based torts in comparison to an expansion of trespass. Many features of conversion of land parallel those of its eponymous counterpart, the existing tort of conversion of chattels. It purifies the tort

[141] Torts (Interference with Goods) Act 1977.

[142] Emily Sherwin "Legal Taxonomy" (2009) 15 Legal Theory 25.

[143] Emily Sherwin "Legal Taxonomy" (2009), above n X, at 45.

of trespass to land by rendering redundant the distortions of trespass by ouster and trespass by relation. It features a wider range of remedies than the action for recovery of land by allowing the return of the land as well as monetary remedies such as damages and mesne profits to be obtained in the single action. A successful claim for land conversion will require the plaintiff to prove that:

(1) The plaintiff had a right to immediately possess the land, and

(2) The defendant intentionally acted in a way that is inconsistent with the plaintiff's right to possess the land.

The majority of instances that involve a conversion of land will also involve a concurrent trespass to the land; for example a lessee holding over by staying on the property is also a trespasser. However, the concurrent liability in trespass should not conceptually threaten the existence of land conversion. Simultaneous liability in trespass and conversion frequently occurs in the chattel torts. If a person removes a wine bottle from a shelf and drinks it, they are committing a trespass and conversion. The trespass exists in the unlawful interference of the bottle by removing it from the shelf; the conversion exists in the appropriation of the wine by consuming it.[144]

2 Remedies

If a plaintiff remains out of possession when a valid claim for land conversion has been established, an injunction should be awarded to put the plaintiff back in possession.[145] This will be the primary remedy to vindicate a landowner's right to immediate possession.

Monetary awards will be available alongside the injunctions to return possession, within the single action. There are two types of awards which will be foreseeably available in cases of land conversion, excluding nominal and exemplary damages. The first is compensatory damages: these are awarded to compensate for economic losses which are consequential of the interference. This is the sort of award sought by Mr Wu, for the lost opportunity to tenant

[144] JA Jolowicz *Winfield on Tort* (8th ed, Sweet & Maxwell, London, 1967) at X.

[145] See *McPhail v Persons (Names Unknown)* [1973] Ch 447 (CA) at 458.

his apartment. The second form of award is mesne profits, a form of disgorgement. These are available in trespass by relation cases,[146] and are quantified by the defendant's profit, rather than the plaintiff's loss. Mesne profits and compensatory damages will almost always be mutually exclusive; an election is required between them.[147]

3 Summary jurisdiction

New Zealand's High Court Rules feature a summary procedure for the action for recovery of land.[148] This is available in instances where plaintiff claims the recovery of land that is "occupied solely by one or more unlawful occupiers".[149] It is also available against parties who are not identifiable by name.[150] This allows a claimant to reclaim their possession against strangers, such as squatters. A claimant can file a statement of claim with an attached affidavit stating their interest in the land and the circumstances of the unlawful occupancy, and then serve the notice either to the occupiers, or to the land itself if the occupiers are unknown.[151] The occupiers have 25 day to serve a statement of defence, after which a summary possession order may be issued.[152]

This summary action is important for allowing expeditious recovery of land in simple cases, and for also allowing claims to be made against unknown defendants. The current rules however do not fit the more expansive approach of conversion of land to instances where the defendant may be in possession of land, but is not in occupation. It is unlikely to be available in the variation of *Wu* where Mr Wu seeks access to his apartment.

As the tort of land conversion supersedes the action for recovery of land (see below), it will be useful to have a summary procedure for the tort which roughly corresponds to the existing

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[146] *Inverugie Investments Ltd v Hackett*, above n X.

[147] *Premium Real Estate v Stevens* [2009] 2 NZLR 384 (SC), per Tipping J; *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514; [1996] 1 All ER 193 (PC).

[148] High Court Rules, pt 13.

[149] Rule 13.2

[150] Rule 13.3(2). See also Civil Procedure Rules 1998, r 55.3(4) (UK).

[151] Rules 13.4 and 13.5.

[152] Rule 13.X.

summary procedure for the recovery of land. This is particularly important for instances where the plaintiff cannot identify the person in possession (such as a squatter) because the existing High Court Rules do not provide for general civil claims to be served against unidentified parties.

