Looking Back On *Dutton*: The Precedent Set, The Accounts Given, And The Problems Caused.

Victoria Ball*

Summary

Two decades on from *Manchester Airport v Dutton* this paper takes the opportunity to reflect on the decision. In doing so, three themes are considered: 1) the critique flowing from the decision; 2) the precedent set and how this has been subsequently used; and, 3) the subsequent accounts that have been given.

Introduction

The infamous decision in *Manchester Airport v Dutton*[1] is now over two decades old. And for those two decades it has proved to be a "controversial and rather enigmatic decision."[2] This paper takes the opportunity to look back and reflect on the decision and the subsequent treatment of it. This is a timely reflection, as there have been a flurry of recent judgements both discussing and citing the decision and dicta handed down twenty years ago. There has also been a relatively recent 'new account' of *Dutton* given, which has not yet been given substantial consideration by other scholars.

This work will start by setting out the case of *Dutton* and the core critique of the decision given in its immediate aftermath. It will then go on to consider the precedent that *Dutton* set by tracking the cases where *Dutton* has been cited, with a specific focus on some recent decisions and the justices' discussions of *Dutton*. Finally, it will consider the recent and radical re-analysis/subsequent account that has been given of *Dutton* by Adam Baker.[3]

It argues that, while heavily, and rightfully, critiqued both in its immediate aftermath and beyond, the decision is here to stay. It unfortunately remains fairly regularly cited and used (especially in the recent flurry of cases), albeit only in a small or limited subset of cases which often have similarities to the original facts. Interestingly, this means the implications of the decision are relatively minor; it has not caused the licence to jump the personal/property divide in all situations as was originally feared, and this limited impact is reassuring. There are, however, *loudening* murmurs of discontent from the judiciary (especially in the recent cases) but until a case reaches above the Court of Appeal (again) it will remain unchallenged. Recent accounts attempting to re-explain away the controversy of *Dutton* suffer from the same foundational problem as the orthodox understanding, a licence was made (at least in limited cases) proprietary and no re-framing as a new tort can escape this error.

The decision in *Manchester Airport v Dutton* and its core critique

The facts of *Manchester Airport v Dutton* are well known. The claimant, Manchester Airport, were granted a licence to 'enter and occupy' a woodland (Arthur's Woods) for the purpose of felling trees and carrying out other works that were needed for the construction of a new runway at the airport. Before the works could begin, and before the licence had been granted, the defendants, who were environmental protestors that were not in favour of the works, entered the woodland to make it

* Lecturer in Private Law, Dickson Poon School of Law, King's College London, vicki.ball@kcl.ac.uk. I am grateful to the SLS Property and Trusts stream for the opportunity to present this paper and for their feedback. I would also like to thank my reviewers for their helpful comments.

[1] [2000] 1 QB 133.

[2] Adam Baker, 'Violating the enjoyment of a licence: a new tort' (2019) 2 Conv 119, 119.

[3] ibid.

difficult for the claimant to fell the trees. The claimant sought an order for possession (order 113), which was granted by the district judge, and ultimately upheld by the Court of Appeal. The defendant's objection was that the claimant did not have a sufficient possessory interest to bring such a claim; they were only granted a licence, and were not currently in possession, and as such they did not have exclusive possession. Chadwick J, in his dissenting opinion, agreed. The majority of the Court of Appeal, however, in their judgment said that neither exclusive possession nor an estate in land were necessary to bring an action for possession, although a licensee's right was limited to the enforcement of the grant/rights granted in the licence.[4]

The decision and reasoning in *Dutton* rightly attracted criticism from property scholars in the aftermath of the decision, with many scholars, and myself, favouring the minority judgment of Chadwick LJ over the leading judgement of Laws LJ.[5] The criticisms of the majority decision can be divided into multiple talking points: 1) The failure of the majority to recognise the distinction between a licensee *in* and *out* of possession/occupation; 2) Issues regarding the *numerus clausus* and how the decision appears to make a licence leap the personal/property right divide; 3) Questions about whether Laws LJ was right to say that the order of possession was able to relinquish itself of the 'medieval chains' and requirements from its forebearer ejectment; and, 4) The (inappropriate) remedialism shown in the judgment of Laws LJ.

1) The failure of the majority to recognise the distinction between a licensee in and out of possession/occupation.

The majority decision delivered by Laws LJ, argued that there was 'no respectable distinction, in law or logic' between a licensee in or out of occupation.[6] The result was that Manchester Airport, a licensee out of possession, was held to have standing in the case. Scholars since have sought to show that this reasoning rests on unsound logic. William Swadling points out, for example, that Laws LJ should have questioned "*why* a licensee in possession is able to bring trespass",[7] and if he had, it would have been clear that the reasoning could not be extended to those out of possession, just as Chadwick LJ concluded in the case. This is because a licensee *in possession* has rights from two sources: one is the contractual licence which gives him personal rights arising from the contract enforceable against the licensor only; And the second are rights arising from his fact of possession. This factual possession gives the licensor a basic property right, and this property right is binding on third parties. The latter is the reason that a licensee *in possession* is entitled to bring a claim in trespass. This is the same right that allows a trespasser to bring an action against subsequent trespassers.

The failure to recognise this distinction similarly led to the next criticism which is the framing of a licence as a proprietary right and the opening of the *numerus clausus*.

2) Issues regarding the numerus clausus and how the decision appears to make a licence leap the personal/property right divide.

It has been argued that the clear distinction between proprietary and personal rights over/in land has traditionally found its practical expression in the inability of persons possessing the latter from obtaining particular remedies (or as some would call them actions) against third parties.[8] Or to put it a different way Baroness Hale (as she then was) stated in *OBG v Allan* that; "once the law recognises something as property, the law should extend a proprietary remedy to protect it"[9] – the reverse of this

[4] *Manchester Airport* (n 1) 149.
[5] See, for example, William Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354; and, Ewan Paton and Gwen Seabourne 'Unchained remedy: Recovery of Land by Licensees' [1999] Conv 535.
[6] See *Manchester Airport* (n 1) 150. A further criticism has been made about the lack of authority cited by Laws LJ in this part of his judgment. See Baker (n 2) 122.
[7] Swadling (n 5) 356.
[8] Paton and Seabourne (n 5) 535.
[9] *OBG v Allan* [2007] UKHL 21 [310].

being, that something is property when a proprietary remedy (or a proprietary action) is extended to protect it. The case, in its granting of a proprietary remedy to the claimants, implies that a licence is in some way proprietary, blurring the boundaries between personal and proprietary rights. This in turn undermines the *numerus clausus* as it introduces another right into the category of property rights. This is the most significant criticism in terms of the implications of the decision beyond the specific case itself and a criticism that I have raised elsewhere.[10]

3) Questions about whether Laws LJ was right to say that the order of possession was able to relinquish itself of the 'medieval chains' and requirements from its forebearer ejectment.

