ABSTRACT

English jurisprudence holds that only those with a proprietary interest in land are able to bring an action for private nuisance. Although briefly challenged by the Court of Appeal in Khorasandjian v Bush, the House of Lords in Hunter v Canary Wharf Ltd affirmed the original position, noting the importance of nuisance as a tort against land. With the highest Court in the nation in Fearn v Tate Gallery framing the tort of private nuisance as a tort against land, it seems unlikely for the courts to now expand the scope of nuisance to protect licensees. Once we look at the principled and policy-based ramifications of this limitation, it becomes even more evident that the court in Hunter was decided correctly. Yet, the policy imperatives advocating for the converse are not by any means insignificant. After all, the licence has very high importance in both the domestic and commercial context. This paper seeks to examine whether there may be an alternative way to protect those interests, other than the law of private nuisance. In assessing the nature and importance of licensees, this paper argues that there is sufficient reason for the law to afford some sort of protection for licensees. However, this may be best achieved not through a haphazard expansion of the tort of nuisance; rather, it could be done through the development of a new tort following from Manchester v Dutton, as identified by Professor Adam Baker.

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INTRODUCTION

Going back as far as 116 years in Malone v Laskey, the locus standi of the tort of private nuisance has been one of the most resilient tortious principles ever held by the English judiciary. Despite having been challenged by the Court of Appeal in Khorasandjian v Bush, the rebuttal in Hunter v Canary Wharf Ltd and the most recent restatement by the Supreme Court in Fearn v Tate Gallery state in unequivocal terms that nuisance is a tort against land, making only those with a proprietary interest in the land able to sue for nuisance. The consequences are well-known — licensees with no proprietary interests in the land are left with little to no recourse in legal action when faced with common nuisances. As harsh as it may seem, based on the recent Supreme Court decision in Fearn, it appears that the courts are unlikely to change the rules on standing to sue anytime soon.

But what of licensees who rely on their licence as living premises? If the right that has been conferred on them entitles them to treat the premises as living quarters, ought the law not provide some protections analogous to those of families under a tenancy? Similarly, should the law not extend its protection to commercial licensees who cannot resume their business activities due to nuisance-type interferences? However much the courts resist against an expansion of the law of nuisance, there is nevertheless merit to the proposition that interests held by genuine users of the land should be given some protection. The question that arises then is whether this can be done via an expansion of the tort of private nuisance, or whether it can be done through another way.

Section 1 begins with a brief restatement of the operating legal standing for the tort of nuisance. Section 2 follows with an outline of the criticisms of the status quo — viz., the protection of the living home and other genuine uses of the licence, as well as the efficiency in the vindication of those rights. Section 3 will identify the arguments for the status quo which, by and large, rely on the

1 Malone v Laskey [1907] 2 KB 141.
3 Hunter v Canary Wharf Ltd [1997] AC 655, 687-688 (Lord Goff), 696 (Lord Lloyd), 702-707 (Lord Hoffmann) and 723 (Lord Hope).
4 Fearn v Tate Gallery [2023] UKSC 4.
commercial dangers of granting a new quasi-proprietary right with respect to licensees, the policy considerations underpinning the *numerus clausus* principle, as well as the potential instability of shifting the boundaries of private nuisance away from a tort against the land. Having thus identified the dangers of haphazardly extending the tort of private nuisance to cover cases of licensees, Section 4 continues with a more in-depth factual and normative analysis of the licence. In doing so, the paper will determine whether the nature of the licence provides an inherent mandate to protect the licensee from nuisance-like harms. Section 5 provides a potential solution to the inquiry which involves neither the extension of the tort of private nuisance, nor the creation of a property right inherent within licences themselves, but the creation of a legally-imposed tort for violating the enjoyment of a licence as identified by Professor Adam Baker. Section 6 then proposes a three-stage inquiry for the novel tort. To conclude, Section 7 provides a brief discussion on the normative boundaries of the novel tort.

1. **PRIVATE NUISANCE AND ITS LOCUS STANDI**

A. What is Private Nuisance?

Whilst there is no universally accepted definition of nuisance, a private nuisance can be broadly defined as ‘an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant’s reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant’s enjoyment of his land’. In this regard, it is often said that ‘unreasonable’ inferences will be actionable under the tort of private nuisance. However, as explained by the Supreme Court in *Fearn*, the use of the word ‘unreasonable’ does not refer to a legal standard or test in itself. Rather, it is merely a label used to describe acts which are considered ‘unlawful’ under the tort of private nuisance.

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7 *Fearn* (n 4) [19].
8 *Fearn* (n 4) [18]. For the use of the term ‘unlawful’ see: James Goudkamp and Donal Nolan (eds), *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) ch 15, para 10.
This determination is made having regard to different elements of ‘unreasonableness’. One such element is the concept of ‘give and take, live and let live’ as between neighbours. The law only asks of others what people ask of themselves and will only recognise actionable nuisances where the relevant behaviour goes beyond this element of reciprocity. This is apparent when we look at the more traditional cases of nuisance involving unreasonable noises and smoke or noxious fumes. However, the tort of private nuisance has evolved to cover a wide variety of situations, applicable in peculiar cases such as interference with a right to light, encroachment by plants from neighbouring lands, and even overlooking. The modern position is that there is ‘no conceptual or a priori limit to what can constitute a nuisance’. It appears that the types of actionable nuisances are not limited and may be expanded in order to accommodate new social conditions.

**B. Who can Sue Under Private Nuisance?**

Despite the courts’ willingness to recognise new categories of what can constitute an actionable nuisance, the same cannot be said once we ask the question of who is able to bring an action under private nuisance. The basic premise is misleadingly simple. The position held by English law as established in *Malone v Laskey* is that only those having a proprietary interest in the land have the locus standi to sue. This includes owners of an estate in fee simple absolute, owners in possession, tenants in occupation, licensees with exclusive possession, and people with exclusive possession without title to land.

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9 *Bamford v Turnley* (1862) 3 Body & Society 62, 83 (Bramwell B).
10 *Christie v Davey* [1893] 1 Ch 316.
11 *St Helen’s Smelting Co v Tipping* (1865) 11 HLC 642.
12 See e.g.: *Goldman v Hargrave* [1967] 1 AC 645, 657 (Lord Wilberforce).
14 *Williams v Network Rail Infrastructure* [2018] EWCA Civ 1514.
15 *Fearn* (n 4).
16 *Fearn* (n 4) [12].
17 See: *Williams* (n 14) [41].
18 *Malone* (n 1).
19 See e.g.: *Jones v Chappell* (1875) LR 20 Eq 539; *Burgess v Woodstock* [1955] 4 DLR 615.
21 *Foster v Warblington UDC* [1906] 1 K 648.
The logic behind the operation of this principle is the following: since private nuisance is a tort to land, only a person with a proprietary interest in the land is able to sue.\textsuperscript{22} It follows from the nature of private nuisance that ‘the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant’s land, and not personal discomfort to the persons who are occupying it’.\textsuperscript{23} Additionally, this conception of private nuisance means that recoverable damages can only be affected by the size, commodiousness, as well as the value of the property, but not the number of people in occupation.\textsuperscript{24}

To illustrate the harshness of the limitation in \textit{Malone v Laskey}, it is useful to preface the discussions with \textit{Khorasandjian v Bush}, as well as its overruling by the House of Lords in the seminal case of \textit{Hunter v Canary Wharf}.

This debate was set in motion when the Court of Appeal in \textit{Khorasandjian v Bush} sought to challenge the principle in \textit{Malone}. The claimant, Mrs. Khorasandjian, lived in her mother’s home. Mrs. Khorasandjian was subject to a campaign of harassment by her former boyfriend, notably via persistent unsolicited phone calls to her mother’s house. In law, she was nothing more than a licensee in her mother’s house; thus, Mrs. Khorasandjian did not possess a proprietary interest that would be sufficient for a claim in private nuisance under the rule in \textit{Malone}. Yet, the majority in \textit{Khorasandjian} nevertheless allowed her claim in private nuisance in light of ‘changed social conditions’.\textsuperscript{25}

It is worth noting that there was no specific redress in law against deliberate campaigns of harassment or invasions of privacy at the time \textit{Khorasandjian} was decided. In view of this lacuna, it was understandable why the court in \textit{Khorasandjian} ruled in favour of Mrs. Khorasandjian.\textsuperscript{26} While Mrs. Khorasandjian would likely be protected under the Protection from Harassment Act 1997 if the case were to arise in modern times, the reasoning in \textit{Khorasandjian} still speaks to the importance of protecting the interests of individuals with real

\textsuperscript{23} \textit{Fearn} (n 4) [11] (Lord Leggatt).
\textsuperscript{24} \textit{Hunter} (n 3) 706 (Lord Hoffmann).
\textsuperscript{25} See: \textit{Hunter} (n 3) 691-692 (Lord Goff).
\textsuperscript{26} \textit{Khorasandjian} (n 2) 735 (Dillon LJ).
occupation/use of land — as with Mrs. Khorasandjian’s use of her mother’s house as genuine living premises.

Similar considerations arose in Hunter. Set at the time of the London Docklands development, local residents complained about the erection of the Canary Wharf tower. The claimants included homeowners, their families, and other licensees. Under Malone, the latter two categories of claimants would not have had the locus standi to bring an action for private nuisance. However, it briefly seemed as though Hunter would dispose of this rule. Indeed, the majority in Hunter adopted the approach in Khorasandjian. Most notably, Pill LJ held that it was sufficient for the claimants to demonstrate a ‘substantial link’ to bring an action for private nuisance. On the facts, the Court of Appeal held that the occupation of the properties as a home was sufficient to confer on the claimants a right to sue in private nuisance.

