Articles

Protecting ‘possessory licences’ over land against interference by third parties

Adam Baker[*]

A new type of claim is emerging in the common law world. It allows some contractual licensees to sue third parties — other than the licensor and their successors in title — who interfere with the exercise of the licence. These actions are developing haphazardly. They are often said to be unjustified. This article contends that these difficulties can be overcome by a close analysis of the principles-based reasoning behind the claims. Contrary to the mistakenly wide readings of them that have prevailed to date, they should only apply to licences insofar as they entitle the licensee to be in possession. They should merely cover the interval between when possession can be, and is, taken. Only conduct that is a tort to the land and that materially impedes the claimant from taking possession should be actionable. Thus understood, these actions amount to a small and justified incursion into the traditional lease-licence distinction.

Introduction

This article is about protecting contractual licences to use land. Claims are emerging in the common law world, by which some licensees can sue third parties, other than the licensor and their successors in title, who interfere with the exercise of the licence. As an example, one might bring a claim against trespassers who stop one from enjoying a licence to build a house.[1] The actions themselves are amorphous and developing haphazardly. It is often doubted that there is any sound basis for them. By a close analysis of the principled reasoning behind them, however, we can overcome these problems.

The claim as it should exist is follows. First, it applies only insofar as the licence envisages possession of land being taken. To this degree the licence is ‘possessory’. Possession is defined here in its normal way, to require factual possession and intention to possess. A licensee who takes the intended possession would have standing in the real property torts (of trespass and nuisance). Therefore, the claim merely fills the gap between when possession can be, and is, taken. It only exists during this interval. In terms of actionable conduct, the defendant must commit a tort to the land and thereby materially impede the licensee from taking possession. For example, a defendant who leaves an empty crisp packet on the land is committing a trespass but does not

* Lecturer in Property Law, University of Leeds, UK. I wish to thank Professor Duncan Sheehan, Professor Michael Cardwell and the anonymous reviewers for their comments on this article.

1 A similar situation arose in *Clarke v Barry* (Bahamas Court of Appeal, Barnett P, Moree CJ, and Evans JA, 22 September 2020) (*Clarke*).

cause a material impediment. As regards defences, one exists for anyone with a better title to the land than the licensor, as well as the licensor and their successors in title.

So understood, the claim is legally principled. It is a small and justified incursion into the proprietary-personal right distinction. We can tease out from the case law two broad arguments as to why this is so. First, the claim is grounded in the morality of the common law. The reason for this is not clearly given; but it is likely to be that there is nothing inherently less significant to right-holders about being able to take possession for a time under a licence than for the equivalent time under a lease. Secondly, a claim is compatible with broader considerations of principle. This article will expand upon both these points.

This new understanding could be germane throughout the common law world. As things stand, the claims have been spreading into common law jurisdictions, and sometimes being rejected in them, based on mistakenly wide readings of them. For example, judges often treat *Manchester Airport plc v Dutton* (*Dutton*) as allowing claims for possession and trespass by licensees with a right to occupy land.[2] The case has been applied in this way by the courts in Hong Kong,[3] Nauru,[4] and the Bahamas.[5] It has been rejected on the same basis in New Zealand and New South Wales,[6] as well as (obiter) in Papua New Guinea.[7] The relevance of *Dutton* will inevitably be litigated in other jurisdictions too: judges[8] or learning writing[9] in several jurisdictions has countenanced a claim. In addition, the same risk applies within the United States to § 521(2) of the *Restatement (First) of Property* (*Restatement*).[10] It supports a claim for licences that give 'possession', without clearly explaining what this means. There have been hints that it might cover licences to occupy.

This article is structured in four parts. The first one sets out the traditional rules. They are that licences do not create property rights and that the real

2 [2000] QB 133 (*Dutton*).

3 See, eg, *Riseway Properties Ltd v Star River Imitation Ornaments Ltd* [2008] HKDC 25 (*Riseway Properties*).

4 *Capelle v Capelle* [2018] NRSC 39 (*Capelle*).

5 *Clarke* (n 1).

6 *Georgeski v Owners Corporation Sp49833* (2004) 62 NSWLR 534; [2004] NSWSC 1096 (*Georgeski*); *Sealink Travel Group New Zealand Ltd v Waiheke Shipping Ltd* (2008) 9 NZCPR 595 (High Court of New Zealand) (*Sealink Travel Group New Zealand*).

7 *Stettin Bay Lumber Co Ltd v Bob* [2011] PGSC 7 at [9]–[11] (*Stettin Bay Lumber*).

8 See, eg, *Lane v White* (2014) 254 A Crim R 594 at [32]; *Nationwide Controlled Parking Systems Ltd v Revenue Cmrs* [2021] IECA 150 at [76]–[77] (Murray and Collins JJ, Costello J agreeing at [94]) (Ireland Court of Appeal) (*Nationwide Controlled Parking Systems*); *Sim Lian (Newton) Pte Ltd v Gan Beng Cheng Raynes* [2007] SGHC 84 at [27]; *Q Development Sdn Bhd v Semua Penghuni dan Penduduk-Penduduk* (High Court of Malaya, Aslam Zainuddin JC, 5 April 2022) at [4]; *Sharma v Kumar* [2013] FJHC 144 at [8]; *A-G of the Republic of Fiji v Silikiwai* [2016] FJHC 330 at [17] (*A-G of the Republic of Fiji*); *Duff's Valley Corporation Ltd v Brookes* (High Court of British Virgin Islands, Ellis J, 3 July 2019) at [30]–[32]; *Clarke* (n 1); *Williams v Pope* (High Court of Barbados, Chandler J, 26 May 2008) at [25]–[27].

9 LexisNexis, *Halsbury's Laws of Malaysia*, Vol 13(2) (at 9 October 2023) [380.434], [380.437]; LexisNexis, *Halsbury's Laws of India*, Vol 35 (2nd ed) (at 9 October 2023) [285.417] (citing *Dutton* (n 2) in discussing the scope to rely on the defence of property, as a defence to a claim in trespass to the person).

10 American Law Institute, *Restatement (First) of Property* (1944) § 521(2) (*Restatement*).

property torts of trespass and nuisance vindicate possession of land, which licensees rarely enjoy. A sound basis in legal principle would be required to support more protection for licensees, given this orthodoxy. Part II introduces the new claims and identifies instances of principled reasoning in the cases. They are not especially clear, but they should be the starting point for clarifying the law. Part III builds upon them, showing that the morality of the common law supports a claim for possessory licensees. Part IV explores the limits of the claim, having regard to general considerations of principle.

I The traditional rules

A Two basic ideas

A traditional account of the protection for licences relies on basic tenets of property law. They are not susceptible to change by a mere reinterpretation of existing decisions. Two ideas are key. One is that a contractual licence confers no legal property right.[11] Windeyer J famously made this point in *Radaich v Smith*, when he distinguished a licence from the legal right of exclusive possession for a term that is given to a tenant.[12] Licences merely make actions lawful that otherwise would not be so.[13] In other words, the licensor cannot sue the licensee, if the licensee keeps within the scope of the licence. A second point is that the real property torts (of trespass and nuisance), on a traditional view, vindicate possession of land.[14] What then does this mean for a licensee? There is a growing number of cases in which licensees have successfully sued, based on prior possession.[15] Generally speaking, they will not be able to do so if they keep to the terms of their licence, as a right to take possession is the hallmark of a lease. However, domestic law may allow exceptions to this rule. One example is when the licensor is disabled by statute from granting a tenancy. In addition, licences may allow the licensee to be in possession only at time(s) during the agreement and/or over just some areas that are covered

11 See, eg, *Thomas v Sorrell* (1673) Vaugh 330 at 351; 124 ER 1098 at 1109 (Vaughan CJ) (*Thomas*). Licences are also not a form of personal property as are protected in the torts of trespass to goods and conversion: see, eg, American Law Institute, *Restatement (Second) of Torts* (1965) § 242(2); *OBG Ltd v Allan* [2008] 1 AC 1 (*OBG*).

12 (1959) 101 CLR 209 at 222. See also *BA v R* (2023) 409 ALR 41 at 56 [69] (Gordon, Edelman, Steward and Gleeson JJ); [2023] HCA 14.

13 *Thomas* (n 11) at 1109 (Vaughan CJ).

14 Some Canadian authorities allow a person with a right to occupy to sue in nuisance: see, eg, *Motherwell v Motherwell* [1976] 73 DLR (3rd) 62 (Alberta Court of Appeal).

15 For trespass claims, see, eg, *Harper v Charlesworth* (1825) 4 B & C 574; 107 ER 1174 (*Harper*); *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Builders' Labourers Federation* (1988) 83 ALR 385; *Dediya v Ketner* [2020] NRSC 14. A possession claim was successful in *Chan Hau Ling v* 劉西 [2015] HKCFI 978. For private nuisance see, eg, *Tinseltime Ltd v Roberts* [2011] BLR 515; *Paxhaven Holdings Ltd v A-G* [1974] 2 NZLR 185 (Supreme Court of New Zealand). For United States case law, see Thomson Reuters, 'Right of Licensee of Real Property to Injunction against, or Damages for, Trespass by Third Person' 139 *American Law Reports* 1204 (online at 9 October 2023).

by it.[16] A lease, by contrast, gives exclusive possession of the whole land for the full agreement.

We will refer to these two basic rules as the orthodox (or traditional) position. Several famous cases illustrate it. The best known one may be *Hill v Tupper* (*Hill*).[17] In that case, a canal owner conferred on the plaintiff an 'exclusive' right to put boats on the canal. The defendant set their own boats on the canal. The plaintiff's action in trespass failed. It was held that the right was a contractual licence rather than a legal easement. As the plaintiff was not in possession whilst they were exercising it, they had no standing in trespass.

The orthodox position means that many licensees cannot bring a strict liability claim against third parties; that is, one that requires no proof of fault. Licensees will instead usually need to consider fault-based claim(s). For example, they might sue if the third party is committing a tort (such as trespass) with an intent to harm the licensee[18] or if they induce the licensor to breach their contract with the licensee. Licensees in some jurisdictions may also sue for negligently inflicted economic losses.[19] Proving fault in practice may be difficult and time-consuming. No fault-based claim could be a routinely adequate alternative to a strict liability one. It is therefore unnecessary here to discuss the fault-based actions in detail.

