TITLE TO SUE IN TRESPASS TO LAND WITH PARTICULAR REFERENCE TO AUSTRALIAN MINING TITLES

By Susan Morgan*

The purpose of this article is to examine legal issues arising from the use of remote sensing techniques in mineral exploration. These techniques involve what is known in the mining industry as 'overflying'. A substantial invasion of the airspace over the land with respect to which the information is sought is involved. There is, however, no interference with the soil itself.[1] The problem is to decide whether such overflying is a legal wrong and if it is whether the person holding rights over the land below is in a position to seek legal redress. In the absence of statutory provisions dealing with these issues it is necessary to resolve them by reference to common law principles governing trespass to airspace and title to sue in trespass.

Although there is no authority directly in point, examination of authorities on trespass to airspace generally support the conclusion that unauthorized overflying may be trespass against those in possession of the surface. Trespass occurs when rights arising from possession are infringed. An unauthorized interference with the possession of another is actionable trespass.[2] In the case of the surface and subsurface it is accepted that any intrusion however slight is trespass and is actionable *per se*.[3] In the case of airspace, however, it is now recognized that the rights of the possessor of the surface to resist intrusions are more limited. English and Australian authorities point to a conclusion that possessory rights in relation to airspace may be restricted to an area of 'effective control', together with a requirement of exploitative conduct on the part of the intruder. In other words, an unauthorized entry into airspace which, by exploiting that air space, results in a benefit to the prospective defendant is trespass.[4] Other non-exploitative entries into airspace are not trespass and are covered by 'innocent passage' legislation. Unauthorized overflying can readily be described as exploitative conduct. Information as to the subsurface of great value to the overflyer is obtained without the

*LL.B.(Melb.), Principal Tutor, Faculty of Law, University of Melbourne.

1 This technical information was provided by Mr. Oliver Beaumont, Mr. Charles Easley and Mr. Dermot Coleman of C.R.A. (Exploration) Proprietary Limited and Mr. Bernard Joyce, Lecturer in Geology, University of Melbourne.

2 *Entink v. Carrington* (1765) 2 Wils 275; 95 E.R. 807.
Ashby v. White 6 Mod. Rep. 45; 87 E.R. 810.
Blundell v. Catteral (1821) 5 B & Ald; 106 E.R. 1190.
Dumont v. Miller (1873) 4 A.J.R. 156 (Vic.).

3 John G. Fleming, *The Law of Torts* (5th ed. 1977) 42; *Clerk & Lindsell on Torts* (14th ed. 1977), 760; Higgins P.F.P. '*Elements of Torts in Australia*' (1970), 117; *Salmond on Torts* (17th ed. 1977) R.F.V. Henston, 43. It *was* questioned by Hogan J. in a dissenting judgment in *Edwards v. Syms* (Ky. 1929) 24 S.W. 2d. 619.

4 *Lord Bernstein of Leigh v. Skyviews and General Ltd.* [1977] 3 W.L.R. 136; [1977] 2 All E.R. 902; *Woollerton & Wilston Ltd. v. Richard Costain Ltd.* [1970] 1 W.L.R. 411; [1970] 1 All E.R. 483. *Graham v. K.D. Morris & Sons Pty. Ltd.* [1974] Q.S.R. 1.

consent of and, in many cases, contrary to the interests of the holder of the mining rights in the land below.[5]

If it can be accepted that overflying may be trespass, the question which next arises is whether the potential plaintiff, the person disadvantaged by the activity, has standing to sue in trespass. In this context the concept of possession is crucial as trespass is concerned with the protection of possession. A potential plaintiff who is the holder of mining rights in the land over which overflying is occurring will need to establish the requisite degree of possession to found an action in trespass.

The mining legislation of the Australian States and Territories creates a multiplicity of titles. An exhaustive coverage is not attempted in this article. The approach taken is to demonstrate by the use of examples that mining rights are capable of classification according to common law principles relating to proprietary interests in land. Such classification is made necessary by the absence of independent proprietary interests appropriate to mining titles. Mining rights will be assigned to the various common law categories in order to determine whether the holders of those rights have title to sue in trespass. The necessity for this classification will also be demonstrated.

1. LEASES

Some mining titles may be capable of being defined as leases according to common law principles. The question of whether an agreement creates a lease is one of substance rather than form and the fact that a statute or agreement refers to a mining title as a 'Mining Lease' does not necessarily mean that the interest created is in fact a lease.[6] The traditional general law test used to determine whether a lease is created requires:

(a) that the duration of the interest be certain[7] (this will not usually be in issue in this context) and,

(b) that exclusive possession be granted.[8]

It has been recognized in Australia that there may be mining titles which are capable of falling within the common law definition of a lease. *In I.C.I. Alkali (Australia) Pty. Ltd. (in Vol. Liq.) v. Federal Commissioner of Taxation*[9] McInerney J. held that a Miscellaneous Salt Lease under the Mining Act, 1930–1962 (S.A.) was a lease because a sufficient degree of rights of occupation had been created to satisfy the requirement of exclusive possession.[10]

5 The question of whether overflying is an activity capable of constituting trespass to land is considered fully by the author in 'The Law Relating to the Use of Remote Sensing Techniques in Mineral Exploration'. (1982) 56 *Australian Law Journal* 30.

6 *Berkeiser v. Berkeiser* [1957] S.C.R. 387. 7 D.L.R. (2d) 721.

7 *Lace v. Chantler* [1944] K.B. 368; *Bishop v. Taylor* [1968] 118 C.L.R. 518.