Further questions arise from Laws LJs ignorance or dismissal of the order of possessions forbearer of ejectment in helping to understand the ambit of the order. His approach in this case has been described as a "clean slate' approach"[11] where he sought to "banish the rattle of medieval chains"[12] and as such did not feel bound by the historical scope of ejectment when making a decision about its modern predecessor of an order for possession. His argument was that the position of licensees with regards to ejectment was unclear because the court were "rarely engaged" with such issues, but, regardless of the rules in ejectment, the law should not be shackled by the old law which he described as "archaic".[13] As such, just because a licensee would not have succeeded in a claim for ejectment does not mean that they cannot succeed now in a claim for possession.

This proposition has been widely critiqued. Ewan Paton and Gwen Seaborne, for example, have argued that "if a licensee not in possession could not sue in ejectment in the nineteenth century, no procedural developments in the last century have altered that position."[14] While authors are sympathetic of the possibly outdated rules, it is clear that it was not open to the court to fashion a remedy,[15] and also Laws LJ failed to express the reasons why the law is outdated. As Emma Lochery argues "They may be old, but this is not the same as being unsuitable for modern conditions."[16] There may be valid reasons for a change in the rules relating to an order for possession to stop them being old fashioned or unsuitable today, these however, where not spoken of, and instead just assumed.[17]

4) The (inappropriate) remedialism shown in the judgment of Laws LJ.

Another critique raised with the approach of the court and particularly with Laws LJ has been labelled as 'remedialism'. This term was coined by Peter Birks as a label for the notion that 'liabilities' and 'remedies' can be separated, so that once a 'liability' or infringement of rights of some kind has been found the court is free to select the most appropriate remedy from a list.[18] Swadling has argued this happened in the case and the result is that the substantive law either becomes confused or 'drops out the picture.'[19] This would explain why an infringement of a personal right led to a proprietary remedy. The court failed to see the link between the right and the remedy and instead saw themselves as free to select whatever remedy they saw as fit. This 'remedialism' can be said to be the cause of the infringement of the *numerus clausus* and the admission of a licence into the remit of property rights.[20]

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[10] Victoria Ball 'The influence of loss in the Property Torts.' (2020) 31(3) King's Law Journal 426.
[11] Paton and Seabourne (n 5) 538.
[12] ibid 537.
[13] Emma Lochery, 'Pushing the Boundaries of *Dutton*' (2011) 1 Conv 74, 77.
[14] Paton and Seabourne (n 5) 540.
[15] ibid 540-541.
[16] Lochery (n 13) 77.
[17] ibid 78.
[18] See Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1.
[19] Swadling (n 5) 359.
[20] ibid 360.

The motivation behind this remedialism seems to be the maxim '*ubi jus, ibi sit remedium*' (where there is a right there is a remedy). The issue within this case, however, is that while there is a right, it is not a right enforceable against the other party in this action. It is purely personal and enforceable only between those parties to the contract – namely, Manchester Airport and The National Trust. As such there was no right that has been infringed or interference with that was binding on the protestors. Rather the court should have probably followed the lead of the judges in *Hunter*[21] and *Williams*[22] and stated, "even in modern times the law does not always provide a remedy for every annoyance… however considerable that annoyance may be."[23]

Dutton as precedent

Dutton, then, has (or had) the potential to create large ramifications for property law. In particular, the blurring of the distinction between property rights and personal rights and allowing a proprietary remedy to be given for a breach of a licence was wrong from both a precedent and theoretical perspective and undermined the *numerus clausus*. If taken up by courts in the future this could fundamentally change the balance of rights which have implications on third parties. This is problematic especially as it has been argued (and shown above) that the reasoning from the majority rested on unsound logic.[24]

Despite this initial (and to some extent ongoing)[25] criticism of the decision in *Dutton* the true ramifications and implications of the decision cannot be found by considering the case in isolation. Rather, the subsequent decisions that cite *Dutton* need to be considered to see if the criticisms and concerns have proven to be true, or whether the decision has been somewhat limited in its impact by subsequent cases. This is a timely reflection, as there has been a recent flurry of judgements both discussing and citing the decision and dicta handed down twenty years ago.

A Few of the Recent Decisions Discussing Dutton

One of the most recent cases citing and discussing *Dutton* is the decision of HHJ Paul Matthews in *Brake v Chedington Court Estate*.[26] This decision is one part of the wider litigation between the parties which revolve around the same, rather complex, factual matrix of a dispute between two (of three) former partners, their trustee in bankruptcy, and a company who purchased the property from that trustee. This particular decision dealt primarily with the claim for delivery up of a cottage which the claimants (the Brakes) allege to have been unlawfully evicted from (by the purchaser from the trustee in bankruptcy). The interest here is not necessarily the conclusion of the case or the factual scenario, but rather the judge's discussion of *Dutton*.

After extensively setting out the facts and the judgment of *Dutton* (including citing both majority judgements and some of the dissent from Chadwick LJ) the judge sought to analyse the decision. He started by suggesting that one difficulty with the decision was that the majority failed to deal with the previous decisions of *Hill v Tupper*[27] and *Clore v Theatrical Properties Ltd.*[28] While Laws LJ in *Dutton* argued that the new action for possession should not be shackled by the rules of ejectment (which he claims to be silent upon the question of relief to licensees). *Hill* actually came after the Common Law

[21] *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL).
[22] *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514, [2019] Q.B. 601.
[23] ibid [79].
[24] Both in terms of how free an order of possession was to rid itself from its forebearer ejectment and how analogous the situation in the case was to a scenario where a licensee in possession has maintained a trespass
[25] Ball (n 10).
[26] [2022] EWHC 366 (ch).
[27] (1863) 159 ER 51.
[28] [1936] 3 All ER 436.