Upon appeal, however, the House of Lords rejected Pill LJ’s suggestion. Reasoning that nuisance is a tort against land, the House of Lords unequivocally restated the principle in Malone and held that, absent a proprietary interest in the land, a claimant would not have the requisite legal standing for private nuisance. Khorasandjian was, in clear terms, overruled. As such, the relatives, children, and licensees could not bring a claim under the tort of private nuisance.

The unfortunate consequence of this rule is that mere licensees cannot bring an action for private nuisance in the absence of exclusive possession, even if there is genuine reliance on the use of the land as living premises. Lodgers, extended relatives, cohabiting partners, children, and guests in general are therefore excluded from the protection under the tort of private nuisance for want of a proprietary interest in the relevant premises. It also follows that commercial licensees who fall short of exclusive possession will have no resort under the tort of private nuisance.

28 Hunter (n 27) 365.
CRITICISMS OF THE STATUS QUO

Is there a reason for why we should allow jurisprudence to be guided by these old principles? As was argued by Lord Cooke in *Hunter*, the inquiry might more instructively be guided not by mere historical facts, but by policy considerations.  

Given the societal importance of licences in both the domestic and commercial contexts, a policy-based shift may allow us to engage more directly with the crucial question of why licensees should be protected from nuisance-type interferences.

A. The Living Home

(i) Genuine use

The claimants who sought to bring an action for nuisance against the developers in *Hunter* included spouses, children, and other licensees. Like in *Khorasandjian*, many of the claimants in *Hunter* had an entitlement to be in the premises. Furthermore, they also had an entitlement to treat the premises as their living homes. Indeed, most of them did treat the premises as living quarters. Some individuals might have gained these entitlements through contractual agreements. Some others might have received the entitlements through more informal means. However, they had unequivocally been using the premises as part of their daily lives and although they could not show a legal proprietary interest in the land, they were more than capable of showing an interest in the land through their real occupation/use of the land. They should not, therefore, have their activities interfered by the defendants, however banal those activities might have been.  

(ii) Economic reality

In domestic arrangements, the question of whether the subject matter being conferred in the agreement is proprietary or non-proprietary will rarely arise. It is simply taken to be understood by the parties that when a person enters an agreement allowing him to make use of a given property as his living quarters,

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29 *Hunter* (n 3) 717 (Lord Cooke).
30 Some Commonwealth decisions have indeed dispensed with the orthodox rules on standing to sue for private nuisance. See e.g.: *Motherwell v Motherwell* (1976) 73 DLR (3rd) 62; *Devon Lumber Co Ltd v MacNeil* (1987) 45 DLR (4th) 300.
there is an expectation that he also be conferred a right of occupation similar to 
that owned by the other party to the agreement. It is also the case that where a 
person demonstrates his right of occupation (e.g. via continuous presence), his 
neighbours will treat him as equally as the person with the proprietary right. This 
is the case with spouses, children, lodgers, and even domestic workers. These 
individuals are taken to be part and parcel of the neighbouring land — no 
distinction or inquiry is made as to whether they are licensors or tenants in law. 
Following this practical reality, it would therefore seem unfair and rather harsh to 
deny licensees protection from interference by third parties, simply due to their 
lack of a proprietary interest in land. The argument that is frequently supplied to 
that effect is that in lieu of having to ask the true owner of the property (e.g. the 
home-owning spouse, the licensor, etc.) to sue for them, licensees with a genuine 
interest in the living home should be enabled to sue against nuisance-type 
interferences.

(iii) Parliamentary intent

The respect for the living home seems to already form a large part of the 
operations of ss 28-30 and sch 3 of the Land Registration Act ('LRA') 2002, 
keeping in mind the reference to ‘actual occupation’ in sch 3 para 2. An extension 
of the law of nuisance in this regard might accordingly be parallel to Parliamentary 
intent, in view of the similar attempts advanced by Parliament to protect the 
genuine interests of the living home. This is more so the case when we remember 
that much of the case law regarding the meaning of ‘actual occupation’ emphasises 
the intention to treat a place as a home to be a decisive factor in establishing ‘actual 
occupation’.31

One concession can perhaps be made in this regard. The priority rules 
under ss 28-30 and sch 3 LRA 2002 do not in themselves confer proprietary rights 
on individuals simply by their ‘actual occupation’. Occupation is necessary to 
postpone other proprietary rights that would ordinarily have taken priority.

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31 Actual occupation was established in Link Lending v Bustard [2010] EWCA Civ 424, 

Despite Mrs. Bustard being detained in a mental hospital and subsequently being absent 

from the premises for extended periods of time. This was due to her belongings 

remaining in the premises, as well as her having paid all the utility bills, which evinced the 

intention to return; Cf. Stockholm Finance Ltd v Garden Holdings Inc [1995] NPC 162 where 

no actual occupation was found despite constant maintenance of the flat, presumably due 

to the absence of intent of using the premises as a home.
However, mere occupation is not sufficient for these priority rules to apply. The key condition is that the person with actual occupation possessed a pre-existing proprietary right. In this sense, Parliament did not intend for actual occupiers’ rights to mirror those of actual proprietors’. Given how licensees do not possess a proprietary right as such, an analogy with the priority rules under the LRA 2002 in the context of nuisances as against licensees might, to a certain degree, be less relevant.

However, such an argument could at most serve as a bar to the proposition that licensees should have the right to exclude others. In contrast, the question of concern is the vindication of a lesser entitlement — that of not being subjected to nuisances. With respect to legislation, Parliament has not barred the possibility of protecting the domestic home from nuisance-type interferences. The policy aim of protecting the interests of the family home from nuisances is still relevant when we take into account the aforementioned concerns.

(iv) Human rights argument

In this regard, we might also consider the application of Article 8 of the European Convention on Human Rights (‘ECHR’) which confers, inter alia, the right to respect for one’s home. At the very least, following the enactment of the Human Rights Act (‘HRA’) 1998, any genuine use of the premises for a legitimate form of enjoyment of the land should be afforded some serious consideration by the courts. In his dissent in Hunter, Lord Cooke noted that provisions such as Article 8 ECHR were aimed, in part, to give protection against nuisance-type interferences. In particular, he cited the case of López Ostra v Spain,32 where it was held that fumes and smells from a waste treatment plant could constitute a breach of Article 8 ECHR on the part of the Spanish State.

While López Ostra concerned the vertical application of Article 8 ECHR, there is also room to argue that the HRA 1998 might affect the standing rules of nuisance horizontally as between individuals. The interplay between private nuisance and Article 8 ECHR as between private individuals was touched on in McKenna v British Aluminium Ltd.33 Here, Neuberger J (as he then was) declined to strike out actions in nuisance that were brought on behalf of children lacking a

32 López Ostra v Spain (1994) 20 EHRR 277.
33 McKenna v British Aluminium Ltd [2002] Env LR 30.
proprietary interest in their homes. He opined that barring a person who has benefited from the enjoyment of the home due to the absence of a proprietary right might cast doubt as to the compatibility of the law with Article 8. He went on to say that the action in nuisance would have failed had it not been for the HRA 1998.

While it may have been hoped that McKenna would move the judicial dialogue away from the status quo, more recent cases indicate an opposite trend. The Supreme Court in Fearn were quite dismissive of any purported reliance on Article 8. The court was primarily concerned with the question of whether overlooking could constitute an actionable nuisance. In the context of Article 8, a minor question arose as to whether not allowing such an action would fall foul of Article 8 on the respect for private life. Lord Leggatt (speaking for the majority) made his reservations clear, only referencing Article 8 once in his entire judgment. He concluded by saying that reliance on Article 8 would only serve as ‘an unnecessary complication and distraction’34 where the common law had already tried and tested such considerations. While the judgment did not speak directly on the rules regarding standing to sue, the answer should not differ too much in substance if we are to follow such a conservative interpretation of the Articles.35

In reading Fearn, one should also be reminded of the Supreme Court’s decision in McDonald v McDonald36 on the application of the Articles more generally. The court in McDonald was even more dismissive of the Articles’ horizontal effect. It warned that courts should not be too steadfast in altering the obligations between the parties due to the Articles where there already exists Parliamentary guidance.

The fact that Parliament has not spoken on the issue of nuisance is significant. This silence could be understood in two ways. It may be argued that the rules on the *locus standi* of nuisance are satisfactory, and that there is, therefore, no need to expand them. On the other hand, recent developments, such as the LRA 2002, seem to point in the other direction.37 Elsewhere, the common law in

34 Fearn (n 4) [113].
35 The explicit rejection of Khorasandjian in Hunter is directly relevant on this point and may therefore make it unlikely for courts to reopen the conversation vis-à-vis Article 8 EHCR in the context of the *locus standi* for private nuisance.
36 *McDonald v McDonald* [2016] UKSC 28.
37 See also: Law Commission, *Renting Homes* (Law Com No 297, 2006) paras. 1.4-1.5.
the *Bruton* line of case law has also been developed to protect the interests of the home without necessarily conferring a proprietary right. A focus on common law dialogue, as advocated in *Fearn*, might accordingly push the law against the status quo. It is at least open to the courts to reconsider whether it should be sufficient for claimants to prove such an interest in order to bring a claim under the tort of private nuisance, without necessarily having to establish a proprietary right in the first place. In this way, extending the tort of private nuisance may serve as one of the ways to protect licensees from nuisances, as well as potentially filling the lacuna for the protection of the living home.