8 *Radaich v. Smith* (1959) 101 C.L.R. 209; [1959] A.L.R. 1253; *Isaac v. Hotel de Paris.* [1960] 1 W.L.R. 239; [1960] 1 All E.R. 348. *Addiscombe Garden Estates Ltd. v. Crabbe* [1957] 2 W.L.R. 964; [1957] 3 All E.R. 563. *Shell-Mex & B.P. Ltd. v. Manchester Garages Ltd.* [1971] 1 W.L.R. 612; [1971] 1 All E.R. 841.
The provisions of the Rent Act 1977 (Eng.) have led to a number of decisions in which agreements effectively conferring rights of exclusive possession have been held not to be leases and have thus avoided the operation of the Act. For an excellent summary of these decisions see Waite A. 'Distinguishing Between Tenancies and Licences' I & II *New Law Journal* (October 1980) 939, 959.

9 (1976) 11 A.L.R. 324.

10 S.85(1) Income Tax Assessment Act 1936–1966 (Cth.) allowed the deduction of an amount paid by the taxpaper in effecting improvements upon land, subject to a lease which is assigned by the taxpayer.

McInerney J. also concluded that provisions restricting the lessee's rights to use and occupation for the purposes of salt mining did not mean that sufficient possession to enable the document to create a leasehold interest had not been granted.[11]

Crommelin observes that the conclusion that the company had exclusive possession is questionable[12]. It cannot be denied that the agreement provided for the retention of more extensive rights by the grantor than one would normally expect to find in a lease. Crommelin also points out that the most surprising aspect of the decision is that McInerney J. decided between two alternatives and accepted that the agreement created either a lease or a licence. A third possibility of a *profit à prendre* was not considered. Australian and overseas authorities have accepted the classification of some mining rights as *profits à prendre*. This is discussed in detail below. In the present context it may be observed that such a classification recognizes the existence of a proprietary right in the grantee and avoids any difficulties created by a requirement of exclusive possession. However, as the essence of a lease is the right to possession, it follows that all mining titles which may be classified as leases will give rise to an absolute right of exclusion against other parties. In other words possession taken in pursuance of such a mining title would clearly confer title to sue in trespass for any unauthorized entry and thus the right to an injunction to restrain unauthorized overflying.[13] In the present context there is a clear advantage attaching to classification of the mining title as a lease. Any unauthorized entry will be trespass as against a plaintiff in possession under a lease. This will not be true in the case of a title involving less extensive rights such as a *profit à prendre*.[14]

2. *PROFITS A PRENDRE*

A *profit à prendre* is the right to enter the land of another, to take something which is part of the land and to carry it away as the property of the grantee. Rights to take minerals or crops or wild animals are classic examples of *profits à prendre*. The *profit à prendre* is more than a mere licence, it is an interest in the land of the grantor. No interest in the products concerned passes until they are severed from the freehold. At that point the products, for example minerals, become the property of the holder of the profit[15]. A *profit à prendre* is not necessarily an exclusive right. The grantor may indeed sever the same items or may grant any number of *profits à prendre* with respect to the same items. Exclusive profits may be created, but the common law requires that if such a profit is to be created the grant should expressly state it to be so.[16]

All mining tenements obviously bear some similarity to the common law concept of the *profit à prendre*. In some cases, however, as decided in *ICI Alkali*[17]

11 *Ibid.* 337.

12 Annual Survey of Law (1977), 88.

13 *Kelsen v. Imperial Tobacco Co.* [1957] 2 Q.B. 334; [1957] 2 All E.R. 343. Another example of a mining lease which could be said to confer a sufficient degree of possession to constitute a lease properly so called is to be found in the Mining Act 1939 (N.T.) s.39.

14 Some States recognize a special status in the applicant for a lease and confirm this by providing for a statutory power to sue in trespass. See Mining Act 1968 (9th ed.) s.23; Mines Act 1958 (Vic.) s.67(1). Mining Act 1939 (N.T.) s.63(1).

15 *Duke of Sutherland v. Heathcote* [1892] 1 Ch. 475; *Mason v. Clarke* [1955] A.C. 778; [1955] 1 All E.R. 914. *Martyn v. Williams* [1857] 1 H & N 817; 156 E.R. 1430.

16 *Duke of Sutherland v. Heathercode ibid.*

17 (1976) 11 A.L.R. 324.

the rights created amount to rights of exclusive possession. These may be classified as leases. A *profit à prendre* traditionally carries the right to go on to land for the purpose of severing and taking away the product with respect to which the grant was made. Some mining interests may give the right to enter and search but give no right to take away minerals or may confer rights to take away a restricted quantity of the product for the purpose of analysis only.[18] These rights cannot be defined as *profits à prendre.* Neither can those which expressly provide that property in minerals will remain in the Crown[19]. Other statutory provisions provide not only for a right to enter and search but provide further that property in minerals won is to pass to the grantee upon severance[20]. Such rights are capable of definition as *profits à prendre* and therefore interests in land.