Procedure Act 1852, making it relevant to the 'new' action. In *Hill*, however, the licensee still 'lost' and were unable to make an order against a third party. This decision then, was highly relevant and arguably should have been considered in *Dutton.* The judge noted that in *Mayor of London v Hall*[29] the inconsistency between *Dutton* and *Hill* were rehearsed by the defendants and it was said that the omission did not impugn the validity of *Dutton.*[30]

Despite the discussion in *Hall*, counsel for Chedington, argued that that the majority decision in *Dutton* was reached *per incuriam*, and that therefore it should not be followed. They argued this was because the court should have considered *Clore* as it was a Court of Appeal decision which should have been binding on the Court of Appeal in *Dutton.*[31] HHJ Paul Matthews, however, pointed out in his judgement that the doctrine of *per incuriam* is of limited reach – it applies only to *appellate* courts considering the decisions of co-ordinate (but not superior) jurisdiction – it does not apply to *first-instance* courts considering the decisions of appellate courts.[32] For that reason, it was not within HHJ Paul Matthews power, sitting at first instance, to refuse to apply and otherwise binding Court of Appeal decision (although it would be an option for the Court of Appeal).[33] He continued:

> "*... That does not mean that I necessarily consider that the decision was right*. It is after all inconsistent with long-standing decisions of the English courts, and has been strongly criticised by academic writers of the highest rank, including Professor Ben McFarlane ("The Numerus Clausus and the Common Law", in *Landmark Cases in Land Law*, ed Gravells 2013), and Professor William Swadling ("Opening the Numerus Clausus", (2000) 116 LQR 354). It has also not been followed in New South Wales, where Chadwick LJ's dissenting judgment has been preferred: *Georgeski v Owners Corporation Sp49833* [2004] NSWSC 1096. However, I do not need to deal here with the substance of the criticisms advanced. *This is because what I think of the decision is irrelevant. It is binding on me, and I must apply it loyally where necessary*."[34]

In the end, however, the judge concluded that 'the application of *Dutton* simply does not arise in the circumstances.'[35]

This discussion shows another criticism of *Dutton* not specifically mentioned in the previous section, which is the inconsistency with previous law. In suggesting that licences could have implications on third parties it is inconsistent with all previous authority suggesting that licences are merely personal rights, that includes *Hill* and *Clore*, but goes even further back to *Thomas v Sorrell*[36] and the idea that a licence '*passeth no* interest' or transfers any property right/entitlement.

This judgement is also interesting in that the judge, while acknowledging that he is bound by the decision (should it be relevant) and that his opinion of it is 'irrelevant', is critical of the decision and this is shown in both the tone and words of his judgement – showing that the academic discontent for the decision is likewise shared by some members of the judiciary. This case has very recently been heard by the Court of Appeal,[37] although here, *Dutton* was not cited and the discontent of HHJ Paul

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[29] [2010] EWCA Civ 817.
[30] Note also, as discussed below, that the decision was ultimately made on the basis of the statute conferring powers of management upon the Mayor (and so on a different basis than *Dutton*).
[31] *Hill* was a decision of the Court of Exchequer, in precedent terms equivalent to the modern High Court, and hence not binding on the Court of Appeal in *Dutton*, but still relevant.
[32] *Brake* (n 26) [158].
[33] ibid [160].
[34] ibid [160] emphasis added.
[35] ibid [162].
[36] [1673] EWHC (KB) J85.
[37] See [2022] EWCA Civ 1302.

Matthews at first instance not discussed, which is sadly a missed opportunity to question the correctness and future of *Dutton*.

Dutton was also discussed in the recent case of *Global 100 Ltd v Laleva*,[38] a case concerning property guardians and the claimant's (the property management company) termination of their licences and subsequent attempts to remove them from occupation through an order of possession. In defence of the claim for possession, the defendant argued that the claimant did not have a sufficient interest to bring a claim for possession.[39] The court held that the defendant was estopped from denying the title of the claimant from whom they had accepted a licence, and it followed from the estoppel and the fact that the claimant had granted the defendant a licence, that they had sufficient title to bring possession proceedings.

In the proceedings, Mr Wonnacott KC on behalf of the defendant, was said to make a 'characteristically erudite and forceful argument'[40] that the line of case law that has developed which holds that a person who has merely a licence has sufficient standing to eject a trespasser (an order of possession) were 'wrong as a matter of principle, logic, history, statute and authority.'[41] The judge, in his decision, attempts to set out the core arguments made by Mr Wonnacott KC and follows this by stating that:

> "I express no view, one way or the other, about whether Mr Wonnacott is right in the case of a person who has entered and remains on land without any consent, except to say that at this level of the judicial hierarchy the argument is a difficult one to sustain in the face of case law which binds us…"[42]

The judge, however, like above, sidestepped this case-law by finding that the defendant was estopped from denying their title as the receiver of a licence themselves.

Like in *Brake v Chedington* the discussion of *Dutton* here suggests that there is still some dissatisfaction with the decision. Although, Lewison J (who gave the leading judgement) recognises here that the court is bound by the decision, and so takes a more neutral approach than HHJ Paul Matthews.

Global Guardians Management Ltd v Hounslow LBC[43] represents an even more recent case related to the same factual scenario where *Dutton* was once again cited. The question for the tribunal was whether either Global Guardians Management (GGM) or Global 100 (G100) were 'persons managing the property' or 'persons having control' within the statutory definitions, so as to be liable for the breach of regulations for houses of multiple occupation (HMO). In answering the question, the agreements between GGM and G100 were analysed by the courts where GGM gave permission to G100 to grant temporary 'non-exclusive licences' to persons selected. The interest for us is the penultimate paragraph of that agreement which the court hypothesised were included to 'give effect to the decision' of *Dutton*, or at least use that decision to give G100 the most minor rights necessary to allow them to bring orders for possession against the licensees/'tenants' (on the basis of the *Dutton* decision). This paragraph reads:

> 'Guardians sign agreements directly with G100 Ltd whose authority to grant such licenses emanates from its permission, or license, from GGM. In as much as GGM authorize G100 to grant such Guardian licenses, it also confers on G100 sufficient interest in the properties for

[38] [2021] EWCA Civ 1835.
[39] The claimant also argued that she in fact had a tenancy as opposed to a licence. This element is not necessary to the consideration of *Dutton* and the judge held that the property guardians here did not have a lease.
[40] *Global 100* (n 38)[59].
[41] ibid [59].
[42] ibid [60].
[43] [2022] WL 04540732 (2022).

> G100 to bring claims for possession if required against the Guardians to whom it has granted licences.'

The use of *Dutton* here is interesting as it suggests that the case is now so firmly engrained that businesses are using it as a basis on which to plan their contracts. GGM were so confident in the ruling it *Dutton* is here to stay that they gave only the minimum rights required on the basis of *Dutton* to allow G100 to use an order for possession to remove tenants when required (rather than the more significant proprietary or possessory rights which would be needed under the orthodox understanding of possession orders). This is despite the negative scholarly and judicial murmurs in the cases and articles cited above.

Another recent case to mention is that of *Walton Family Estates Ltd v GJD Services Ltd*.[44] The claim in this case related to the removal of certain (unairworthy) aircrafts which were parked at Bruntingthorpe Airfield, allegedly without authority. The defendant sought to defend the claim either on the basis of proprietary estoppel, or on the basis of a licence, but also submitted that the claimant did not have sufficient title to sue in trespass. The claimant in this case was the freehold title owner of the land, but the land itself had been leased out, and so the defendants sought to argue that it was the tenant who was in exclusive possession (and not the landlord). The court held that under the lease agreement the claimant did retain (through a licence) a sufficient interest to sue in trespass as they had the right to occupy the land within the aerodrome and have access to the land to fulfil its obligations under the lease (which was to retain certain aircraft/scrap and to remove it before a certain date). In deciding this the court used *Dutton*.