In theory, licensees might also take other steps to protect themselves. For example, they could bargain for a contract term, by which the licensor promises to take reasonable steps to deal with any interference. The growing case law on the new claims suggests that the other options are inadequate. We will touch upon them later, in the course of discussing whether a claim is supportable.[20]

B Principle and a change in the law

Given how entrenched the orthodox position is, any judicial change to the law should be grounded in principle. In broad terms, principles are the norms for which existing case law and legislation stand. Judges may refer to them expressly, but they can also sometimes be inferred too. Gray and Gray, for example, identified 'meta-principles' in land law, which 'lurk quietly ... between the inscrutable lines of statutory or judicial prose'.[21] They include the meta-principles of 'reasonableness' in dealings between neighbours and of rationality in one-off land transactions. These norms help to shape the rules of land law. Of course, principles do not dictate results;[22] and balancing them is

16 *Fatac Ltd (in liq) v Cmr of Inland Revenue* [2002] 3 NZLR 648 at 663 [49] (Fisher J for the court) (Court of Appeal of New Zealand) (*Fatac*). See also below nn 182–5 and accompanying text.

17 (1863) 2 H & C 121; 159 ER 51.

18 See generally *Bram Enterprises Ltd v AI Enterprises Ltd* [2014] 1 SCR 177.

19 See, eg, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (Court of Appeal of New Zealand), affd [1996] AC 624.

20 See below nn 124–5 and accompanying text.

21 K Gray and S Gray, 'The Rhetoric of Realty' in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn*, Joshua Getzler (Ed) (Butterworths, 2003) p 278.

22 An example is given by R Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14 at 25–6, of how the maxim against profiting from one's wrongdoing is contradicted by some rules.

important. Their weight is determined by a host of factors, such as the extent to which they are supported by case law. There is clearly a subjective element to the application of principles. For example, judges can agree that legal certainty is an important principle but disagree over what that should mean for the law on a given issue.[23]

The influence of principles extends across the common law. Take the real property torts. To draw the line at possession is the traditional compromise. But it has never been a completely static one. The meaning of possession can be nuanced to reflect 'pragmatic considerations and considerations of social policy'.[24] There may also emerge caveats to the general rule, such as when jurisdictions protect easements in gross.[25] In this case, the real property torts go beyond protecting possession. Such exceptions and such instances of loose definition may reflect the force of competing principles. Even in a case like *Hunter v Canary Wharf Ltd* (*Hunter*), in which a majority of the House of Lords held that having a 'substantial link' with the land did not give standing in nuisance in England and Wales, the majority advanced grounds of principle for their decision.[26] Lord Goff referred to the uncertainty of the proposed test, for example.[27] These factors shored up the decision. It seems implicit that the outcome might otherwise have been different. When change does happen, it is likely to happen incrementally.[28] We might speak of 'measured' progress, that is 'evolutionary and not revolutionary'.[29]

To focus then on the present issue, it is also one of principle. As far back as 1929, Charles Clark wrote a classic treatise on aspects of real property law.[30] He considered the issue at hand. Whilst he acknowledged the case law in which licensees had failed in claims in the real property torts, this was not decisive. He argued that 'the question is one of policy, which in this case would seem largely one of justice and equity, and not of logic', adding that we might conceive of cases 'where recovery by the licensee against a third party interfering with the exercise of his privilege might seem just'.[31] This view was repeated in a second edition, by which time Clark had become a United States

23 See, eg, the discussion of relief against forfeiture in *Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd* [2020] AC 1161 at 1178–9 [49]–[50] (Lord Briggs JSC, Lord Carnwath, Lady Black and Lord Kitchin JJSC agreeing), 1187–8 [88] (Lady Arden JSC) (*Manchester Ship Canal*).

24 American Law Institute, *Restatement (Fourth) of Property* (2021) § 1.1 Tentative Draft No 2, Reporter's Note.

25 See, eg, American Law Institute, *Restatement (Third) of Property (Servitudes)* (2000) §§ 1.2(3), 3.1; Property Law Act 2007 (NZ) s 291.

26 [1997] AC 655 (*Hunter*). See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 527 (McTiernan J) (denying that any principle supported an alleged new type of claim in nuisance).

27 *Hunter* (n 26) at 693 (Lord Goff, Lord Hope agreeing at 726).

28 Lord Walker, 'How Far Should Judges Develop the Common Law?' (2014) 3 *Cambridge Journal of International and Comparative Law* 124 at 130; J Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291 at 295.

29 M Arden, *Common Law and Society: Keeping Pace with Change* (Oxford University Press, 2015) p 10.

30 C Clark, *Real Covenants and Other Interests which 'Run with the Land'* (Callaghan, 1929) (*Real Covenants and Other Interests which 'Run with the Land'*).

31 Above, at p 19. He had previously expressed the same view elsewhere: C Clark, 'Licenses in Real Property Law' (1921) 21 *Columbia Law Review* 757 at 763–4.

federal judge.[32] Insofar as his reference to 'justice and equity' is one to justiciable grounds, it must be an allusion to legal principles. The issue that Clark raises is hence whether they might yet prevail over the 'logic' of the orthodox rules. Indeed, we see the same approach being taken in *Hunter*. Lord Cooke said that whether the courts should accept the 'substantial link' test 'is a question of the policy of the law', which cannot be 'answered by analysis alone'.[33]

To date, Clark's question has been addressed only in part. His own brief suggestion was that there were insufficient grounds for a claim for *any* licensee[34] — a view supported by this article. He does not consider specific types of licence.[35] In more recent scholarship, we find negative appraisals of *Dutton*, on the premise that it applies to any licence to occupy.[36] Yet we might wonder if some other version(s) of a claim are principled. As to the reasons that authors have given for one, they are often stated in passing and are not of themselves compelling. This is easy enough to see. For instance, there are statements that third-party interference can harm licences of significant economic value,[37] that the consequences for the licensee can be serious,[38] and that licensees may be vulnerable due to the licensor having no strong incentive to act.[39] Yet harm itself is not enough for tortious liability to be justified,[40] let alone liability without fault. Even the risk of serious economic harm does not set licences apart from other contractual rights, which can also be highly valuable, but which do not enjoy strict liability protection.[41] At the most, these points could feed into a more thorough case for a claim.

II Hints of principled reasoning

This part introduces the new claims and — as a first step in answering Clark's question — teases out the principled reasoning about them. The overall argument is that a claim can be supported in terms of legal morality and that

32 C Clark, *Real Covenants and Other Interests which 'Run with the Land'* (2nd ed, Callaghan, 1947) pp 28–9 (*Real Covenants 2nd ed*).

33 *Hunter* (n 26) at 717. Lord Cooke dissented as to the outcome, but his statement fits with the engagement with principle by the majority.

34 See, eg, Clark, *Real Covenants and Other Interests which 'Run with the Land'* (n 30) at p 19. His consideration of the point was framed in the same way on each occasion that he addressed it.

35 It is not even clear that he recognised the category of 'possessory licences'. He stated that 'a licensee does not have possession': Clark, *Real Covenants 2nd ed* (n 32) at p 29 n 41.

36 See, eg, B McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in *Modern Studies in Property Law*, S Bright (Ed) (Hart, 2011) vol 6.

37 Editorial, 'Interference by Third Parties with the Privilege of a Licensee' (1924) 33 *Yale Law Journal* 642; A Evans, 'Interferences with Licenses by Strangers' (1951) 1 *Intramural Law Review of St Louis University* 189 at 199; G Alexander, 'The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis' (1982) 82 *Columbia Law Review* 1545 at 1581–2.

38 M Wonnacott, *Possession of Land* (Cambridge University Press, 2006) p 71.

39 B Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387 at 410.

40 T Honoré, 'The Morality of Tort Law — Questions and Answers' in *The Philosophical Foundations of Tort Law*, D Owen (Ed) (Clarendon Press, 1995) p 78.

41 *OBG* (n 11). One account of the reasons for this is given by MJR Crawford, 'Contract as Property: Triangles and Tragic Choices' (2023) 82 *Cambridge Law Journal* 83.

no other considerations of principle tell against one. However, the engagement with principle is quite thin. The reasoning could be better explained, and it is hard to say that every instance of it is to the same effect. It is well-known that terms like ‘possession’ and ‘occupation’ can be used with subtly different meanings.[42] For example, the word ‘possession’ could refer to exclusive possession, actual possession, possession in fact, and such like.[43] With this point in mind, we must interpret the cases with caution.

A Commonwealth and Irish case law

Let us start then with *Dutton*. The facts were as follows. The plaintiff had a licence to occupy land, to lop and fell trees on it.[44] The defendants were environmental protestors. They were stopping the plaintiff from accessing the land. The plaintiff sought a possession order. The defendant objected that they did not have legal title to the land. The court held that such a title was not required. The crucial judgment was given by Laws LJ, with whom Kennedy LJ agreed.[45] He accepted that licensees did not have standing in ejectment, which claim had historically been the basis of possession orders. Yet this action had been abolished and replaced with the new procedural rules. Laws LJ did not say that this change was done with the positive intention to extend standing,[46] but he thought that it was crucial. It meant that the limits of ejectment should not be decisive.

Uncertainty exists about what exactly Laws LJ went on to decide.[47] At one point, he says that ‘a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys’.[48] He described this as the ‘true principle’.[49] In that event, the case cannot apply when there is

42 J Hill, ‘The Proprietary Character of Possession’ in *Modern Studies in Property Law*, E Cooke (Ed) (Hart, 2001) vol 1, pp 24–5; M Dixon, ‘Editor’s Notebook’ [2010] 74 *Conveyancer and Property Lawyer* 423 at 426 (Editor’s Notebook).