Australian courts have recognized that some so-called mining 'leases' do not create leases in the general law sense, but in fact create *profits à prendre. In ex parte Henry and others: Re Commissioner of Stamp Duties*[21] the majority expressed the general principle that

> It may be stated generally that a licence to dig minerals of itself confers no estate or interest in the soil or mine containing them. Nor, as we have indicated, does it confer any estate or interest in the minerals before they are actually gotten. It merely authorises the doing of an act which, prima facie, is unlawful. *Carr v. Benson* emphasised the distinction between a licence and a lease of mines. The plaintiff's licence there was a bare licence to enter which passed no interest and did not alter or transfer property. Its only effect was to make the action lawful which without the licence had been unlawful. However, a licence to dig minerals, coupled with a grant to carry them away, is more than a mere licence. It is a profit a prendre, an incorporeal hereditament lying in grant and is capable of assignment.[22]

It was held that agreement in question created such a *profit à prendre.*

A similar decision was reached in *Unimin Pty. Ltd. v. The Commonwealth.*[23] Here a right to take river sand in return for payment of a royalty was in question. O'Connor J. in the Supreme Court of the Australian Capital Territory concluded as follows:

> Reading the document as a whole, however, I think it is intended clearly enough that the plaintiff should have the property in the sand which it had the right to remove and that this gives the right the character of a profit a prendre. The fact that it is not an exclusive right does not, in my view, deprive it of that character.[24]

These decisions concern private agreements. There is no Australian decision in which a statutory mining right has been classified as a *profit à prendre.* Indeed, in *Madalazzo v. The Commonwealth,*[25] where the plaintiff claimed that a statutory mining lease conferred an interest in land for the purposes of compensation upon compulsory acquisition, Gallop J. distinguished *Unimin Pty. Ltd. v. The Commonwealth* upon the basis that in that case the rights had been created by a private individual whereas in the case before him the grantor was the Crown. As Crommelin points out not only is there no authority for such a conclusion but, on the contrary, the Crown is entitled to grant the full range of

18 *E.g.* a mineral claim under Mining Act (1971), (S.A.) s.23.
19 *E.g.* an 'authority to prospect' under Mining Act 1968–71 (Qld.) s.20.
20 *E.g.* Mining Act 1971, (S.A.) s.16.
21 (1963) 63 N.S.W.R. 298.
22 *Ibid.* 304.
23 (1974) 22 F.L.R. 299.
24 *Ibid.* 306. See also *Berkheiser v. Berkheiser* [1957] S.C.R. 387; 7 D.L.R. (2d) 721.
25 (1979) 22 A.L.R. 561.

interests in land recognized by the common law.[26] It is argued that, as a matter of principle the classification of a right as a proprietary interest in land depends upon the nature of the rights granted.[27] The identity of the grantor is quite irrelevant. The plaintiffs appealed to the Full Court of the Federal Court against Gallops J.'s refusal to uphold their claim for compensation. The appeal was allowed upon other grounds and this decision was subsequently upheld by the High Court.[28] Neither the Full Court nor the High Court suggested that anything turned upon the fact that the plaintiffs' rights were granted by the Crown. Indeed only Wilson J. in the High Court referred to the argument and he did not consider it.[29] Furthermore, it was not suggested in *ICI Alkali (Aust.) Pty. Ltd. (in Vol. Liq.) v. Federal Commissioner of Taxation*[30] that the fact that the landlord was the Crown had any legal significance. McInerney J. expressly stated that the nature of the rights granted was the deciding factor.

A *profit à prendre* is a proprietary interest in land. However this does not in itself entail the right to sue in trespass. *Actual* possession is crucial.[31]

The ability of the holder of *profit à prendre* in possession to sue in trespass was recognized in the early decision in *Bristow v. Cormican*.[32] In this context Lord Hatherley stated that 'the slightest amount of possession is sufficient to support an action in trespass'.[33]

In Fitzgerald v. Firbank[34] the plaintiffs, who had been granted an 'exclusive right of fishing', sued the defendant in trespass when he wrongfully discharged filth into the stream thereby reducing the supply of fish. Lindley L.J. described the plaintiff's rights as follows:

> The right of fishing includes the right to take away fish unless the contrary is expressly stipulated. I have not the slightest doubt about that. Therefore the plaintiffs have a right as distinguished from a mere revocable licence. What kind of right is it? It is more than an easement: it is what is commonly called a profit à prendre, and it is of such a nature that a person who enjoys that right has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights.[35]

He went on to say:

> Again, if he has a possessory right, and if not a grantee by deed but only claiming under an agreement, he can be said to have the use and occupation of the right.

The references to possession and to 'use and occupation' are crucial as is the observation regarding possession without a deed. The significance of the taking of possession by the holder of *profit à prendre* was clearly demonstrated in *Mason v.*

26 Annual Survey of Law 1979. 397.
27 *Berkheiser v. Berkeiser* supra. *Hill v. Tupper* (1863) 2 H & C 212; 159 E.R. 51. *Victoria Park Racing & Recreation Grounds v. Taylor* (1934–35) 52 C.L.R. 9.
28 (1979) 22 F.L.R. 437. (F.C.); (1979–80) 29 F.L.R. 161 (H.C.).
29 *Ibid.* 172.
30 *Supra* (1976) 1 A.L.R. 324.
31 *E.g.* The holder of an easement has a proprietary interest in the servient tenement but cannot sue in trespass because the rights granted of their very nature preclude any right to possession. *Paine & Co. Ltd. v. St. Neot's Gas & Coke Co.* 3 All E.R. 812. The same is true of a rent charge.
32 [1878] 3 App. Cas. 641.
33 *Ibid.* 657. The question of what constitutes taking possession with respect to a *profit à prendre* is discussed in more detail *supra.*
34. [1897] 2 Ch. 96.
35 *Ibid.* 101.

