

Brooking
on Building
Contracts

5TH EDITION
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recoverable should be the price a reasonable person would pay for the right of user.²⁵

Remedies for trespass

19.7 Remedies for trespass may include injunctive relief and/or damages²⁶ characterised as compensatory, aggravated or exemplary damages²⁷ and for claims such as restoration costs,²⁸ reinstatement, and diminution in value.²⁹ Assessment of the appropriate remedy will always focus upon what is reasonable.³⁰

NUISANCE

Nuisance generally

19.8 The law of nuisance is divided into two areas — private and public nuisance.³¹ Certain types of nuisances are also prohibited under statute, often replacing the common law in the area.³² Whether a nuisance is public or private, due to the widely varying impact of activities of people in commerce or otherwise, and the entitlement to use exclusively possessed land as the owner or occupier chooses, the types of interferences that may be classified as a nuisance are open ended.³³ This can make defining a nuisance at law difficult.³⁴

19.9 Private nuisance relates to unreasonable and substantial interference with rights connected with the use and/or enjoyment of land of a person, while public nuisance involves substantial and unreasonable interference with communal rights at large — rights of people generally — not necessarily related to land.³⁵ Additionally, for an injury due to public nuisance to be actionable, it must be the direct, necessary, natural and immediate

25. *Ibid* at [35]; *Attorney-General v Blake* [2001] 1 AC 268 at 278.

26. *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 at [62].

27. *Stereff v Rycen* [2010] QDC 117.

28. *Hansen v Gloucester Developments Pty Ltd* [1992] 1 Qd R 14 at 30.

29. *State of SA v Simionato* [2005] SASC 412 at [100].

30. *Hansen v Gloucester Developments Pty Ltd* [1992] 1 Qd R 14.

31. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 QB 182.

32. See e.g. Water Act 1989 (Vic) s 16(2). See also: Protection of the Environment Operations Act 1997 (NSW) s 268; Environmental Protection Act 1994 (Qld), ss 15, 440; Airports Act 1996 (Cth) s 131D; Public Health and Wellbeing Act 2008 (Vic); Building Act 1993 (Vic).

33. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 503.

34. For example: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 888, 903.

35. *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169; *Cartwright v McLaine & Long Pty Ltd* (1979) 143 CLR 549; *R v Rimmington* [2006] 1 AC 459; *McFadzean v Construction, Forestry, Mining and Energy Union* [2007] VSCA 289; *Onus v Telstra Corporation Ltd* [2011] NSWSC 33.

a plaintiff's rights, and by breaching those rights secures a great advantage while causing little damage to the plaintiff, it is sometimes appropriate to deter such conduct by awarding damages bearing some relationship to the advantage sought to be gained by the defendant.¹⁹

In a second judgment in that case,²⁰ Hodgson J cited with approval the comments of Smith LJ in *Shelfer v City of London Electric Lighting Co*²¹ that whilst a plaintiff may be entitled, *prima facie*, to an injunction, there may be cases where the injunction should be refused such as when damages are the more appropriate remedy or where the plaintiff is disentitled by conduct or delay; or an injunction may be refused if the injury to the plaintiff's rights is minor and capable of being adequately compensated by a money payment, and if grant of the injunction would be oppressive. However, the defendant may not be protected on this basis, for example, if acting in reckless disregard of the plaintiff's rights. The jurisdiction to order damages instead of granting an injunction is not to be exercised for instance so as 'to enable the defendant to purchase from the plaintiff against his will his legal right to the easement'.

In *Lang Parade Pty Ltd v Peluso*,²² a developer erected two cranes that encroached into the airspace of adjoining land. The developer asserted a statutory right under s 180 of the Property Law Act 1974 (Qld) and sought to negotiate a right of access on commercial terms. In rejecting the developer's entreaties, the owner contended that the Act required a determination of 'adequate' compensation for any loss or disadvantage the owner may suffer as a result of the imposition of the obligation; such compensation to be determined by measuring all factors of benefit or detriment including any increase in the profitability of the venture brought about by savings enjoyed by carrying out the works by means of encroachment. In rejecting the owner's argument, Douglas J referred to the rationale of Windeyer J in *Goodwin v Yee Holdings Pty Ltd*²³ that:

... what is to be compensated is the loss arising from the compulsory acquisition or imposition of the easement; that is the loss of property arising from the taking out of the freehold estate the incorporeal proprietary interest of the easement. It is not compensation to be equated with or apportioned out of the gain to the dominant owner as a result of the imposition.