4 Application to Wu and foreseeable variations

Mr Wu had the immediate right to possess his unit on September 1, when the Academic lease was terminated.[153] The lease to Academic did not transfer possession of the common property, this means Mr Wu always had the right to immediately possess it.[154] Mr Wu therefore had the right to immediately possess his land, meaning the first element is met; Mr Wu had the right to immediately possess his land at the time of the conversion. The defendants' actions of deactivating Mr Wu's swipe card and refusing to issue him a new one dispossessed Mr Wu, an act clearly inconsistent with his right to possess. The elements for land conversion are therefore met. Mr Wu would be entitled for an injunction to allow him to resume possession (if he had not already re-entered), and compensation for his loss of opportunity to lease his unit.

The elements of land conversion could apply in the instance where a hacker interfered with the electronic locking system of a standalone dwelling house to lock out the owner; it would not rely on the structure of Unit Titles Act, or the vertical structure of the apartment dwelling complex. A claim of land conversion would not be affected by the lack of emanation, the exact mechanism of the electronic locking system, co-ownership of the subject property, or whether the plaintiff had already re-entered the land. Moreover, it is likely that any intentional locking out by a party from the main centre of an estate, whether through an interference with an electronic lock or otherwise, will put that party in such a degree of control over the land that it is inconsistent with the landowner's right to possess the land, and thus a land conversion.

Land conversion will also enable an action to extend to a new situation which was not covered under the law of trespass. Say a rogue opportunistically comes across the last remaining key

[153] At [115].

[154] *Wu v Body Corporate 366611* [2014] NZSC 178, [2015] 1 NZLR 215 (recall judgment) at [13].

to a house. The rogue retains the key, knowing that the owner is no longer able to enter their house. The detention of the key involves no intrusion, and falls outside the law of trespass. The only potential remedy in the existing array of torts might be an action for the recovery of land, which would not give compensation. A claim for chattel conversion of the key would not give full compensation for the loss of the possession of the land. However, under land conversion, the knowing detention of the key is an action inconsistent with the plaintiff's right to possess the land, and would therefore be amenable to a claim, resulting in an injunction for the recovery of the access to land, as well as compensation or mesne profits.

5 Consequences of the new tort

(a) Trespass by ouster is obsolete

When a co-owner ousts another, there will always be a dispossession. Because every trespass by ouster will also be a dispossession, it is foreseeable that the injury suffered in such situations will always be covered by land conversion. This renders trespass by ouster obsolete, and brings a new level of conceptual purity to the law of trespass by purging it of this distortion.

Trespass by ouster is not only invoked in cases involving ouster, but also in cases involving a complete destruction of the common property, such as the destruction of a co-owned building or a party wall.[155] The tort of land conversion will cover these instances too, given that complete destruction of the shared property by a co-owner will almost certainly be an action that is inconsistent with the other co-owner's right to immediately possess the property. A destruction means the plaintiff can no longer possess or use the land in the form the land existed in when the right to immediate possession accrued.

This is consistent with the conversion of chattels, which not only holds the destruction of a chattel to be a conversion where,[156] but also allows claims in conversion where one co-owner of common property acts inconsistently with the other co-owner's right to possession.[157]

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[155] See *Jacobs v Seward,* above n 39.

[156] Cynthia Hawes "Conversion" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [12.3.02(3)].

[157] *Coleman v Harvey* [1989] 1 NZLR 723 (CA).

(b) Trespass by relation is obsolete

A plaintiff will no longer need trespass by relations' requirement of an entry in order to make a claim for damages or mesne profits. For example, a landlord will be able to make a claim for a monetary award against a tenant who is holding over (along with an injunction for to reclaim possession, in the same action) without having to re-enter and rely on the fictitious pretence that possession relates back to the time the right to immediate possession accrued.

(c) The action for recovery of land is obsolete

The action for recovery of land is superseded by the land conversion developed below, which will allow the use of injunctions to return a person into possession of land. The complex relationship between the action for recovery of land, historical ejectment, trespass, and mesne profits will be simplified with the abolition of the action for recovery of land.

(d) Injury to the reversion should be independent from trespass

In *Lockwood Buildings*, Tipping J subsumed the claim for injury to the reversion into the law of trespass.[158] Although the development in *Lockwood* does not specifically affect land conversion, its existence is an anomaly in the law of trespass. This is because once trespass by ouster and trespass by relation are excised from trespass and subsumed into land conversion, reversionary injury would be the only aspect of trespass which is not concerned with the possession of land.

6 Outstanding Issues to be Resolved

This outlines merely gives rough boundaries and key conceptual elements of the new tort of land conversion. It does not propose to define the manner in which the tort can apply in all circumstances. It is likely that that its counterpart, conversion of chattels, will be able to provide analogous cases to aid its development in some novel situations. Nevertheless, a few key issues for future resolution do remain, although these are issues which are not exclusive to land conversion:

[158] *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd*, above n 126, at 34.