43 Hill (n 42) at pp 24–5; Dixon, ‘Editor’s Notebook’ (n 42) at 426.

44 Laws LJ’s judgment implies that he thought the licence to be contractual: see below nn 56–8 and accompanying text.

45 Kennedy LJ gave additional reasons for the decision, based on a reading of the relevant procedural rules (which view has not found favour: see below n 46 and accompanying text), but he agreed in the alternative with Laws LJ’s reasoning: *Dutton* (n 2) at 150–2.

46 Any such argument would be unpersuasive: E Paton and G Seabourne, ‘Unchained Remedy: Recovery of Land by Licensees’ [1999] *Conveyancer and Property Lawyer* 535 at 540.

47 See, eg, *Hounslow LBC v Devere* [2018] EWHC 1447 (Ch) at [64] (*Hounslow LBC*); *Nationwide Controlled Parking Systems* (n 8) at [77] (Murray and Collins JJ, Costello J agreeing at [94]).

48 *Dutton* (n 2) at 150.

49 Above, at n 48.

no licence to occupy. Several cases treat *Dutton* thus.[50] However, some judges have not taken there to be such a limitation.[51] We return to this debate later.[52]

Several authors have criticised *Dutton* for infringing the orthodox rules.[53] It is submitted that principle is the key to Laws LJ's efforts to sidestep them. His conclusion that the limits of ejectment were not decisive was an attempt to find the space, in which to apply legal principles. Speaking extra-judicially, Lord Hodge has referred to 'the general recognition that', when the established rules do not apply, 'a judge is to search for and apply a principle'.[54] That Laws LJ took this approach fits with his minimal engagement with case law on the tort of trespass.[55] It is also notable that Laws LJ never described *Dutton* as a trespass case. He framed the issue as whether a licensee can obtain a possession order, having already averred that the rules on ejectment were not decisive. In answering this question, he stated as follows:

> In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim (for which I make no apology), 'ubi jus, ibi sit remedium.'[56]

In this passage, Laws LJ constructed an argument of principle. He started by framing the issue 'as a matter of principle'. He compared the position of contractual licensees and persons with 'title'. Plainly, 'title' is a wide concept. It covers any holder of a legal fee simple or legal leasehold estate. Only a common principle can justify making the comparison. Laws LJ then sought to

---

50 See, eg, *Walton Family Estates Ltd v GJD Services Ltd* [2021] EWHC 88 (Comm) (*Walton Family Estates*); *Capelle* (n 4); *Riseway Properties* (n 3) at [18]–[19]; *Countryside Residential (North Thames) Ltd v T* [2000] 2 EGLR 59 (*Countryside Residential (North Thames)*); *Alamo Housing Co-operative Ltd* [2003] HLR 62 (*Alamo Housing Co-operative*); *Nationwide Controlled Parking Systems* (n 8) at [77] (Murray and Collins JJ, Costello J agreeing at [94]).

51 *Hounslow LBC* (n 47) at [65]–[69] (the claim failed on the facts). See also the wide framing of *Dutton* in *Clarke* (n 1) [23] (Barnett P for the court).

52 See below nn 154–60 and accompanying text.

53 W Swadling, 'Opening the Numerus Clausus' (2000) 116 *Law Quarterly Review* 354; Paton and Seabourne (n 46); Hill (n 42) at pp 33–5; V Ball, 'The Influence of "Loss" in the Property Torts' (2020) 31 *King's Law Journal* 426 at 431–4; C Boge, 'Possession of Land: Missteps in the Control Analysis — Part 1' (2015) 89 *Australian Law Journal* 49; C Boge, 'Possession of Land: Missteps in the Control Analysis — Part 2' (2015) 89 *Australian Law Journal* 100; E Lochery, 'Pushing the Boundaries of Dutton?' [2011] *Conveyancer and Property Lawyer* 74; V Ball, 'Looking Back on *Dutton*: The Precedent Set, the Accounts Given, and the Problems Caused' [2023] *Conveyancer and Property Lawyer* 184. But see M Dixon, 'Real Property, Licences and the Slippery Idea of Possession' (2023) 139 *Law Quarterly Review* 552 (Real Property, Licences and the Slippery Idea of Possession), suggesting that 'possession' is taking on a different (and wider) meaning in the remedial context, whilst raising concerns about the vague limits of this emerging meaning.

54 Lord Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (Speech, Max Planck Institute of Comparative and International Private Law, 28 October 2019) [32].

55 *Dutton* (n 2) at 141–2 (Laws LJ).

56 Above, at 150.

explain the law and hinted that societal morality is crucial to its legitimacy. In particular, he characterised any other outcome as 'unjust and disreputable'.[57] A regard for morality does shape tort law, as we see later.[58] His Lordship then closed with a Latin maxim, to the effect that 'where there is a right, there is a remedy'. In this closing sentence, he presumed that the licensee should have *some* right against third parties; there should otherwise be no remedy. The reasons for this conclusion must lie in his appeal to principle. Implicitly, his Lordship must also have thought that no other principles tell against the claim that he advanced.

Dutton has been applied in other contexts; this suggests that it is indeed an example of principles-based reasoning. Two instances should be mentioned. First, *Dutton* has been invoked in a trespass claim by a licensor with no title to land, as against a licensee who exceeded the terms of the licence.[59] The claim technically prevailed as the licensee was estopped from disputing the licensor's title.[60] The reliance on *Dutton* suggests that the court was invoking a principle for which it stands. Moreover, *Dutton* has been taken to support a kind of derivative claim in Ireland. It involves the licence agreement permitting the licensee to rely on the licensor's title to sue in trespass. This happened in *Inland Fisheries Ireland v O'Baoill*.[61] The case concerned a contractual licence to manage a portion of a river and to exercise the licensor's rights in relation to it. Laffoy J justified her decision 'on the basis of the reasoning of Laws L.J.',[62] having set out our key passage from *Dutton*, save for the last sentence that invokes the Latin maxim. This omission could reflect a wish to avoid Latin. Whilst derivative claims raise their own issues and this article is not about them,[63] Laffoy J could only rely on *Dutton* to support one if it is a principles-based decision. Her argument is that whatever principle(s) justify the plaintiff's right against third parties in *Dutton* can also support a right to rely on the licensor's title. Unfortunately, she did not explain the relevant principle(s) in her own words.

Other judgments also hint that a claim for *some* licensees is principled. They are provided by senior judges. In *Mayor of London v Hall* (*Mayor of London*), Lord Neuberger MR gave the sole judgment, with which Arden and Stanley Burnton LJJ agreed.[64] He considered obiter the position of a licensee who has 'a right to use and control, which effectively amounts to possession'. He said that it was 'apparently absurd' to say that they cannot seek a

57 Above, at n 56. See also *Riseway Properties* (n 3) at [19].

58 See A Tettenborn (Ed), *Clerk and Lindsell on Torts* (24th ed, Sweet & Maxwell, 2023) [1-23].

59 *Vehicle Control Services Ltd v Revenue and Customs Cmrs* [2013] STC 892 at 901–5 [32]–[44] (Lewison LJ, Treacy LJ agreeing at 905 [46], Hallett LJ agreeing at 905 [47]) (*Vehicle Control Services*).

60 See also *Global 100 Ltd v Laleva* [2022] 1 WLR 1046 at 1063–6 [67]–[82] (Lewison LJ, Macur LJ agreeing at 1066 [84], Snowden LJ agreeing at 1066 [85]) (*Global 100*).

61 [2012] IEHC 550 (*Inland Fisheries*). There was an appeal on a separate matter: *Inland Fisheries Ireland v O'Baoill* [2015] 4 IR 132 (Ireland Supreme Court).

62 *Inland Fisheries* (n 61) at [82].

63 For example, it is unclear what damages would be available in such a case: *Nationwide Controlled Parking Systems* (n 8) at [59] (Murray and Collins JJ, Costello J agreeing at [94]).

64 [2011] 1 WLR 504 (*Mayor of London*).

possession order.[65] This statement is notable when it is seen in its context. His Lordship was aware of the objection, based on the lack of precedent for a possession claim in *Dutton*. He set it out clearly in his judgment. Yet he nevertheless implied that some other factor(s) might justify the decision. His Lordship may have had in mind some non-justiciable reasons, but it is natural that he would have been thinking of legal ones too. If that is so, we are being offered a provisional view about the correct balance of principles. That the law would otherwise be 'apparently absurd' is also strong language. These words hint at an underpinning in societal morality, much like with those of Laws LJ in *Dutton*.

Baroness Hale JSC has also made some notable obiter remarks. She did so whilst discussing a different issue: whether a possession order can cover more of the claimant's land than just those part(s) that the defendant is possessing. She said that the relevant questions 'should be seen as [ones] of principle rather than pragmatism or procedure'.[66] She added that: 'The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right.'[67] This is the same idea that Laws LJ invoked in *Dutton*. Of course, the context here is different: a titleholder does have a 'right' against third parties to begin with; a licensee traditionally does not. However, Baroness Hale JSC favoured protecting 'the right to the physical occupation of tangible land'.[68] This is not a right of possession, as we traditionally define it. Baroness Hale JSC's view does not necessarily support *Dutton*: it may just be a call to allow possession claims by legal owners against those who are occupying (but not possessing) the land.[69] However, it leaves the door open to a principled claim for persons whose right would not have qualified under the rules of ejectment.[70] In other words, her preferred approach may go beyond what ejectment has done in the past.

As to the remaining case law, we find no real guidance about how judges understand Laws LJ to have arrived at his view.[71] Indeed, some of them express criticism of *Dutton*. A tendency remains to assert that it is wrong as it contradicts cases like *Hill* and *Hunter*.[72] In New South Wales, indeed, Barrett J concluded that it 'overlooks the nature of the wrong of trespass and

65 Above, at 515 [22].

66 *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 at 2788 [25].

67 Above, at n 66.

68 Above, at 2788 [26].

69 This would be contrary to the traditional view: *Brake v Chedington Court Estate Ltd* [2022] EWHC 366 (Ch) at [121]–[124] (*Brake*), revd on another ground: *Brake v Chedington Court Estate Ltd* [2022] EWCA Civ 1302.