He decided a more appealing approach was adopted in *Jacobsen Holdings Ltd v Drexel*²⁴ namely, 'the price that willing parties would arrive at in friendly negotiation'. Further, damages should be measured by the benefit received by the trespasser, that is, out of use of the land, and that the damages

19. (1990) 24 NSWLR 490 at 497. Applied in *Fyvie v Anand* (1994) 6 BPR 13,743; *Fanigun Pty Ltd v Woolworths Ltd* [2006] QSC 28; *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87.

20. (1989) 24 NSWLR 491 at 496.

21. [1895] 1 Ch 287 at 322-3.

22. [2005] QSC 112.

23. (1997) 8 BPR 15,795 at 15,801.

24. [1986] 1 NZLR 324.

consequence of the wrongful act.³⁶ Public nuisance may also result in criminal sanctions depending on the nature of the nuisance in question.³⁷ However, as certain legal principles are shared by both public and private nuisance, the same interference constituting a private nuisance may also in some circumstances establish public nuisance.³⁸

Private nuisance

19.10 The tort of nuisance involves fault of some kind.³⁹ Such fault generally involves foreseeability but liability is not strict.⁴⁰ The kind of fault required depends upon whether the defendant created the nuisance in the first place or adopted or continued the nuisance.⁴¹ Liability for nuisance (unless the conduct gives rise to a claim based on strict liability)⁴² will not be established unless it can be shown the defendant acted recklessly or either failed to take action or took action knowing the likely impact upon the enjoyment by the plaintiff of its property.⁴³

19.11 To constitute a nuisance, the interference must be unreasonable, having regard to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the peculiar sensitivity of the user or use of the claimant's land; the nature of established uses in the locality (e.g. residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.

As such, private nuisance is a substantial and unreasonable interference with the private right to use and enjoy land. To establish the cause of action, the plaintiff must demonstrate the holding of title to prosecute in respect of the particular nuisance, and that the defendant has interfered with its property right. Interference must be both substantial and unreasonable.⁴⁴ The interference must result in physical or material damage, and/or interference with the use and enjoyment of the land.⁴⁵

36. *Harperv GN Haden & Sons Ltd* [1933] Ch D 298; *Leichhardt Municipal Council v Montgomery* [2007] HCA 6. See also *Onus v Telstra Corporation Ltd* [2011] NSWSC 33 at [122].

37. *Hunter v Canary Wharf Ltd* [1997] AC 655.

38. *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 905, 907.

39. *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [119]; *Robson v Leischke* [2008] NSWLEC 152; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 61 ALJR 282 at 284.

40. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904.

41. *Robson v Leischke* [2008] NSWLEC 152 at [47].

42. In Australia, strict liability within the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 has been subsumed within the law of negligence: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. However, strict liability can still be created by statute.

43. *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [140].

44. *S J Weir Ltd v Bijok* [2011] SASCF 165.

45. *Harris v Carnegie's Pty Ltd* [1917] VLR 95; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; *Robson v Leischke* [2008] NSWLEC 152 at [42]–[48]; *Holloway v Newcastle City Council* [2013] NSWDC 62 at [112].

Creation of a nuisance

19.12 If the defendant deliberately or recklessly uses land in a way which the defendant knows will cause harm to a neighbour, and that harm is an unreasonable infringement of the neighbour's interest in property, and thus an unreasonable use by the defendant, the defendant will be held liable for the foreseeable consequences. This covers all those cases of obvious or 'patent' nuisances, and they are peculiarly the cases which call for prevention or prohibition by injunction. It is no defence the defendant believed in an entitlement to do as was done or took all possible steps to prevent the action causing a nuisance. Generally it may be said that if the defendant knows or ought to know that conduct may cause harm to a neighbour and such harm is reasonably foreseeable, then the defendant is under a duty of care to prevent such harm by not engaging in such conduct. It should be noted that the formerly well-known rule in *Rylands v Fletcher* has been subsumed under the law of negligence following the decision in *Burnie Port Authority v General Jones Pty Ltd*.⁴⁶

Cases where a defendant has created a nuisance include:⁴⁷ encroaching onto a neighbour's land, short of trespass; causing physical damage to a neighbour's land or building works or vegetation on it; and interfering with a neighbour's comfort and convenient enjoyment of land.