Counsel for the defendants sought to distinguish *Dutton* arguing that the principle applied only to licences to 'enter and occupy[45] and thus a licence merely to enter (which they claimed the claimant had) was insufficient. In doing so some other post-D*utton* cases were raised including *Alamo*[46] and *Countryside Residential v T*[47] (which are discussed below) where the courts did draw a distinction between licences which merely provided access, with those that allow the licensee to occupy. The court here, however, found that the claimant had established sufficient interest to sue in trespass as the lease, when properly interpreted provided the claimant with the "right to occupy the land within the Aerodrome on which the Aircraft are parked and to have access to the property for the purpose of fulfilling its obligations under Clause 40.1"[48] and so:

> "The situation is therefore on all fours with the *Manchester Airport* case indeed it is a fortiori here, because in the *Manchester Airport* case the court held it had jurisdiction to grant a licensee an order for possession against trespassers even before the licensee was in de facto possession, if such an order was necessary to give effect to the licensees right to occupy under the contract with the licensor"[49]

The judgment here seems to sidestep the limitation which some of the earlier case law has attempted to place on *Dutton* by holding that the licence needs to be a licence allowing *occupation*, by finding here that the agreement, when properly interpreted, does allow both *access and occupation*. This will be further discussed below. In so holding, the court suggests that the decision here seems similar, but also on stronger ground, than that of *Dutton*. This case also confirms that the extension of those

[44] [2021] EWHC 88 (Comm).
[45] ibid [45].
[46] *Alamo Housing Cooperative Ltd v Meredith* [2003] EWCA Civ 495.
[47] [2000] 3 WLUK 128.
[48] *Walton Family Estates* (n 44)[47].
[49] ibid.

eligible to bring a claim brought about by *Dutton* is applicable to both trespass to land and for possession orders, as is often interpreted by scholars in the leading texts.[50]

Rather than continuing to list the authority dating back to the *Dutton* decision, it is more useful to group the cases based on the common characteristics and the use/discussions of *Dutton* that arise in these different contexts. This exercise is also interesting as it shows that the cases where *Dutton* is cited (and where it proves successful/useful) naturally coalesce into distinct and discreet categories.

Protest or unlawful occupation cases

One subset of cases is those that involve protests or unlawful occupation of land, and hence those that are factually similar to the original decision in *Dutton*, in fact, this subset makes up the bulk of decisions citing *Dutton*. This subset of cases includes: *Hackney LBC v Powlesland*[51]; *Mayor of London v Hall*[52]; *Secretary of State for the Environment, Food and Rural Affairs v Meier*[53]; *Drury v Secretary of State for the Environment, Food and Rural Affairs*[54]; and, *Countryside Residential (North Thames) Ltd v T.*[55] This category also features the very recent decision of *High Speed Two (HS2) Ltd v Persons Unknown.*[56]

The discussion should start with *Mayor of London v Hall*, as one of the more discussed cases citing *Dutton*.[57] This case concerned a protest camp (Democracy Village Camp) that was set up on parliament square gardens, and whether the Mayor of London had sufficient standing, in his own name, to seek an order for possession. The court held, both at first instance and in the Court of Appeal that he did have such power. Ultimately this was because of the powers and rights granted to him by the Greater London Authority Act 1999 which gave him 'every aspect of ownership and possession'. In so deciding, however, there were discussions of *Dutton* at both stages.

At first instance, counsel for the defendants argued that *Dutton* was distinguishable to the current scenario as in *Dutton* the licence gave the right to enter and occupy, and in the present case no occupation rights were given. Counsel also argued that if not distinguishable then the court should find that the case was decided *per incuriam* as the Court of Appeal did not refer to relevant decisions such as *Hill v Tupper* but also *Hunter*.[58] At first instance, this line of argument was taken seriously by the judge, Griffith Williams J, who stated:

> "The facts in *Dutton* are markedly different to the facts in the present case and so it is distinguishable on its facts and I accept it is arguable that the Court of Appeal's decision was reached without regard to binding authorities and that the court's approach to "the law of remedies", applied by Laws LJ in *Dutton* (see 149H-150E) conflicts with the opinion of Lord Neuberger in *Meier* above at paragraph 59. There is also authority – *Countryside Residential (North Thames) Ltd –v- Tugwell and others* [2003] 34 EG 87 – that Dutton should not be construed as going further than its particular facts allow. But in the light of my decision on the

[50] See, for example, Michael Jones and Anthony Dugdale (eds), *Clerk & Lindsell on Torts* (23rd Edn, Sweet & Maxwell 2020) 18-23.
[51] [2020] EWHC 2102 (Ch).
[52] [2010] EWCA Civ 817.
[53] [2009] UKSC 11.
[54] [2004] EWCA Civ 200.
[55] [2000] 3 WLUK 128.
[56] [2022] EWHC 2360 (KB) [This case, while recent, is being discussed here because of the more limited treatment of *Dutton* than those above, and because of the clear factual similarities to this grouping of cases]
[57] See for example Lochery (n 13).
[58] *Mayor of London* (n 52) [93].

> jurisdiction issue, it is unnecessary to consider the alternative submissions or to reach a concluded view."[59]

This line of argument was not given the same favour in the Court of Appeal, where, it is already well known, that Lord Neuberger sought to approve of the decision and reasoning in *Dutton*. Lord Neuberger suggested that:

> "... there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question -along the lines of the views expressed by Laws LJ in Dutton's case [2000] QB 133"[60]

The result of this decision in the Court of Appeal is the express approval (albeit in obiter) of the *Dutton* decision, the reasoning of Laws LJ, and its potential extension. While other decisions that will be discussed below had sought to limit the decision (this is true mainly of those which came immediately after the *Dutton* decision), as does the first instance decision here, the dicta by Lord Neuberger has been interpreted as an extension,[61] suggesting that any right to 'use and control' would be sufficient.