70 A parallel has been perceived between the approaches of Laws LJ and Baroness Hale JSC: *Mayor of London* (n 64) at 516 [27] (Lord Neuberger MR, Arden LJ agreeing at 527 [76], Stanley Burton LJ agreeing at 527 [77]). See also Dixon, 'Real Property, Licences and the Slippery Idea of Possession' (n 53) at 569–70.

71 They often merely quote without demur from the key passage (see above n 56 and accompanying text): see, eg, *Clarke* (n 1) at [21] (Barnett P for the court); *Riseway Properties* (n 3) at [18]; *iTaukei Land Trust Board v Webb* [2020] FJHC 878 at [14]; *Ravutubananitu v Nair* [2019] FJHC 632 at [13]; *A-G of the Republic of Fiji* (n 8) at [17].

72 *Brake* (n 69) at [146], [153], [160]. The possession claim in *Brake* failed on the facts as no licence was held to exist.

its foundation in possession'.[73] All this would not matter if the claim is a new and a principled one, though it is reasonable that the onus for showing as much falls on its proponents.

B United States

Hints of a reliance on principle also exist in the United States. This is so with respect to the § 521(2) of the *Restatement*.[74] It proposes that some (but not all) licences afford 'possession' against third persons.[75] Thus, § 521(2) states that: 'A licensee is entitled to protection against interference by third persons with the use privileged by the license to the extent to which the license gives him possession as against such persons.'[76] The provision involves a 'somewhat more extended' scope of 'possession' against third parties than the owner.[77] Precisely what this means is not explained. In this regard, it is unfortunate that possessory licences are not directly addressed. The *Restatement* defines a 'licence' as involving a privilege to 'use' land that is 'in the possession of another'.[78] This overlooks the recognition that a licensee may be in possession.[79] Nevertheless, whatever principled case might exist for § 521(2) should equally support a claim for possessory licences.

Other aspects of § 521(2) may be highlighted. Of note is how § 521(2) sets apart two things: the contractual right against the licensor (the 'privilege'),[80] on the one hand, and the 'possession' that the licence affords, on the other hand. The words 'gives him possession' also suggest that the claim flows from the licence; the privilege need not have been exercised. Therefore, the 'possession' appears to rest upon some type of right. This view accords with a comment, describing the relevant licensees' interests as being 'the equivalent of leases as against third persons.'[81] It is also said that the right is *not* an 'interest in land' within the meaning of the Statute of Frauds;[82] we return later to its quality.[83]

Some (unstated) legal principle is the only plausible basis for § 521(2). The original publication of it came with no citations;[84] yet the *Restatement* aims to be 'an orderly statement of the general common law of the United States'.[85]

---

73 *Georgeski* (n 6) at 563 [105].

74 *Restatement* (n 10).

75 For this purpose, it is irrelevant that such a licence is revocable at the will of the licensor: above, at § 521(2) cmt (c).

76 Above, at § 521(2).

77 Above, at § 521(2) cmt (b).

78 Above, at § 512.

79 See above n 15 and below nn 179–85 and accompanying text.

80 See also American Law Institute, *Restatement (First) of Property* (1936) § 2, defining the term 'privilege'.

81 *Restatement* (n 10) at § 521(2) cmt (b):

82 Above, at § 521(2) cmt (a).

83 See below nn 139–47 and accompanying text.

84 This fact is noted by Clark, *Real Covenants and Other Interests which 'Run with the Land'* (n 30) at pp 29–30, n 41.

85 American Law Institute, *Restatement (First) of Property* (1936) Introduction. A similar mission statement is given to this day for the *Restatements* generally: available at <https://www.ali.org/about-ali/faq> (accessed 24 October 2023).

Unless the *Restatement* authors thought § 521(2) to be legally principled, it is hard to see how they could have included it.

In terms of the case law on § 521(2), most of it does not justify the claim in terms of principle. This is understandable, as judges may feel able to rely on the *Restatement* without more. A case that does allude to principle is *Affiliated FM Ins Co v LTK Consulting Services Inc* (*Affiliated FM Ins*).[86] It applied § 521(2), albeit in a different context. To state the facts, a monorail owner had hired the defendant firm to perform maintenance work. The firm did so negligently, damaging the monorail. SMS, which had by contract a right to operate the monorail, incurred financial losses in consequence. No contract existed between SMS and the defendant firm. Nevertheless, the defendant was held to owe a duty of care to SMS.[87] The majority held that this duty extended to anyone with 'a legally protected interest in the damaged property'.[88] They did not decide whether SMS had a lease or a licence, as the licence would be a sufficient interest under § 521(2) anyway. Fairhurst J explained that:

> The law protects a wide range of property interests from harm. A license, a privilege to use property, is entitled to legal protection against interference by a third person if the license ... grants possession to the exclusion of the third person ... property interests falling well short of a full fee simple estate are worthy of legal protection.[89]

This reasoning is principle-based, albeit very sparse. A crucial idea is that property interests 'are worthy of legal protection'. This is a high-order principle. § 521(2) is a rule that flows from it. There must hence be some ground(s) why the licences that fall under § 521(2) are 'worthy' of protection. Alas, the court did not articulate what they are.

The remaining evidence is what we can infer from some general statements by judges. They all countenance claims by licensees. For example, one judge opined that: 'At the most, [a licensee] may maintain an action to enjoin or to redress a violation of his right to exercise the license.'[90] Another judge has said that 'an unrevoked license has value; and, as against every one but the licensor or those claiming under him, an action ought to lie for injury to the licensee'.[91] These passages should be read with caution. Sometimes, their wording itself could suggest a claim for just *some* licensees.[92] The context is also usually

86 243 P 3d 521 (Wash, 2010) (*Affiliated FM Ins*).

87 The action was brought by SMS's insurer (as their subrogee).

88 *Affiliated FM Ins* (n 86) at 530 (Fairhurst J, Chambers J providing a concurring opinion at 532–3, Johnson, Sanders and Stephens JJ agreeing at 533).

89 Above, at 530–1 (Fairhurst J, Chambers J providing a concurring opinion at 532–3, Johnson, Sanders and Stephens JJ agreeing at 533).

90 *Nahas v Local 905, Retail Clerks Int'l Association*, 302 P 2d 829 at 830 (Cal Dist Ct App, 1956) (*Nahas*). See also *Bell Tel Co of Pennsylvania v Baltimore & O R Co*, 38 A 2d 732 at 733 (Kenworthey J for the court) (Pa Super Ct, 1944) (*Bell Tel Co of Pennsylvania*); *Hancock v McAvoy*, 25 A 47 at 48 (Pa, 1892).

91 *Miller v Greenwich Twp*, 42 A 735 at 736 (NJ, 1899) (*Miller*).

92 For example, an expression like 'At the most', in the quotation from *Nahas* (n 90), could imply that sometimes the claim will *not* lie. See also *Schwartz-Torrance Inv Corp v Bakery & Confectionery Workers' Union*, 394 P 2d 921 at 925 (Tobriner J, Gibson CJ and Traynor, Schauer, McComb, Peters and Peek JJ agreeing at 926) (Cal, 1964), dismissing as 'strained' a wide construction of *Nahas*.

either a dispute over another claim[93] or an outcome that fits with the orthodox rules. For example, the licensee might be in prior possession,[94] be able to claim for damage to their property on the land,[95] have a licence coupled with an interest,[96] or be suing in negligence.[97] The context might colour our interpretation of what is said on each occasion. The judges could be hinting that it is principled to protect some licences and treating the decision on the facts as being consistent with this idea.

On occasion, however, not enough is made of the context of these passages. An example is *Patterson v Shoffner Sand of Oklahoma Inc* (*Patterson*).[98] In this case, the Court of Civil Appeals in Oklahoma held that a licensee 'can bring an action for the harm done to the right to exercise its license'.[99] The plaintiff had a contractual licence to remove sand; it complained of the defendant dumping items on the land. The court overturned a summary judgment for the defendant,[100] so allowing the case to proceed to a trial. The limits of the decision are unclear. The court does not clearly characterise the licence and does not refer to § 521(2). If the judgment is intended to go beyond § 521(2) — as may be the case[101] — no principled reasons are given to explain this.

III Justifying a claim

A Revisiting the moral argument

Thus far, we have identified hints that a claim for some licensees is principled. There are allusions to societal morality and an implicit acceptance that other principles fit with a claim, though whether each judge is proposing the exact same version of a claim is unclear. This section expands upon the societal morality point. A failure to engage sufficiently with it has led several judges astray.

---

93 See, eg, *Kincaid's Appeal*, 66 Pa St 411 at 421 (1871): 'while the license continued [the licensee] could perhaps maintain trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers'. *Kincaid's Appeal* concerned the constitutionality of legislation concerning the removal of bodies from a cemetery.

94 *Miller* (n 91).

95 *Moundsville Water Co v Moundsville Sand Co*, 19 SE 2d 217 (W Va, 1942) (*Moundsville Water*); *Illinois Bell Tel Co v Charles Ind Co*, 121 NE 2d 600 (Ill App Ct, 1954). *Case v Weber*, 2 Ind 108 (1850) (*Case*) may be an example of this too: see *Moundsville Water* (n 95) at 219–20.

96 *Funk v Haldeman*, 53 Pa 229 (1866); *Lucky Auto Supply v Turner*, 53 Cal Rptr 628 (Cal Ct App, 1966) (*Lucky Auto Supply*).

97 *Bell Tel Co of Pennsylvania* (n 90).

98 530 P 2d 580 (Okla Ct App, 1974) (*Patterson*). See also *Ride the Ducks of Philadelphia LLC v Duck Boat Tours Inc*, 138 Fed Appx 431 (3rd Cir, 2005) (*Ride the Ducks of Philadelphia LLC*) (relying on *Patterson* to justify a preliminary junction in favour of a claimant who had an exclusive licence to pass boats over a ramp); *Water Works & Sewer Bd v Anderson*, 530 So 2d 193 (Ala, 1988) (a *Patterson*-type claim seems to be assumed in the course of granting a temporary restraining order).

99 *Patterson* (n 98) at 584 (Neptune J, Brightmire PJ and Bacon J agreeing at 584).

