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The law of private nuisance following *Wu*: emanation
and access.

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Abstract

The boundaries of nuisance have traditionally been tightly guarded. However, the tort's underlying concern for the protection of property rights has provided it with sufficient flexibility to adapt to changing social and legal circumstances. The New Zealand Court of Appeal's decision in *Body Corporate 366611 v Wu* represents the extension of private nuisance to remedy gaps in the tort's application to the relationship between body corporates and individual proprietors under the Unit Titles Act 1972. The case concerned the defendant Body Corporate's denial of access to an individual proprietor with an interest in the common property from which the nuisance 'emanated'. Though the Court erred in its interpretation of existing nuisance principles relating to emanation, its decision can be rationalised on the basis that the plaintiff's lack of control and restricted access speak to the core interests protected by the tort. Given the Court's finding that access restrictions may be reasonably imposed upon occupiers under the Body Corporate's modified rules, the decision's limited effect is to provide an individual proprietor with a figurative right of access. Outside of clarifying these doctrinal uncertainties, the decision does not produce lasting ramifications for private nuisance.

Key Words

Torts; Nuisance; Emanation; Control; Access

I Introduction

The tort of nuisance is born from the need to protect the proprietary rights of individuals as they relate to land. The manner in which this protection is achieved is, however, hotly debated. Whilst, traditionally, property-based laws have been clearly delineated to provide certainty, the extent to which this applies to contemporary nuisance law is questionable.

Following *Clearlite Holdings Ltd v Auckland City Corporation*,¹ the question of the ability to sue for an interference emanating from an area in which the plaintiff retained an interest lay dormant. However, the recent decision of the New Zealand Court of Appeal in *Body Corporate 366611 v Wu*² has again thrust these issues into the legal spotlight. The case highlights the historical boundaries that traditionally distinguished actions in nuisance and trespass, as well as the role of private nuisance in protecting rights of access. It also brings into question the fundamental function of

¹ *Clearlite Holdings Ltd v Auckland City Corporation* [1976] 2 NZLR 729 (SC).

² *Body Corporate 366611 v Wu* [2012] NZCA 614.

tort law in providing a remedy for interferences with land amidst a heavily regulated system of property law.

This essay analyses the reasoning of the Court of Appeal and, in particular, explores the nature and the role of private nuisance as a mechanism for protecting rights of access. It concludes with the decision's implications for the future of nuisance and commercial property arrangements of the kind involved. This discussion demonstrates that the novel circumstances in *Wu* legitimise the application of nuisance in this setting. However, the reasoning underlying the Court's conclusions contains flaws, and highlights the need for further clarification of the law.

II The Law of Nuisance

A The Traditional Law

Nuisance represents a tort against land,³ and was traditionally available only to protect rights in relation to the use and enjoyment of land.⁴ It has since diverged into two distinct torts, the distinction between which is not always apparent. Private nuisance consists of an interference with a private right in connection with land, whereas public nuisance involves an interference with a public right shared equally among the members of a community, such as a right to pass on a public highway.⁵ Unlike private nuisance, a person can sue in public nuisance only where they have suffered "special damage" differentiating their loss from that suffered by the rest of the community.⁶

Private nuisance is defined as "a recurrent or persistent activity or state of affairs causing a substantial and unreasonable interference with the claimant's land, or with his use or enjoyment of that land."⁷ The use of nuisance or trespass was traditionally dependent upon whether the conduct complained of occurred on the plaintiff's land.⁸ Whilst trespass required the defendant's act to occur directly on the plaintiff's land, a

³ Donal Nolan "A Tort Against Land": Private Nuisance as a Property Tort" in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing Ltd, Oxford, 2012) 459 at 461.

⁴ J Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2009) at 5.

⁵ JW Neyers and Jordan Diacur "What (Is) A Nuisance? *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*" (2012) 90 Can Bar Rev 214 at 224.

⁶ At 224; citing *Hicket v Electric Reduction Co of Canada* (1970), 21 DLR (3d) 368 (Nfld SC).

⁷ Murphy, above n 4, at 33.

⁸ Paula Giliker "Nuisance" in Carolyn Sappideen and Prue Vines (eds) *Fleming's the Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) 487 at 496.

nuisance was traditionally available only where an interference emanated from outside this area.⁹

Private nuisance requires two elements: a substantial interference with the rights of the plaintiff, and interference that is unreasonable in the sense of its effect upon the plaintiff.¹⁰ This substantiality requirement distinguishes nuisance from trespass, which is actionable per se.¹¹ Interferences may materially affect the land itself, the plaintiff's use or enjoyment of that land, or alternatively any servitude or similar right over land.¹² The question of substantiality is generally regarded as a question of degree,¹³ with the claimant needing to demonstrate a "real interference" with the right to the use and enjoyment of their land.¹⁴ The paradigm for such infringing interference has been described as a "complete interruption of the use of land."¹⁵ These indirect interferences may consist of smells,¹⁶ physical invasions,¹⁷ or even interferences causing emotional distress.¹⁸ However, in measuring substantiality, the courts have historically demonstrated a predilection to treat physical harm as substantial, rather than interferences with either use or enjoyment of land.¹⁹

In assessing reasonableness, the law is less concerned with the unreasonableness of the infringing conduct as with the unreasonableness of the result.²⁰ The focus of the analysis is upon achieving a "tolerable balance" between competing litigants,²¹ meaning intervention is only justifiable where excessive use of property causes inconvenience beyond what could reasonably be expected.²² Both the duration of the

⁹ Giliker, above n 8, at 496.

¹⁰ Murphy, above n 4; Simon Deakin, Angus Johnston, and Basil Markesinis *Markesinis and Deakin's Tort Law* (7th ed, Oxford University Press, Oxford, 2013) at 415.

¹¹ Murphy, above n 4, at 35.

¹² Deakin, Johnston and Markesinis, above n 10, at 414.

¹³ *Gaunt v Fynney* (1872) 8 Ch App 8, at 11-12 per Lord Selbourne; cited in Murphy, above n 4, at 35.

¹⁴ *Tetley v Chitty* [1986] 1 All ER 663 at 665.

¹⁵ Giliker, above n 8, at 500.

¹⁶ *Wheeler v J J Saunders* [1995] 2 All ER 697.

¹⁷ *Christie v Davey* [1893] 1 Ch 316.

¹⁸ *Thompson-Schwab v Costaki* [1956] 1 WLR 335 (CA).

¹⁹ Murphy, above n 4, at 43; citing P Cane *The Anatomy of Tort Law* (Hart Publishing, Oxford, 1997) at 90.

²⁰ Deakin, Johnston and Markesinis, above n 10, at 414.

²¹ Giliker, above n 8, at 499.