Other cases have similarly concerned protests. For example *Powlesland* concerned a protest over the removal of a tree known as the 'happy man tree' where *Dutton* was applied to conclude that '[i]f the possession of others interferes with the activities that the licensee is permitted to carry out on land, the licensee is entitled to claim possession from those so interfering.'[62] *Drury* similarly concerned a protest in a woodland, in this case, however, *Dutton* was only cited in argument and not in the judgement. *Countryside Residential*, one of the first cases citing *Dutton*, involved the occupation of a woodland by a 16-year-old in a protest against new housing. Like in *Dutton* the respondents had only licences, and those licences allowed them to carry out 'investigatory work', and T had started occupation of the woodland before the developers had come to site. By the time the appeal had come to court T was no longer occupying the woodland and the developers had gained legal title, but costs meant that the appeal was not dismissed and so the court took the opportunity here to consider *Dutton*. Here *Dutton* was distinguished, and the court suggested that *Dutton* should not be extended beyond its current parameters.[63] The licence in this case was different as it provided only for access and so did not provide sufficient effective control to allow possession proceedings;

> "The developers did not have a contractual right to occupy or have possession with the effective control that is necessary if *Dutton* is to apply. They simply had a contractual right to access which is not sufficient for Ord 113 purposes."[64]

The court refused to hear or make any judgment of the status of the *Dutton* decision and whether it was correctly decided. Regardless, the distinguishing of *Dutton* is interesting here as it shows that immediately post-decision the courts sought to limit the decision and contain it to the limited factual scenario which would have been a welcome move. This, unfortunately, was undone by the Court of Appeal in *Mayor of London v Hall*.

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[59] ibid [102].
[60] ibid [27].
[61] Lochery (n 13) 82.
[62] [2010] EWHC 1613 (QB) [26]. The court held that this right to claim must be a parallel claim to that of the paper title owner, and would not mean that the paper title owner was excluded from also making a claim.
[63] This was the dicta which fed into the first instance decision in *Mayor of London v Hall*.
[64] *Countryside Residential* (n 55) [17].

The case in *Meier* was slightly different from those above, and concerned possession proceedings against a number of travellers who had set up camp in an area of woodland owned by the Secretary of State and managed by the Forestry Commission. The claimant sought possession of the occupied site, and a number of other unoccupied woodland sites in the vicinity. The Supreme Court held that the claimants were not able to make a possession claim for land currently unoccupied, but could be made against the parts occupied. But the court ultimately upheld the injunctions granted by the Court of Appeal for the other woodlands sites. In doing so, they laid down the purpose of possession proceedings, and confirmed the expansion of those able to bring a claim as a result of *Dutton:*

> "Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport plc v Dutton [2000] QB 133*, the claimant no longer needs to have an estate in the land."[65]

Most recently, *Dutton* has once again been used in the context of protest in *High Speed Two (HS2) Ltd v Persons Unknown*. The claim here was for interim injunctive relief to restrain potential unlawful protests against the building of HS2 on HS2 owned land which have/will hinder construction, and which is either a trespass or a nuisance (or both).[66] One question was whether the claimants had sufficient power to claim an injunction arising from trespass/nuisance. During the discussion of what was needed, in terms of possession, for an action in trespass/nuisance, *Dutton* was cited to suggest that, 'all that needs to be demonstrated by the claimant is a better right to possession than the occupiers,'[67] and:

> "[a]ctual occupation or possession of land is not required, as *Dutton* shows (see in particular Laws LJ's judgment at p151); the legal right to occupy or possess land, without more, is sufficient to maintain an action for trespass against those not so entitled."

As suggested in the introduction to this subset of cases, this category is probably the most significant in two respects: 1) it makes up the bulk of cases citing *Dutton;* and, 2) it is the category most factually similar to *Dutton*. This suggest, at least implicitly *Dutton* is being contained to a great extent to cases involving similar facts. It proves useful in cases of protest and unlawful occupation, especially when the 'rightful' occupiers have not yet gone into occupation and started the works. The very recent citing in the HS2 protest cases suggests that *Dutton* is likely to remain useful to this category of case and remain cited. But if this is where *Dutton* is most useful it is interesting to think about whether changes in the criminal law in relation to protests and police powers are likely to make the need for *Dutton* less important in the future, especially as these powers have peaked public attention in protests relating to Black Lives Matter, Extinction Rebellion and recently the Royal Family. With the extension of police powers in the criminal law, the need for these civil law measures and orders for possession remain to be seen. While it is good that *Dutton* has been mostly contained to this scenario, and this in effect minimises the negative critiques and problems flowing from the case, it does still mean that licences in protest scenarios are elevated to pseudo-property rights and able to bind third parties which is problematic, especially as in most cases there will be a 'proper' party that could bring an action without undermining the distinction between personal and property rights (just as the National Trust could have in *Dutton* itself).

Dutton used to help define possession cases

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[65] *Meier* (n 53) [6].
[66] *HS2* (n 56) [3] and [9].
[67] ibid [77].

Dutton has also been used in a couple of cases to help define possession. Here Chadwick LJs dissenting judgment has been favoured. Those two cases are *Clarence House Ltd v National Westminster Bank Plc*[68]and *Reiner v Triplark*[69] which both concerned assignment (or virtual assignment) of leases.

The first case, *Clarence House Ltd*, turned on whether the term 'possession' within the leasehold covenant against assignment had its natural meaning of the right to enter and occupy the land to the exclusion of others or whether it had an extended meaning which would include the right to receive rets and profits from the land. In deciding it held the former meaning, Chadwick LJ's judgement in *Dutton* was cited:

> "And as Chadwick LJ said in Manchester Airport plc v Dutton [2000] QB 133, 142: 'possession is synonymous . . . with exclusive occupation' that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title . . .__ The hallmark of the right to possession is the right to exclude all others from the property in question. That is the ordinary and normal sense of the word and that is the meaning which it should be given in this covenant."[70]

When the concept of possession within leasehold covenants was further discussed in *Reiner v Triplark* the above was similarly cited.

This category of case citing *Dutton* is interesting in the preference of Chadwick LJ's discussion of possession. As possession is typically required for trespass to land (and also an order of possession) one interpretation of *Dutton* is that it changed what was required of possession to align with occupation or something less. The preference for Chadwick LJ's judgement signals that this interpretation is not necessarily correct and this is to be welcomed.

Accommodation for the homeless cases

The decision in *Dutton* has also been cited in a couple of cases where housing associations have sought to bring possession proceedings against those they have provided with accommodation. There are obvious similarities here with the *Global 100* and *Global Guardians Management* cases cited above. The first of these cases post *Dutton* was *Alamo Housing Cooperative Ltd v Meredith.*[71] The arrangement in this case is a familiar one. The property was owned by Islington Council and the council entered into a lease with Alamo, a fully mutual housing association. Alamo subsequently granted a series of sub-leases to each of the defendants in the case. The claimants submit, that at the time the possession proceedings were sought, Alamo did not have a sufficient interest in the property to do so. This is because by this time the council had already served a notice to quit against Alamo which had expired and so Alamo was no longer the defendant's landlord. The only possible right which Alamo had to bring an action was contained in Clause 2(1) of the lease and allowed for terminations of Alamo's interest '*except for the purpose of enabling eviction if required by the Council*' and the claimants contend that this clause does not give them the *right to enter and occupy and have effective control of the land*[72] which is required to bring possession proceedings. The court found that at the time of the councils notice to quit Alamo no longer had an estate in the land. However, since the Council had required Alamo to take proceedings to evict the tenants so as to be able to hand over the properties with vacant possession, they must have, in this exception stated above, conferred on Alamo a continuing right to possession for that purpose.