- Whether conversion of land could extend to situations such as *Dutton,*[159] where a claimant has a mere right to occupy that is short of a right to possess.

- Whether jus tertii can be a good defence to land conversion.[160]

- Whether damages will be recoverable per se, or whether proof of damage will be required.[161]

Naturally, judicial reasoning will develop and adapt the tort to new situations as they arise. The principled foundation laid in this chapter, however, provide a substantial and rationalised basis for its application which should allow clear and easy access to both a land based and monetary remedies in all situations where there has been a dispossession, whether electronically or not.

[159] *Manchester Airport Plc v Dutton,* above n 131.

[160] This is still a point of contention for the action for recovery of land: see Atkin "Trespassing on Land", above n 54, at [9.3.01]. It would be unusual if a defendant must divest possession and an award of damages against a person who has no right to it.

[161] Trespass has always been actionable per se, however this was called into question by the Court of Appeal in *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd,* above n 126, where Tipping J conflated the action for reversionary injury, which is not actionable per se, into a trespass claim.

VI An Economic Analysis of the Torts Applying to the Wu Scenario

The previous chapters have largely been concerned with a doctrinal analysis of the land-based causes of action. In contrast to doctrinal analyses, economic theories of law view the legal system as a pricing mechanism through which the law acts as a price or tax; this economically incentivises parties' behaviour, leading to an allocation of resources.[162] Instead of doctrinally attempting to determine what the law *should be*, an economic analysis of law seeks to determine what the law *is* by observing the effect that rules and judicial decision making has on society, particularly in relation to the allocation of resources and the economic efficiency. This chapter will conduct an economic comparison of the action for recovery of land coupled with trespass, private nuisance, and conversion of land in the *Wu* scenario.

A. The Methodology of this Economic Analysis

1 Outline

An economic analysis of tort law relating to access to land can be conducted under the terms of the well-known Coase theorem.[163] Richard Coase proposed that if certain rigorous assumptions are satisfied—including clearly defined property rights, zero transaction costs, perfect sharing of information, and profit maximising behaviour by all parties—then the legal rules surrounding an area of law are irrelevant because parties will trade their rights until an economically efficient, welfare maximising outcome is achieved. Although Coase's assumptions do not materialise in the real world, they can still provide a useful way to examine the way the law will apply to *Wu* like scenarios where a landowner is locked out of their property.

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[162] Simon Deakin, Angus Johnston, and Basil Markesinis *Markensis & Deakin's Tort Law* (7th ed, Oxford University Press, Oxford, 2013) at 32.

[163] RH Coase "The Problem of Social Cost" (1960) 3 J Law & Econ 1.

2 The specific methodology

Thomas Merrill applied an economic analysis based on Coase's theorem to analyse the economic effects of the law's differing standards between trespass and nuisance in cases involving intrusions.[164] His analysis provides the foundation of this chapter.

(a) Transaction costs

Merrill conducts his analysis on the basis that all of Coase's assumptions necessary for an optimal allocation of resources are satisfied, but for two: the assumption of clearly delineated property rights, and the assumption of zero transaction costs.[165] He uses the term transaction costs to refer to the various expenses surrounding the agreements that exchange or modify property rights.[166] They include such expenses as those surrounding the search for and identification of parties to negotiation with, conducting negotiations, and performing due diligence. The more difficult it is to do these things, the higher the transaction costs are going to be; the difficulty may be affected by matters such as whether the parties are in a long term relationship or not, or the buying power of one of the parties.[167] The reason Coase believes zero transaction costs are necessary to achieve market welfare maximisation is that the gains for a party from any exchange will be limited. If the transaction costs are going to be greater than the parties' potential gains from the transaction, there will be no profits, and no incentive to exchange property.

(b) Entitlement-determination rules

Merrill rephrases Coase's assumption of clearly delineated property rights as an assumption of zero entitlement-determination costs.[168] Entitlement-determination costs refer to the expenses incurred, particularly by courts, when applying rules to determine who has the

[164] Thomas W Merrill "Trespass, Nuisance, and the Costs of Determining Property Rights" (1985) 14 Journal of Legal Studies 13.

[165] At 21.

[166] At 21.

[167] At 22.