²² Giliker, above n 8, at 500; see *Walter v Selfe* (1851) 4 De G & Sm 316; 64 ER 849, per Knight-Bruce V-C.

nuisance and the object of the defendant in undertaking the offending act are relevant to this inquiry.²³

B A Change in Approach

Despite the traditionally rigid application of nuisance, its conceptual basis provides sufficient flexibility to accommodate changing social circumstances. Judicial commentary suggests the tort has “yet to be united under a coherent thread of general principle.”²⁴ This denotes an inherent discretion within nuisance, which was cited by Asher J in the High Court in *Wu* as facilitating the law’s adaptation to the “changing circumstances of property ownership and developing community standards.”²⁵

This shift from orthodox nuisance principles was first contemplated in *Clearlite Holdings Ltd v Auckland City Corporation*,²⁶ where it was held that the disturbance of rights in land required a remedy regardless of the source of the alleged interference.²⁷ The conception of nuisance as a field of tort liability, focused upon the protection of property rights, might provide sufficient doctrinal flexibility to legitimise the stretching of nuisance principles in response to emerging contingencies.

Despite judicial disquiet over the correctness of *Clearlite*,²⁸ the decision remains intact. The re-emergence of these ideas in the case of *Wu* demonstrates that certain judges in New Zealand view nuisance as a means of protecting interests falling along the boundaries of the law’s current scope. The issue is whether the use of private nuisance as a mechanism for compensating such harm is too detached from traditional nuisance doctrine to be justified.

²³ Giliker, above n 8, at 504; *Benjamin v Storr* (1874) LR 9 CP 400 at 407 per Brett J.

²⁴ A Mullis and K Oliphant *Torts* (4th ed, Palgrave Macmillan, Basingstoke, 2011) at 247; see also C Gearty “The place of private nuisance in a modern law of torts” (1989) 48 CLJ 214 at 214-216.

²⁵ *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) at [30].

²⁶ [1976] 2 NZLR 729 (SC).

²⁷ *Clearlite Holdings Ltd v Auckland City Corporation*, above n 26, at 740.

²⁸ *BP Oil New Zealand v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC).

III Background to Wu

A The Unit Titles Act 1972

The unit titles framework under which Wu acquired a registered title has ramifications for the body corporate-individual proprietor relationship that necessitate a basic understanding of the Unit Titles Act. The Act attempts to reconcile the existing property registration system with contemporary ownership models for flats and business premises.²⁹ It provides the individual proprietor of a delineated stratum estate with the exclusive right to occupation and use. Common property areas are owned in common and managed by a body corporate, comprising all the individual proprietors of units in shares proportional to their unit entitlement.³⁰ Both the body corporate and common property are seen as separate legal entities from the individual units and the associated individual proprietors.³¹ This distinction represents the fundamental theme of the statute and underpins the issues in *Wu*.³² Individual property is the realm of the individual registered proprietor, whereas ‘common property’ is “owned [in common] by *all* proprietors and must be managed by the body corporate for the common good of all.”³³

The Act provides default rules that prescribe conduct in relation to common property,³⁴ and to individual units within the estate.³⁵ Its underlying rationale is the need to provide for a democratic model to reconcile the differing interests associated with commercial property arrangements of the ilk involved in *Wu*.³⁶ It is in the context of these interests that the Act imposes duties upon a body corporate,³⁷ whilst conferring on the body corporate all powers reasonably necessary to carry out such

²⁹ G W Hinde et al *Hinde, McMorland & Sim Land Law in New Zealand* (LexisNexis, Wellington, 2005) Vol 1 at 14.022; cited in *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [84].

³⁰ Unit Titles Act 1972, s 9(1); *World Vision of NZ Trust Board v Seal* [2004] 1 NZLR 673 (HC) at [24].

³¹ Unit Titles Act 1972, s 14(2).

³² *North Shore City Council*, above n 29, at [97].

³³ *North Shore City Council*, above n 29, at [97].

³⁴ The default rules binding all proprietors collectively as a body corporate are set out in Schedule 2 of the Act. These apply in the absence of a unanimous resolution to the contrary; see Unit Titles Act 1972, s 37(3).

³⁵ Schedule 3 provides default rules that may be amended through a body corporate’s resolution at a general meeting; see Unit Titles Act 1972, s 37(4).

³⁶ *World Vision*, above n 30, at [51].

³⁷ See the Unit Titles Act 1972, s 15(1).

duties.³⁸ These duties provide the background for the relevant conduct of Theta and Body Corporate 366611 in *Wu*.

B The Facts of the Case and Procedural History

The developer Sanctuary Group purchased Empire Apartments and converted it into student accommodation, which it advertised to prospective investors. Whilst in control of the body corporate, Sanctuary leased all units to Academic Accommodation Management Ltd (Academic) as building manager. All units were sold subject to this lease, with Academic undertaking to license each unit to student tenants. Wu subsequently became an owner and individual proprietor under this arrangement. In August 2007 Academic resigned from its role, with Theta appointed as building manager in its stead. However, the terms of the lease offered by Theta were substantially different from the prior arrangement. Most significantly, it required each individual proprietor's accession to Security and Access Protocols (the Protocols) designed to mitigate safety and insurance problems that had arisen under Academic's management. Wu refused to enter this modified lease.

It is suspected that, on the 31 August, Academic terminated all occupation licences and changed the electronic locks. Proprietors who had not signed the Protocols were denied access to both common areas and their individual units. Subject to the accession of refusing proprietors, access remained restricted until December 2009. On 14 October 2009 Wu issued proceedings in the High Court. Lang J concluded that these restrictions were unreasonable, and ordered that access be provided.³⁹ Consequently, in December 2009 electronic key cards were provided to Wu and others to allow access to common areas, at which point some proprietors were able to access their units. Wu subsequently brought these proceedings in private nuisance against the Body Corporate and Theta as its agent.

³⁸ Unit Titles Act 1972, s 16.

³⁹ *Wu v Body Corporate 366611* (2010) 10 NZCPR 917 (HC) at [53].

IV The Decisions

A The High Court Decision

Asher J's decision in the High Court is relevant given the adoption by the Court of Appeal of many of the Judge's conclusions upon the issue of emanation. Asher J reasoned that the relevant nuisance for the purposes of the analysis was the original reprogramming and maintenance of the electronic locks to prevent access.⁴⁰ In considering that locking out constituted an actionable nuisance, Asher J deduced that, in the absence of any authority, the conduct was capable of doing so.⁴¹ Despite this, Wu's claim appeared limited, as a nuisance action was only available where an interference emanated from outside the plaintiff's land. The Judge therefore proceeded to consider whether the nuisance's 'emanation' from property owned partly in common by the plaintiff precluded Wu's private nuisance action – the 'emanation issue'.

Asher J first justified his allowance of the emanation upon a theoretical basis, given that the focus of an investigation in nuisance was upon the relevant interest of the plaintiff, and not the defendant's conduct.⁴² As a corollary to this, the Judge observed that there was a "lack of formalism about the law of nuisance, which has allowed it to adapt to the changing circumstances of property ownership and developing community standards."⁴³ Upon this basis, he reasoned that there was an inherent flexibility within the tort to adapt and provide a remedy in response to novel developments, such as that contemplated by the Unit Titles Act.