19.13 If a defendant owner deliberately or recklessly uses land in such a way that it is known it will cause harm to a neighbour, and such harm is an unreasonable interference with the neighbour's interest, and thus an unreasonable use by the defendant, the defendant generally will be liable for all the foreseeable consequences.

Knowledge may be an issue in the application of the law of nuisance. It is necessary to show to the requisite degree not whether a risk is far-fetched or fanciful, but whether there is evidence of facts, matters or circumstances from which the defendant ought to have known of the nuisance.⁴⁸ The question will then be whether, at the time the action giving rise to the consequences complained of was undertaken, the defendant had actual or constructive knowledge of the consequences of that action which consequences must be shown to be likely.⁴⁹

Adopting or continuing a nuisance

19.14 Where a defendant continues with or adopts a nuisance, different criteria apply before liability is imposed. An occupier of land 'continues' a nuisance or a potential nuisance if, with actual or constructive knowledge of its existence, such occupier fails, within a reasonable period of time, to

46. (1994) 179 CLR 520.

47. *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [142].

48. *Rickard v Allianz Australia Insurance Ltd* [2009] NSWSC 1115 at [188]–[189].

49. *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [144].

take reasonable measures to bring that nuisance to an end.⁵⁰ An occupier of land who knows or ought to know of a nuisance, and that the possibility of danger occurring in consequence is a real risk, must take such positive action as a reasonable person would consider necessary in that occupier's position to eliminate the nuisance.⁵¹

Mere encroachment into a neighbour's land is not sufficient to complete an action for nuisance. Special damage must be suffered by the neighbour as a result of the encroachment to obtain a remedy. The cause of action for nuisance will ordinarily accrue on proof of damage occurring and damage will be the last element completing the cause of action.⁵²

19.15 An occupier 'adopts' a nuisance should the occupier make use of the structure, building or object the subject of or that constitutes the nuisance.⁵³

The duty on the occupier to take steps to eliminate the risk of reasonably foreseeable damage from the nuisance arises out of its knowledge of the nuisance.⁵⁴ The defendant will be liable if, when the nuisance arose, it did not take any reasonable steps to bring it to an end upon becoming aware, or when the defendant ought to have become aware, of the nuisance, and damage results.⁵⁵

Interference resulting in material damage to land

19.16 Where an interference results in material damage to the land, such as encroachment of a building onto the land, or such as physical damage to other structures on the land or water entering and damaging the land, the interference is taken as unlawful. In such cases, a plaintiff pursuing an action in nuisance does not need to establish that the defendant's acts or the defendant's use were unreasonable.⁵⁶

Examples of this kind of nuisance, often arising out of building operations, include: a drain becoming blocked or laying a concrete driveway

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50. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 657-8; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 61 ALJR 282 at 284; *City of Richmond v Scantelbury* [1991] 2 VR 38 at 41, 42; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 484; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 at 332; *Holloway v Newcastle City Council* [2013] NSWDC 62 at [112].
51. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894, 904 and 913; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 484.
52. *Holloway v Newcastle City Council* [2013] NSWDC 62 at [113]; *Lister v Hong* [2006] NSWSC 1135 at [23], [30].
53. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894, 904 and 913; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 484.
54. *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [149].
55. *Valherie v Strata Corporation No 1841* [2004] SASC 170; *Sutherland Shire Council v Becker* (2006) 150 LGERA 184 at 226.
56. *Bamford v Turnley* (1860) 2 F & F 231; 122 ER 27; *Harris v Carnegie's Pty Ltd* [1917] VLR 95; *Kraemers v A-G (Tas)* [1966] Tas SR 113.