[168] At 21.

property right subject to the exchange.[169] Some entitlement-determination rules are mechanical; they are predictable and easy to apply. They involve minimal judicial involvement when determining property rights. On the other end of the spectrum are judgment rules; determining property rights under these rules involves a high level of judicial involvement and large amounts of legal advice, and can thus be costly. However, the corollary of this is that the rigidity of the mechanical rules may produce results that parties perceive as arbitrary, or unfair. In contrast, the inherent flexibility of judgment rules can lead to results that may better achieve justice in particular circumstances.[170] The reason why the Coase theorem requires zero entitlement-determination costs is similar to the reason some disputes inevitably proceed to court without settlement.[171] If parties share the same estimate about who holds a property right, then the parties should be able to negotiate to a welfare maximising outcome without any entitlement-determination costs. However, if they disagree about liability, it will be difficult to reach an appropriate settlement price, and the parties would have to spend money on litigation to determine who has the property right. This expense required for entitlement-determination will reduce the gains made through litigation.

For example, the entitlement-determination rule for trespass is typically highly mechanical, with the plaintiff merely needing to prove that the defendant invaded the boundaries of the land in their possession.[172] In contrast, the entitlement-determination rule for private nuisance is more complicated.[173] Interferences will only lead to liability in private nuisance if the interference is "unreasonable" and "substantial" so to ensure that people's right to use their property for their own lawful purpose is balanced against the right of others' undisturbed use and enjoyment of their property.[174] This weighing of factors means private

[169] The reason Merrill clearly delineated property rights with zero entitlement-determination costs is that "if it is costless to determine legal entitlements, then delineation of property rights should always be clear", at 21.

[170] At 24.

[171] At 24.

[172] *Bocardo v Star Energy,* above n 58.

[173] At 17.

[174] *Hawkes Bay Protein*, above n 103, at [17].

nuisance features a judgment entitlement-determination, and is likely to feature much higher costs compared to trespass.

The tort of land conversion is likely to sit somewhere in between trespass and nuisance, although perhaps skewed towards the mechanical end of the spectrum in the majority of circumstances. The element of an "intentional act that is inconsistent with the plaintiff's right to possess land" features a degree of indeterminacy in establishing whether a plaintiff's actions were "inconsistent" or not. However, in cases involving an ouster from the main portion of a property, such as an apartment unit or a dwelling house, there is likely to be little indeterminacy given the fact that the plaintiff's actions will almost certainly involve a dispossession.

(c) Putting the rules together

When these distinct rules are put together, Merrill observes a pattern that flows when they are applied to a legal system which tries to promote economic efficiency.[175] First, he notes that where transaction costs are low, a legal system would tend to adopt mechanical entitlement-determination rules.[176] Coupling the low entitlement-determination cost of mechanical rules with low transaction costs maximises mutually beneficial exchange and the modification of property rights. However, the second consequence is that where transaction costs are high, a market exchange is less likely to take place at all, even if the entitlement-determination cost is low.[177] The economically efficient choice will therefore depend on a comparison between the increase of entitlement-determination costs caused by a shift from a mechanical to judgmental rule, and the potential increase in efficiency from allowing a court to take into account broader principles, rather than adhering to a mechanical rule.[178] This means that cases involving high transaction costs are more likely to feature judgemental entitlement-determination rules.

[175]At 25.

[176]At 25.

[177]At 25.

[178] At 25-26.

B. Applying the Tests

1 The facts of Wu

If *Wu* were to occur again, the transaction costs are likely to be relatively low.[179] Identifying the parties is simple because the Body Corporate, Theta, and the unit owners already share some form of legal relationship separate from the dispute. The number of parties is limited, and although there could still be a large number of aggrieved parties given the number of units in the apartment building,[180] the parties have all suffered independent wrongs and do not have to all enter the same settlement contract in order to effectively resolve their claim. This lowers both the search costs, and the costs of coordinating a large number of litigants, especially given the risk of free-rider or holdout problems when multiple parties are trying to enter the same contract.[181] The dispute around the access issue is not ongoing beyond the plaintiff's re-entry, meaning there will not need to be ongoing enforcement, monitoring, or adjustment measures which will add additional transaction costs.