The Judge then sought to justify his conclusion on the basis of control. He held that there was no need for the defendant to have a particular status as owner or occupier of adjacent land, provided the plaintiff did not retain "exclusive control" over the area constituting the source of the nuisance.⁴⁴ Through reference to *Hooper v Rogers*,⁴⁵ the Judge reasoned that co-owners were not precluded from bringing an action in

⁴⁰ *Wu*, above n 25, at [31].

⁴¹ *Wu*, above n 25, at [34].

⁴² *Wu*, above n 25, at [29].

⁴³ *Wu*, above n 25, at [30].

⁴⁴ *Wu*, above n 25, at [30].

⁴⁵ [1975] 1 Ch 43 (CA).

nuisance given their inability to control the actions of the other party.⁴⁶ The Judge buttressed this with *Clearlite Holdings Ltd v Auckland City Corporation*, which had previously held that a nuisance emanating from neighbouring land did not represent a pre-requisite to a cause of action.⁴⁷

Finally, Asher J relied upon *J Lyons & Sons v Wilkins*⁴⁸ and *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia*⁴⁹ in concluding that private nuisance may potentially provide a remedy in cases involving restricted access.⁵⁰

Asher J ultimately concluded that the fact that the actions were undertaken by defendants in common areas, co-owned by the plaintiff, did not preclude a nuisance action. He commented that the actions of Theta and the Body Corporate could not be materially distinguished from those of an adjoining owner or third party preventing access by way of its physical activities.⁵¹

B The Court of Appeal Decision

In the Court of Appeal, Heath J observed that the nuisance constituted the defendant's refusal to supply an access card giving access to common property and the individual unit.⁵² The Judge commented that the refusal could have resulted from a decision of the defendant either inside or outside the Empire building.⁵³

Heath J reiterated Asher J's finding that a successful action in private nuisance was not precluded by precedent, observing that the "authorities do not lay down any immutable rule that the interference must 'emanate' from land occupied or controlled by a defendant."⁵⁴ The Court then affirmed Asher J's comments regarding exclusive control. It held that, so long as a plaintiff did not have exclusive control over the relevant area, there were no restrictions on the area from which a nuisance may emanate.⁵⁵

⁴⁶ *Wu*, above n 25, at [30].

⁴⁷ At [30].

⁴⁸ [1899] Ch 225 (CA) at 267 per Lindley MR and 271-272 per Chitty LJ.

⁴⁹ [1986] VR 383 (SC).

⁵⁰ *Wu*, above n 25, at [33].

⁵¹ *Wu*, above n 25, at [34].

⁵² *Body Corporate 366611 v Wu* [2012] NZCA 614 at [94].

⁵³ At [94], per Heath J.

⁵⁴ At [95], per Heath J.

⁵⁵ At [98], per Heath J.

Heath J upheld Wu's private nuisance claim through analysing the nature of the Body Corporate under the Unit Titles Act 1972. In particular, he distinguished the Body Corporate's rights and responsibilities in relation to common property from the rights of an individual proprietor in individual property, with the Body Corporate retaining sufficient independence to support a tort claim.⁵⁶ Heath J observed that, regardless of whether the decision not to provide access was made on common property, the interference by the third party would constitute the tort.⁵⁷ Further, the Judge noted that no earlier authority supported the argument that emanation from an adjacent property was a precondition to a successful private nuisance action.⁵⁸

In assessing reasonableness, Heath J referred to s 15(1) of the Unit Titles Act 1972 and explained the nature of the Body Corporate's duties, which included the maintenance of property and insurance.⁵⁹ The Judge acknowledged that s 16 of the Act gave the Body Corporate the powers reasonably necessary to enable its performance of those duties.⁶⁰ However, the Court differed from Asher J as to which version of the Body Corporate's rules was applicable.⁶¹ Consequently, the Body Corporate was permitted to provide security keys restricting access on grounds of security, given the use of the premises as student accommodation.⁶² However, the Court of Appeal acknowledged that the accompanying discretion must be reasonably exercised, given the rule could not have been intended to arbitrarily prevent proprietors' access to individual units.⁶³ Consequently, the right to restrict access existed only where there were genuine concerns about property damage and vandalism adversely affecting insurance.⁶⁴ In the present context, the restrictions placed upon Wu's access were not reasonably necessary and therefore unjustified.⁶⁵ The defendants' conduct thus constituted an actionable private nuisance.

⁵⁶ *Wu*, above n 52, at [97], per Heath J.

⁵⁷ At [97], per Heath J.

⁵⁸ At [97], per Heath J.

⁵⁹ At [59], per Heath J; referring to Unit Titles Act 1972, s 15(1).

⁶⁰ At [61], per Heath J.

⁶¹ At [63], per Heath J.

⁶² At [73], per Heath J.

⁶³ At [74], per Heath J.

⁶⁴ At [79], per Heath J, and [79] per Heath J.

⁶⁵ At [86], per Heath J.

Heath J then made an important distinction, observing that, while the restriction of access in these circumstances was unreasonable according to the access provisions, the Body Corporate could have restricted access to a potential licensee unless the licensee acceded to the relevant protocols.⁶⁶ The Court consequently remitted the question of damages to the High Court, citing the difficulty in assessing damages where licensees could have been lawfully excluded from Wu's unit.⁶⁷ The outcome of the Court of Appeal's decision differs from that in the High Court, as the access provisions validated by the Court of Appeal allow the reasonable restriction of occupiers.⁶⁸ Under the High Court's reasoning, the exclusion of occupiers in this manner would have been compensated.⁶⁹ This difference is relevant when evaluating the overall implications of the Court of Appeal's decision.

V Analysis

A The Nature of the Nuisance

Before considering the emanation issue, it is appropriate to identify the relevant nuisance that the Court is concerned with. In the High Court, Asher J considered that the nuisance represented the act of originally reprogramming the locks and their subsequent maintenance, thereby restricting Wu's access to common and individual property.⁷⁰ The Court of Appeal framed the issue in a slightly different manner, observing that the nuisance constituted the defendant's refusal to provide access cards to Wu and other affected proprietors.⁷¹ Both formulations are focused upon the defendant's conduct in continually restricting access to the plaintiff.

Given that the locks were changed electronically, however, it is difficult to frame the actual 'source' from which the nuisance emanated. This confusion is recognised by Heath J, who observed that the decision to refuse access could have been made either inside or outside the Empire complex.⁷² The fact that the remainder of the analysis in both decisions involves extensive consideration of the emanation issue indicates that

⁶⁶ *Wu*, above n 52, at [86], per Heath J; at [124], per Hammond J.

⁶⁷ *Wu*, above n 52, at [89], per Heath J.

⁶⁸ *Wu*, above n 52, at [124], per Hammond J; at [129], per Hammond J.

⁶⁹ *Wu*, above n 52, at [130], per Hammond J.