Clarke[36] in which case both *Bristow v. Cormican* and *Fitzgerald v. Firbank*[37] were followed. The plaintiff had been granted an exclusive right to catch rabbits and other game. In the exercising of these rights he went onto the land and laid snares for the trapping of rabbits. When the defendant removed the snares the plaintiff brought a successful action in trespass claiming both damages and an injunction. No deed has been executed and the plaintiff therefore had no legal proprietary interest. The defendant argued that equitable rights were not a sufficient basis for an action in trespass and that damages were a legal remedy. The plaintiff, however, whilst agreeing that in equity he was entitled only to specific performance of his contract, argued that in law he was in *possession* of a *profit à prendre* which he could protect by an action in trespass. His title to sue rested *upon that possession* and not upon a documentary title to a proprietary right. The plaintiff's argument succeeded. All members of the Court of Appeal emphasized the fact that it was the plaintiff's actual legal possession which gave rise to the right to sue in trespass. Viscount Simmonds put it as follows:

> It is true that he had no legal title but . . . Mason had a clear equitable title. If and so far as it is necessary to buttress actual possession of a profit à prendre with a title of ownership that condition is in this case fulfilled. I express myself with this qualification for as was said in *Bristow v. Cormican* possession 'for however short a period' (*per* Lord Cairns L.C.) 'the slightest amount of possession' (*per* Lord Hatherley) of a profit a prendre is sufficient to support an action for trespass against a wrongdoer . . . Mason was in possession of profit à prendre . . .[38]

In other words, the legal or equitable nature of the proprietary right granted by the transaction was not relevant. The fact of possession was. That possession in itself gave rise to a legal right. It was for the infringement of legal possession that trespass lay. Proprietary rights granted by the contract were relevant only to the decision as to whether the acts of the plaintiff constituted a taking of possession.[39] The significance of possession is clearly illustrated in the Victorian decision in *Moreland Timber Co. Pty. Ltd. v. Reid*.[40] The plaintiff had been granted a *profit à prendre* in writing. No deed had been executed. The plaintiff's interest was therefore, of course, equitable. The plaintiff in this case failed in an action in trespass because of an important factual distinction from *Mason v. Clarke*. It had never taken possession by entering the land and cutting timber. As the plaintiff's rights were equitable in nature it could not be awarded damages. The legal right arising from actual possession demonstrated by the plaintiff in *Mason v. Clarke* was missing. MacFarlane J. put it thus:

> In the case of an action for damages for trespass it would appear to be sufficient answer that the plaintiff was not only not the owner in law of any interest in land but was not at the times of the acts relied on as constituting trespass in possession or occupation of the land or an interest in land.[41]

From the authorities it is clear that the holder of a *profit à prendre* in

36 [1955] A.C. 778; [1955] 1 All E.R. 914.
37 *Supra*.
38 [1955] A.C. 778, 794, [1955] 1 All E.R. 914, 920. The respondent was the successor in title of the grantor. See also *Wellaway v. Courtier* [1918] 1 K.B. 200. *Simpson v. Knowles* [1974] V.R. 190.
39 The significance of the reference to the necessity to 'buttress the plaintiff's' possession is discussed *intra* 296.
40 [1946] V.L.R. 237.
41 *Ibid.* 244.

possession does have standing to sue in trespass to land. But whilst it is clear that a tenant takes possession by entry and that any unauthorized entry is trespass as against a tenant,[42] those propositions do not follow in the case of a *profit à prendre*. What then amounts to the taking of possession of a *profit à prendre*? In *Mason v. Clarke* the plaintiff by exercising the very right granted had clearly taken possession of the profit. Would some less precise action suffice? The holder of a mining title classified as a *profit à prendre* may have entered the land in a substantial manner for the purposes of exploration. He may not yet have commenced digging or boring or actually mining the minerals concerned. Does this mean that possession has not been taken?

The observations of Lord Hatherley in *Bristow v. Cormican*[43] were made in relation to a *profit à prendre*. The issue was succinctly posed in *Hegan v. Carolan*:[44]

> there must be actual possession before an action or trespass can be brought. Now, how can actual possession be required? It cannot be necessary for one who is asserting his rights to walk over every inch of a field. That would be absurd. All that is necessary is that he should do some act from which it may reasonably be inferred that he claimed the whole, and intended to assert his right to the whole.[45]

In that case, entry and the cutting of trees was held to be consistent only with an intention to take possession. In the mining context will substantial entry onto the land before the production stage amount to such an act of possession? It would be consistent with commensense, in the absence of direct authority, to conclude that in would. Some support for this proposition is gained from the Victorian decision in *Ebbels v. Rewell*[46] in which an exclusive right to mine 'in and under all the land' concerned was held to include the right to possession of all the surface. These authorities indicate that whilst possession must be taken activities falling short of actually exercising the precise rights granted may be sufficient possession where the plaintiff has title to a *profit à prendre*.[47]

The question of what type of activity will constitute interference with the possession of the holder of a *profit à prendre* must also be considered. In *Harker v. Birbeck*[48] the plaintiff had been granted an exclusive right to raise lead ore. The defendant had also dug for ore and had interfered with the right granted to the plaintiff. The plaintiff brought an action in trespass and succeeded. Lord Mansfield said that the plaintiffs were in possession of the mine and the entry was a trespass. Almost two hundred years later the House of Lords in *Mason v. Clarke*[49] decided that where the plaintiff had granted the right to kill and take rabbits on an estate that right was a *profit à prendre*. A successful action in trespass was brought against the defendant, a successor in title of the grantor who directly interfered with the exercise of those rights.