Merrill's methodology would suggest that a relatively mechanical entitlement-determination rule would arise on the facts of *Wu* because a coupling of the lower transaction costs with the low costs of a mechanical entitlement-determination rule would facilitate a mutually beneficial exchange and settlement of the dispute. It therefore seems that on the facts of *Wu*, the tort of land conversion is likely to facilitate a mutually beneficial exchange between the parties. Where there has been a complete ouster, as in *Wu*, it is almost certain that the ousting party's actions will meet the element of "an intentional act inconsistent with the plaintiff's right to possess land" because the actions completely dispossess the landowner. Therefore, the mechanical behaviour of land conversion on the facts of *Wu* is likely to lead to economically efficient outcomes in similar future situations. This means that land conversion

[179] This analysis is conducted based on the forward looking approach of economic analysis. The principal issue which hindered settlement and protracted negotiations between the parties in the actual case was the question as to whether the defendants had the power to exclude Mr Wu under current law surrounding unit titles. This issue has largely been settled by the Supreme Court, meaning there will greater certainty of the parties' positions about this variable which is largely independent of the legal transaction before going into negotiations.

[180] *Wu* (SC), above n 2, at X

[181] Merrill, above n X, at 22.

is not a just a conceptually coherent tort, but that it provides, ex ante, an economically efficient way of allocating resources and property rights.

Taking the analysis beyond Wu

It is obviously not possible to apply the analysis to all the scenarios where an ouster or an interference with electronic locks takes place. However, the economic analysis is able to be applied to the small range of scenarios that have arisen in the previous chapters. For instance, where a co-owner ousts their companion from the land, the transaction costs are likely to be very low given the easy identification of the other parties. This would suggest a mechanical entitlement-determination rule will arise, which is consistent with land conversion. The same is likely to be true when a tenant holds over from their landlord.

Nevertheless, higher transaction costs may apply in situations where the activity which causes an ouster is less direct, but still intentional. An example of this could be where a landowner releases toxic fluorine gas from their property to drive neighbouring landowners from their land. The intentional release of gas "constructively dispossesses" the neighbours by forcing them to abandon their properties.[182] In this situation, it is foreseeable that the gas could travel far and affect a potentially large number of parties, making it more difficult to identify who was affected. The less direct nature of the activity also complicates negotiations because the parties may have suffered to different degrees, raising factual ambiguities as to whether there was actually a constructive dispossession. These are all likely to raise transaction costs, meaning the exchange of property rights is less likely to occur. Under Merrill's variation of the Coase theorem, parties would be less likely to adhere to a mechanical rule in such instances where transactions would be forced, resulting in potentially inefficient results. They are more likely to pursue efficiency by allowing a Court to apply a judgmental entitlement-determination rule.[183] This would mean that an action similar to private nuisance is more likely to apply in such situations.

[182] This scenario is based on the facts of *Martin v Reynolds Metals Co* 221 Or 86, 342 P 2d 790 (1959).

[183] Merrill, above n 164, at 26.

C. Conclusion

The result of this is that there can be two sorts of actions which correspond to various instances of ouster from property: land conversion, and private nuisance. The relatively mechanical entitlement-determination rule of land conversion is likely to apply in the majority of instances involving a dispossession where the inconsistent act is direct and obvious, whereas the judgmental nature of private nuisance will apply in situations where there has been a less direct interference, or where the exact nature of the interest that is interfered with is uncertain. This largely corroborates with the development of the new tort of land conversion, demonstrating that its existence is not only doctrinally correct, but that it may also fit within the profit maximising paradigm of economic efficiency.

VII Conclusion

The novel facts of *Wu* have exposed some of the inherent difficulties of using trespass, as well as our other existing land-based torts in the modern age. These torts developed long before the age of computers, the internet, high rise apartment complexes, and electronic locking systems. Yet all of these are factors which courts must now take into account when deciding claims such as trespass or private nuisance.[184] *Wu* demonstrates the struggle of the New Zealand Courts to apply and adapts these causes of action to a novel scenario, made particularly difficult by the fact it involved an electronic locking system.

Although this dissertation has demonstrated the inability of these actions to provide a robust cause of action which will be effective in gaining compensation on the facts of and its foreseeable variations, it shows that are land-based actions are not a lost cause. It proposes a feasible and conservative solution in the development of the new tort of 'conversion of land'. Land conversion rationalises and simplifies the cause of action available in the electronic lock cases, as well generally improving the coherence of the cause of action available in other cases involving an interference with a person's right to possess land. It also adheres to economic rationality. It shows that our land based torts need not be ineffectual or tangled, but it demonstrates the power that difficult and novel cases can have in unveiling incoherency which can lead to better development of the law in the future.

[184] See the dicta of Lord Cooke on private nuisance in *Hunter v Canary Wharf,* above n 17, at 711.

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