causing water to overflow onto a neighbour's land;⁵⁷ allowing buildings to become dilapidated so that they, or parts of them, fall onto a neighbour's land;⁵⁸ dust;⁵⁹ vibrations; water and/or blocking a watercourse (resulting in flooding);⁶⁰ air pollution⁶¹ — smoke, odours⁶² and fumes,⁶³ gas; noise;⁶⁴ trees and/or vegetation;⁶⁵ escaping objects;⁶⁶ swimming pool excavations causing dampness and cracking on an adjoining property.⁶⁷

19.17 Where nuisance is based upon physical damage, there will be a positive duty to take action when a defendant has, or ought to have had, knowledge of the existence of a defect in land or something on it and also of the danger the defect thereby created. The scope of the duty, however, involves doing only that which is reasonable in the circumstances so as to prevent or minimise known risk of damage or injury to a neighbour.

Interference with amenity or personal enjoyment of land

19.18 Interference with amenity or enjoyment of land is actionable only if the plaintiff is able to demonstrate the interference is unreasonable and substantial. Substantial⁶⁸ interference with a plaintiff's amenity or enjoyment of land occurs where the inconvenience caused by the defendant materially interferes with the ordinary physical comfort of human existence according to reasonable standards within the general community,⁶⁹ or where interference affects the ability of the person to enjoy the normal comforts and rights associated with possession of land.⁷⁰ The interference does not need to be continuing or recurrent but causation must be established.⁷¹ A useful test is

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57. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Bennetts v Honroth* [1959] SASR 170; *Pemberton v Bright* [1960] 1 WLR 436.
58. *Todd v Flight* (1860) 9 CB NS 377; 142 E R 148; *Wringe v Cohen* [1940] 1 KB 229.
59. *Harris v Carnegie's Pty Ltd* [1917] VLR 95: dust, noise, vibration and foul smell; *Thompson v Sydney Municipal Council* (1938) 14 LGR (NSW) 32.
60. *Gartner v Kidman* (1962) 108 CLR 12; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248.
61. *McKell v Rider* (1908) 5 CLR 480.
62. *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; *Baulkham Hills Shire Council v AV Walsh Pty Ltd* [1968] 3 NSWLR 138: offal plant; *Bone v Seale* [1975] 1 All ER 787.
63. *St Helen's Smelting Co v Tipping* (1864) 4 B & S 616; 11 ER 1483; *Salvin v North Brancepeth Coal Co* (1874) LR 9 Ch 705; *Manchester Corp v Farnworth* [1930] AC 171.
64. *Vincent v Peacock* [1973] 1 NSWLR 466; *Haddon v Lynch* [1911] VLR 230.
65. *P Baer Investments Pty Ltd v University of New South Wales* [2007] NSWLEC 128; *Vella v Owners of Strata Plan 8670* [2007] NSWLEC 365; *Holloway v Newcastle City Council* [2013] NSWDC 62.
66. *Lester-Travers v City of Frankston* [1970] VR 2.
67. *Ikic v Evans* (1989) 7 BCL 114.
68. *Sturges v Bridgman* (1878) 11 Ch D 852. See: *Andreae v Selfridge & Co Ltd* [1937] 3 All ER 255 (vibrations from factory); *Munro v Southern Dairies Ltd* [1955] VLR 332 (noise); *Thompson-Schwab v Costaki* [1956] 1 All ER 652 (noise smells and flies due to horses); *Raciti v Hughes* (1995) 7 BPR 14,837 (street soliciting); *Onus v Telstra Corporation Ltd* [2011] NSWSC 33 at [149] (backyard lighting).
69. *Bayliss v Lea* [1961] NSWLR 1002; *Robson v Leischke* [2008] NSWLEC 152 at [84].
70. *Walter v Selfe* (1851) 4 De G & Sm 315; 64 ER 849; *Haddon v Lynch* [1911] VLR 5.
71. *Hargrave v Goldman* (1963) 110 CLR 40.

what is reasonable according to the ordinary uses of people living in society, or a particular society.⁷²