100 The court below had given summary judgment on the basis that the licence conferred no interest in land.

101 *Patterson* is not mentioned as a case that supports § 521(2).

That Laws LJ made a moral argument for a claim is a good starting point. It is often said that a tort claim ought to have a moral basis.[102] Lord Steyn has stated that:

> [J]udges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.[103]

Laws LJ implicitly recognised such an idea in *Dutton*, when he stated that any other outcome in that case would be 'unjust and disreputable'.[104] We may sense in these words an echo of the famous tort case, *Donoghue v Stevenson* (*Donoghue*),[105] and Lord Atkin's 'neighbour principle' in particular. Lord Atkin spoke of providing a remedy when there is 'so obviously a social wrong'.[106] This seems to refer to something that society would view as wrong.[107] Laws LJ perceived the interference in *Dutton* in the same terms. What he did not give are reason(s) for this view.

If we are to identify such grounds, we should begin by recognising that opinions differ about the foundations of tortious liability. Many ideas exist about what makes strict liability claims proper.[108] Indeed, the justifications at common law are likely to vary from tort to tort.[109] A promising account of the present claim begins with the idea that the significance of the interest that is being protected can justify strict liability.[110] According to Varuhas, the real property torts affirm the interest that we have in the possession of land.[111] This 'interest' must be taken to include one in affirming rights to possession, for this is also what the real property torts do. Their rules obscure this fact by using a legal fiction. A tenant who is not physically in possession of the land when their lease commences is retrospectively treated as if they were, from the point at which they claim possession.[112]

In addressing whether possessory licences are important enough to support a new claim, we should not defer to formalistic responses. Most obviously, they include any argument that leases are different to licences because they are proprietary. To suggest that property is protected because it is property is circular reasoning.[113] Indeed, the boundaries of what can be a property right

---

102 Honoré (n 40) at p 74.

103 *MacFarlane v Tayside Health Board* [2000] 2 AC 59 at 82 (*MacFarlane*).

104 *Dutton* (n 2) at 150. See also *Riseway Properties* (n 3) at [19].

105 [1932] AC 562.

106 Above, at 583.

107 S Kiefel CJ, 'The Adaptability of the Common Law to Change' (Speech, Australasian Institute of Judicial Administration, 24 May 2018) 7–8.

108 See, eg, G Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537; R Epstein, 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 151; G Keating, 'Strict Liability Wrongs' in *Philosophical Foundations of the Law of Torts*, J Oberdiek (Ed) (Oxford University Press, 2014); J Gardner, *Tort and other Wrongs* (Oxford University Press, 2019).

109 Tettenborn (n 58) at [1-83].

110 For this idea, see above, at [1-83]; J Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 *Oxford Journal of Legal Studies* 253.

111 Varuhas (n 110) at 259.

112 This is the doctrine of trespass by relation: see Tettenborn (n 58) at [18-29]–[18-30].

113 K Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252 at 292–3.

are viewed as reflecting various combinations of economic, moral and social imperatives.[114] Our focus should be on substantive reasons.

Let us consider then the legal morality of protecting licensees. We may support a claim by thinking about what a licence may mean to its holder. Its significance may be marked. It could exceed the importance of some possessory titles, depending on the context, though there are other reasons for protecting prior possession.[115] A better comparison is with leases. If the licence is one to take possession of land, its importance to the right-holder may bear comparison with the significance to them of a lease. This is chiefly so when we consider possessory licences and shorter leases of, say, up to a couple of years. Of course, this observation is very general. There are too many contexts in which leases and licences are used to be more precise. The key point is that both rights allow for possession of land as a unique thing. That only a lease confers an estate in land will often not be significant in terms of how people feel and think about their rights. Lord Roskill has said of leases that:

> However much weight one may give to the fact that a lease creates an estate in land in favour of the lessee, in truth it is by no means always in that estate in land that the lessee is interested. In many cases he is interested only in the accompanying contractual right to use that which is demised to him by the lease and the estate in land which he acquires has little or no meaning for him.[116]

Similar views are often expressed academically.[117] Lord Roskill’s words are apt to apply to many shorter leases. They may well be unaware of the lease-licence distinction. If their intended possession had instead been under a licence, we may doubt that they would often think or feel much differently about it. They are likely to be interested in what the agreement says that they can do. Indeed, the law is not insensitive to the focus on contractual rights in many leases. We have seen a ‘contractualisation’ of leases,[118] as well as the rise of legislation that does not distinguish between leases and licences, when they serve the same overall purpose.[119] These developments fit with the primacy of the contract to persons in some matters. Furthermore, that equitable relief against forfeiture now applies to ‘possessory’ licences could

114 See, eg, N Davidson, ‘Standardization and Pluralism in Property Law’ (2009) 61 *Vanderbilt Law Review* 1597 at 1654–5; Michael Weir, ‘Pushing the Envelope of Proprietary Interests: The Nadir of the Numerus Clausus Principle?’ (2015) 39 *Melbourne University Law Review* 651 at 656.

115 See generally L Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford University Press, 2021) ch 6.

116 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 714.

117 See, eg, A O’Hara, ‘The Frustrated Tenant — Towards a Just Solution’ (1994) 2 *Australian Property Law Journal* 1 at 12; J Brock and J Phillips, ‘The Commercial Lease: Property or Contract?’ (2001) 38 *Alberta Law Review* 989 at 1020; W Barr, ‘Frustration of Leases — Hazards of Contractualisation’ (2001) 52 *Northern Ireland Legal Quarterly* 82 at 83; N Dawson, ‘Contractual Licences, Leases and Fitness for Purpose’ (1983) 34 *Northern Ireland Legal Quarterly* 349 at 352. See also O Radley-Gardner, ‘Forgotten Land Law (Publication Review)’ [2022] *Conveyancer and Property Lawyer* 436 at 437–8.

118 This involves applying normal contractual principles to leases: K Gray and S Gray, *Elements of Land Law* (5th ed, Oxford University Press, 2008) para 4.1.15 (*Elements of Land Law*).

119 See, eg, Renting Homes (Wales) Act 2016 (Wales) s 7; Residential Tenancies Act 2010 (NSW) s 13; Residential Tenancies Act 2006 (Ontario) s 2(1); Retail and Commercial Leases Act 1995 (SA) s 3(1); Business Tenancies (Fair Dealings) Act 2003 (NT) s 5.

also reflect their comparable significance to leases.[120] Our claim is in step with all these developments. Admittedly, some persons may feel differently about leases and possessory licences if they understood the orthodox rules;[121] though we may doubt how often they would, hence § 521(2), Laws LJ's judgment in *Dutton* and the views of Lord Neuberger MR. Tort law should nevertheless take society as it finds it, when it comes to setting the broad outlines of the law, unless there are ground(s) to do otherwise. No principles supply a strong counter-reason in this case, as we explain in the next section. They would cause concern only if the claim is open to non-possessory licences.

In advancing this view, we should recognise some things about it. First, it might in theory be relevant to licences that do not envisage possession but mere occupation. In this sense it may have been intended to underpin the claim in § 521(2). However, we will see that other considerations of principle tell against a wide version of the claim. Secondly, this is categorically not an argument for always treating possessory licences the same as leasehold estates. It is a contention for allowing the licensee to go into possession, as against third parties. A possessory licence would still get less overall protection than a leasehold; this would reflect the greater overall significance of leases vis-à-vis such licences. Thirdly, the argument is not empirical. We do not rely on studies of how possessory licensees and tenants feel about their possession, less still ones that compare their feelings.[122] For better or worse, the common law has not developed its law of possession in this way. We should not be surprised that intuition is a theme in the judicial hints that a new claim is principled. There is a vague sense that the orthodox position rests mainly upon formalistic arguments. To repeat the words of Lord Steyn, the judge considers 'what he reasonably believes that the ordinary citizen would regard as right'.[123] The 'ordinary citizen' may well look at things in the sense that is being advanced here.

A final point is that our justification does not rely on ideas about allocative efficiency. In other words, the contention is not one about promoting a net gain in economic value, even if this was arguably a result of the claim in some cases.[124] The argument is a moral one. Views about allocative efficiency may have some influence on the precise rules of a claim,[125] but it is not obvious that they would play a large role with the present one. Any efficiency gains under the new claims are largely just a bonus.

There are various attractions in treating this moral argument as the basis for the new claims. First, it helps to explain why the claims did not emerge sooner.

---

120 For this development, see *Manchester Ship Canal* (n 23). See also *Kay v Playup Australia Pty Ltd* (2020) 19 BPR 40,037.

121 Dissenting judgments are common with landmark cases: Michael Kirby, *Judicial Activism* (Sweet & Maxwell, 2004) pp 67–8. Chadwick LJ dissented in *Dutton* (n 2).

122 The author is aware of no such studies.

123 *MacFarlane* (n 103) 82.

124 Such benefits may arise as a possessory licence may be the optimal arrangement for the parties, allowing them to share the use of the land whilst protecting the licensee against third parties. There may be problems with other options; eg, over whether the licensor is complying with an expressly stated term to take reasonable steps to secure the land for the licensee.

125 D Cole, 'The Law and Economics Approach to Property' in *Researching Property Law*, S Bright and S Blandy (Eds) (Palgrave, 2016) pp 110–19.

The moral argument has only become relevant in more recent times due to how the common law has evolved. The orthodox position was that a licence could neither give a right of possession nor involve the licensee taking possession.[126] As late as the 1930s, the idea of an exclusive possession licence would apparently have caused ‘merriment’.[127] This meant, for example, that any attempt to create a tenancy for an uncertain term was incapable of taking effect as a licence.[128] It now seems very arguable that it can do so.[129] There is also now a general acceptance that a licensee can be in possession of land as a licensee and not a tenant.[130] Therefore, the gap that can arise between when a licensee is entitled to, and does take, possession, became a prominent issue only during the 1900s. Statements of the law from earlier centuries were not reasoned with this development in mind. There is a danger in relying too much on them.