**B. Commercial Licensees**

(i) *Economic reality*

A licence is nothing but a permission. But many other economic needs are derived from this mere permission — some use it as living premises, while others use them as the main centre for their economic activities. The peculiarity of the licence lies in the fact that it is an entitlement to use land in some way, even though it is only meant to be operative as between the parties to the licence agreement in law. However, if the licensee then undertakes an economic activity that the licensor (with the proprietary right) was entitled to do in the first place, what difference does it make in relation to third parties whether the act is done by the licensee and not the original proprietor? It is arguable that, where the

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38 *Bruton v London & Quadrant Housing Trust* [1999] UKHL 26. The London Borough of Lambeth owned a block of flats and granted a licence to the London & Quadrant Housing Trust. The Trust later conferred a licence on Mr. Bruton, but Mr. Bruton claimed that the Trust had granted him a lease, meaning that the Trust was under a statutory repairing duty under s. 11 of the Landlord and Tenant Act 1985. The issue was that the council could only have granted a licence and not a tenancy under the statutory framework. Notwithstanding this logical limitation, the court accepted Mr. Bruton’s argument. The court recognised the existence of a tenancy despite the clear contravention of the *nemo dat quod non habet* doctrine.

39 Lord Scott in *Kay v Lambeth LBC* [2006] 2 AC 465 at [144]-[145] explains that the *Bruton* tenancy is a ‘non-estate tenancy’. As such, it will only be enforceable between the parties to the agreement but not as against the original freehold owner or third parties. See: Susan Bright, ‘Leases, Exclusive Possession and Estates’ (2000) 116 Law Quarterly Review 7.

40 Concerns regarding the impacts of such an expansion as regards legal principle will be discussed later on in the sections below.

41 See: *Bate v Affinity Waters Ltd* [2019] EWHC 3425 [127] (HHJ Paul Matthew).
licensee is undertaking a commercial activity that was permitted by the original proprietor, he is entitled to also have his activities protected from unreasonable nuisances.

(ii) Efficiency and agency

There may also be other relevant questions to challenge the viability of the current legal order. Chiefly, would it apport the law any efficiency by forcing claimants of these types to be ‘at the mercy of the person who owns the home, as the only person who can bring proceedings’. Absent additional contractual obligations on the part of the licensor, the licensor is always free to refuse to sue on behalf of the licensees. The licensor might conclude that commencing proceedings is more costly and time-consuming than settling the dispute, or they may outright refuse to assist the licensee. If that is the licensor’s conclusion, then the commercial licensee will effectively have to bear the nuisance until after the licence expires. This is even if the nuisance is wholly disruptive of the licensee’s commercial undertakings.

Opponents may argue that this is an issue in neither tort nor property law. Rather, this is an issue reserved for contract law. If the licensee truly wanted to avoid these risks, then he should have made sure to identify those risks by undertaking additional due diligence exercises. It is not to be assumed that the courts will disapply the maxim of \textit{caveat emptor} — let the buyer beware — in these situations. Additionally, he should have made sure to protect himself by incorporating additional terms in the contract. He might opt to incorporate, \textit{inter alia}, indemnity clauses, break-clauses, or clauses which make it obligatory for the licensor to sue on the licensee’s behalf. This perspective points to the danger of courts becoming excessively protectionist. Such concerns regarding freedom of contract should not be taken lightly.

On the other hand, it is also possible to see how allowing licensees to sue directly against nuisances might instead bring about more efficiency. Suit through an intermediary (i.e. through the true holder of the proprietary right) adds unnecessary time to the process. If a possession order was denied by the court in \textit{Manchester Airport plc v Dutton},\footnote{Manchester Airport plc v Dutton [2000] QB 133.} the loss suffered by the licensee would not have

\footnote{McKenna (n 33) [53] (Neuberger J).}
been quite enough to completely ruin its economic stability. Contrastingly, for other smaller licensees who are at the mercy of their licensors, the time wasted by having to first communicate with the licensor to sue in their stead will be economically significant. An inability to make use of a licence due to nuisance can toe the difference between going up against the wall and going to the wall. Accordingly, there should be a way to expedite the vindication of these entitlements.

Furthermore, affording the legal standing for licensees to bring an action in their own name gives them more agency as economic actors, thus enhancing freedom of contract. Such an expansion presents a win-win situation for the contracting parties. By giving the licensee the choice to bring an action directly against the nuisance, the law gives him the agency and freedom in deciding whether he wants to anticipate these risks before contracting, or whether it might be better to go through proceedings should a dispute occur. This gives the licensee another choice beyond undergoing additional negotiation stages with the licensor to include cautionary terms in the contract, and subsequently having to pay more for the costs of the licence as a result of those additional terms. In Coasian terms, the licensee has a choice to minimise transaction costs. Moreover, the licensor might also implicitly want the nuisance to cease, but may not have enough of an economic impetus to do so. Allowing the licensees to bring an action on their own behalf thus allows the licensor to strengthen the economic value of his land, without necessarily having to account for additional expenditure. In this respect, an expansion of the tort of private nuisance may accordingly provide for more efficiency.

44 Ronald Coase, ‘The Problem of Social Cost’ (1960) 3 Journal of Law and Economics 1, 15. Coase explains that transaction costs are resources that must be expended ‘to discover who it is that one wishes to deal with […] and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on’. 
ARGUMENTS FOR THE STATUS QUO

A. A Quasi-Proprietary Right to Sue

Borrowing the comments of the House of Lords in *National Provincial Bank v Ainsworth*, property rights must necessarily be ‘definable, identifiable by third parties, capable in [their] nature of assumption by third parties, and have some degree of permanence or stability’. Being but a right *in personam*, a licence should not, in principle, be able to assume the characteristics of a proprietary right. While it may be desirable to respect the living home and other commercial interests, one major concern with giving mere licensees the ability to bring an action under nuisance against non-contracting parties is the possibility of then creating a right exhibiting characteristics of a proprietary right, capable of affecting third parties. The consequence is twofold: (i) an influx of new nuisance claims; and (ii) the complication of commercial risk assessment.

(i) Influx of new nuisance claims

If licensees had the freedom to sue anyone under private nuisance, we risk opening the floodgates of liability. Privity of contract ensures that any obligation contained in the licence only binds the respective parties. Whereas this principle would have ordinarily ensured that agreements of the like are segregated between the parties, the recognition of the right to sue for nuisance for mere licensees might confer on them a quasi-proprietary right capable of binding third parties.

It must be remembered that the creation of licences does not require formalities, except perhaps when contractual licences are concerned (which by their very name would require ordinary contractual formalities). Whereas the grant of a tenancy might require thorough deliberation by the parties in view of the formalities needed to complete the process, licences can be made on the spot as long as the grantee is given a permission by the grantor to enter his land (even when implied). The absence of formalities as a cautionary instrument makes it

45 *National Provincial Bank v Ainsworth* [1965] AC 1175.
46 *National Provincial Bank* (n 45) 1247-1248.
easier for parties to create licences as they wish.\textsuperscript{47} Therefore, there is little to stop licensors in a given area from granting licences. What arises from this is the constant ‘pyramiding’\textsuperscript{48} of vulnerability from suit against nuisance from the surrounding lands, and the subsequent sterilisation of the land’s economic value.\textsuperscript{49} Economic actors, and perhaps even domestic actors, might then be exposed to an additional layer of suit from the influx of new licensees capable of bringing an action for nuisance against them.

(ii) \textit{Complication of commercial risk assessment}

Secondly, commercial actors may have to exert more time and money to carry on with their economic ventures due to the increase of information costs. Apart from obvious insignia such as actual occupation, the lack of formalities would make it difficult for third parties to properly identify the existence of a licence in the first place.\textsuperscript{50}

This is perhaps not as much of a problem where the party concerned is not a commercial actor, but a family intending to use the premises as a home. But for parties intending to move into new premises for commercial purposes, this might pose more problems. If one is to make a risk assessment regarding the potential of being sued for nuisance, how is one to ensure that it does not cause a nuisance to anyone around me if one cannot in the first place see whether there is anyone actually capable of suing them? Economic actors, such as property developers, would now be under an even more onerous imperative to calculate such risks of suit. This is especially true, given the potentially large number of licensees in family homes with a sufficient interest to sue.

It does not help that the law regarding the locality of an area is not clear either. It has long been established that what constitutes as a common and ordinary use of land (and therefore non-actionable) in the context of nuisance

\textsuperscript{47} On the function of formalities as a cautionary instrument, see generally: Lon Fuller, ‘Consideration and Form’ (1941) 41 Columbia Law Review 799.
\textsuperscript{49} Rudden (n 48) 257.
\textsuperscript{50} Fuller (n 47) 800.
must be judged having regard to the character of the locality. Yet the guidance given by majority the Supreme Court in Lawrence v Fen Tigers Ltd contends that all activities should be considered as being part of the locality, except those activities which constitute a nuisance (including those of the defendant himself). While the issue of locality will not be considered in detail in this instance, it is not difficult to see the circularity that arises from this ‘guidance’. Such a legal test only exacerbates the complexity of calculations. In addition to having to discern all the licences with a legal standing to sue, commercial parties will then have to determine whether any activities pursued by those licences are actually capable of forming part of the locality.

Occasional justice may therefore be achieved by allowing mere licensees to sue. However, this will be at the expense of commercial viability, as parties will have to accept an increase in information costs. Factoring in the ease with which parties are able to create licences — there being no requisite formalities for enforceability — other licensors would also be free to create even more binding licences. Even after a successful initial risk assessment, commercial parties will inevitably have to guard against suit for the whole duration of their activities.

B. The Intermediary Step to Legal Recourse and the Numerus Clausus Principle

Viewed from this lens, Lord Cooke’s position seems to no longer be fully warranted. While it is understandable why one would opt to expand the tort of private nuisance in order to protect the rights under the living home, the potential ramifications of such an expansion might not be sufficient to outweigh the positives. Some might argue that there is no need to change the legal standing at all, especially given how licensees do have recourse to legal action, albeit through the person who possesses the original right as the licensor. In accordance with the policy arguments advanced in the previous section, it might indeed be that this intermediate step serves as the main control mechanism to prevent the aforementioned floodgate of liability from ensuing, in addition to being a Pareto-

51 Sturges v Bridgman (1879) 11 Ch D 852, 865.
53 Lawrence (n 52) [74]-[75] (Lord Neuberger).
54 Lord Neuberger even concedes this point in Lawrence (n 52) [72]-[73].
55 See: Rudden (n 48) 254.
efficient trade-off between efficiency and liability control.\textsuperscript{56} If we based the threshold for the \textit{locus standi} on the genuine use of land, there might exist some difficulty in determining who is entitled to sue.