Nuisances of this kind generally arise from something coming from the defendant's land⁷³ such as noise,⁷⁴ vibration,⁷⁵ dust,⁷⁶ sediment from soil erosion,⁷⁷ noxious smuts and pollution,⁷⁸ smoke,⁷⁹ and offensive odours and stench.⁸⁰

19.19 Courts will look to balance the right of the plaintiff to enjoyment of property with the right of the defendant to undertake the activity in question. In assessing whether the activity is unreasonable or not, a court may consider factors such as severity and type or nature of activity,⁸¹ duration and time,⁸² location,⁸³ motive,⁸⁴ and precautions taken by the defendant to minimise any interference having regard to practicality and cost in all the circumstances.⁸⁵

Noise, vibration and dust

19.20 Controlling dust and other emissions during building operations is a legal obligation, particularly should there be the possibility of asbestos fibres. In addition to the common law of nuisance, environmental protection and workplace health and safety legislation will usually regulate such emissions, setting strict controls, and setting penalties for breach. The approval processes for the majority of Australian construction and building works also include provisions for addressing and mitigating the potential for such emissions. Primarily to reduce environmental risks, these planning and control provisions also specify construction practices that must be implemented

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72. *Elston v Dore* (1982) 149 CLR 480 at 488; *Michalief v Galea* [2001] NSWSC 984; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [161].
73. *Hunter v Canary Wharf Ltd* [1997] AC 655 at 685.
74. *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 at 697–702; *Vincent v Peacock* [1973] 1 NSWLR 466; *Cohen v City of Perth* [2000] WASC 306.
75. *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287; *Hoare & Co v McAlpine* [1923] 1 Ch 167.
76. *Pwllbach Colliery v Woodman* [1915] AC 634; *Thompson v Sydney Municipal Council* (1938) 14 LR (NSW) 32; *Kidman v Page* [1959] Qd R 53.
77. *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108 at 126–7.
78. *St Helen's Smelting Co v Tipping* (1864) 4 B & S 616; 11 ER 1483; *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683.
79. *Crump v Lambert* (1867) LR 3 Eq 409; *Manchester Corp v Farnworth* [1930] AC 171.
80. *Bainbridge v Chertsey Urban District Council* (1914) 84 LJ Ch 626; *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482; *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683; *Baulkham Hills Shire Council v A V Walsh Pty Limited* [1968] 3 NSWLR 138.
81. *Andreae v Selfridge & Co Ltd* [1937] 3 All ER 255. Compare *Clarey v The Principal and Council of the Women's College* (1953) 90 CLR 170.
82. *Wherry v KB Hutcherson Pty Ltd* (1986) 4 BCL 164; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (minor interference over a long time).
83. *Sturges v Bridgman* (1878) 11 Ch D 852.
84. *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 1 All ER 825.
85. *Painter v Reed* [1930] SASR 295.

where activities may result in water, air or noise pollution that may annoy or affect the health or amenity of neighbouring landowners or communities.

19.21 Difficult problems of the balancing of interests may arise, for example, in relation to the use of jack hammers or concrete saws to demolish a substantial concrete building which is surrounded by office buildings. Usually what a plaintiff wants is not damages as such but peace and quiet to be maintained, and this means an injunction. An interlocutory injunction will not be granted, however, except on the usual undertaking as to damages — that is, the undertaking of the plaintiff to abide by any order the court may make as to damages should it subsequently find the defendant has sustained loss by reason of the injunction being granted which the plaintiff ought to pay. The possible amount of the liability required to be so assumed deters many aggrieved persons from seeking interlocutory relief, with the result that in many cases the occupier adjoining the works, having made a complaint, takes no legal proceedings. Many of those who have suffered from the noise of jack hammers, compressors, drill rigs, concrete vibrators and the like must have wondered whether an ordinary contractor takes any steps to minimise noise, except under the compulsion of legal process. It is thought that in many, although by no means all, cases, relatively inexpensive means of noise abatement, such as the construction of a simple housing, are available to the contractor.