In these cases the acts complained of involved a direct interference with the very right which the plaintiff was granted and was exercising. In the mining context they would clearly apply where the unauthorized intruder actually engages in or

42 *Supra.* 285.
43 *Supra.* 287.
44 [1916] 2 I.R. 27.
45 Pim J. *ibid.* 28–30.
46 [1908] V.L.R. 26.
47 The relevance of title is discussed *infra* 296.
48 [1764] 3 Burr. 1556; 97 E.R. 978.
49 [1955] A.C. 778; [1955] 1 All E.R. 914 *supra* 288.

obstructs mining operations. The plaintiff has clearly taken possession and the defendant has clearly interfered with that possession. Will something less than direct interference suffice? The answer to this question is as in *Mason v. Clarke* crucial in the mining context. In the case of overflying interference is not as direct because the actual mining operation is not obstructed. But it does render the rights conferred on the plaintiff less valuable by extracting the very information which the plaintiff would hope to exploit. In *Fitzgerald v. Firbank*[50] the defendant argued that his actions in fouling the river did not amount to a trespass as he had not actually prevented the plaintiff from fishing.

Having decided that the plaintiff had a *profit à prendre* with respect to which he had taken possession, Lindley L.J. went on to consider the action of the defendant:

> The plaintiffs' rights are, therefore, pretty accurately defined. Now, what has the defendant done? Has he interfered with them? He has not challenged the rights, but he has done that which prevents the plaintiffs from exercising them to the extent to which they would exercise them if not wrongfully prevented.[51]

Lord Rigby put the point more forcibly:

> The argument was pushed with the greatest courage to this extent that a wrongdoer, unless he tried to do the very thing that the grantees were authorized to do, might destroy the whole subject-matter of the grant and be liable to no action. I never met with any case which gave the slightest colour to such a doctrine. I hold that the grantees of the incorporeal hereditament have a right of action against any person who disturbs them . . .[52]

On this authority it is submitted that the holder of *profit à prendre* who has taken possession could maintain an action in trespass against any person carrying out mining operations on any part of the land.[53] Any unauthorized mining operation must make less profitable the rights of the plaintiff in the same way as the activity of the defendant made less valuable the plaintiff rights in *Fitzgerald v. Firbank*. In some states indeed the activity of overflying would, as a matter of statutory interpretation, be described as a mining operation.[54]

Despite these authorities it may be argued that as the holder of a profit has more limited possessory rights than the holder of a lease a more limited class of activities will constitute an infringement of the rights. This is in one sense correct. The holder of a mining lease could complain if, for example, a pastoral lease was granted over the area concerned. The holder of a mining *profit à prendre* could not unless the holder of the pastoral lease interfered with his mining activities. Does he have sufficient standing to sue with respect to unauthorized exploration? The following conclusion is suggested although the issue has not been litigated. In the

50 [1897] 2 Ch. 96.

51 *Ibid.* 101–2.

52 *Ibid.* 104.

53 Some reservations must be expressed in the case of non-exclusive profits. It is clear that in such a case there is sufficient title to sue in trespass. However, traditional authorities suggest the right to sue is limited to interferences with mines actually being worked by the plaintiff. *Jones v. Reynolds* 4 A & E 805; 111 E.R. 986. Decisions such as this do not accord with modern mining techniques. If the commencement of large scale mining operations by the erection of infrastructure and the introduction of equipment amounts to taking possession then any interference with those activities must necessarily be trespass whether the profit is exclusive or not.

54 Mining Act 1939 (N.T.) s.38 M (5)(a).
Mining Act 1929 (Tas.) s.15A.
Mining Act, 1973–1976 (N.S.W.) ss.6(1), 86.

mining context a *profit à prendre* involves the right to search for, win and take away minerals. Unauthorized overflying interferes with one of the very things granted, namely the right to search. A profit carries with it the right to explore for minerals on and under land. It must also carry with it the right to use all the land and airspace for the purpose of such search. Therefore any unauthorized entry for exploration purposes would constitute an interference with that right and would therefore be a trespass.

On the basis of the above analysis it is concluded that the holder of a mining interest classified as a *profit à prendre* who has taken possession has standing to sue an unauthorized overflyer in trespass.[55]

3. LICENCES

The final category to be considered concerns those mining titles which are in the nature of licences. These are rights which give the holder the right to enter land in order to search for minerals but which do not grant rights which enable the licence to be assigned to a recognized category of common law proprietary right.

A most critical example of such a right is an exploration licence.[56] Such a licence does not confer sufficient rights to exclusive possession to enable it to be classified as a lease. Neither does it confer property in severed minerals, enabling its classification as a *profit à prendre*.[57] On the present state of the Australian authorities a licence grants no proprietary rights.[58] Nevertheless, it seems probable that the holder of an exploration licence is the person most likely to be complaining about unauthorized overflying over the land with respect to which the exploration licence is held. Reference to the traditional authority of *Hill v. Tupper*[59] might lead one to the conclusion that because the holder of an exploration licence has no recognized proprietary interest by virtue of that licence no action in trespass could lie at the suit of the licensee. In *Hill v. Tupper* A agreed that B should have an 'exclusive' right to let out pleasure boats for hire on a canal. It was held that the agreement created a mere licence and no interest in the land and that B could not maintain an action in trespass against C when the latter engaged without authority in the same activity. This finding was not affected by the fact that the right was described as 'exclusive'.

It is, however, argued that the decision in *Hill v. Tupper* can no longer be

55 The fact that such an analysis is necessary demonstrates the undesirability of the present legal position. Becuase of the absence of a proprietary system appropriate to mining rights, one is forced to classify complex mining agreements according to ancient principles devised to protect rights to fish and collect seaweed. *Infra* 297.

56 Mining Ordinance (N.T.) s.38 5.6.
Mining Ordinance (A.C.T.) 1980 s.144.
Mining Act (Qld.) 1968–79 s.12.
Mining Act, (W.A.) 1978–81. s.60.