Although perhaps not explicitly expressed, the case law has long demonstrated that this intermediate step forms a crucial part of English law; the intermediate step is a necessary component in the legal framework on both principle and policy grounds. In \textit{Hill v Tupper},\textsuperscript{57} the company granted Hill a licence for the sole and exclusive right or liberty to use and put boats for hire on the canal. Hill then proceeded to bring an action for infringement against Tupper for using boats in the canal. It was held that Hill had no other recourse but to plead the company to vindicate his rights arising out of the licence as against a third party; Hill could only ask for an injunction forcing the company to take action against the interfering third party, as opposed to suing in his own name.

The explanation given by the court was simply that the law does not allow parties to create new species of incorporeal hereditaments at their own will and pleasure.\textsuperscript{58} Rather, they should be content with the species of rights case law or Parliament have already settled.\textsuperscript{59} While not expressly referencing it, the judgment in \textit{Hill} forms in essence the operation of the \textit{numerus clausus} — that private individuals are not allowed to create new species of property rights at their own discretion.

As discussed above, recognising a right to sue under the tort of private nuisance for mere licensees may result in the creation of a quasi-proprietary right. For the same reasons as in \textit{Hill}, we might then consider whether we should also be slow to recognise the creation of a wholly new quasi-proprietary right as dictated by the \textit{numerus clausus} principle. The question then implicitly becomes whether there is sufficient justification for the \textit{numerus clausus} principle to prevent the recognition of this new right and preserve the intermediate step.

\textsuperscript{56} See e.g.: \textit{Hunter} (n 3) 693 (Lord Goff).
\textsuperscript{57} \textit{Hill v Tupper} (1863) 2 H & C 121.
\textsuperscript{58} \textit{Hill} (n 57) 127.
\textsuperscript{59} \textit{Hill} (n 57) 128.
Insofar as there remains some debate as to the degree of applicability of the *numerus clausus* principle in the English jurisdiction, it seems apparent that the policy principles underpinning the principle do indeed apply in the context of private nuisance. Rudden identifies, *inter alia*, several justifications for this principle — *viz.* the lack of notice, an increase in information costs, and the sterilisation of land. The creation of a quasi-proprietary right, as explored in the previous section, has proven to be problematic insofar as it is liable to sterilise the value of land caused by the deletion of the segregative effect of privity of contract, further exacerbated by the absence of formalities as a cautionary instrument. Commercial actors might also have to put up with an increase in information costs and an even more convoluted discernment exercise in view of the lower ascertainability exhibited by licences. In this sense, the policy concerns identified by Rudden can indeed be translated in the context of private nuisance. As such, does the status quo afford the law the policy advantages that the *numerus clausus* principle purports to protect?

The answer, it is submitted, is in the affirmative. In principle, the status quo maintains the orthodoxy of the licence being a personal right only capable of binding the contracting parties. This method enforces, in unequivocal terms, the right of the licensor who has the true proprietary right as between the parties. In addition to being more easily identifiable for commercial parties, the licensor also acts as an efficient stop gate to prevent the influx of nuisance claims. How is this so? True proprietary owners are usually few in number in comparison to the number of licences one might find under the purview of a commercial licensor. It may be objected that this intermediary step is illusory, seeing as how licensors (more specifically, commercial licensors) might bring a claim on behalf of numerous parties. However, Lord Hoffmann in *Hunter* reminds us that damages for nuisance cannot be increased due to the number of people affected by the harm. The cumulative effect of both of these findings must surely be sufficient to push back on any concerns regarding the sterilisation of land.

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60 In particular with regards to the recent developments regarding easements of parking and easements to use recreational facilities. See *Moncrieff v Jamieson* [2007] UKHL 42 and *Regency Villas v Diamond Resorts* [2018] UKSC 57 respectively.

61 Rudden (n 48).

62 Note that Rudden talks of the sterilisation of land arising out of rights being assumed by successors in title whereas the previous section of this paper talks about sterilisation of land relative to the devaluing effects of the surrounding lands.
Opponents of the status quo might nevertheless argue that the influx of new nuisance claims could be managed indirectly by requiring formalities for licences akin to the tenancy or the fee simple. It is submitted, however, that this step is erroneous. The point of licences is for parties to have flexibility in fixing their obligations vis-à-vis land. The law cannot set in stone an instrument so prevalent in society, sixty-three lest we turn it into a doublet of a tenancy or complicate the already tortuous distinction between the licence and the lease.

C. The Nature of Private Nuisance as a Tort against Land

In considering the role of tort law in the apportioning of liability, one is always reminded that the world is ‘full of harm for which the law furnishes no remedy’. Sixty-four When we look at the types of harm commonly seen in cases of actionable nuisance, it is often difficult to pinpoint exactly their position within the larger scheme of tort law. One commentator notes that ‘[b]eing a residual category of liability, encompassing all invasions of real property rights that fall short of trespass, private nuisance is inevitably something of a rag-bag’. Sixty-five In light of the previous policy discussions, the question we arrive at now is whether such considerations are enough to conclusively close the arguments against the expansion of private nuisance to protect the interests of licensees.

Regrettably, the reality is that there is an even bigger danger lurking around the boundaries of nuisance. To quote Lord Lloyd in Hunter: ‘[I]t is one thing to modernise the law by ridding it of unnecessary technicalities, it is another thing to bring about fundamental change to the nature and the scope of action’. Sixty-six Although there exists an imperative to protect the interests of licensees, the stability and distinction of nuisance against the backdrop of other torts necessarily demands restrictions of its current ambits.

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63 It must be remembered that licences can be granted in the most mundane of situations. For instance, ordinary members of the public entering public parks are granted a licence to use the premises for recreation purposes (see e.g.: Waverley Borough Council v Fletcher [1995] 4 All ER 756). This is perhaps more relevant in the context of the family home where the other members of the family (save the owner of the proprietary right) will be nothing more than mere licensees.

64 D v Eats Berkshire Health NHS Trust [2005] 2 WLR 993, [100] (Lord Rodger).


66 Hunter (n 3) 696 (Lord Lloyd).
If we extend the operation of the tort of private nuisance to cover cases of mere licensees, what would the criteria for the new locus standi be? Presumably, if the imperative is truly to protect the actual interests of licensees, the focus would then be on the relevant person’s activities relative to the land. The issue with this is that this would, in effect, transform nuisance from a tort against land to a tort against the de facto or de jure use of the land. Framing private nuisance as a tort against the de facto use of the land opens up the possibility for any harm, whether material or nominal, to give rise to a cause of action with respect to third parties, so long as the licensee’s de facto enjoyment of the land has been unduly interfered with. Conversely, framing private nuisance as a tort against the de jure use of land would make it possible for parties to make actionable any contractual rights conferred under their licences, no matter how onerous.

Either of these outcomes could unravel the whole case law covering the meaning of unreasonable interference in the context of nuisance, requiring us to rethink the ambit of the tort in all directions. If the determinant of the equation is the execution of a licence which oftentimes already involves a specific way of enjoying the land, then the law must be forced to adopt a subjective method of inquiry specific to the contents of the licence in lieu of the standard of the locality. This is difficult to reconcile with the objective stance taken by the law of nuisance which focuses not on what the claimant cannot do or the perceived interference with the property, but on whether the claimant can do things regarded as common and ordinary in the area, according to the ‘plain and sober and simple notions’ of people. In other words, such an expansion brute-forces the recognition of specific types of enjoyment into a framework which, by its very conception, concerns itself with geographically ordinary modes of land use. This might explain why courts are unwilling to use Article 8 ECHR as an instrument to expand the tort of private nuisance. Doing so risks interfering with the doctrinal stability of the tort.

If this was not enough to throw principle out of the window, then the loss of private nuisance’s identity as a tort against land further opens up the

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67 Lawrence (n 52) [5] and [179].
68 Water v Selfé (1851) 4 De G & Sm 315, 322 (Knight Bruce V-C).
potential for damages to become recoverable even for mere discomfort\textsuperscript{70} so long as it interferes with the execution of a licence. Strictly speaking, this would not shift it to a tort against persons \textit{per se}. Rather, it would be a tort against the interference of \textit{in personam} rights which could arise as a result of a prior harm to the person. But if private nuisance could now involve such harms against persons, there would be very little left to distinguish it from the tort of negligence. Academics such as Professor Newark have of course cautioned against this\textsuperscript{71} — but we might want to ask again in this instance, why ought we not assimilate the tort of nuisance to the tort of negligence?

For one, the two torts are aimed at protecting different interests. While nuisance is concerned with the amenity of land (and thus befittingly only protects those with an interest in the affected land), negligence is more expansive in protecting both economic and bodily interests in a variety of different scenarios. Furthermore, while the actionability of negligence, for the most part, depends on the conduct of the defendant — namely by investigating the duty, breach, and remoteness of his actions — nuisance focuses more on the effect of his conduct relative to the claimant.\textsuperscript{72} Finally, while negligence concerns the redress against past events by way of damages, nuisance concerns ongoing interference — ‘[n]uisance tends to look to the future; negligence to the past’.\textsuperscript{73} This is why the primary remedy for nuisance is the injunction and not an award for damages.\textsuperscript{74} Having thus reviewed the different interests and purposes covered by private nuisance, care must therefore be taken before callously morphing its identity as a tort against land for fear of blurring its distinction with that of the law of negligence.