19.22 In *Harrison v Southwark and Vauxhall Water Co*⁸⁶ Vaughan Williams J said that no nuisance is committed if all reasonable care and skill is used in the work of demolition, even though the resulting noise and dust would be a nuisance if they were not created in the course of demolition, for the law takes into consideration the object and duration of the alleged nuisance. This case was distinguished in *Harris v Carnegie's Pty Ltd*⁸⁷ on the ground that the dust complained of had caused property damage so that the defendant was liable even though all reasonable precautions had been taken.

In *Wherry v K B Hutcherson Pty Ltd*,⁸⁸ Hodgson J accepted as correct that noise caused by demolition and rebuilding will not be actionable if the operations are being reasonably carried on and all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours. He also accepted that for a nuisance of this kind to be actionable, it must be a real interference with the comfort or convenience of living according to the standard of the average person.⁸⁹

86. [1891] 2 Ch 409 at 414. See also *Warne v Nolan* [2001] QSC 053 at [89] per Muir J: 'Duration of the interference is a relevant consideration, but a short lived interference may be regarded as substantial if it causes permanent damage to land'.

87. [1917] VLR 95. See also *Daily Telegraph Ltd v Stuart* (1928) 28 SR (NSW) 291; *Andrae v Selfridge & Co Ltd* [1938] Ch 1; *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108; *Wildtree Hotels Ltd v London Borough of Harrow* [1998] EWCA Civ 978; *Deepliffe Pty Ltd v Council of the City of Gold Coast* [2001] QCA 342; *Warne v Nolan* [2001] QSC 053.

88. (1986) 4 BCL 164 at 170.

89. *Ibid.*

A developer may acquire several buildings with a view to demolishing them and erecting a new building on site. The buildings may be occupied by tenants, with whom the developer seeks to come to terms on the question of the surrender of their leases. Care must be taken to ensure compliance with obligations under any applicable residential tenancies legislation. It may happen that the developer by negotiation is able to obtain possession of all but one of several buildings and then embarks upon the demolition of those buildings, leaving the other building, occupied by the tenant whose price is too high, untouched for the time being. That tenant, either by way of ventilating a genuine grievance in relation to noise, dust or vibration, or in an attempt to attract a higher bid for the balance of the term, may complain that the building operations constitute a nuisance or are a breach of a covenant for quiet enjoyment.

Prior to *Kalmar Property Consultants Ltd v Delicious Foods Ltd*⁹⁰ there does not appear to be any reported case in which demolition operations have been held to be a breach of the covenant for quiet enjoyment. In *Matania v National Provincial Bank Ltd*⁹¹ a claim for breach of the covenant failed on the ground that the acts done by the person claiming under the landlord were not lawful and were not done with the consent of the landlord, the law being that the covenant for quiet enjoyment does not extend to the unlawful acts of persons claiming under the landlord unless the landlord has consented to them. Had it not been for this defence, it would seem the Court of Appeal would have held that the acts were a breach of the covenant.

In *Harris v Carnegie's Pty Ltd*,⁹² the plaintiff was the lessee of a handbag shop in part of a building owned by the defendant. The defendant was demolishing and reconstructing the building in part. A claim in nuisance with regard to dust succeeded, but a claim for breach of the covenant of quiet enjoyment failed.⁹³ Scaffolding erected outside a shop occupied by a tenant in such a way as to obstruct to some extent access to the shop and its window may be a breach of the covenant for quiet enjoyment as was held in *Owen v Gadd*.⁹⁴

In *Kalmar Property Consultants Ltd v Delicious Foods Ltd*⁹⁵ partial demolition of a building of which the demised shop formed part was held to be a

90. [1974] 2 NZLR 631; referred to in *Norden v Blueport Enterprises Ltd* [1996] 3 NZLR 450; *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1.

91. [1936] 2 All ER 633. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Southwark London Borough Council v Mills* [1998] 3 WLR 49; *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108; *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185; R. Mulheron, 'The Interplay of Quiet Enjoyment and Assignment' (2000) 8 APLJ 181.

92. [1917] VLR 95.

93. [1917] VLR 95 at 101.