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[68] [2009] EWCA Civ 1311.
[69] [2018] EWCA Civ 2151.
[70] *Clarence House* (n 68) [32].
[71] [2003] EWCA Civ 495.
[72] ibid [37].

The second case that falls within this category is *Kay v Lambeth LBC*, here *Dutton* was discussed in the Court of Appeal Judgment, but not cited in the House of Lords decision (though it was cited in counsel's arguments).[73] The core facts here are similar to the above, however, in this case the homeless occupier was supposed to be given a licence to occupy. The House of Lords in *Bruton*,[74] however, held that the occupiers were tenants of housing trust. In coming to that conclusion, they left open the question as to whether they were also secure tenants of local authority. In response the Local Authority ended the head leases, between themselves and the Housing Authority and sought possession against occupiers. In the case the counsel for the defendant used *Dutton* to argue that the law treats a licence in the same way as a lease and so the surrender exception applied here and on termination of the head lease the defendants becomes direct tenants of the council, and thus had an estate in land. The Court of Appeal did not agree with the reasoning advanced here.

Vehicle Control Services v Revenue and Customs case

Dutton was cited at multiple stages of the *Vehicle Control Services v Revenue and Customs* dispute. The case concerned the management and operations of parking enforcement on private car parks and whether the income was outside of VAT as it was paid as damages in lieu of trespass. *Dutton* was relevant to decide whether Vehicle Control services had sufficient standing to sue in trespass as a licensee to make the claim that the money received was damages in lieu of trespass a viable argument. In the First Tier Tribunal the focus was on *what* the licence provided Vehicle Control services *with*, and in particular the fact that, unlike *Dutton*, it did not provide a right to occupy. The Upper Tribunal similarly held that Vehicle Control Service did not have a right to occupy or possess with the effective control necessary for *Dutton* to apply; the mere right of access was insufficient.[75] The Upper Tribunal continued, that even if they did have sufficient standing, *Dutton* placed restrictions on the remedy, namely that the remedy must protect, but not exceed, the legal rights granted by the licence. In this case the Tribunal found that the limited rights afforded to Vehicle Control Service under the contract do not require 'protection' from motorists who park their cars in breach of the relevant restrictions.[76] When the case reached the Court of Appeal, the application and understanding of *Dutton* changed from that applied previously within the case with the court arguing that Vehicle Control Services must have the right to eject trespassers as this is plain from the right to tow cars which the contract provides. In terms of the application of *Dutton* and the limits placed on it by *Countryside* the court confirmed that the traditional view that a licensee cannot maintain an action for trespass has been "modified in more recent times."[77] They further said:

> "I do not consider that these two principles are limited to cases in which the licensee has a right to possession or occupation. In my judgment Laws LJ makes it clear that the extent of the remedy is commensurate with the right."[78]

And that *Countryside* cannot be taken "to stand for the proposition that a licensee whose rights are interfered with is without a remedy against the person who interferes with them."[79]

The decisions in the First Tier Tribunal and the Upper Tribunal show preference for a strict and limited view of *Dutton* similar to that discussed in *Countryside Residential* and also in the first instance decision in *Hall*. Attempts here then have been made once again to limit the scope of *Dutton*. This view was obviously changed in the Court of Appeal, as it was in *Hall*. This decision is interesting as it also

[73] See Court of Appeal decision [2004] EWCA Civ 926; and House of Lords decision [2006] UKHL 10.
[74] *Bruton v London & Quadrant Housing Trust* [1999] UKHL 26.
[75] [2012] UKUT 129 [27].
[76] ibid [28].
[77] [2013] EWCA Civ 186 [33].
[78] ibid [35].
[79] ibid [41].

suggests that the rule from *Dutton* for possession orders similarly apply to trespass, which was often presumed by commentators,[80] and can be seen in more recent cases too.

Miscellaneous cases where Dutton has been applied/discussed

Two other decisions which evade the previous categorisation but nonetheless cite and discuss *Dutton* are *Hounslow LBC v Devere*[81]and *R v Day*.[82] The latter can be dealt with briefly, here *Dutton* was used to argue (and hold) that a lawful occupier (someone who just has a licence) can evict an unwanted trespasser and claim self-defence; meaning that self-defence was open not just to an owner or resident, but any lawful occupier on the basis of *Dutton*.

The facts of *Hounslow LBC v Devere* are as follows, the appellants had moored their vessel on the River Thames alongside land owned by the local authority. The local authority had claimed trespass and sought the removal of the vessels. The vessels were secured to concrete posts under a walkway and to 'dolphins' (wooden piles sunk into the riverbed). The local authority owned the land, and they had a licence to maintain the posts which were in the riverbed (but did not own the riverbed). The appellant argued that the local authority did not have effective control of the posts to enable it to bring a trespass claim and argued that the judge at first instance had impermissibly extended *Dutton* ignoring cases like *Countryside Residential*. The court found that it would be artificial to find that the local authority was in control of the walkway (on top of the pillars) but not the posts below it/supporting it, but that they were not in possession of the dolphins which they had no permitted use of (nor did they need to use them). The next question about the dolphins, was whether they nonetheless had a claim because of *Dutton*.

In discussing *Dutton* the judge suggests (talking about *Dutton* and the subsequent cases) that:

> "These cases are not without their difficulties. It is not clear precisely what principle was being laid down by Laws LJ and Kennedy LJ who formed the majority in *Manchester Airport plc v Dutton* . Were they deciding that a licence which conferred a right to possession entitled the licensee to sue for possession even if he had not been in possession? Were they treating possession and occupation as the same thing for practical purposes? Or were they saying that where there was a contractual right to occupy or use land and that right was interfered with, the licensee could obtain an injunction to restrain that interference and in some circumstances an order for possession of the land would be a more appropriate remedy than an injunction? Is there a special rule in relation to interference with a contract as to the use of land so that the court will restrain an interference with that contract even where the tort of unlawful interference with contractual relations had not been committed?"[83]

The court went on to suggest that this area has been recently discussed in *Vehicle Control Services*, and so they ought to adopt and seek to apply the principles as recognised by the court there.[84] In discussing it though the judge recognised that Lewison LJ 'did not appear to find the position as problematic as I would have done.'[85] This discussion once again shows the hesitancy of judges when

[80] See, for example, Michael Jones and Anthony Dugdale (eds), *Clerk & Lindsell on Torts* (23rd Edn, Sweet & Maxwell 2020) 18-23, and also John Stevens and Robert Pearce, *Land Law* (5th Edition Sweet and Maxwell 2014).
[81] [2018] EWHC 1447 (Ch).
[82] [2015] EWCA Crim 1646.
[83] *Devere* (n 81)[64].
[84] ibid [66].
[85] ibid [65].

it comes to *Dutton* and the confusion caused by the decision and what it stands for in terms of principle.