Although the analogy should not be pressed too hard, there is also some historical precedent for such gap-filling in the context of leases. The original common law rule was that a leasehold estate did not exist at common law until the lessee took possession.[131] In principle, this rule could leave a tenant somewhat vulnerable. It would mean that, as against a third-party possessor of the land, they could not bring a possession claim. The third party’s actions denied them the title that they needed to have standing to do so. The courts intervened to fill the gap. In the 1800s, they held that the lessee’s right of entry (the *interesse termini*)[132] was legal property right, enforceable against third parties.[133] Several jurisdictions have abolished the right, but only whilst also abrogating the common law rule that prompted its creation.[134]

Our argument also fits well with Laws LJ’s reasoning in *Dutton*. He was exercised about any difference in protection that turned on whether plaintiff was in or out of possession.[135] He also affirmed that the plaintiff could have potentially been in possession.[136] This is a plausible view on the facts. We will

126 *Lynes v Snaith* [1899] 1 QB 486; S Tromans, ‘Leases and Licences in the Lords’ (1985) 44 *Cambridge Law Journal* 351 at 352. Cf *Harper* (n 15) at 593 (no tenancy at will as the grantor of a void lease was the Crown).

127 AW B Simpson, *A History of the Land Law* (Oxford University Press, 1986) p 265.

128 *Lace v Chantler* [1944] KB 368 at 371–2 (Lord Greene MR, MacKinnon LJ agreeing at 372–3, Luxmoore LJ agreeing at 373).

129 For obiter support, see *Mexfield Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955 at 972–3 [58]–[63] (Lord Neuberger MR), 978 [80] (Lord Hope), 979 [82] (Lord Walker), 984 [102] (Lord Mance), 985 [109] (Lord Clarke), 988 [120] (Lord Dyson).

130 See above n 15 and accompanying text.

131 R Megarry and W Wade, *The Law of Real Property* (5th ed, Stevens, 1984) 647–8. The Statute of Uses 1535, 27 Hen 8, c 10 had been used to create a workaround: Simpson (n 127) at p 252.

132 See generally M Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange, 2011) pp 44–8.

133 *Doe d Parsley v Day* (1842) 2 QB 147; 114 ER 58; *Gillard v Cheshire Lines Committee* (1884) 32 WR 943. Cf *Wallis v Hands* [1893] 2 Ch 75 (affirming that the lessee has no claim in trespass). A similar position still prevails in the United States: Thomson Reuters, *Tiffany Real Property* (online at 9 October 2023) § 86; American Law Institute, *Restatement (Second) of Property: Landlord and Tenant* (1977) § 6.2.

134 See, eg, Law of Property Act 1925, 15 & 16 Geo 5, c 20, s 149; Property Law Act 1969 (WA) s 74; Law of Property Act 2000 (NT) s 115; Property Law Act 1958 (Vic) s 149.

135 *Dutton* (n 2) at 147.

136 Above, at n 135.

recall that the licence was one to lop and fell trees. Some preparatory work for this may be done without needing to exclude other persons. The act of lopping and felling trees is different. The land needs to be clear whilst this occurs, at least over such parts of it as are then being cleared. To this extent, the licence envisaged 'possession' by the licensee. What Laws LJ said about morality should be viewed in this light.

Laws LJ's concern on this point is, by contrast, irrelevant to licences that countenance nothing more than occupation. This strongly suggests that he was making no argument in relation to such licences. He did not think that principle favoured a claim for them. Indeed, licences only to occupy have been known for centuries and their protection was not a novel issue at the time of *Dutton*. Although Laws LJ posed the question whether a possession order is a 'necessary remedy' to vindicate the licensee's 'rights of occupation',[137] these words should be understood in their context. The plaintiff's 'right to occupy' had enough of a possessory hue. Not all licences to occupy do so. We may treat similarly Law LJ's references to 'violating' the 'enjoyment' of a licence.[138] This may be a statement of the tort, but it is not a literal guide to applying it. As we will confirm later, there are strong arguments of principle against a wider claim. Laws LJ implicitly recognises this fact.

A final reason for reading *Dutton* in this way is that it confines the claim to a gap-filling role. Judges are much more likely to seek to fill a gap than to make radical changes to the law. Laws LJ will doubtless have been aware of the principle of incremental change. Insofar as what he said is open to interpretation, we should favour a view that accords with such an approach to common law development.

Of course, upholding a new claim of this sort raises questions about its conceptual basis. The answer is not entirely clear, but we might take an educated guess. It was surmised earlier that § 521(2) is based upon some right for the licensee, not being an interest in land.[139] The right-based explanation also appears in other United States cases that include general statements in favour of a claim. In *Patterson*, for instance, the court spoke of the 'right to exercise [the] license'.[140] Comparable language also appears in two other judgments,[141] one of them also disclaiming any interest in land.[142] *Dutton* is also said not to involve a proprietary interest in land.[143] This would all make sense. The right does not match up well to the common indicia of a property right.[144] For example, it is not assignable and (in the United States) it is liable

137 Above, at 150.

138 Above, at n 137.

139 See above nn 80–3 and accompanying text.

140 *Patterson* (n 98) at 584 (Neptune J, Brightmire PJ and Bacon J agreeing at 584).

141 *Nahas* (n 90) at 830 ('an action to enjoin or to redress a violation of his right to exercise the license'); *Lucky Auto Supply* (n 96) at 633 (Frampton J, Shinn PJ and Kaus J agreeing at 636) ('right to exercise its license to occupy'). Other statements of the claim are ambiguous enough to be reconcilable with the right-based interpretation: *Case* (n 95) at 111 (the defendants had 'obstructed' the licence); *Bell Tel Co of Pennsylvania* (n 90) at 733 (Kenworthey J for the court) ('any invasion or disturbance of the terms of the license').

142 *Nahas* (n 90) at 830: 'a licensee has no interest in the land'.

143 *Global Guardians Management Ltd v Hounslow LBC* [2022] UKUT 259 (LC) at [72].

144 See generally *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247–8

to summary termination by the licensor.[145] Moreover, the claim at hand exists only between the time at which any envisaged possession can be assumed and when it is taken.[146] It would also not affect conduct that does not materially impact upon the licensee’s ability to take possession.[147] Such a right is fleeting and not much like a legal right of possession. Therefore, it may be that the right in question is not proprietary at all.

B Confusion owing to a lack of engagement with principle

So far, we have expanded upon the moral argument for a claim. Unfortunately, many cases have not engaged sufficiently with it. The result is growing confusion over even basic details of a claim. Two key instances of this may suffice.[148]

A first difficulty is what cause of action is at play. If a moral principle lies behind the claims, they must be new ones, for only the highest courts could overrule the cases on which the orthodox rules are based. This is not what they have done. Regrettably, lots of judges have treated the cause of action in *Dutton* as trespass to land.[149] The courts in New South Wales and New Zealand assume as much in rejecting the claim.[150] However, a textual reading of Laws LJ’s judgment does not support this view.[151] Laws LJ never framed his decision as being relevant to trespass. He did not speak of the wrong as being an interference with possession per se. He also did not say that any encroachment onto the land would be actionable, as it is in trespass. Indeed, that the claim must be new is appreciated in the United States, albeit only implicitly. There is no attempt there to deny that the cause of action is novel. Words such as ‘trespass’ are conspicuously absent from § 521(2) and

(Lord Wilberforce); *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342–3 (Mason J).

145 This is because the licence itself can be ended summarily: *Restatement* (n 10) at § 519. This is not always the case in other jurisdictions: see, eg, *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173; *Zen Group Constructions v Benuga Pty Ltd* [2020] NSWSC 1667 at [28]–[32].

146 See below nn 186–7 and accompanying text.

147 See below n 201 and accompanying text.

148 Another example is the countenancing in some cases of a claim for bare licensees: see, eg, *Clarke* (n 1); *Capelle* (n 4). Cf *Countryside Residential (North Thames)* (n 50) at 61 (Waller LJ, Aldous LJ and Rougier J agreeing at 61). The United States cases all seem to involve contractual licences, but the judgments never in terms exclude bare ones. Only in *McInnes v Kennell*, 286 P 2d 713 (Wash, 1955) (*McInnes*) is there not an express reference to the licence being one for consideration.

149 *Vehicle Control Services* (n 59) at 901–2 [32]–[33] (Lewison LJ, Treacy LJ agreeing at 905 [46], Hallett LJ agreeing at 905 [47]); *Ricas Properties Ltd* v *Armed Forces Trading Co Ltd* [2008] 5 HKC 210 at [38]; *Riseway Properties* (n 3) at [19]; *Capelle* (n 4) at [10]–[15]; *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at [77] (*High Speed Two (HS2)*).

150 *Georgeski* (n 6); *Sealink Travel Group New Zealand* (n 6). See also *Stettin Bay Lumber* (n 7) at [9]–[11].

151 A Baker, ‘Violating the Enjoyment of a Licence: A New Tort?’ [2019] *Conveyancer and Property Lawyer* 119. One judge has pondered whether *Dutton* (n 2) involves ‘a special rule’, going beyond the tort of unlawful interference with contractual relations: *Hounslow LBC* (n 47) at [64].

the comment on it.[152] The general statements in favour of a claim for licensees — as are cited in *Patterson* — also typically disclaim (obiter) any reliance on trespass.[153]

A second example of confusion is over what type(s) of contractual licence give standing. Laws LJ's arguments, as we have seen, are directed at possessory licences. The law, however, is not developing according to any clear sense of principle.

Let us look first how things stand with *Dutton*. The case law is quite discordant. Most indications are that it applies to licences to occupy,[154] without them distinguishing between occupation and exclusive occupation.[155] However, one Hong Kong case required the licence to be 'sole and exclusive'.[156] Reference has also been made to the idea of 'control'. This occurred in the judgment of Lord Neuberger MR in *Mayor of London*. His Lordship referred to the sufficiency of 'a right to use and control, which effectively amounts to possession'.[157] What exactly is covered by this notion is unclear. It may be a narrower idea than occupation, including just possessory licences. This must remain conjecture. The widest view is that *Dutton* applies to any licence. Laws LJ said that: 'In every case, the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment.'[158] In England and Wales, the Court of Appeal has reiterated this idea more recently.[159] One first instance judge also felt bound, with some reluctance, to work on the basis that a licensee without even a right to occupy has standing.[160] There is much scope for confusion as things stand.