⁷⁰ *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) at [31].

⁷¹ *Wu*, above n 52, at [94].

⁷² *Wu*, above n 52, at [94].

each judgment considered the location of the locks themselves as the appropriate point of reference in considering the remainder of the analysis. However, neither judgment appears to consider this issue closely, preferring to found the acceptance of locking out as a basis for an actionable nuisance upon the absence of any prior precedent that such an act was incapable of doing so.⁷³ The approach in both judgments implicitly suggests that both Asher J and the Court of Appeal saw themselves free to consider whether locking out was capable of supporting a nuisance action on the basis of first principles. The extent to which traditional nuisance doctrine supports this conclusion is considered later.

1 Substantial interference

The substantiality issue was largely overlooked by both the High Court and Court of Appeal. Rather, both courts implied that the complete disruption of an individual proprietor's access to their own land always represents substantial interference. While there is support for this conclusion within legal literature,⁷⁴ both judgments assume the point without discussing substantiality.

The issue of substantiality is generally a question of degree,⁷⁵ with the claimant needing to demonstrate a "real interference" with the right to the use and enjoyment of their land.⁷⁶ This analysis is conducted objectively, in terms of any impact on the use of the land itself.⁷⁷ One issue that emerges with this analysis is the effect of Wu's position as a foreign investor upon the substantiality of any restricted access to the relevant individual property. The Canadian Supreme Court recently indicated that a substantial interference must "interfere to a significant extent with the *actual* use being made of the property."⁷⁸ This will be further explored later in this analysis. When applied to the actual circumstances of the plaintiff's use in *Wu*, this statement may cause the substantiality of the alleged interference to be brought into question.

⁷³ *Wu*, above n 52 at [95]; *Wu*, above n 70, at [34].

⁷⁴ Paula Giliker "Nuisance" in Carolyn Sappideen and Prue Vines (eds) *Fleming's the Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) 487 at 500.

⁷⁵ *Gaunt v Fynney* (1872) 8 Ch App 8, at 11-12 per Lord Selbourne.

⁷⁶ *Tetley v Chitty* [1986] 1 All ER 663 at 665.

⁷⁷ Donal Nolan "'A Tort Against Land': Private Nuisance as a Property Tort" in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing Ltd, Oxford, 2012) 459 at 471.

⁷⁸ *Antrim Truck Centre Ltd v Ontario (Transportation)* 2013 SCC 13 at [22] (emphasis added); citing *St. Pierre v Ontario (Minister of Transportation and Communications)* 1987 CanLII 60 (SCC) 1 SCR 906 at 915.

As an overseas investor, Wu's position as individual proprietor was almost exclusively for the purpose of licensing the property to individual student tenants. Following the Court of Appeal's findings regarding the validity of any access restrictions placed upon these licensees, it is difficult to see how there could be any substantial interference with Mr Wu's rights in actual use. Given the plaintiff's intended use, an argument exists that he was denied the opportunity to market his unit, with the intention of having tenants subsequently enter access protocols. Under the previous lease arrangement, this letting function had been discharged by Academic as building manager; the individual proprietors were not themselves responsible for obtaining individual tenants. In light of this, not only was Wu never in occupation of the unit, he was never responsible for acquiring licences from prospective tenants. To therefore claim that the denial of his opportunity to market the property represented a substantial interference would be at odds with Wu's literal use of the land.

However, to place such restrictions on a small subset of potential claimants by virtue of their novel situation of property ownership would be to unjustly dilute the rights afforded to all individual proprietors under contemporary property law. Consequently, regardless of the failure of both the High Court and Court of Appeal to undertake an assessment of substantiality, a principled view of the situation suggests that locking out should constitute a substantial interference capable of supporting a nuisance action. This follows from Wu's status as individual registered proprietor, regardless of the purposes for which he obtained registration.

B The Emanation Point

I A question of control

One of the fundamental bases for the Court of Appeal's finding that interferences in nuisance may emanate from land owned by the plaintiff is the notion of control. In the High Court, Asher J observed that the source of the emanation should not impede a private nuisance action, provided the plaintiff did not have exclusive control over the relevant area.⁷⁹ This view was affirmed by Heath J in the Court of Appeal, who

⁷⁹ *Wu*, above n 70, at [30].

believed such an approach accorded with their views regarding the Body Corporate's status and the irrelevance of the emanation's source.⁸⁰

The distinction between having rights in and having exclusive control over the relevant area for the purposes of standing in private nuisance is a logical one. One of the primary justifications for retaining the emanation rule stems from the supposed ability of an owner or occupier to control any potentially harmful activity conducted upon his or her own land.⁸¹ In complex commercial property arrangements of the nature involved in *Wu*, the ability to distinguish between rights and control makes this analysis increasingly difficult.

The delineation of responsibility and control is directly contemplated by the Unit Titles Act 1972. The fundamental theme of the Act is considered to be the distinction between individual units and common property.⁸² Individual property is largely the responsibility of the individual registered proprietor, whereas common property is owned and managed in common by the Body Corporate in accordance with the duties stipulated in its rules.⁸³ The Body Corporate itself constitutes a distinct entity capable of being sued under its corporate name.⁸⁴ The statute is also clear that, in the case of legal proceedings, common and individual property are to be considered separate premises.⁸⁵ Heath J considered this sufficient to justify his findings as to control.⁸⁶ It would be an anomalous distinction if, whilst capable of being the subject of a different legal action, an individual proprietor's rights as a member of the Body Corporate prevented that individual bringing an action in private nuisance. If this distinction were allowed to stand in the absence of the Body Corporate's accepted rules, an individual occupier would theoretically be able to sue in private nuisance, whereas the holder of the individual registered title would be precluded from doing so as a member of the Body Corporate. This result would be inconsistent with the rationale of nuisance as a land-based tort protecting the rights-holder from third party

⁸⁰ *Body Corporate 366611 v Wu* [2012] NZCA 614 at [97].

⁸¹ *Hooper v Rogers* [1975] 1 Ch 43 (CA) at 51; also see Rosemary Martyn "Nuisance arising on the plaintiff's land: the Clearlite case" (1979) 10 VUWLR 144 at 148.

⁸² *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [97].

⁸³ *North Shore City Council*, above n 82, at [97]; Unit Titles Act 1972, s 9(1).

⁸⁴ Unit Titles Act 1972, s 13(1).

⁸⁵ *North Shore City Council*, above n 82, at [89]; Unit Titles Act 1972, s 14(2)(a).

⁸⁶ *Wu*, above n 80, at [97].

interference with those rights. Consequently, the distinction between rights in and control over land represents an appropriate means of reconciling the existing rules regarding emanation with the application of private nuisance to these circumstances.