Finally, for fullness, there are a series of cases where *Dutton* has been cited in argument, but not within the decision or judgement. These include: *Monsanto Plc v Tilly*;[86] *Football Dataco Ltd v VBrittems Pools Ltd*;[87] *31 Cadogan Square Freehold v Earl Cadogan*;[88] *Teathers Ltd (in Liquidation) re*;[89] *Parshall v Hackney*;[90] and, *Rashid v Nasrullah*.[91]

Manchester Ship Canal v Vauxhall Motors[92] also falls within this list with it only being raised by counsel and not within the judgment. Despite this, it does feed into some of the criticisms of *Dutton*, specifically about whether a licence can be considered, at least in some instances, a proprietary right, or have some proprietary implications. This is because here, the court held that relief from forfeiture was open to a licensee who had possession or effective control of the land. The absence of any reference to *Dutton* in the judgement, however, does speak volumes and does potentially alleviate some of criticisms or concerns raised in the aftermath of the decision, in particular the concern about the *numerus clausus* and making a licence proprietary. If *Dutton* did make a licence leap the personal property divide one can assume that this would have been cited in the decision to support the claim that forfeiture is available to a licensee. This was not done, instead the court focused on the fact that the licence in *Manchester Ship Canal* gave possession and possessory rights which left open the possibility of forfeiture in the case. The lack of citing of *Dutton*, however, cannot be considered a true 'win' here, because this case once again disrupts and questions the orthodox understanding of a licence and its personal (as opposed to proprietary) status.

What does the precedent tell us about Dutton?

Despite the flurry of recent cases citing *Dutton* the first thing to note is that despite the potentially large ramifications of *Dutton* for the distinction between property and personal rights the actual impact of *Dutton* has thankfully been relatively minor. This is for a couple of reasons. The first being while it remains cited fairly regularly, which can be seen in recent cases, it is not usually at the forefront of the decisions or the ratio of the cases. Instead, it might form part of the wider argument or engagement with the wider literature, and even if it could be used, judges tend to try to side-step the decision and decide it on some 'firmer ground' e.g. on the basis of estoppel in *Global 100*. The decisions which follow and apply *Dutton* are much more limited in number than those that cite or significantly discuss the case; this can be seen above and is a positive development. Keeping *Dutton* as much as possible outside the limelight and instead just part of the wider legal background in this area (though a background that most, including myself would rather rid of/change), while not the best solution, is at least a step in the correct direction to stop the distinction between property and personal rights from being undermined further.

Secondly, the decision has fortunately not been taken as authority that a licence is now a proprietary right in all circumstances, and so it has not undermined the *numerus clausus* completely. It has been taken forward in the more limited interpretation that those with a right to use/occupy under a licence can seek an order of possession, and this is further normally contained within similar factual

[86] [1999] 11 WLUK 843.
[87] [2009] EWHC 3294 (Ch).
[88] [2010] UKUT 321 (LC).
[89] [2012] EWHC 2886 (Ch).
[90] [2013] EWCA Civ 240. Here it was used in argument to discuss who would be able to bring a claim for possession.
[91] [2018] EWCA Civ 2685.
[92] [2019] UKSC 46.

scenarios to *Dutton*. Attempts to limit this further to only those licences with rights of occupation, while attempted numerous times have, unfortunately failed. It is also interesting to note that the citing of *Dutton* often falls within discreet classes of action, the most common being those that are factually similar engaging with questions of protest (this is where *Dutton* is actually *followed* and forms a significant part of the judgement rather than just where it is discussed and cited). This suggest, at least implicitly *Dutton* is being contained to a great extent to cases involving similar facts. This is where the case has the most use, and the very recent citing in the HS2 protest cases suggests that *Dutton* is likely to remain useful to this category of case, and remain cited. But if this is where *Dutton* is most useful it is interesting to think about whether changes in the criminal law in relation to protests and police powers are likely to make the need for *Dutton* less important in the future. With the extension of police powers in the criminal law, the need for these civil law measures and orders for possession remain to be seen. While it is good that *Dutton* has been mostly contained to this scenario, and this in effect minimises the negative critiques and problems flowing from the case, it does still mean that licences in protest scenarios are elevated to pseudo-property rights and able to bind third parties which is problematic, especially as in most cases there will be a 'proper' party that could bring an action without undermining the distinction between personal and property rights (just as the National Trust could have in *Dutton* itself). *Dutton* also seems to be valuable in the cases where accommodation has been provided for the homeless, and the recent case of *Global Guardians Management Ltd v Hounslow LBC* suggests that the case has been so influential that it now forms part of the contractual arrangements that G100 enter into.

Thirdly, in terms of scope of *Dutton* as precedent, the cases also imply that these rules would apply to trespass, as is often interpreted by scholars in the leading texts.[93] This is to some extent an extension of *Dutton* and therefore a negative move forward, but one that was entirely expected even in the immediate aftermath of the decision.

The discussion above also shows that many members of the judiciary remain confused as to what *Dutton* stands for, or disagree with/disapprove of the decision and reasoning. Despite these *loudening* murmurs of discontent from the lower courts, these discussions of whether *Dutton* was right have not been taken up, or taken seriously, by those in a position to clarify or limit the decision. This can be seen, and is particularly disappointing, following the criticism offered by HHJ Paul Matthews which was not taken up or noted by the Court of Appeal on appeal.

Finally, on this point, the regularity of citing *Dutton* tells us that this is not a case that is happy to be confined to the history books. It's a case which we cannot ignore, and hope goes away; As we once thought and hoped *Bruton* was (although recent events here again tell us this is not a successful route forward).[94] As such, while wrong in principle, theory and precedent, the best that can be done currently is to restrain it to similar facts, which is what has happened thus far. But while the decision remains, and continues to be cited, attempts should be made to *understand* and make sense of the decision, and try to reconcile it with proper or orthodox thinking.

The subsequent accounts

In light of the criticism of the decision in *Dutton,* Adam Baker recently produced a new account of the case. He argues that rather than continuing to view the decision as one that modifies an existing cause of action (e.g. modifies the rules for an order of possession) *Dutton* should be treated as a starting point for a new tort. This 'new tort' is based on 'violating the enjoyment of a contractual licence'. This new account has yet to be given substantial consideration by other scholars, and this

[93] See, for example, *Clerk & Lindsell* (n 80) 18-23.
[94] *Cabo v Dezotti* [2022] UKUT 240 (LC).

paper seeks to question the logic and basis for the argument that the decision did in fact create a new tort and that this 'solves' some of the core problems with *Dutton.*

Baker's account is that laws LJ in *Dutton* actually intended to create a new cause of action, a new tort of violating the enjoyment of a licence and this explains how (and why) he sidestepped the constraints of prior decisions.[95] On such an approach, *Dutton* does not change any of the standing rules for existing actions, e.g. trespass or orders of possession, but instead creates something new.