57 Mining Act, (S.A.) 1971–1976. s.18. See also Crommelin B.M.L. 'Annual Survey of Law' (1977).

58 *Cowell v. Rosehill Racecourse Co. Ltd.* (1937) 56 C.L.R. 605. [1937] A.L.R. 273; cf. *Hounslow London Borough Council v. Tickenham* [1971] Ch. 233; *D.H.N. Food Distributors Ltd. v. Tower Hamlets* [1976] W.L.R. 852. For a recent analysis and comparison of the Australian and English authorities see Hardingham I.J. 'The non-marital partner as contractual licensee', 1980 12 *Melbourne University Law Review* 356.

59 [1863] 2 H-C 212; 159 E.R. 51.

accepted as authority for the proposition that under no circumstances can a licensee have the requisite possession to enable a successful suit in trespass. The plaintiff's argument failed not because he did not have a proprietary interest in the land but rather because he did not have possession.[60] On the facts of the particular case the rights granted did not amount to rights of occupation and exercise of these rights did not amount to a taking of possession.

It will be recalled that the action in trespass protects possession and not title and with the benefit of hindsight it is suggested that plaintiff's counsel in *Hill v. Tupper* might have argued that his client had taken *de facto* possession. This is borne out by *Mason v. Clark*.[61] The nature of the plaintiff's title was irrelevant. The fact that the plaintiff was in *de facto* possession was crucial. This may be taken further. A person in wrongful possession with no title *i.e.*, no proprietary right may maintain trespass against a third party by virtue of *de facto* possession.[62] This has been held to be so in the mining context.[63] Why should a person with no proprietary right and wrongfully in possession have a better right against third parties than the person who, whilst also having no proprietary right, is on the land with the consent of the grantor. Despite recent English decisions, the Australian licensee has no proprietary interest in the land.[64] However, this is not the reason for denying a licensee an action in trespass. *Mason v. Clarke*[65] and the other authorities referred to demonstrate that the nature of the plaintiff's documentary title to the land is not directly relevant to his title to sue in trespass. That title depends upon possession. This is precisely what the plaintiff in *Hill v. Tupper* did not have. Analysis of recent authorities supports the proposition that the decision in *Hill v. Tupper*, so often expressed as authority for a general principle in relation of the rights of licensee against third parties, is more restricted in its application and should be confined to its own facts. In that case the exercise of rights under the licence did not amount to a *de facto* taking of possession. The distinction between such a case and the exploration licence which involves such extensive rights of user as to amount to possession in fact is clear.

In the *National Provincial Bank Ltd. v. Ainsworth*[66] the House of Lords decided that the deserted wife had no equitable proprietary interest in the matrimonial home. She was in the house by reason of her relationship with her husband and her rights would therefore not prevail against a *bona fide* purchaser of the legal estate for value without notice. However, whilst the House of Lords decided that the wife had no proprietary interest based upon title it did not decide that she had no rights whatsoever against third parties. Indeed, Lord Upjohn expressly recognized that such rights based upon possession might exist and be enforceable against third parties without title.

60 Street H. *The Law of Torts* (4th ed. 1968) 68.
61 *Supra* 288–289.
62 *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1;
Perry v Clissold [1907] A.C. 73;
Allen v. Roughley (1955) 94 C.L.R. 98.
63 *Bell v. Clarke* (1906) V.L.R. 56 V.R. (M);
Truswell v. Powring (1870) V.R. 13;
Ballancourt v. O'Rorke (1870) V.R. (M) 43;
Bartens Gold Mining Co. v. St. Georges Band of Hope (1870) V.R. (M) 18.
64 *Supra.* n.57.
65 *Supra.*
66 [1965] A.C. 1175; [1965] 2 All E.R. 472.

> I cannot seriously doubt that in this case in truth and in fact the wife at all material times was and is in exclusive occupation of the home. Until her husband returns she has dominion over the house and she could clearly bring proceedings against trespassers.[67]

There are no reported decisions in which this *dictum* has been followed. However in *Taylor v. Rees.*[68] Lord Upjohn's *dictum* was applied and a deserted wife in occupation of the matrimonial home maintained a successful action in trespass.[69]

A similar situation arises in relation to the rights of a mortgagor in possession of general law land in the absence of an attornment clause in the mortgage. The nature of the mortgagor's legal rights in that situation has been the subject of much discussion.[70] The equity of redemption as an equitable proprietary interest will not itself confer the right to sue in trespass. It is, however, recognized that whatever be the nature of the mortgagor's documentary title his actual possession will of itself give rise to a right to sue in trespass. Sykes puts it in the following way:

> It seems that the mortgagor in possession has always had the right to bring action to protect his possession against strangers . . . not from any recognition that he had rights of ownership but because the essential demands of such actions were that they lay to protect possession as such, even wrongful possession. The right of the mortgagor to sue . . . rests on factual and legal possession and not on the right to possession and the fact that a mortgagor in possession has conveyed the legal title to the mortgagee would be irrelevant. . . .[71]

It is suggested that the deserted wife and the mortgagor are in possession by virtue of a licence arising by implication of law because of a special relationship between the parties. In both cases, despite the fact that the licence which explains the possession does not confer a recognized proprietary right, the *fact* of possession gives title to sue in trespass.

The proposition that *Hill v. Tupper* should be confined to its own facts gains further support from the fact that there are authorities decided both before and after the decision which recognize that a contractual licensee, whilst having no proprietary interest in the land may have the requisite possession to sue in trespass. In *Harper v. Charlesworth*[72] the plaintiff held a licence from the Crown. It was recognized that the agreement, through failure to comply with the statutory requirements then in force, did not create a lease and that the plaintiff therefore had no title as against the Crown. Nevertheless it was held that he could sue in trespass based upon his actual possession.