The absence of Wu's control over the source of the nuisance is most evident in his inability to prevent the offending conduct. As an individual proprietor, Wu was only responsible for his individual property. His rights in the common property were limited in so far as he retained the right to vote upon matters of concern to the Body Corporate collectively.⁸⁷ In relation to the Body Corporate's support of 'Security and Access Protocols', Wu represented one of a small minority of proprietors who refused to enter into the amended lease agreement. As a result, Wu had little power to prevent the decision being taken to restrict access. This embellishes the merit found in distinguishing a plaintiff's rights in land from their level of control over it, in order to preserve an action in private nuisance for diminution of those rights caused by an interference emanating from the relevant area.

In reaching his conclusions upon control, Asher J in the High Court relied partially upon *Hooper v Rogers*. He reasoned that the decision supported the conclusion that one co-owner was not precluded from claiming in nuisance against the other owner, given their inability to control the actions of the other party.⁸⁸ The Court of Appeal affirmed these findings as they related to the issue of control.⁸⁹ *Hooper* concerned parties who were owners of adjacent farmhouses whilst co-owning the immediately surrounding land. The defendant undertook bulldozing works on sloped land beneath the plaintiff's farmhouse, exposing the slope to soil erosion that would eventually compromise its supports.⁹⁰ In considering private nuisance, Scarman LJ observed obiter that the plaintiff's ability to control the actions of the co-owning defendant was no greater than that of a stranger.⁹¹ The plaintiff's ownership position was therefore an irrelevant consideration, unless that position could be used to raise a defence of contributory negligence or *volenti non fit injuria*.⁹² This supports both Courts' findings that Wu's claim in private nuisance was possible on the basis that he lacked

⁸⁷ Unit Titles Act 1972, s 9(1).

⁸⁸ *Wu*, above n 70, at [30].

⁸⁹ *Wu*, above n 80, at [98].

⁹⁰ *Hooper*, above n 81.

⁹¹ At 51, per Scarman LJ.

⁹² At 51, per Scarman LJ.

sufficient control to avert the interference complained of. This is especially so given the analogous facts present in *Wu*, where there existed a similar arrangement of co-ownership and occupation of common property from which the nuisance emanated.

In affirming the High Court's conclusion that earlier authorities do not support the emanation requirement, however, the Court of Appeal demonstrated a fundamental misunderstanding of prior precedent. In his judgment in *Hooper*, Scarman LJ observed that the claimant must prove "that the threat of damage to his land arises from acts or omissions of the defendant on his, the defendant's, land."⁹³ The Judge based this observation on the fact that an owner retained the ability to exclude those likely to perpetrate a nuisance on his own property.⁹⁴ As will be demonstrated shortly, these ideas are not limited to the observations of Scarman LJ in *Hooper*. This implies that the statement by Heath J in the Court of Appeal that the Court was free to consider the matter effectively *res integra* was manifestly unfounded. Conversely, whilst the authorities may support the more limited distinction between control and rights in land for the purposes of private nuisance, they potentially do not support a wider deviation from traditional nuisance principles.

Another case that supports this control distinction is *Clearlite Holdings Ltd v Auckland City Corporation*.⁹⁵ Whilst the decision was relied upon by Asher J in the High Court as supporting the contention that a nuisance emanating from neighbouring land did not represent a pre-requisite to a cause of action,⁹⁶ the case is not mentioned by the Court of Appeal. This seems odd given the precedent speaks to the exact emanation issue at the heart of the litigation. The circumstances in *Clearlite* involved the Auckland City Corporation employing the second defendant to lay new drainage pipes. In the absence of negligence, the digging of a tunnel to carry the pipes caused the concrete floor of the plaintiff's factory, located directly above, to crack.⁹⁷ Contrary to the observations of the Court of Appeal, Mahon J explicitly quoted the commentary in *Salmond on Torts* (16th ed)⁹⁸ that a "nuisance must have arisen

⁹³ *Hooper*, above n 81, at 50, per Scarman LJ.

⁹⁴ At 50 and 51, per Scarman LJ.

⁹⁵ [1976] 2 NZLR 729 (SC).

⁹⁶ *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) at [30].

⁹⁷ *Clearlite*, above n 95.

⁹⁸ John Salmond *Salmond on Torts* (16th ed, Sweet & Maxwell, London, 1973) at 52.

elsewhere than in or on the plaintiff's premises."⁹⁹ Further, the Judge acknowledged the decision in *Titus v Duke*,¹⁰⁰ where the plaintiff, as a lessee of premises upon which a rotted tree branch had fallen and caused damage, was denied a remedy in private nuisance because the alleged interference stemmed from land in his occupation.¹⁰¹ Despite this precedent, Mahon J observed that the proposition in *Titus* that liability for private nuisance was necessarily predicated upon the defendant being the owner or occupier of the adjacent was incorrectly decided.¹⁰²

The main difficulty faced by Mahon J in reconciling *Titus* and traditional nuisance principles with the particular facts of *Clearlite* stemmed from the plaintiff's lack of control over the source of the interference.¹⁰³ This had arisen by virtue of the defendant's statutory responsibility for the tunnel that represented the source of the relevant emanation. It is these same ideas of control that preclude the reconciliation of the Court of Appeal's conclusions in *Wu* with traditional nuisance doctrine. In relation to the facts in *Clearlite*, academic commentary has suggested that the nature and extent of the defendant's control over the area from which the nuisance emanated meant that it was not a case in which the nuisance was committed on the plaintiff's land.¹⁰⁴

It is therefore the absence of control, not the presence of an emanation from adjacent land, which is determinative. This is evident in *Clearlite*, where it is easier to rationalise the Court's decision on the basis of the plaintiff's lack of control than it is to frame the relevant emanation. In the context of *Wu*, were the locks to be changed manually, rather than remotely, *Wu* would potentially still suffer sufficiently limited control to sustain an action, despite the absence of any 'emanation'. With the increasing difficulty faced in framing an emanation in contemporary nuisance, it is arguably more appropriate to qualify nuisance actions on the basis of control than through a strict emanation requirement. To this extent, the conclusion of the Court of Appeal in *Wu* regarding the plaintiff's control can be justified on the grounds that it does not represent a substantial deviation from nuisance principles. Conversely, the

⁹⁹ *Clearlite*, above n 95, at 731.

¹⁰⁰ *Titus v Duke* (1963) 6 WIR 135 (T).

¹⁰¹ *Titus v Duke*, above n 100.

¹⁰² *Clearlite*, above n 95, at 735.

¹⁰³ Martyn, above n 81, at 148.

¹⁰⁴ RS Chambers "Nuisance – Judicial Attack on Orthodoxy" [1978] NZLJ 172 at 177.

decision represents a necessary development to fill a lacuna within a heavily regulated property system whereby owners and occupiers have experienced diminished control over their own land.