The first point to raise is that this is not how the decision has been interpreted in subsequent cases. While Baker argues that as a matter of precedent how to use/explain *Dutton* has "yet to be settled",[96] the previous section has illustrated that *Dutton* has continually been used as precedent for the standing rules in both trespass to land and for orders of possession, as academics expected in the wake of the decision. While some of the judges in these decisions have passed comments or shown concern about exactly what *Dutton* stands for, for example the judge in *Devere* quoted above,[97] there have been numerous of cases where *Dutton* has been taken as changing the standing rules for possession orders and trespass.

Regardless, I think the more interesting question relates to the logic (as opposed to the basis) of arguing that the court intended to create a new tort.

Baker in his analysis argues that this tortious duty, to not interfere with the enjoyment of a licensee, is a duty owed by everyone. It is a claim-right to 'non-interference' owed by third-parties and is separate to the 'liberty' that the licence otherwise provides (claim-right and liberty here being used in the Hohfeldian sense).[98] Despite this, Baker suggests that the courts in *Dutton* were not advancing any new property right, [99] and so this claim-right to non-interference of a licence (owed by everyone to the licensee) is not proprietary (potentially because it does not have thing-relatedness as Baker argues). I do not think you can have it both ways.

A right to non-interference with a licence can only be binding on the world *because* it is a property right. Property rights are often labelled as *rights in rem* and can be contrasted with *rights in personam. Rights in personam*, or personal rights, are those rights which avail against a specific person (or persons) while *rights in rem* are those which avail against a very large or infinite class; they bind the world.[100] When we use tort law to protect rights, it is still the nature of the right that is important, as opposed to the use of tort law *per se* to protect it.

The role of tort law within the common law system is often disputed, and there are many different explanations of the role or function that tort law is said to have. It is not possible here to give a comprehensive account of all of tort law theory, and nor is it needed. Instead, a rights-based/corrective justice account will be used to illustrate the point.[101] A rights-based/corrective justice approach sees the gist of tort law as the infringement of rights, and correcting injustices; a

[95] Baker (n 2) 123.
[96] ibid 123.
[97] See footnote 83.
[98] Baker (n 2) 127.
[99] ibid 134.
[100] Michael Bridge and others, *The Law of Personal Property* (2nd edn, Sweet and Maxwell 2018) 1-052.
[101] Although rights-based theories (e.g., the work of Robert Stevens – Robert Stevens, *Torts and Rights* (OUP 2007)) and corrective justice theories (e.g., those put forward by Ernest Weinrib – Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 UTLJ 349; Ernest Weinrib, *The Idea of Private Law* (OUP 2012) and Arthur Ripstein – Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016)) are not identical, they share a common feature being non-instrumental theories of private law that hold that the wrongfulness of a tortious act results not from the infliction of a loss as such, but from the violation of a right and that the remedy is a response to the rights violation.

harm is recoverable in tort because it is the result of the violation of the claimant's rights. So far this account of tort law fits with Baker's suggestion. But the emphasis under these models needs to be on *appropriate* rights, under this model the focus is on rights which have been infringed, but only where the infringer had a correlative duty not to infringe, not any infringement of rights.

A right is not binding on the world simply because it is protected through some tort. Rather tort, under a rights-based perspective, takes its objective from the right being protected. If the right being protected is binding on the world, then any infringement will be an appropriate one that correlates with a duty on that person to respect it. If it is not a right of such kind, then the first question is whether the person infringing is under a correlative duty. If rights protected through tort law all had this nature, then the question of correlativity and appropriate remit of the rights could not and would not be raised.

We often think of rights protected through tort law as binding on the world because of the *types* of rights we normally think of e.g. a large subset of tortious actions do protect property rights e.g. conversion, trespass (to goods and land). But it is the right itself rather than the tort protecting it which gives this remit of protection. So even suggesting that the decision in *Dutton* created a new tort against interference with licences does not *solve* the oft-raised critique that the action blurred the distinction between proprietary and personal rights. Because this solution does exactly the same.

If this 'new tort' suffers from the same problem, and in fact the problem the solution was attempting to avoid, then the point of such a radical reinterpretation should be questioned. The new interpretation does not align with the subsequent use, and still leaves *Dutton* blurring the distinction between property and personal rights, but at the same time creates a 'new' property right with little boundaries or justification. The better conclusion is just that *Dutton* is not a decision that makes sense. It is a decision which purposely blurs the distinction between property and personal rights in a limited scenario and does so without a basis in theory, logic, or precedent.

There are other potential issues to raise with the reinterpretation including: 1) why tort law would be the appropriate invention for the protection of enjoyment of licences. It is often thought that tort law is there to fill any gaps that might arise in the law. This, however, causes problems for the internal coherence of tort law, and we need to consider whether any action should really be the remit of tort law, or whether it is there simply because there is no other logical place to put it; 2) whether licences encompassing such a right undermines some of the important distinctions between a lease and a licence. A lease confers exclusive possession, it confers control, and a licence does not. This is an important distinction. Allowing someone to claim for an interference with enjoyment appears to give them a level of control that one would normally only expect with some kind of 'ownership' right e.g. a lease or a freehold. Thus, the new action undermines the lease/licence distinction; and 3) whether judges can or should create new actions in this way (if that can really be said to be what Laws LJ had intended). This paper is not the place for these discussions.

Conclusion

This paper has sought to reflect on *Dutton*; both the decision and the subsequent treatment of it. While the decision was heavily, and rightfully, critiqued both in its immediate aftermath and beyond, the decision is here to stay. It remains regularly cited and used, especially in a flurry of recent cases, but the implications of the decision are relatively minor; it has not caused the licence to jump the personal property divide in all situations, instead it is confined to certain similar situations to that of the original facts, as shown through the discussion of cases above. There are, however, still murmurs of discontent from the judiciary (especially in the recent cases) but until a case reaches above the Court of Appeal (again) it will remain unchallenged. The appeal from the decision of HHJ Paul Matthews, in *Brake and Chedington*, was potentially this opportunity, but it was disappointingly not taken up and *Dutton* nor the critique that HHJ Paul Matthews raised were discussed in the appeal.

And so, we await further opportunities for *Dutton* to be confined to either; 1) its specific facts and protest cases where it seems useful; or better yet, 2) the history books. The recent re-account of *Dutton* by Adam Baker attempting to re-explain away the controversy of *Dutton* unfortunately suffers from the same foundational problem as the orthodox understanding of *Dutton*, a licence is made (at least in limited cases) proprietary and no re-framing as a new tort can escape this fundamental problem.