> It appears to me that the payment of the rent, the exercise of the privilege shooting over the land, the actual cutting of the grass with the plaintiff's permission was sufficient evidence that . . . the plaintiff was in possession.[73]

The question was said to be not whether the plaintiff had a legal title to the land, but rather assuming that he could not retain the actual possession against the

67 *Ibid.* 1232; 484.
68 Unrep. 1979 Current Law 2733.
69 *In Oldham v. Samson* (No. 1) 1976 V.R. 654. A husband living with his wife in a house owned by her was held not to be in possession for the purpose of an action in nuisance. In the case of the deserted wife the husband is, of course, not in possession.
70 Sykes E.I. '*The Law of Securities*' (3rd ed. 1978), 71–79.
71 *Ibid.* 79.
72 (1825) 4 B. & C. 574; 107 E.R. 1174.
73 *Ibid.* per Bayley J. 594; 1181.

Crown whether he could maintain it against a third party.[74] In deciding that he could, Littledale J.[75] referred to the decision in *Graham v. Peat.*[76] There the plaintiff was in possession under a void lease and therefore, of course, had no title. It was held that he could maintain trespass against a third party. Littledale J. concluded that *Graham v. Peat* was:

> . . . direct authority to show that a party having no title as against his landlord may still maintain trespass against a wrongdoer . . . the plaintiff does not claim under the Crown any interest for life, or for years, he merely claims the actual possession . . . I am therefore of the opinion that so long a plaintiff had the land by licence from the Crown he had a sufficient possession to enable him to maintain trespass as a wrongdoer.[77]

In both cases a contractual licence had been granted which, whilst not creating a proprietary interest based upon title, did confer the right to possession. Once possession was taken the plaintiff could sue to protect his actual legal possession. This view gains support from the judgment of Megarry J. in *Hounslow Borough Council v. Twickenham Garden Developments Limited.*[78] That decision is authority for the principle that, in England at least, equity may by injunction restrain the revocation of contractual licences.[79] Megarry J. expressly refrained from considering the enforceability of such licences against third parties. To recognize this possibility would have been to elevate the contractual licence itself to the status of a proprietary interest. He did, however, consider the question of possession and drew the following conclusion in relation to building contracts.

> In some the building owner may be in manifest possession of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control but leave the contractor in sole and undisputed control of the site. . . . In recent years it has been established that a person who has no more than a licence may yet have possession of the land. Though one of the badges of a tenancy or other interest in land, possession is not necessarily denied to a licensee.[80]

Megarry J. does not cite any authorities for these observations. It may be that he is referring to the decisions concerning the provisions of the English Rent Act 1977 in which, despite rights of exclusive possession, agreements were held to create licences and thus avoid the operation of the Act.[81] This analysis leads to the conclusion that whilst a licence does not itself confer a proprietary right, the exercise of rights under the licence may amount to *de facto* possession. Title to sue in trespass will be based upon this actual possession.

Special mention must be made of Statutory Licences because these licences are of particular relevance in the mining context. There are a number of provisions

74 A licence on the state of the English authorities at the time of the decision was always revocable. See *infra.* n. 78.

75 *Ibid.* 595, 1181.

76 (1808) 1 East 244, 246. 102 E.R. 95, 96 per Kenyon C.J. 'There is no doubt that the plaintiff's possession in this case was sufficient to maintain trespass against a wrongdoer . . . Any possession is a legal possession against a wrongdoer.'

77 (1825) 4 B & C 574, 595–6; 107 E.R. 1174, 1181–2. Statutory Licences are discussed *infra.*

78 [1971] Ch. 233; [1970] 3 All E.R. 326.

79 In the absence of more recent authority than *Cowell's Case* (supra) contractual licences are, in Australia, revocable at the will of the grantor, but see *Heidke v. Sydney City Council* (1952) 52 S.R. (N.S.W.) 143. This does not affect the possessory rights.

80 [1971] Ch. 233, 357; [1970] 3 All E.R. 326, 346.

81 *Supra* n.8 Waite *op cit.*

which confer rights which, whilst they do not create recognized interests in land, nevertheless expressly confer on the holder the right to take possession of a specified area of land. A good example of this is the Exploration Licence created under the Northern Territory Mining Act 1939. Section 38(5)(b) gives the right to take possession of the land. The same right is granted to the holder of an authority to prospect in the Australian Capital Territory. The Mining Act (Qld.) 1968–79 section 12 provides that the holder of a Miner's Right 'shall be deemed to be possessed of such land except as against the Crown.' In *Cudgen Rutile v. Chalk*[83] it was held that an Authority to Prospect under the Queensland Mining Act did not create a recognized proprietary interest in land but did confer a statutory entitlement to take possession. In the case of an Exploration Licence in Western Australian the powers granted to the licensee are so extensive as to amount to possession.[84]

It is consistent with the authorities already discussed to conclude that in cases where possession is taken according to the authority in the licence that possession will confer title to sue in trespass. It is, however, submitted that the case for concluding that a statutory licensee in possession has standing to sue in trespass is stronger. In most cases the statute specifically confers the right to possession and itself indicates by the provision of penalties a clear intention to protect it.[85] There is ample authority to support the argument that the statutory licensee's right to sue is based upon possession. A clear illustration is to be found in *Lewisham Borough Council v. Maloney.*[86] In that case it was held that an Authority requisitioning property under Defence Regulations did not have a proprietary interest in the land. This was because the right granted did not conform to any recognized category of proprietary interest. Nevertheless the Act conferred a statutory possession on the Authority. That possession was held of itself to be sufficient to maintain an action in trespass.