Whether *Clearlite* can be used to justify the wider abolition of the requirement of an emanation from the defendant's adjacent land is a separate question. Whilst the decision arguably dispenses with the requirement of emanation, this approach has been criticised in both judicial and academic circles. R S Chambers' commentary upon the decision postulates that Mahon J's judgment was erroneously decided.¹⁰⁵ The author believed the only justification for the ultimate result in the case was the plaintiff's lack of control, a factor that led the author to "applaud the result, if not the reasoning."¹⁰⁶ The wider effect of Mahon J's decision was also criticised in *BP Oil New Zealand Limited v Ports of Auckland Limited*,¹⁰⁷ where Rodney Hansen J observed that there existed "no reason in law or justice to extend nuisance beyond its established boundaries."¹⁰⁸ In this instance, the Judge considered that remedies, such as negligence and trespass, already existed for injury to land caused by acts upon it.¹⁰⁹ The question therefore remains whether, in situations in which the plaintiff has no recourse to any alternative legal remedy, the extension of private nuisance can be justified in providing one.

It is unclear how influential the *Clearlite* decision was upon the judgment of the Court of Appeal. While Heath J affirmed the conclusions of Asher J in the High Court in relation to control,¹¹⁰ *Clearlite* itself is not discussed. Although this illustrates a degree of judicial oversight here on behalf of the Court of Appeal, the decision still provides some justification for their conclusions in so far as they are based upon Wu's absence of control. However, the misguided conclusions of the Court of Appeal regarding their ability to rule upon the wider emanation issue *res integra* suggests a more principled look at the theoretical justifications for the rule is required.

¹⁰⁵ Chambers, above n 104, at 176.

¹⁰⁶ Chambers, above n 104, at 177.

¹⁰⁷ [2004] 2 NZLR 208 (HC).

¹⁰⁸ At [85].

¹⁰⁹ At [85].

¹¹⁰ *Body Corporate 366611 v Wu* [2012] NZCA 614 at [98].

2 Theoretical justifications for the extension of nuisance

The question remains whether the need to vindicate the rights at the core of nuisance's protection outweighs adherence to established principles. One of the functions of private nuisance is to reconcile the rights of adjacent land users to maximise the use of their proprietary rights.¹¹¹ The reasonableness component of the analysis, whereby the rights of adjacent land users are balanced in accordance with the context surrounding the land use, demonstrates this. The analysis is predicated upon achieving a "tolerable balance",¹¹² aimed at facilitating each individual's enjoyment of their proprietary rights, whilst regulating use to protect the equivalent rights of adjacent land users. The premise of this analysis is that nuisance is a tort against land.¹¹³ This principle has formed the basis for judicial resistance to change in other areas of nuisance. This is evident from the refusal of the House of Lords in *Hunter v Canary Wharf* to uphold the Court of Appeal's ruling that standing in private nuisance extended to non-occupiers of the affected property.¹¹⁴ The reason for the hesitancy to extend the tort's scope in this manner stems from the fact that torts of this nature are not free-standing causes of action, but rather represent "constituent elements of the wider law of property."¹¹⁵ This focus upon the land itself is the reason why the law looks to the infringing conduct's "harmful result" and not the nature of the conduct itself.¹¹⁶ Such considerations have informed the Canadian Supreme Court's belief that there is not a 'typology' of types of nuisance.¹¹⁷

As a result of this land-based analysis, there exists some prima facie justification for the Court of Appeal's conclusions upon the emanation issue. Wu retained rights in his individual property by virtue of his individual registered title. Consequently, independently of Wu's position vis-à-vis the Body Corporate, there exist a series of proprietary rights, including access, which private nuisance primarily exists to protect.

¹¹¹ Paula Giliker "Nuisance" in Carolyn Sappideen and Prue Vines (eds) *Fleming's the Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) 487 at 499; *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 WLR 683 at 698, per Veale J.

¹¹² Giliker, above n 111, at 499.

¹¹³ Donal Nolan "'A Tort Against Land': Private Nuisance as a Property Tort" in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing Ltd, Oxford, 2012) 459 at 461; citing *Hunter v Canary Wharf* [1997] AC 655 (HL).

¹¹⁴ *Hunter v Canary Wharf* [1997] AC 655 (HL).

¹¹⁵ Nolan, above n 113, at 475.

¹¹⁶ Giliker, above n 111, at 487.

¹¹⁷ *Antrim Truck Centre Ltd v Ontario (Transportation)* 2013 SCC 13 at [23].

Adherence to the principles that have shaped the tort's development should not preclude it being used to provide a remedy where one is merited.

The historical basis for the law's approach to emanation was the distinction between the actions of trespass and nuisance.¹¹⁸ Traditionally, any interference that consisted of a physical act occurring directly on the plaintiff's land was considered a trespass, with nuisance limited to interferences emanating from outside the plaintiff's land.¹¹⁹ However, this distinction cannot be relied upon in upholding the emanation principle in the context of modern property arrangements. The longstanding nature of the rule does not conceal the fact that it originated at a time when complex commercial property arrangements, such as stratum estates under the Unit Titles Act 1972, were beyond contemplation. The emanation principle thus stems from a time in which the concepts of occupation/ownership and control were incapable of distinction. This fact should not preclude the law developing in accordance with changing social and legal circumstance.

Much has been made of the lack of any coherent, unified principle within private nuisance.¹²⁰ Whilst this may cause inherent uncertainty and confusion within the law,¹²¹ it provides private nuisance with the flexibility to adapt to these changing circumstances in order to vindicate the rights of land users. Both Asher J and the Court of Appeal believed this justified extending the ambit of private nuisance to the present facts.¹²² The Court of Appeal's conclusions appear logical when analysing the overall result of the decision through the lens of traditional nuisance principles. After all, tort law's foremost function is to compensate harm,¹²³ or, where the nuisance is ongoing, to enjoin the relevant state of affairs. This is exacerbated by the fact that the plaintiff's ability to control the nuisance was limited. It follows that, in situations such as the present, where the plaintiff has recourse to no other legal remedy, the extension of private nuisance to vindicate an individual proprietor's right of access is justified.

¹¹⁸ Giliker, above n 111, at 496; N McBride and R Bagshaw *Tort Law* (3rd ed, Pearson Longman, Harlow, 2008) at 371-372.

¹¹⁹ Gilker, above n 111, at 496.

¹²⁰ A Mullis and K Oliphant *Torts* (4th ed, Palgrave Macmillan, Basingstoke, 2011) at 247.

¹²¹ J Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2009) at 5.

¹²² *Wu*, above n 96, at [30].

¹²³ A M Linden *Canadian Tort Law* (5th ed, Butterworths, Toronto, 1993).

C Private Nuisance and the Issue of Access

A significant tension underlying both Courts' judgments in *Wu* is the perceived need to provide a remedy in cases of restricted access. The protection of such fundamental incidents of property ownership has led to the blurring of private and public nuisance, particularly within the Canadian courts.¹²⁴ The issue therefore becomes the extent to which the Court of Appeal based its judgment upon the need to provide a remedy for restricted access, and whether the use of private nuisance to achieve such aims is appropriate.