94. [1956] 2 QB 99; considered in *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1; *Spathis v Hanave Investment Co Pty Ltd* [2002] NSWSC 304; *Worrall v Commissioner for Housing for the ACT* [2002] FCAFC 127; *Kazas & Associates Pty Ltd v Multiplex (Mountain Street) Pty Ltd* [2002] NSWSC 840.

95. [1974] 2 NZLR 631.

breach of an implied covenant that the entire building would continue to exist throughout the term of the lease, as well as of a covenant for quiet enjoyment.

19.23 In *Aussie Traveller Pty Ltd v Marklea Pty Ltd*,⁹⁶ the Queensland Court of Appeal upheld the decision at first instance where a breach of the covenant was found to exist by virtue of the activities of another tenant causing dust and noise which substantially interfered with the plaintiff's business. In doing so, it rejected a suggestion to be found in some cases that the interference must be such as to amount to a 'practical frustration' of the purposes of the lease. It held also that there was no need for there to be authorisation or active participation on the part of the lessor. The case failed to distinguish between breach of the covenant for quiet enjoyment and breach of the implied term not to derogate from the grant, if there be any real distinction between the two which seems doubtful in many cases.

In *Tenth Vandy Pty Ltd v Natwest Markets Australia Ltd*⁹⁷ a claim by a lessee under a commercial lease arising out of internal and external refurbishment works adversely affecting customer flows was rejected as 'relatively short lived' and nothing to do with its massive decline in financial performance.

Remedies

19.24 A plaintiff relying upon a substantial interference to ground a claim in nuisance does not need to prove that the alleged nuisance caused physical damage to the property in order to prove an unreasonable and substantial interference in property rights and make out its cause of action in nuisance.⁹⁸ Even when there is no physical damage to property, the interference may cause annoyance, inconvenience and discomfort to the occupier in its enjoyment of the property. However, a failure to prove actual damage may result in an award of only nominal damages.⁹⁹

Remedies available to a plaintiff include injunctive relief, damages and abatement.

19.25 Courts have authority to grant a wide variety of injunctions to restrain private nuisances.¹⁰⁰ An interlocutory or permanent injunction may

96. [1998] 1 Qd R 1, as referred to in *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185 at [39]; applied in *Byrnes v Jokona Pty Ltd* [2002] FCA 41. See also *Kazas & Associates Pty Ltd v Multiplex (Mountain Street) Pty Ltd* [2002] NSWSC 840; and *Worrall v Commissioner for Housing for the ACT* [2002] FCAFC 127 at [75]: 'to be a breach of the covenant there must be a substantial inference with the tenant's quiet enjoyment'.

97. [2012] VSCA 103.

98. *Thompson-Schwab v Costaki* [1956] 1 All ER 652; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245 at 248; *Roberts v Rodier* [2006] NSWSC 282 at [119].

99. *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245 at 248; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [167].

100. *Gartner v Kidman* (1962) 108 CLR 12; *Codeffa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Melaleuca Estate Pty Ltd v Port Stephens Council* [2006] NSWCA 31; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248; *Onus v Telstra Corporation Ltd* [2011] NSWSC 33.

be granted to restrain an act that constitutes private nuisance, applying the ordinary principles involved with a grant of each.¹⁰¹ Injunctions also may be granted for actual or possible nuisance.¹⁰² A mandatory injunction may require removal of the nuisance where there is a very strong chance that damage will ensue at a future time due to the interference created by the defendant¹⁰³ but generally speaking mandatory injunctions are not readily granted by courts.

Once the plaintiff has established a legal right and wrongful or threatened interference with that right, an injunction will usually be granted. There is generally no condition precedent that damage be reasonably foreseeable.¹⁰⁴

However, an injunction for private nuisance may be refused where, for example, damages are an adequate remedy instead;¹⁰⁵ where the defendant has delayed or could be considered to have acquiesced to the apparent interference;¹⁰⁶ or where the defendant has abated the nuisance to avoid future interference or has agreed to do so.¹⁰⁷