\textsuperscript{70} Hunter (n 3) 693 (Lord Goff).
\textsuperscript{71} Newark (n 22). Note that Newark’s article discussed the need to distinguish between negligence and nuisance in the context of claims for personal injuries and not \textit{in personam} rights.
\textsuperscript{72} Nolan (n 65) 1140.
\textsuperscript{73} ibid.
\textsuperscript{74} Lawrence (n 52).
THE CONTENT AND THE MANDATE BEHIND THE LICENCE

The position we arrive at now is the following: There are policy reasons to protect the interests of licensees from harms that are typically encountered in cases of nuisance. However, it is not viable to simply extend the tort of nuisance to cover those instances as this would require us to completely reimagine the ambit of the tort. Perhaps then, it may be more useful to focus our attention towards the purpose and nature of the licence, in order to consider any alternatives other than expanding the law of nuisance in a haphazard manner.

A licence can be characterised as a permission to do something on somebody else’s land. It has long been established in English jurisprudential orthodoxy that a licence merely makes lawful an action which would otherwise have been unlawful without there being any alteration nor transfer of property.\(^75\) Therefore, a licence does not constitute a property right which binds successors in title or affect third parties.\(^76\) Using Hohfeldian jural analysis,\(^77\) the permission granted under a licence can best be characterised as a privilege whereby the licensee (B) is no longer under a duty to stay off the licensor’s (A) land until said privilege is revoked.\(^78\) Yet this is different from saying that the world at large has a duty not interfere with B’s liberty to be on A’s land. The privilege is the mere negation of a duty.\(^79\) Whereas B would have been under a duty not to be on A’s land prior to the grant of the licence, B is now no longer under a duty to be on A’s. In contrast, third parties still have a duty to stay off A’s land — but in relation to B who now

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\(^{75}\) *Thomas v Sorrell* (1673) 124 ER 1089, 1109 (Vaughan CJ).

\(^{76}\) Though some case law seems to have argued to the opposite effect – see e.g. *Errington v Errington* [1952] 1 KB 290 where it was held that a grant of an equitable remedy upon a revocation of a licence in breach of contract may give rise to an equitable right to remain, and therefore capable of binding a third party (although this was ultimately rejected in *Ashburn Anstalt v Arnold* [1989] Ch 1). See also: *Binion v Evans* [1972] Ch 359, 369 which holds that a constructive trust may be held in favour of the licensee where a purchaser ‘takes the land impliedly subject to the rights of the contractual licensee’.


\(^{78}\) Wesley Hohfeld, ‘Faulty Analysis in Easement and License Cases’ [1917] Yale Law Journal 66, 94.

\(^{79}\) Hohfeld (n 77) 32.
has a privilege, third parties have no corresponding duty; third parties possess only a ‘no-right’ as against B.

This is demonstrated by the fact that a licensee cannot ordinarily rely on his licence to exclude others, as was decided in *Hill*. According to this orthodoxy, this principle should stand even where a third party interferes with the enjoyment of a licence. The only way he is able to somehow prevent the third parties from interfering is by either asking the licensor (with the original proprietary right) to sue the third parties, or by establishing a greater title as against mere wrongdoers by the fact of exclusive possession and not on the licence by itself.\(^8\) Holding otherwise would involve us ‘leap[ing] the personal/property divide’.\(^9\)

But possessing the legal entitlement to do something is one thing, and the ability to enjoy it in practice is quite another. Indeed, it would be futile to have a framework by which a person is given a privilege in law without arming him with any legal recourse to vindicate his entitlement. Any purported economic effects of the licence are rendered nugatory if the privilege in law does not arm the recipient with an inherent legal recourse to vindicate his entitlement.

This mirrors the facts in *Dutton*. There, Manchester Airport was granted a contractual licence to use the lands owned by the National Trust; the lands were later occupied by protesters. The issue here was that the airport could not have claimed exclusive possession, as the protesters had occupied the land way before the licence was even granted. Even if the airport had occupied the land before the protestors did, it would have been impossible for them to have exclusive possession, as the National Trust Act 1939 prevented the National Trust from granting exclusive possession in the first place.

This was the position assumed by the orthodoxy — and was indeed the stance that Chadwick LJ took in his dissent in *Dutton*. He noted that the claimant ‘must succeed by the strength of his title, not on the weakness (or lack) of any title in the defendant’.\(^8\) But how are we to expect licensees with a clear privilege

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81 Swadling (n 80) 359.
82 *Dutton* (n 43) 147 (Chadwick LJ).
to enter the land to solely rely on the strength of a possessory title, if we allow mere wrongdoers to prevent that possession in the first place?

The potency of such a liberty must surely lie in its ability to give rise to a cause of action, so long as it does not disproportionately infringe on other individuals’ entitlements. It is implicit upon the conferral of such a licence relating to the use of land that one should have some power to prevent others from preventing its enjoyment when we think of the policy considerations delineated in the previous discussions. Speaking in the context of possession claims, Lord Neuberger in Mayor of London v Hall and others\(^83\) echoed similar concerns in approving (obiter) the decision in Dutton. He wrote:

‘[T]here is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question.’\(^84\)

This follows from the maxim ‘ubi ius, ibi sit remedium’ — where there is a right, there is a remedy. Another entitlement may come from the outside to assault it, but it should be inherent in the nature and content of a licence which confers on recipients an entitlement of use and control that it be capable of generating a shield to defend itself from nuisance-type interferences without having to resort to another person’s rights. Under this analysis, the licensee should therefore possess claim-right of sorts when encountered with harms analogous to nuisance, albeit perhaps only under onerous circumstances.

There may be hints from the pre-existing law prompting a move in vanguard of these considerations. Although the orthodoxy states that grant of a licence does not in itself confer a duty on others not to interfere with the execution of the licence, we have seen, in several instances, scenarios where the existence of a licence facilitated the finding of an analogous right of sorts.

\(^83\) Mayor of London v Hall and others [2010] EWCA Civ 817.
\(^84\) Mayor of London (n 83) [27] (emphasis added).
In *National Provincial Bank v Ainsworth*, it was held that a spouse in exclusive occupation of the home could bring proceedings against trespassers. True, it might be said, that it is not the licence itself which provides that title. It is only the case that relative to the strangers, the wife has a better title due to her exclusive possession — i.e. her complete and exclusive physical control\(^{85}\) over the land, combined with an intention in her own name and on her own behalf to exclude the world at large.\(^{86}\) That said, the licence assisted in her gaining exclusive possession over the premises. It is the fact of her enjoyment of the licence which gave rise to her title.

Similarly, although licences do not ordinarily bind successors in title,\(^{87}\) the court in *Binion v Evans*\(^{88}\) held that equity may intervene to impose a constructive trust ‘whenever the purchaser takes the land impliedly subject to the rights of the contractual licensee.’\(^{89}\) Clarification by subsequent cases further indicates that this does not ordinarily arise unless ‘the conscience of the estate owner is affected’\(^{90}\) — more specifically where ‘he has undertaken a new obligation […] to give effect to the relevant […] prior interest’.\(^{91}\) External facts might, therefore, prompt equity to intervene to arm the licensee with a right which binds successors in title.

The end result is that, although English law does not consider licences to be of a proprietary nature, in practice, it allows licensees to derive rights of a proprietary nature or quasi-proprietary nature where there is sufficient enjoyment of the land or certain other external factors supporting such enjoyment. This is ultimately in order to vindicate the content of the licence. Even in cases of bare licences which are freely revocable by the licensor,\(^{92}\) the law still affords some limited protection. *Winter Garden Theatre v Millenium Productions*\(^{93}\) (*obiter*) indicates that a bare licensee is given reasonable time to vacate the premises before being

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\(^{87}\) *King v David Allen* [1916] 2 AC 54.

\(^{88}\) *Binion* (n 76).

\(^{89}\) *Binion* (n 76) 369 (Lord Denning MR).

\(^{90}\) *Ashburn Anstalt v Arnold* [1989] Ch 1, 25 (Fox LJ).

\(^{91}\) *Lloyd v Dingdale* [2001] EWCA Civ 1754, [52] (Sir Christopher Slade).

\(^{92}\) *Wood v Leadbitter* (1845) 13 M & W 838.

\(^{93}\) *Winter Garden Theatre v Millenium Productions* [1948] AC 173, 204.
considered a trespasser. Hill notes that the law here aims to balance the licensor’s and the licensee’s interests ‘in not suffering excessive disruption’. The key word here is ‘disruption’. Evidently, there is even more of a demand to protect licensees from nuisance-type harms which are liable to cause a similar degree of disruption.

**SOLUTION — A NEW TORT?**

How can we then protect these interests under licences without endangering the boundaries of the tort of nuisance? Having reviewed the principle and policy considerations, as well as the relevant authorities, any purported solution would have to satisfy the following criteria:

(i) The solution must be able to protect interests in the living home, as well as commercial interests of licensees with genuine use of the premises.

(ii) The solution must not be too quick at achieving ‘justice’ for the licensee at the expense of external interests, especially regarding third parties to the licence agreement.

(iii) The solution must provide an optimal trade-off between legal efficiency and liability control — care should be taken to not create proprietary rights.

(iv) The solution must not destabilise the legal scope of the tort of nuisance; neither can it end up blurring the line between itself and nuisance.

As difficult as it may seem to reconcile these points, we might be able to draw an amalgamation of sorts, not through well-established causes of action in property law or tort law, but through a tortious interpretation of a case which would ordinarily have been seen as jumping out of the proprietary orthodoxy. Enter *Dutton* — as instructively interpreted by Baker.95

As discussed above, *Dutton* was not decided based on orthodox principles. Although the airport did not have a title capable of excluding third parties, Laws LJ (with whom Kennedy LJ agreed) nevertheless argued that the airport was entitled to a possession order against the defendants due to it being necessary to

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95 Baker (n 5).
vindicate their rights of occupation under the licence. The crux of this analysis lies within the following quotation by Laws LJ:

‘[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 […] 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’.96

As if relying on trite law, there is no explanation as to why a contractual licensee can sue for possession without a proprietary right.97 The effect of Laws LJ’s analysis is to effectively ‘grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence’.98 But it is not difficult to see that Laws LJ still alluded to some conditions necessary for such protection to crystallise.