Moving on to § 521(2), it is problematic that the *Restatement* definition of a 'licence' excludes possessory ones.[161] If the courts were to engage more with principle, they might well say that the advent of possessory licences offers a more satisfactory basis for § 521(2) and encourage a revision to the definition of the word 'licence'. The wording of § 521(2) would be apt in this event. It refers to 'the extent to which the license gives ... possession'. This could readily mean the licensee must be entitled to take possession under the licence, even if only for a time and/or over certain area(s). A licence that

152 See also American Law Institute, *Restatement (Fourth) of Property* (2021) § 1.3 (Tentative Draft No 2) cmt (b).

153 *Nahas* (n 90) at 830; *Bell Tel Co of Pennsylvania* (n 90) at 733 (Kenworthey J for the court). The claim is described as one in trespass in *Ride the Ducks of Philadelphia LLC* (n 98) at 434 (Nygaard CJ for the court).

154 *Nationwide Controlled Parking Systems* (n 8) at [77] (Murray and Collins JJ, Costello J agreeing at [94]).

155 *Countryside Residential (North Thames)* (n 50) at 61 (Waller LJ, Aldous LJ and Rougier J agreeing at 61); *Walton Family Estates* (n 50) at [49]; *Capelle* (n 4) at [10]–[15]; *High Speed Two (HS2)* (n 149) at [78].

156 *Riseway Properties* (n 3) at [19] (the licence was of this type on the facts).

157 *Mayor of London* (n 64) at 515 [22] (Lord Neuberger MR, Arden LJ agreeing at 527 [76], Stanley Burton LJ agreeing at 527 [77]).

158 *Dutton* (n 2) at 150.

159 *Vehicle Control Services* (n 59) at 902 [34]–[35] (Lewison LJ, Treacy LJ agreeing at 905 [46], Hallett LJ agreeing at 905 [47]).

160 *Hounslow LBC* (n 47) at [65]–[66].

161 The exclusion was explained earlier: see above nn 78–9 and accompanying text.

permits possession only in part is not a right ‘of possession’, as it is traditionally defined, but it does ‘give’ possession to a degree.

As things stand, the courts have struggled clearly to apply § 521(2). The cases have not sought to engage too closely with its boundaries. Thus, in *Affiliated FM Ins*, Fairhurst J described the licensee’s right as one for ‘using and possessing’ the monorail.[162] He did not suggest that this ‘possession’ was of an unorthodox sort.[163] Similarly, the court in another case countenanced that a licence to stockpile dirt, though it gave no right of exclusive possession, could give ‘possession’ for the purposes of a statutory rule.[164] The matter was left for determination by the court below. The nature of the needful ‘possession’ is left unexplored. It is much the same in another case, in which the licences were ones to use exclusively some land for installing and using gasoline pumps.[165] The licensees seem to have been in factual possession of the pumps.[166] The court allowed to proceed to trail a claim that the licensees had property rights for the purposes of eminent domain proceedings. The judgement refers to § 521(2), but not to the definitional issue or to any extended scope for possession.[167]

A final decision of note is *McInnes v Kennell*.[168] In this case, the court said that it could intervene if ‘the exercise of a license requires exclusive possession of the property’.[169] The words ‘exclusive possession’ may denote ordinary possession of the land. On the other hand, the licence is repeatedly described as one to ‘occupy’ a moorage.[170] The court held that the licensee could seek the removal of a houseboat that was encroaching on it. This outcome is not explained in any detail, and the judgment risks creating the impression that any licence to occupy is enough.

IV The limits of the new claim

The previous section explained the moral principle behind a claim. We have suggested that there is nothing inherently less significant to right-holders about being able to take possession for a time under a licence than for the equivalent time under a lease. Much confusion can be avoided by giving due prominence to this idea.

The next step is to consider other principles. We will show that a claim for possessory licences can be reconciled with them if it is limited in certain ways. The arguments are illustrated chiefly with reference to the law of England and Wales, but they can apply more generally. We will first explain who should

162 *Affiliated FM Ins* (n 86) at 531 (Fairhurst J, Chambers J providing a concurring opinion at 532–3, Johnson, Sanders and Stephens JJ agreeing at 533).

163 The rights of the licensor are indeed compared to the limited rights of entry of a landlord in a lease: above, at n 162.

164 *O’Shea v Claude C Wood Co*, 159 Cal Rptr 125 (Ct App, 1979) (in which a summary judgment was set aside).

165 *Re Primary Rd No Iowa 141*, 114 NW 2d 290 (Iowa, 1962).

166 Above, at 295 (Larson J for the court), referring to ‘absolute possession and control’.

167 Above, at 295–6.

168 *McInnes* (n 148).

169 Above, at 717 (Weaver J, Hamley CJ, and Mallery, Hill and Rosellini JJ concurring at 718).

170 Above, at 716–17 (Weaver J, Hamley CJ, and Mallery, Hill and Rosellini JJ concurring at 718).

have standing to sue. This involves defining the term 'possessory licence'. Secondly, there needs to be a threshold of actionable interference. This makes the claim narrower than one for trespass to land. Other aspects of a claim will warrant discussion going forward, such as the fit between it and the possession claim rules in different jurisdictions.[171]

A Standing to sue

As concerns standing to sue, a key task is to define the term 'possessory licence'. In each jurisdiction, one should draw upon its normal meaning of possession of land. In England and Wales, this approach is illustrated in *Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd* (*Manchester Ship Canal*).[172] The court defined what is a possessory licence using orthodox concepts, in the context of holding that possessory licencees may seek relief from forfeiture. The licence must afford 'a sufficient degree of physical custody and control ("factual possession")'.[173] The licensee must also intend to exercise this 'on [their] own behalf and for [their] own benefit ("intention to possess")'.[174] Both of these conditions are significant in terms of principle — as we will see.

The requirement of intention to possess is judged objectively. The focus is on whether *the contract* discloses the needful intention.[175] The default position must be that an intention to possess flows from entry into a licence that gives factual possession. However, there should be scope to opt out of this result. The inclusion of an intention requirement in *Manchester Ship Canal* otherwise adds nothing. A term might state that the licensee's intention is not to possess on their own behalf but on behalf of the licensor.[176] In this event, the licence itself is not possessory. No case on the new claims denies that the parties could opt out of one.

The intention to possess requirement is important in terms of principle. It shows respect for freedom of contact. At common law, legal title gives a prerogative of control over land.[177] With regards to *Dutton*, McFarlane contends that the claim reduces this control, thereby impinging upon the licensor's rights as title holder.[178] This point has some force, as the licensor has not consented to the creation of a property right, as traditionally gives rights against third parties. The possessory licence test makes it easier to deflect. By including a requirement of intention to possess, it allows for opting out of a claim. The landowner also has the power to confer property rights on third parties and/or to sell the land free of the licence, even if this breaches the contract with the licensee. Moreover, a claim for the licensee may be exactly

171 For a discussion of these rules in England and Wales, see Baker (n 151) at 130–3. Query also whether the licensor's consent is a defence to a claim; it was held not to be in *Patterson* (n 98) at 584 (Neptune J, Brightmire PJ and Bacon J agreeing at 584).

172 *Manchester Ship Canal* (n 23).

173 Above, at 1177 [42] (Lord Briggs JSC, Lord Carnwath, Lady Black and Lord Kitchin JJSC agreeing).

174 Above, at n 173.

175 The contract terms are not strictly relevant if the licensee sues in the real property torts.

176 Questions may arise about exactly what counts for this purpose.

177 See Gray and Gray, *Elements of Land Law* (n 118) at para 1.5.38 (citing various examples).

178 McFarlane (n 36) at pp 316–17.

what the parties envisaged; to allow this is to promote rather to than frustrate the licensor’s freedom of choice.

The more important question in most cases will be whether the licence gives factual possession. Two types of licence should qualify. The first category includes most types of exclusive possession licence. These are contracts under which the licensee can exclude the licensor for the whole term to such a degree that, but for want of some other requirement for creating one, would have created a leasehold estate. An example is when the landowner is prevented by statute from granting a leasehold estate. On the other hand, such licences would not suffice when the licensee is treated as the agent of the licensor, such as in cases of service occupancy.[179] In these situations, the licensor should have a clear incentive to act anyway.

We could argue that only this type of licence is enough. The licence in *Manchester Ship Canal* seems to have been one of this sort.[180] Whether the law should draw the line here with respect to relief from forfeiture is a separate question.[181] For the purposes of a claim against third parties, a moral case that covers envisaged possession suggests a wider approach. There should hence be a second category. It covers licences that give a right to assume possession only at times and/or over specific areas. The licence is ‘possessory’ to this extent.

Licences that are ‘possessory’ over just some area(s) can be found in case law.[182] We can envisage cases in which a licensee is entitled to assume possession of the land (or part of it) at some point(s) during the period of the licence.[183] An instance is a licence to manage housing stock, under which the licensee agrees to hand over the relevant properties with vacant possession, once its management functions have ended. *Dutton* has been relied on in such a case.[184] Licences to carry out work on land could also fall into this category.[185] There may be stage(s) when the licensee must keep area(s) clear for safety reasons, the licensor only having a limited right (or no rights) of entry during them. *Dutton* is again an example. We have seen that the plaintiff

179 *Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708.

180 *Manchester Ship Canal* (n 23) at 1181 [61] (Lady Arden). See also *Global 100* (n 60) at 1063 [66] (Lewison LJ, Macur LJ agreeing at 1066 [84], Snowden LJ agreeing at 1066 [85]).

181 One issue left open in England and Wales is whether the licence needs to be perpetual: see *Manchester Ship Canal* (n 23) at 1179 [51] (Lord Briggs JSC, Lord Carnwath, Lady Black and Lord Kitchin JJSC agreeing), 1187–8 [88] (Lady Arden).

182 *Fatac* (n 16) at 663 [49] (Fisher J for the court). It may sometimes be that the courts will find a lease over the relevant part and a licence over the remainder: *Antoniades v Villiers* [1990] 1 AC 417 at 471 (Lord Oliver, Lord Ackner agreeing at 466).