Damages

19.26 Damages¹⁰⁸ alone may be an appropriate remedy for a tort of nuisance and may include for property damage or diminution in value resulting from the nuisance or consequential loss.¹⁰⁹ Aggravated and exemplary damages are also *potentially* available for nuisance.¹¹⁰ Damages may be awarded for loss of amenity; that is for use and enjoyment of land.¹¹¹ The usual requirements for claims in tort of reasonable foreseeability,¹¹² causation and remoteness of damage apply to damages in nuisance. However, the defendant's act does not need to be the sole cause. It is sufficient if it is *a* cause.¹¹³

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101. *Carter v Murray* [1981] 2 NSWLR 77 at 80; *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248.
 102. *Redland Bricks Ltd v Morris* [1970] AC 652; *Onus v Telsstra Corporation Ltd* [2011] NSWSC 33.
 103. *Yared v Glenhurst Gardens Pty Ltd* (2002) 10 BPR 19 at 485; *Redland Bricks Ltd v Morris* [1970] AC 652 at 665–6.
 104. *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 300.
 105. *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11.
 106. *Spencer v Silva* [1942] SASR 213 at 221–2.
 107. *Kidman v Page* [1959] Qd R 53.
 108. *Bone v Seale* [1975] 1 All ER 787 at 794; *Young v Wheeler* (1987) Aust Torts Reports 80–126 at [80]–[126]; *Jaggard v Sawyer* [1995] 2 All ER 189; *Stockwell v State of Victoria* [2001] VSC 497 at [483].
 109. *Harris v Carnegie's Pty Ltd* (1917) 23 ALR 75; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426.
 110. *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108; *Walsh v Ervin* [1952] VLR 361 at 371.
 111. *Bone v Seale* [1975] 1 All ER 787 at 794; *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426.
 112. *City of Richmond v Scantelbury* [1991] 2 VR 38 at 45.
 113. *Fennell v Robson Excavations Pty Ltd* [1977] 2 NSWLR 486 at 492.

These damages are assessed according to the degree of annoyance or discomfort caused by the nuisance. A plaintiff however may not recover damages for *mere* inconvenience, or prior to actual injury to land, until actual damage has been caused. While damages may be awarded to a plaintiff for the annoyance and loss of amenity associated with the nuisance, the plaintiff may not recover damages for reduction in the value of its land in the absence of material damage to that land.¹¹⁴

19.27 Generally, damages may be awarded instead of an injunction¹¹⁵ where for instance granting an injunction would be oppressive to the defendant; or where the injury is small, for it may be assessed and sufficiently compensated by a reasonable payment; or where equitable damages would be more appropriate instead of a *quia timet* injunction.

As a complement or alternative to either injunction or damages, a plaintiff may take reasonable steps on its own — a ‘self-help’ remedy — to abate the nuisance, although the cost of doing so, by going onto the land of another, is generally not recoverable as damages for the nuisance.¹¹⁶ Also there are certain inherent risks involved in taking such a possibly risky course.

EASEMENTS

Easement formation

19.28 It is generally accepted that there are four essential requirements for a valid easement:¹¹⁷

1. There must be a dominant and a servient tenement. In Australia, unless statute provides otherwise, an easement may not exist ‘in gross’. It must always be annexed to a dominant tenement. Whether a right is annexed to land is determined by construing the instrument that created the right.
2. The easement must accommodate the dominant tenement, that is, the easement must benefit the dominant tenement and be connected with its enjoyment. The crucial matter in determining whether the easement accommodates the dominant tenement is whether it has a necessary connection with the land and whether it is reasonably necessary for its better enjoyment as a parcel of land. The existence of

114. *Young v Wheeler* (1987) Aust Torts Reports 80-126 at 68,971-2; *Gunnerson v Henwood* [2011] VSC 440 at [348].

115. *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245; *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391 at 399-400.

116. *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226; *Young v Wheeler* (1987) Aust Torts Reports 80-126; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478; *Burton v Winters* [1993] 1 WLR 1077 at 1081; *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157; *Owners Strata Plan 30339 v Torada Pty Ltd* [2008] NSWSC 1154; *Nguyen & Le v Davies* [2011] SADC 63 at [78]; *Owners Strata Plan 32735 v Heather Lesley-Swan* [2012] NSWSC 383 at [191].

117. *Re Ellenborough Park* [1955] 3 All ER 667 at 673 per Lord Evershed MR.