One indication that the Court of Appeal's decision attempts to use private nuisance to resolve what is conventionally a public nuisance issue is the nature of the facts in *Wu*. If *Wu* were the registered proprietor of a property accessed by way of a public highway, any denial of access would likely constitute public nuisance, as *Wu* would be able to demonstrate that he had suffered special damage capable of supporting the action.¹²⁵ However, the actual nature of *Wu*'s individual property necessitated that he proceed through common areas in order to access his unit. The actions of the Body Corporate in restricting access did not therefore infringe a wider right held by the public, but one specific to the individual proprietors who were denied access. This necessitated *Wu*'s reliance on private nuisance as a means of vindicating his right to access.

The Courts' focus upon access is evident from the nature of the cases cited in the judgment of Asher J. The Judge first discussed the flexible nature of nuisance, citing *J Lyons & Sons* and *Dollar Sweets Pty Ltd* as examples of this alleged flexibility.¹²⁶ Both cases represent dubious exemplars, given their reputation as 'watching and besetting cases' in which the application of private nuisance has been subsequently questioned.¹²⁷ *J Lyons & Sons* involved the picketing of the plaintiff's works by the defendant's employees. The primary focus of the litigation was upon the defendant's liability for watching and besetting under s 7 of the Conspiracy and Protection of

¹²⁴ JW Neyers and Jordan Diacur "What (Is) A Nuisance? *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*" (2012) 90 Can Bar Rev 214 at 224.

¹²⁵ See *Tynan v Balmer* [1967] 1 QB 91 at 105 per Widgery J; *Bird v O'Neal* [1960] AC 907.

¹²⁶ *Wu*, above n 96, at [33].

¹²⁷ Chambers, above n 104, at 174.

Property Act 1875.¹²⁸ The Court's discussion of private nuisance only arose due the defendant's assertion that such conduct was lawful unless private nuisance was established. Thus while Lindley M.R. and Chitty LJ both entertained the possibility of private nuisance obiter, their limited discussion of the tort reflects its ancillary nature within the decision. Similarly, *Dollar Sweets Pty Ltd* involved the picketing of the plaintiff's premises whereby the defendants caused disruption to the plaintiff's business.¹²⁹ In the Victorian Supreme Court, Murphy J found that the occupation of a roadway causing hesitation to proceed constituted 'besetting' amounting to nuisance at common law.¹³⁰ The Judge's conclusions, whilst founded heavily upon the decision in *J Lyons & Sons*, also failed to define whether the relevant action was sourced in private or public nuisance.

Asher J's reliance upon these two cases as support for the use of private nuisance to provide a remedy in access cases is therefore questionable. Firstly, the two cases represent a significant stretching of private nuisance to cover what is ostensibly a public nuisance issue. The second issue is whether the prevention of something entering the land, as was the case in restricting Wu's access, is inconsistent with general conceptions of what a nuisance is. There consequently exists the argument that such issues are better handled under causes of action other than private nuisance.¹³¹ This suggests a more detailed look at potential remedies for those cases falling along the boundaries of private nuisance beyond the scope of this essay is warranted. Ultimately the extent to which the Court of Appeal based its conclusions upon considerations of access is unclear, given its judgment simply affirms the conclusions of Asher J in the High Court. In doing so, the Court of Appeal arguably implicitly accepted this reasoning. This aside, the courts have been increasingly willing to use private nuisance as a mechanism to resolve such issues.¹³²

An important point of reference in considering the applicability of private nuisance to access cases following *Wu* is the later decision of the Canadian Supreme Court in

¹²⁸ *J Lyons & Sons v Wilkins* [1899] Ch 225 (CA).

¹²⁹ *Dollar Sweets Pty Ltd v Federated Confectioners of Australia* [1986] VR 383 (SC).

¹³⁰ *Dollar Sweets Pty Ltd*, above n 129, at 388.

¹³¹ Richard W Wright "Private Nuisance Law: A Window on Substantive Justice" in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing Ltd, Oxford, 2012) 491 at 513-4.

¹³² Neyers and Diacur, above n 124, at 224.

Antrim Truck Centre Ltd. v Ontario (Transportation).¹³³ The plaintiff operated a truck stop complex that serviced users of a highway over a period of 26 years. The respondent public authority subsequently opened an adjacent stretch of highway, altering the existing highway and thereby restricting access to the appellant's premises and damaging their business. The case was brought as a claim for damages for injurious affection under the Expropriations Act – an action for which damages were awarded if a right of action for damages existed at common law independently of the statute.¹³⁴ As a result, the Antrims were required to establish a cause of action under private nuisance.

In approaching the matter, the Canadian Supreme Court undertook a similar analysis to that of the Court of Appeal in *Wu*. The Court emphasised that there was not a 'typology' of actionable nuisances but rather a threshold of sufficient seriousness.¹³⁵ While not concerned with the issue of emanation, the case represents an example of judicial willingness to use private nuisance to provide a remedy in cases of restricted access. This willingness is especially notable given that public nuisance was available on the facts. One possible explanation for this is that the potential damages available under private nuisance were much greater than those at public nuisance, given the manner in which consequential economic loss was handled under the latter tort.¹³⁶

One factor complicating the use of private nuisance in this context is the apparent inconsistency of the emanation requirement with issues of access. Unlike paradigm nuisance cases in which there is a tangible 'emanation', such as noise, access cases consist of 'blocking'. In *Hunter v Canary Wharf*,¹³⁷ the House of Lords refused to uphold the plaintiffs' contention that an adjacent building that blocked television signals constituted a nuisance.¹³⁸ However, Lord Cooke's dissent partly stemmed from his perception that a reasonable user should abide by such interferences.¹³⁹ This leaves open the question whether private nuisance will be available where there is a denial of a more substantial right, such as a complete interruption of access. Courts

¹³³ *Antrim Truck Centre Ltd. v Ontario (Transportation)* 2013 SCC 13.

¹³⁴ *Antrim*, above n 133; see RSO 1990, C E.26, s 1(1).

¹³⁵ *Antrim*, above n 133, at [23].

¹³⁶ Neyers and Diacur, above n 124, at 230.

¹³⁷ *Hunter*, above n 114.

¹³⁸ *Hunter*, above n 114, at 710-11, per Lord Hoffman.

¹³⁹ *Hunter*, above n 114, at 721, per Lord Cooke.

have previously been willing to allow nuisance actions in respect of interferences with analogous proprietary rights, such as easements over land.¹⁴⁰ Given the similar interests protected in these cases, the extension of private nuisance to vindicate these rights is amply justified.

Another justification is the predilection evident in recent decisions for Canadian courts to merge private and public nuisance in access cases, particularly where there has been a restriction upon public rights to use a highway resulting in unreasonable interference with individual rights to use and enjoyment.¹⁴¹ This position lends support to the Court of Appeal's use of private nuisance in protecting an individual's right of access. Unlike in *Antrim*, there was no recourse to public nuisance as a means of vindicating Wu's rights. Consequently, there is support for the use of private nuisance to fulfil this purpose.