183 A right to possession could in theory be for as little as a few hours: *Boylan v Dublin Corp* [1949] IR 60 at 73 (Black J) (Ireland Supreme Court).

184 *Alamo Housing Co-operative* (n 50). See also *Global 100* (n 60).

185 Building contracts could fall within it. The degree of possession under a construction contract can differ according to the nature of the agreed work: *Penvidic Contracting Co Ltd v International Nickel Co of Canada Ltd* [1976] 1 SCR 267 at 276 (Spence J for the court); *R v Walter Cabott Construction Ltd* (1975) 69 DLR (3d) 542 at 553 (Urie J, Smith DJ agreeing at 554); *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 257.

licensee could have enjoyed possession over the areas in which it was presently lopping and felling trees.

Thus defined, the possessory licence concept covers licensees who would have standing under the real property torts, but for the actions of the defendant(s). As has been stressed already, the claim merely fills a gap. It would exist only between the time when possession can be taken and when it is assumed. There is no need for it to exist insofar as the intended possession has been taken. The real property torts cover this ground. This fact engages the principle that the law should not change insofar as there are adequate legal alternatives to it.[186] The right on which the claim is based, as is referred to in the United States case law,[187] would hence have a fleeting existence. The same principled reasoning also tells us that the claim need not exist against the licensor, for they can be sued for breach of contract.[188] There is no need for another claim.

Of course, many licences are not 'possessory'. A licence merely to occupy does not suffice. This is principled, even though (as was noted earlier) the core moral principle may to some extent apply to such licences. Other principles have greater cumulative weight in this matter. We can see this by comparing occupational licences to possessory ones, in terms of several considerations of principle.

A good starting point is that the change, when confined to possessory licences, is quite incremental. The claim would not help parties who could never expect to enjoy protection under the real property torts. The 'possessory licence' test also sets a clear limit on how far the law can develop. The result is to blur only to a small degree the traditional boundary between leases, as property rights, and licences, as personal ones. The courts need not worry about where this step might end up. By contrast, a claim for anyone with a right to occupy would be a markedly greater change. It would go against the long focus on possession as a bedrock of property law. The wider consequences of doing so would be harder to predict.

Another important consideration is legal certainty.[189] The test of a right to occupy would be quite uncertain: the term 'occupy' has many shades of meaning.[190] It is hard to see how the courts could ever set down clear boundaries for the claim under such a test. By contrast, the claim that is being proposed here uses a 'practical and workable' test that is already in use.[191] Although there is some uncertainty for third parties, due to them not being able easily to discern when a licensee may have a right to assume

186 The relevance of this factor is supported by *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 at 819 (Lord Brandon, Lord Keith agreeing at 807, Lords Brightman, Griffiths and Ackner agreeing at 821); *Willers v Joyce* [2018] AC 779 at 803 [47] (Lord Toulson JSC, Baroness Hale and Lords Kerr, Clarke and Wilson JJSC agreeing), 813 [87] (Lord Clarke JSC).

187 See above nn 139–47 and accompanying text.

188 But see *Patterson* (n 98) at 584 (Neptune J, Brightmire PJ and Bacon J agreeing at 584).

189 *Ashburn Anstalt v Arnold* [1989] Ch 1 at 26 (Fox LJ, Neill and Bingham LJJ agreeing at 32).

190 *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] AC 329 at 334–6 (Lord Nicholls, Lords Mackay, Goff, Jauncey and Lloyd agreeing at 333).

191 *Manchester Ship Canal* (n 23) at 1177 [42] (Lord Briggs JSC, Lord Carnwath, Lady Black and Lord Kitchin JJSC agreeing).

possession,[192] some uncertainty of this sort is already tolerated with respect to lessees prior to their entry. Many leases do not require registration[193] or even to be created in writing,[194] and any publicity of registration may be designed with purchasers in mind rather than trespassers.[195] Moreover, the impact of any uncertainty in practice is mitigated by a rule that the grant of a property right by the licensor is defence. This option should reassure third parties.

The extent of liability is another issue.[196] Rules that risk excessive liability by 'opening the floodgates' are to be avoided.[197] How does this concern relate to the present claim? Drawing the line at possessory licences is helpful to mitigate it. If something less was enough, there is a risk of many claims arising at the same time. There is nothing inherently exclusive about a right to occupy; several of them could exist simultaneously. What the new claim adds is more tolerable. That the defendant could be sued by both the licensor (in trespass)[198] and the licensee is not overly concerning. The real property torts produce much the same result as soon as the licensee takes possession anyway. The licensor, who has contracted for their own exclusion at the relevant time, is also unlikely to receive anything more than damages for the harm (if any) done to their interest. The licensee recovers for the denial of their envisaged possession.

As a final point, a possessory licence test creates minimal tension between the claim and the principles that underpin the boundaries of leases. For example, whilst requiring exclusive possession for a lease may help to promote certainty by making them apparent to outsiders, it does not do so prior to the tenant's entry onto the land. So, the requirement does not exist to ensure that the right is obvious to third parties in *all* situations. There is hence no aim of constant publicity that a claim for possessory licences would undermine. Other conditions, such as (in many jurisdictions) a term certain,[199] are not obviously intended to protect the third parties who would become defendants under the claim.[200]

In sum, it is principled to confine a claim to 'possessory licences', as we have defined that term here. This approach shows enough respect for the

192 The costs of deciding in advance whether there will be a claim are sometimes called 'measurement costs': see generally H Smith and T Merrill, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1 at 26–34.

193 See, eg, Land Registration Act 2002 (UK) ss 4, 27; Real Property Act 1900 (NSW) s 53(1); Real Property Act 1886 (SA) s 116.

194 See, eg, Law of Property Act 1925, 15 & 16 Geo 5, c 20, ss 52(2)(d), 54(2); Conveyancing Act 1919 (NSW) s 23D(2); Property Law Act 1958 (Vic) s 54(2); Property Law Act 1974 (Qld) s 12(2).

195 E Cooke, *The New Law of Land Registration* (Hart, 2003) p 90.

196 P Cane, *Tort Law and Economic Interests* (Clarendon Press, 1991) 473–4; Honoré (n 40) at p 89.

197 See generally K Oliphant (Ed), *The Law of Tort* (3rd ed, Oxford University Press, 2014) [12.72]–[12.76].

198 When the licensor is not the owner, the owner can sue also sue for damage to their interest: *Jones v Llanrwst Urban DC (No 2)* [1911] 1 Ch 393.

199 The requirement has been abrogated in New Zealand: Property Law Act 2007 (NZ) ss 206(2), 212.

200 For a discussion of the justification for the term certain rule, see I Williams, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' (2015) 74 *Cambridge Law Journal* 592.

licensor's rights as legal title holder. It is an incremental change. The law remains sufficiently certain; and liability concerns are kept in check. There is also no threat to the principles that shape the limits of leases. The underlying moral case for a claim should hence be allowed to prevail.

B Actionable interferences

The question of what interferences are actionable has not clearly been answered with respect to the new claims. It is obviously principled that one cannot sue for conduct that is not a tort to the land at all: the claim cannot be wider than the real property torts. The key question is whether standing should be narrower in any way.

It is suggested that a threshold of interference should apply. We can first support this conclusion in terms of the moral principle behind the claim. As we have seen, it is based on the significance of being able to take envisaged possession. A claim that exists to protect intended possession does not have to cover absolutely anything that is done in relation to the land. For example, leaving an empty crisp packet on the land is a trespass, but it does not thwart a possessory licensee. They could easily take possession despite its presence. Furthermore, many types of nuisances do not greatly impact upon the licensee's ability to go into possession.[201] Nuisances may hence routinely be outside the bounds of the claim. The exact threshold for an action need not be determined here, for the basic case for a claim does not turn on it. We might provisionally suggest a test of whether the defendant has substantially impeded the claimant from taking possession. It is likely that the test would be applied in a light-touch way, when doing otherwise would pose a risk of violence to either third parties or property that is of value to them (as opposed to the crisp packet in our example).

This approach is also attractive in terms of wider principle. It is another way of keeping to a minimum the blurring of the lines between leases and licences, thereby ensuring the most incremental change that is reasonably possible. Unexercised leases remain higher in the hierarchy of rights than unexercised licences. For a lessee, *any* encroachment on the land is prima facie actionable in trespass. To an extent, a threshold test also reduces the scope for liability for third parties. This helps to mitigate any 'floodgates' concerns.

This approach is, for completeness, readily compatible with § 521(2) and *Dutton*. § 521(2) merely says that relevant licensees are 'entitled to protection against interference'. It does not specify the bounds of the term 'interference'. No claim has ever succeeded against a minor impediment. The same is also true of *Dutton*, in which the plaintiff was being prevented from entering onto the land. No authority would need to be overruled in confirming this position.

Conclusion

New strict liability claims for licensees are emerging in the common law world. Unfortunately, we find an increasingly dissonant array of remarks and

201 An example is if the defendant uses a house for prostitution: *Thompson-Schwab v Costaki* [1956] 1 WLR 335.

decisions on them. This situation owes to a lack of engagement with legal principles. The longer this problem continues, the harder it will become to put the law back on the correct course.

This article has identified the principles that should shape the law in this area. It has expanded upon them to advance a case for a claim for possessory licensees and to explain key details of it. The underlying legal morality of the claim is that there is nothing inherently less significant about being able to take possession under a possessory licence than under a lease. Other principles serve to confine the claim just to possessory licences. Conduct should be actionable only if it is a tort to land and it materially affects the licensee’s ability to go into the envisaged possession. The result is a claim that makes a small and justified incursion into the traditional lease-licence distinction. It is also a fair reading of *Dutton*.

The task of reshaping the claims along these lines could take time. The appellate courts must be bold in their willingness to set aside wrong statements and (where necessary) overrule contrary decisions. Many judicial remarks can be explained away when they are seen in their context. What would be a mistake is to abandon the claims entirely. The key is to return to the question of principle that federal judge Charles Clark posed in 1929. There is a strong case for answering it in the affirmative.