One possible explanation is that Dutton is to be interpreted as creating a totally new tortious cause of action — that of violating the enjoyment of a licence. On its face, Dutton does not correspond to any of the pre-existing causes of action, nor does Laws LJ cite any authority for the new wrong.99 In this analysis, a liberty is still derived from the licence. However, the law grafts a claim-right akin to a shield in the form of a tortious action. It is an entitlement conferred by the law, activated upon it being assaulted by the absence of an entitlement coming from a third party, which cannot by itself be capable of binding third parties without any prior activation. A licensee is then entitled to bring a claim under the novel tort where the entitlements under his licence have been affected in a substantial fashion.

Whereas Baker’s focus was on the application of Dutton in the context of possession claims, this article differs by arguing that the casting of the principles

96 Dutton (n 43) 150 (emphasis added).
98 Dutton (n 43) 149.
99 Baker (n 5) 125.
in *Dutton* is capable of encompassing claims brought by licensees regarding nuisance-type harms. Subsequently, this tort can serve as an alternative to expanding the tort of nuisance.

*Prima facie*, it would seem as though Laws LJ confined his discussions strictly to the facts on hand. He made it clear that in cases of trespass, a licensee may claim possession if it is necessary to vindicate the rights conferred under the licence.\(^\text{100}\) However, his analysis extends beyond that assertion. He went on to formulate those principles more broadly, explaining that courts today have ‘ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence’,\(^\text{101}\) before ending his statement on the applicable legal principles with the maxim of *ubi ius, ibi sit remedium*.\(^\text{102}\)

It can be implied from this passage that rights under licences in general will be protected by the principle in *Dutton*. As discussed in previous sections, it is at least arguable that the right to have one’s family life undisturbed should benefit from some protection where it arises out of a licence. In the same way, the enjoyment of the economic content of a licence could also benefit from some protection. If those interests are violated through nuisance-type interferences, there might accordingly be grounds for the novel tort to bring relief. That is not to say that the remedy will always be an order for possession as in *Dutton*. Laws LJ took care in writing that the order for possession in *Dutton* was only awarded because it was the only practical remedy.\(^\text{103}\) Absent trespass (and therefore the need to exclude third parties), it may accordingly be possible for courts to award a different remedy to match the interference in question.

Does subsequent case law support such an interpretation? As a matter of precedent, the full ramifications of *Dutton* are ‘yet to be settled’.\(^\text{104}\) Most commentators apply *Dutton* in the context of trespass\(^\text{105}\) and not necessarily in the

\(^{100}\) *Dutton* (n 43) 150.

\(^{101}\) *Dutton* (n 43) 149.

\(^{102}\) *Dutton* (n 43) 150.

\(^{103}\) ibid.

\(^{104}\) Baker (n 5) 123.

\(^{105}\) See e.g.: Michael Jones and Anthony Dugdale (eds), *Clerk & Lindsell on Torts* (24th edn, London: Sweet & Maxwell 2023) ch 18.
way proposed by this paper. More recently, Ball has criticised Baker’s account of *Dutton, inter alia* on the grounds that precedent has not interpreted *Dutton* in a tortious fashion. Admittedly, subsequent cases have indeed chosen to apply *Dutton* in the context of trespass claims. Most notable is the case of *Vehicle Control Services Ltd v Revenue and Customs Commissioners* where Lewison LJ explained that the effect of *Dutton* was to modify the traditional standing to sue for a claim in trespass.

The interpretation of *Dutton* could have easily ended here. However, this point was strictly obiter. Furthermore, very little discussion was dedicated to the exact impact of *Dutton* modifying the traditional rules on the legal standing for trespass. Instead, Lewison LJ restated the broad approach in *Dutton*. He noted that courts are empowered to protect a licensee’s legal rights, but not go beyond what was conferred under the licence. In addition, he made it clear that the question to be asked is what the extent of the right is, and whether said right has been violated by the defendant.

Lewison LJ’s insistence on the *Dutton* principles is inevitably liable to raise some eyebrows here. The implicit support for a broader interpretation of *Dutton* is even more visible in his subsequent discussion of *Alamo Housing Co-operative v Meredith*. There, Alamo sub-let the property to the defendants. However, the original landlord terminated the lease. The lease itself provided that all interests in the property would cease, ‘except for the purpose of enabling eviction if required’ by the landlord. Lewison LJ points out that the remedy in *Alamo* was awarded in order to vindicate the rights under the agreement — i.e. the right to evict the sub-tenants as directed by the original landlord. He concluded by saying

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106 Victoria Ball, ‘Looking Back on *Dutton*: The Precedent Set, the Accounts Given, and the Problems Caused’ (2023) 2 Conveyancer and Property Lawyer 184.
107 See e.g.: *Walton Family Estates Ltd v GJD Services Ltd* [2021] EWHC 88 (Comm) and *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB).
108 *Vehicle Control Services Ltd v Revenue and Customs Commissioners* [2013] EWCA Civ 186.
109 *Vehicle Control Services* (n 108) [33].
110 Baker (n 5) 124.
111 *Vehicle Control Services* (n 108) [34].
112 *Alamo Housing Co-operative v Meredith* [2003] EWCA Civ 495.
that the claimant in *Vehicle Control* was also entitled to sue in trespass in order to vindicate the rights under the licence.\(^{113}\)

This judgment suggests that the effect of *Dutton* goes beyond mere claims in trespass. In rudimentary terms, trespass is an interference with land in possession of another. It is actionable *per se*,\(^{114}\) satisfied upon entry in the land, and not dependent on a purported threshold of enforceability of *in personam* rights. If this were truly a case of trespass, then one would have expected more engagement with traditional conceptions on the factual possession of the property itself,\(^{115}\) as opposed to the fact of interference with the rights under the licence. If anything, this looks more like an attempt to restore a wrong against a non-proprietary right. This ambiguity is perhaps what led the judge in *Hounslow LBC v Devere*\(^ {116}\) to list several possible interpretations of *Dutton*, including the possibility of it having conferred on a licensee an injunction to restrain an interference with a contractual right to occupy or use land.\(^ {117}\) Thus, it is still open for the tortious analysis to be accepted by the courts in the future.

**THE REQUIREMENTS OF THE NOVEL TORT**

The next step would be to determine when the novel tort should arise. This will no doubt require more than one academic article. By no means does this paper purport to conclusively close the inquiry. With that said, this paper proposes three stages of inquiry to elaborate on *Vehicle Control*. Firstly, what is the reach of the right under the licence? Secondly, has there been a subjective substantial interference of said enjoyment? Thirdly, is this a type of right that can reasonably be anticipated based on the expectations of the area? This final stage should necessarily involve considerations of fairness, justness, and reasonableness, similar to the law of negligence. Additionally, the sections below will explain how such prongs may achieve the aims under Section 5.

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\(^{113}\) *Vehicle Control* (n 108) [44].

\(^{114}\) *Entick v Carrington* (1765) 19 St Tr 1029.

\(^{115}\) No mention was made of *J A Pye (Oxford) Ltd V Graham* [2002] UKHL 30. See also: *Baker* (n 5) 124.

\(^{116}\) *Hounslow LBC v Devere* [2018] EWHC 1447 (Ch).

\(^{117}\) *Hounslow* (n 116) [64].
A. Reach of the Right

If we wish to protect the residual interests left by the law of nuisance, it must be necessary for the novel tort to protect licensees from nuisance-type interferences. The entitlement protected by this tort must accordingly be phrased in terms of an ‘enjoyment’ of the land as envisaged by the agreement of the parties: not just necessarily the right to possession, as in Dutton, but also the right to not be subject to nuisance-type interferences where such protection is necessary to vindicate the contents in the agreement.

In order to determine the meaning of ‘enjoyment’, care must be taken to identify the object/purpose conferred by the licence based on the agreement of the parties. Where a contract is concerned, ordinary principles of contractual interpretation will be applicable as they normally would under any other type of contract, although it may be expected that the more domestic the agreement, the less formal it will be. If a licence was conferred for a person to use the premises to sleep, eat, and drink in, complete with the necessary furniture or appliances, then the object and purpose of the licence cannot consequently be far off from the entitlements that a family might have under a tenancy. There might be some evidentiary issues in this regard, but very rarely should we expect courts to be defeated by a question of fact.

Such an exercise will involve a consideration of the objective intention of the parties. The simplicity and ease of this task will of course vary depending on the contractual environment — commercial licences being perhaps more easily ascertainable given the formal nature of the undertakings. Where there is little to deduce between the parties, however, an ordinary understanding of their agreement must be presumed to exist. As enunciated by Scrutton LJ in The Calgarth, an invitation to another person’s house to use the staircase is not an

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118 While Laws LJ might have intended his judgment to apply only in the context of contractual licences, an expansion to cases of bare licences will be necessary to protect interests which arise out of informal situations. Hence, why the general rule is to be applied in the context of the ‘agreement’ between the parties and not only the ‘contract’ between the parties.

119 It might be the case that parties in the domestic context do not have a sufficient intention to enter into a legally-binding agreement. See: Balfour v Balfour [1919] 2 KB 571.

120 The Calgarth [1927] P 93 Coram 110.
open invitation for the invitee to slide down the bannisters. Rather, the invitee is only empowered to use the stairs in the ordinary way in which it is used.