VI Implications of the Decision and Conclusions

The Court of Appeal's conclusions upon the issue of emanation seem alarming given its apparent refusal to recognise the emanation rule. However, the decision's effect is limited by the Court's findings as to reasonableness and damages. Essentially the finding of the Court of Appeal that the parties' accepted version of the Body Corporate's default rules distinguished between individual proprietors and occupiers enabled it to reasonably restrict access.¹⁴² Heath J subsequently observed that, while it would be unreasonable to exclude an individual proprietor from common property (barring extreme circumstances), such restrictions were logical when imposed upon student occupiers.¹⁴³

These conclusions therefore limit the decision's effect beyond providing the individual proprietor figurative access, detached from any meaningful right to market and license the unit. The sole purpose of Wu's acquisition of the unit was to license the premises to prospective tenants. Given that Wu exhibited no intention to occupy

¹⁴⁰ *Paine & Co Ltd v St Neots Gas & Coke Co* [1939] 3 All ER 812 (CA); *Saint v Jenner* [1973] Ch 275 (CA); Simon Deakin, Angus Johnston, and Basil Markesinis *Markesinis and Deakin's Tort Law* (7th ed, Oxford University Press, Oxford, 2013) at 414.

¹⁴¹ Neyers and Diacur, above n 124, at 224.

¹⁴² *Body Corporate 366611 v Wu* [2012] NZCA 614 at [86] and [87].

¹⁴³ *Wu*, above n 142, at [86].

the unit, it is unclear what relief the Court of Appeal's decision provides beyond facilitating nominal access. This is reflected in the fact that the Court remitted the assessment of damages to the High Court, citing an absence of consequential economic loss given Wu's inability to license the unit without acceding to Theta's Security and Access Protocols.¹⁴⁴ This is a logical result, providing the individual registered proprietor with the fundamental right to access, whilst balancing his use of the property against the interests of fellow members of the Body Corporate as part of a commercial property arrangement he knowingly entered into. This accords with the dual function of private nuisance in protecting rights in land whilst achieving a balance between the rights of adjacent landowners.

The effect of the Court of Appeal's decision may be more evident if the plaintiff were in the position of an owner-occupier. Its conclusions upon the reasonableness of access restrictions upon prospective tenants centred on the need for the Body Corporate to make adequate provision for safety and insurance considerations.¹⁴⁵ Based upon this reasoning, if the plaintiff were to occupy the unit, such access restrictions would be justified under the accepted version of the Body Corporate's rules. To reach this conclusion may place a gloss on the Court of Appeal's reasoning however, as its conclusions upon reasonableness are predicated upon the occupation of individual units by student tenants on a significant scale. To infer that this would result in a reasonable restriction of access to an owner/occupier with a registered title may take the reasoning beyond the Court of Appeal's scope of contemplation. This is because the Body Corporate's rules were amended to reflect the specific ownership arrangement at issue. Consequently, the unlikelihood of an owner-occupier arrangement arising in a situation governed by a Body Corporate's rules in this manner renders this discussion largely hypothetical.

In the context of private nuisance generally, the effect of the decision is limited. The Court of Appeal's conclusions are more appropriately viewed as a limited extension of private nuisance to cover a lacuna within the law's scope of protection as a result of the particular facts of the case. This is even more pronounced if the decision is considered as being predicated on the plaintiff's lack of control. In this instance, the

¹⁴⁴ *Wu*, above n 142, at [117].

¹⁴⁵ *Wu*, above n 142, at [79] per Heath J, and [87] per Heath J.

frequency with which the boundaries of private nuisance are likely to be tested in this manner is limited. The primary scenario will be that in which some sort of co-ownership or co-occupation agreement exists between two parties. As was demonstrated in *Hooper*,¹⁴⁶ the law has been able to provide a remedy in such scenarios without drastically altering the nature of private nuisance.

One area in which this concept of control may become relevant is in a similar lease arrangement to that found in *Titus v Duke*.¹⁴⁷ In that situation, the lessee's possessory right to the relevant land precluded their claim against the property's owners in private nuisance, despite their inability to effect the removal of the ultimate cause of the damage.¹⁴⁸ Were the case to be heard again, it is possible that this concept of control could result in the extension of private nuisance in order to provide a remedy. However, this result is likely to be unnecessary, given the statutory scheme that governs property law in situations of this nature. The Court of Appeal's extension of private nuisance in *Wu* is a direct result of the plaintiff's inability to obtain a legal remedy by other means. Consequently, the lasting effect of the decision is likely to be limited by both its narrow scope and the fact that gaps of this nature are relatively rare within property law. Generally speaking, cases in which the application of the concept of control is necessary are likely to be few.

A Conclusion

Private nuisance is fundamentally concerned with the protection of rights in land. The decision of the Court of Appeal in *Wu* can be viewed as a reflection of this. While private nuisance has traditionally excluded interferences that emanate from an area in which the complainant has an interest, the decision reflects the necessity of adapting the law to changing social and legal circumstances. Further, if the decision is framed from the perspective of the plaintiff's lack of control, the case represents a logical justification for the extension of the tort that accords with private nuisance's protection of proprietary rights. This approach is also consistent with the tort's theoretical basis, and can be reconciled with the existing emanation rules on the grounds of flexibility and of the need to provide a remedy where none currently

¹⁴⁶ *Hooper v Rogers* [1975] 1 Ch 43 (CA).

¹⁴⁷ *Titus v Duke* (1963) 6 WIR 135 (T). See earlier discussion on page 18.

¹⁴⁸ *Titus*, above n 147.

exists. As illustrated by the Canadian case of *Antrim*,¹⁴⁹ there is also precedent for the slackening of private nuisance principles in cases of restricted access.

Despite this, the manner in which the Court of Appeal justified its decision was riddled with inaccuracies and uncertainty. While the Court correctly cited the plaintiff's lack of control as grounds for extending or avoiding the existing emanation rule, its judgment failed to clarify a number of significant points. Firstly, the Court's refusal to acknowledge the existence of established emanation rules flouts traditional nuisance principles. The Court therefore failed to consider precedent that may have helped reinforce the judges' conclusions, particularly the decisions of *Hooper* and *Clearlite* that speak to the issue of control. In failing to address much of the High Court's reasoning regarding emanation, the Court failed to clarify the grounds upon which the decision was ultimately based. Were the Court to acknowledge the control distinction and the need to provide a remedy for restricted access as bases for its decision, its conclusions upon the emanation issue would have been more acceptable. The result is consequently more justified than the manner in which it was reached. In any event, the limited effect of the decision beyond filling a minor gap in existing property law and in providing a symbolic right of access means the decision is unlikely to have wider ramifications upon private nuisance. Regardless of the decision, *Wu*'s impending appeal to the Supreme Court will allow for greater consideration of these issues and the future direction taken by the courts in the area of private nuisance.

¹⁴⁹ *Antrim Truck Centre Ltd v Ontario (Transportation)* 2013 SCC 13.

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