In the domestic context, this must necessarily involve the enjoyments expected in the family home; the right to not have the family home disturbed by excessive noise, dirt, fumes, vibrations, etc. However, the interests of the family home under licensees should not entitle other types of nuisance-type claims which veer on the interference of actual ownership rights. Hence, the encroachment from the Japanese knotweed in *Williams v Network Rail Infrastructure*\(^{121}\) would perhaps not be actionable under a licence. Similarly, while a homeowner with a proprietary interest is armed with the ability to protect his property from trespass or physical damage, the novel tort does not confer such an entitlement automatically, unless a more onerous threshold is reached. In a commercial context, however, the contents of the rights conferred under a licence might be more varied, ranging from selling food in a park, to undertaking construction work in a given area. It is only if there is a substantial interference of such commercial purposes as outlined in the licence agreement that the novel tort should come to bite.

A more important aspect of this inquiry has to do with what the requisite reach of the licence must be for the novel tort to apply. In his article, Baker left the question open as to whether the novel tort would only cover cases of ‘use and control’, or whether it would also encompass cases of ‘mere use’ licences. It is worth noting that such a distinction was not made in *Dutton*. However, recent cases such as *Alamo Housing Cooperative Ltd v Meredith*,\(^{122}\) *Countryside Residential (North Thames) Ltd v T*,\(^{123}\) and *Walton Family Estates Ltd v GJD Services Ltd*\(^{124}\) have — in seeking to distinguish *Dutton* in the context of possession claims — differentiated between licences which provided mere access and those which conferred actual control. There is also guidance from *Vehicle Control* which suggests that user licensees (i.e. licensees who are only entitled to access the premises) should be entitled to rely on *Dutton*, although such determination was made in *obiter*.

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121 *Williams v Network Rail Infrastructure* [2018] EWCA Civ 1514.
122 *Alamo* (n 112).
123 *Countryside Residential (North Thames) Ltd v T* [2021] EWHC 88 (Comm).
The issue is that all the cases involving the application of *Dutton* have involved the presence of the defendants within the property. What position ought the law then take in the context of nuisance-type interferences? As a matter of legal principle, the argument could be made that it should not matter whether the licensee is only a user licensee. This follows from the tort’s focus on the right under the licence that has been violated. So long as there is a right, there should be a remedy that is ‘commensurate with the right’.125

Be that as it may, different considerations may have implicitly persuaded the courts in *Vehicle Control* and *Devere* to allow relief for user licensees. This could be explained by the urgency and visibility of trespass cases. For nuisance-type interferences however, the answer is not necessarily the same. Nuisance-type harms can violate the enjoyment of a licence more easily than outright trespass. This is because trespass will usually require awareness, whereas one could commit nuisance-type harms and hinder one’s neighbour’s activities with little cognisance of it happening. As a matter of policy, therefore, it may be desirable for the licensee to have control over the premises. This will, in turn, serve as an evidentiary boundary to indicate to neighbours that there is an enforceable right next door.

**B. Subjective Substantial Interference**

If it is the enjoyment of a licence that is being protected, then the novel tort must focus on whether the claimant is subjectively able to enjoy the contents of the licence. If such is the focus of the novel tort, the licensee must necessarily have experienced the interference when it occurred/is occurring. It might be possible to phrase the question by asking whether the licensee has experienced the interference, such that it substantially interferes with the enjoyment of the licence. In the same way, restrictions on time will have to be considered, as a violation can only occur where there was an effective entitlement when the harm occurred. If the purported nuisance usually occurs during a time in the day where the licensee’s privilege is suspended (i.e. if the licence states that the licensee be out of the premises after midnight and the nuisance occurs after midnight), there surely cannot have been a violation of any enjoyment.

125 *Vehicle Control Services* (n 108) [35].
Allowing the licensee to bring a direct claim against the alleged tortfeasor based on his own experience allows a more efficient vindication of rights as opposed to having to rely on an intermediary step. This allows us to leap beyond the lengthy process of having to reason with the licensor to sue in their name. This right conferred under *Dutton* is not a strictly contractual right as it is capable of affecting third parties and is not confined to the contractual parties themselves. Neither would this constitute a true proprietary right — just like how negligence or other torts in general behave, the novel right cannot be said to constitute a proprietary right simply due to its enforceability against third parties generally.\(^\text{126}\)

Proprietary rights are frequently seen as rights ‘contingently associated with any particular owner’\(^\text{127}\) that can then be transferred to third parties. Upon the transfer, that particular right is identical in the sense that the contents of the relationship between the successor in title and the property stay the same as they once were, vis-à-vis the original proprietor. Nothing in *Dutton* suggests it being transferrable to successors in title. Even if it were transferable, the fact that the weight of that right depends on the subjective ability of the successor in title to enjoy the contents of the licence takes away from the identical nature of proprietary transfers. Furthermore, although the right may be identified with reference to the area subject to the licence, the right is contingent on a subsequent sub-specification by the parties; an additional carve-out that is not inherent in the property itself, but via a novation by the contractual parties.

Of course, there is the concern that such a right of action would be far too expansive. The majority in *OBG Ltd v Allan*\(^\text{128}\) pointed out that a contractual right does not benefit from the same protections against third parties afforded for proprietary rights. The law does not provide a general defence against third parties who interfere with an individual’s contractual rights, save in situations where that third party induces the other party to breach the contract. But even then, the only protection in that regard is afforded not by the law of property, nor by the law of contract, but by the law of tort. The role of the law of tort in the context of private law may thus be analysed as a catch-all protection for residual categories of

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\(^{126}\) See: Percy Winfield, *The Province of the Law of Tort* (Cambridge University Press, 1931) 32 (emphasis added): ‘Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages’.


\(^{128}\) *OBG Ltd v Allan* [2007] UKHL 21.
wrongs for which the law has not yet devised a remedy. It follows that, as far as principle is concerned, an application of such a novel tort would not form anything too radical. It is simply the vindication of the violation of rights under a licence that the law has chosen to remedy\textsuperscript{129} for the policy reasons that have been previously discussed.

One caveat should perhaps be grafted as an addendum. In \textit{Dutton}, the licensor was unable to confer exclusive possession by virtue of statute. Even if they did possess the power to do so, it would not have made much of a difference, since the defendants had already been occupying the land prior to the grant of the licence. They could not, in any case, use their title — or the lack thereof — to bring an action against the defendants under the orthodoxy. Thus, if the policy imperative pushes us to vindicate these entitlements, then the claimant should need only to show that there is a clear intention to use the premises as envisaged in the licence. If substantial use of the land were a requirement, then the outcome under \textit{Dutton} would not have been possible.

This requirement also ensures that parties do not abuse the creation of licences as instruments of fraud, merely to prevent third parties from continuing activities which are alleged nuisances. For instance, it might be possible for a future defendant to be setting up a ‘sham’ licence in order to prevent a competitor in the area to reduce the frequency or completely stop certain of their activities under the guise of there being a violation of the enjoyment of the claimant’s licence.

\textbf{C. Recognition of Rights: Control Mechanisms}

Since the existence of a licence does not normally require any formalities that can fulfil an evidentiary function, it remains necessary to provide other control mechanisms to prevent the gateways of liability from collapsing. While the exercise undertaken in this article is not an exhaustive one, it may nevertheless be possible to identify several control mechanisms.

Baker argues that the tort should not include instances of delayed trains or power cuts.\textsuperscript{130} It is submitted that this is the correct view. If we are to prevent

\textsuperscript{129} See generally: Robert Stevens, \textit{Torts and Rights} (Oxford University Press 2007).
\textsuperscript{130} Baker (n 5) 128.
a floodgate of liability, then the law must provide for a control mechanism which prevents the tort from being stretched to unreasonable limits. Ascertaining the exact form of these limits will be difficult.\textsuperscript{131} But if there is anything we can learn from other torts in this regard, it is instructive to look at the development of the duty of care in negligence.

The most recent guide by the Supreme Court states that the question of whether there is an applicable duty of care is to be determined by reference to an already-existing category of duty.\textsuperscript{132} If the scenario is a novel one, we then apply the three-stage test in \textit{Caparo Industries plc v Dickman} which involves asking whether damage is foreseeable, whether there is sufficient proximity between the defendant and claimant, and whether it would be fair, just, and reasonable to recognise a duty.\textsuperscript{133} Similarly, the ambit of this tort should depend on an incremental development by the common law. Since we have little to start with, we might perhaps put a bit more weight on the \textit{Caparo}-like test. The exact inquiries to be asked would admittedly be better handled by the courts themselves, although it would seem that a prong along the lines of fairness, justness, and reasonableness will have to form a substantial part of the considerations.

Given the potentially abstract nature of the \textit{Caparo} test, there might understandably be concerns about the viability of adopting an analogous approach to that of negligence. However, many modern harms recognised in tort law only became so because of incremental development and policy argumentation. That is the very nature of tort law — moves and countermoves between the rights and their recognition. This was certainly the case with overlooking in the context of private nuisance. In the same way, there may be a plethora of undiscovered scenarios requiring recognition or an outright block by the courts on the grounds of policy considerations.

An assessment that is based on such considerations might certainly explain why the majority in \textit{Dutton} was so vehement in granting a remedy to the airport to expel the protesters out of the property. It could well have concluded

\textsuperscript{131} Regrettably, the scope of this inquiry will have to be relegated to another opportunity.
\textsuperscript{133} \textit{Caparo Industries plc v Dickman} [1990] 2 AC 605.
that the airport ought to have relied on the National Trust to sue and evict the protesters in its stead. However, this would have been unlikely, in practice, given the National Trust’s public role. It would be neither fair, just, nor reasonable to deprive the airport of the chance to argue that they should be able to occupy the premises under the licence. The answer might not have been the same if a scenario similar to *Hill v Tupper* were to arise. In the context of exclusive possession, proprietary rights must surely be given a priority over licence rights, even if the content of the licence purports to confer exclusive possession over the premises. It is difficult to see how a mere licence should be enabled to defeat rights of exclusion that are automatically conferred by proprietary rights. Of course, the law would limit the possibility of conferring exclusive possession in the first place due to the *numerus clausus*. Nevertheless, this logic speaks to the necessary inclusion of public policy considerations of fairness, justness, and reasonableness. All in all, allowing individuals to sue following the disruption of a licence to occupy premises as living quarters arising out of a train delay or a power cut would in any case seem unreasonable.

**THE BOUNDARIES OF THE NOVEL TORT**

*Prima facie*, the potency of the right conferred by the novel tort should in theory be less expansive than that afforded by the tort of nuisance. After all, a licence ordinarily lies lower in terms of potency relative to the proprietary interests protected by the tort of nuisance. It follows that the threshold for actionability under the new tort should be less onerous than that under the tort of nuisance, given how it protects lesser rights than property rights.

However, it must be remembered that the subject matter of a novel tort would be the *de jure* activity conferred by the licence. Barring illegality, there is little to no fetter as to the onerousness of what two parties might agree to contract for under a licence — potentially going beyond the bundle of rights reasonably expected to be exercised under a tenancy. Accommodating a lower threshold of actionability may bring about more justice to the licensees, but this will inevitably be made at the expense of those at the other end of the suit. Accordingly, the thresholds of actionability for the novel tort should in general be even more onerous than that of nuisance in order to limit the commercial risks of tortious liability arising out of the novel tort.
For an actionable right to exist, there must, necessarily, be ways for third parties to anticipate the existence of said rights exercised in relation to land. Taking into account the absence of formality requirements for licences, this could very well give rise to the concerns allured to by Rudden.\(^{134}\) A non-proprietary right attached to land that is capable of affecting third parties cannot operate in secrecy under the veil of a contract — there must be an indicium of sorts to point at its existence, substituting the evidentiary function of the formalities usually required for the creation of other legal interests in land. This way, risk calculation by commercial actors can be made more certain. In the case of the domestic family, or where frequent presence is part of the execution of the rights under the licence, occupation should usually suffice to exhibit the existence of such rights. But in the case of entitlements under licences which have not yet been exercised (like in *Dutton*), there must at least be an understanding of mutual expectations that potential tortfeasors are able to gauge against. For this reason, a locality-based approach might still be necessary to pin the contractual right conferred by the licence against the normalcy of its environment. In other words, the threshold ought not be wholly removed from nuisance-type considerations. In this regard, starting from a clean slate now allows us to break away from the circularities post-*Lawrence*, opting perhaps for Lord Carnwath’s approach which takes the defendant’s activities into account from the outset. It should then be left to the courts to decide whether this novel tort should give more weight to planning permission.\(^{135}\)

By creating a wholly new tort, we can avoid the risks of destabilising the tort of nuisance. The next step is to ensure that such a tort would not blur the line between itself and nuisance. As a preliminary point, insofar as the types of conduct castigated by both torts will often, if not always, overlap, the distinction between the novel tort with the tort of nuisance lies in the *locus standi* of each respective torts. Nuisances should only protect individuals with a proprietary interest in land in accordance with the status quo. In contrast, a novel tort should protect individuals falling short of that entitlement. Furthermore, as discussed above, whereas drastic measures such as orders for possession might only be granted under the novel tort in circumstances where doing so is absolutely

\(^{134}\) Rudden (n 48).
\(^{135}\) See: *Lawrence* (n 52) [223] (Lord Carnwath).
necessary to give effect to the right under the licence,\textsuperscript{136} the bundle of rights afforded to a homeowner are much more expansive than that apportioned under the novel tort.\textsuperscript{137}

It will also have to be conceded that the remedies awarded under the novel tort in the domestic context will inevitably be similar to those afforded under the tort of nuisance — namely injunctions. With that said, one important difference between both torts will lie regarding commercial licences — more specifically, in the way each tort treats the commercial devaluation of their respective subject matter.\textsuperscript{138} In the context of nuisance, the primary remedy is thought to be the injunction, although this may be replaced by damages in limited circumstances.\textsuperscript{139} Additionally, it is also possible to claim damages as a result of consequential loss arising out of a nuisance.\textsuperscript{140} However, the concern is the amenity value of the property and not necessarily any inherent economic value in it. The court in \textit{Williams} made it clear that private nuisance was not about the protection of land as a financial asset. It was not the damage to the foundation of the building arising out of the Japanese knotweed which gave rise to a claim in private nuisance. Rather, it is the fact that there is now a burden on how the claimant can enjoy the land which entitles him to bring an action against the defendant. In view of this, Steel explains that the effect of \textit{Williams} is to solidify the requirement that there be ‘physical damage or interference with the ability to

\textsuperscript{136} This corresponds with Laws LJ’s insistence that the possession order be granted only ‘if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys.’ in \textit{Dutton} (n 43) 150.

\textsuperscript{137} Although disputes vis-à-vis possession will be resolved not via nuisance, but via trespass.

\textsuperscript{138} i.e. the commercial value of land under nuisance, and the commercial value of the rights contained in the licence under the novel tort.

\textsuperscript{139} See: \textit{Shelfer v City of London Electric Lighting} [1895] 1 Ch 287 setting out the criteria for where damages may be awarded instead; but see \textit{Lawrence v Fen Tigers Ltd} [2014] UKSC 13, [123]-[124] (Lord Neuberger) which qualifies \textit{Shelfer} and reinforces the discretion of the court in awarding the type of remedy under a nuisance claim.

\textsuperscript{140} \textit{Hunter} (n 3) 706 (Lord Hoffmann): ‘There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result’. 
use and enjoy the land or rights over land’ in order for a claim in nuisance to arise.\textsuperscript{141}

In contrast, although the novel tort makes reference to a concept of ‘enjoyment’, any such reference directly refers to the loss of the commercial or economic utility of the right conferred under the licence. The court in \textit{Dutton} vindicated the rights of the airport precisely because the protesters prevented the airport from ‘enjoying’ the content of the licence — i.e. the economic benefit under the licence. This allows the courts (or rather limits them) to shift relief under the novel tort, not towards the protection of amenity which is in itself difficult to quantify, but towards the compensation of the loss of commercial value. The novel tort will therefore be restorative in nature.\textsuperscript{142} The effect of this is that there will be a presumption in commercial licences that the appropriate remedy is damages, and not necessarily an injunction. As discussed previously, nuisance looks to the future and seeks to prohibit future interferences. This is why courts are intent on giving as much weight to the role of injunctions in the tort of nuisance. Of course, commercial licensees might still want to prevent future interferences should they decide to stay in the premises. On the other hand, the commercial licensee always has a choice to not renew the arrangement under the licence. What the law does here is give agency to the licensee to decide whether his current position is worth the occasional interference. This novel tort therefore serves as a lifeline for the licensee in order to prevent him from suffering further loss while he finds another venue to resume his business on.

This is also another reason for why the novel tort should not be seen as creating a new proprietary right. Ball has criticised Baker’s approach to \textit{Dutton} on the grounds that such a right to non-interference with a licence ‘can only be binding on the world because it is a property right’.\textsuperscript{143} In other words, the right to non-interference still is a right \textit{in rem} due to its very nature, not simply because it is protected through a tort. The issue with this view is that it looks solely at the

\begin{footnotesize}
\textsuperscript{141} Sandy Steel, ‘The Gist of Private Nuisance’ (2019) 135 Law Quarterly Review 192, 195. Steel further writes: ‘More ambitiously, physical damage could be considered a subspecies of interference with amenity—if so, the gist of private nuisance is simply interference with the amenity value of land or rights over land’.

\textsuperscript{142} Or at the very least, restorative justice should be at the basis of its foundation, especially when it concerns commercial licences.

\textsuperscript{143} Ball (n 106) 202.
\end{footnotesize}
exigibility of the right as against persons generally or universally. Under this wide understanding of proprietary rights, ‘the whole superstructure of the law of torts would have to be included’,\textsuperscript{144} even the right to not be assaulted or defamed.\textsuperscript{145} In the same way, categorising \textit{Dutton} as such would be a mistake. As explained in previous sections, there is something special in the \textit{in personam} content of certain licences which merits their protection. Laws LJ only provided a remedy to protect the economic benefit under the licence — the aim was not to vindicate title to land. What \textit{Dutton} does is to protect the economic benefit arising out of the contractual relations between the parties.

\textbf{CONCLUSION}

As controversial as the \textit{locus standi} of nuisance may be, it will remain comfortably seated in the jurisprudence of the Courts of England in both precedential and normative value. The occasional injustice to both domestic and commercial consumers in the receiving end of a licence transaction may, of course, arise in the context of nuisance by virtue of this limitation — and no doubt will these instances be stifling and unsatisfactory, given the policy aims that we have discussed. However, a removal of this limitation from the law of nuisance would be a mistake. This \textit{locus standi} acts as a stabiliser of the very conception and legal framing of the law of nuisance. Its existence is a corollary of the objective nature of locality considerations which are concerned not with a subjective way of enjoying the land, but with plan and sober and simple notions of living as enunciated by Knight-Bruce in \textit{Water v Selfe}. Its removal would force us to reconsider the whole case law of nuisance. Any protections that we might want to confer on licensees will therefore have to be found elsewhere. One such possibility lies in the case of \textit{Dutton}, but only if we interpret it as creating a wholly novel tort of violating the enjoyment of a licence. This allows us to safeguard the stability of nuisance as an independent tort, while also protecting the rights of both domestic and commercial licensees. Starting from a clean slate also provides the courts to pre-emptively anticipate any of the potential policy issues of extending the protection to licensees as the aforementioned discussions have touched on. It is hoped that this account allows for an opening for future debates.

\textsuperscript{145} ibid.
to start on. To take an example, this paper leaves open the question of whether the policy reasons discussed in this paper are strong enough to warrant the creation of a novel tort by the court in *Dutton* without prior legislative mandate. Ultimately, while the acceptance of such a tort will depend on future courts, the hope is that this paper will invigorate the court’s appetite in recognising the merits of such a tort in vanguard of licensee rights which have long been overlooked.