The English decisions concerning the Rent Act 1977 also recognize the right of a statutory licensee to sue in trespass.[87] In *Marcoft Wagons Limited v. Smith.*[88] Evershed M.R. recognized

> . . . the conception that a person may have such a right of exclusive possession of property as will entitle him to bring an action for trespass . . . but which confers no interest whatever in the land.[89]

In the Victorian mining context one also finds support for this argument in *Cruise v. Crowley.*[90] The plaintiff had taken up a claim but had not registered it under the relevant legislation and therefore arguably had no title. It was held that possession was sufficient title against a wrongdoer.[91]

This analysis of the law relating to licences results in a conclusion that where a statutory licence is granted which confers no recognized proprietary right but does

82 Mining Ordinance (A.C.T.) 1980 s.144.
83 [1975] A.C. 520; [1975] 2 W.L.R. 1; (1974) 4 A.L.R. 438; 49 A.L.J.R. 22.
84 Mining Act, (W.A.) 1978–81 s.66.
85 *E.g.* Mines Act 1958 (Vic.).
86 [1948] 1 K.B. 50; [1947] 2 All E.R. 36.
87 *Supra*, n.8.
88 [1951] 2 K.B. 496.
89 *Ibid.* 501.
90 (1868) 5 W.W. & A.B. (M) 27.
91 See also *Bell v. Clarke* [1906] V.L.R. 567, 574. *Whiteley v. Schmur* (1882) 8 V.L.R. (M) 58; *Lecarne v. Froggatt* (1876) 2 V.L.R. (M) 1.

confer such extensive rights of user as to amount to possession in fact, an action in trespass may be maintained for an interference with that possession.

THE RELEVANCE OF TITLE

A final question must be answered. If possession itself will give title to sue even in the absence of a recognized proprietary right, is the preceding classification of mining titles into recognized categories of proprietary rights necessary? The answer is that in the absence of an independent proprietary right appropriate to mining titles such a classification is important. The presence or absence of title is of great significance when one is deciding whether the plaintiff has taken possession in fact. It is, to be sure, true that possession without title will give standing to sue in trespass. It is also true that if the plaintiff is in possession the fact that his title is equitable rather than legal is irrelevant. However the authorities demonstrate that the fact that a plaintiff does have title and has entered the land by virtue of title to a proprietary right has an important bearing on the question of whether the plaintiff has taken possession. To put it in another way title is an important consideration when deciding whether the acts relied upon do constitute a taking of possession. This means that the holder of a mining right which grants a recognized proprietary right, in other words title, may be in a better position than the holder of a licence which does not confer a recognized proprietary interest.

In *Mason v. Clarke*[92] Viscount Simonds, observing that Mason had a clear equitable title said, 'if and so far as it is necessary to buttress actual possession of a profit à prendre with a title of ownership that condition is in this case fulfilled.'[93] What is meant by the necessity to 'buttress actual possession'? The answer lies in the fact that if a person has title the acts relied upon as constituting possession may be far less extensive than those relied upon by a person seeking to establish *de facto* possession without title to a proprietary right. This proposition is amply borne out by the authorities. It will be recalled that in *Bristow v. Cormican* Lord Hatherley stated that 'the slightest amount of possession is sufficient to support an action in trespass.'[94] Lord Hatherley was there concerned with a plaintiff with title to a *profit à prendre*. In a more recent Privy Council opinion in *Ocean Estates v. Pinder*[95] Lord Diplock, after referring to this observation and to *Wuta-Ofei v. Danquah*,[96] stated that:

> it is clear that the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title.[97]

A similar conclusion had been reached in *Canvey Island Commissioners v. Preedy*.[98] In a case where the court could not decide who, as between the plaintiff

92 [1955] A.C. 778 [1955] 1 All. E.R. 914.
93 *Ibid.* 794; 920.
94 *Supra* n.31 & 32.
95 [1969] A.C. 19.
96 [1961] 1 W.L.R. 1238, 1243 The Privy Council held that where an action in trespass by a person with title was concerned 'the slightest amount of possession would be sufficient'.
97 *Op. cit.* 25. This statement was referred to with approval in *Portland Management Qld. v. Harte* (C.A.) [1977] 1 Q.B. 306, 315–16 in which Scarman L.J. referred to 'the scintilla of evidence of possession required to sue in trespass'.
98 [1923] 1 Ch. 179.

and defendant, was in possession first Eve J. held 'The possession of the plaintiffs and of the defendants is, at most, doubtful or equivocal and in those circumstances the law attaches it to title'.[99] The plaintiff succeeded in trespass on the basis that given that the acts relied upon were slight the fact of title 'was conclusive'. Reference to the relevance of 'paper title' was made by Russell L.J. in *Fowley Marine (Emsworth) Ltd. v. Gafford.*[100] He observed that:

> The judge found that the paper title was on this aspect of the case irrelevant except to permit the plaintiff to rely on acts of possession of its predecessors in paper title. I consider that there is a greater significance in the paper title, in that it attaches to the activities of those claiming under it a quality of acts of possession of the Rythe, whether the actual laying of moorings, or the granting of permission to others to lay moorings. The plaintiff's predecessors were doing these things as an assertion of ownership or of the right to possession of the Rythe because they considered themselves so entitled because of the paper title.[101]

In the words of Viscount Simonds in *Mason v. Clarke* the claim of both of these plaintiffs to have taken possession was 'buttressed' by their documentary title.[102] Whilst these authorities demonstrate that the person taking possession with title may rely upon very slight acts as taking of possession, they also demonstrate that the same is not true of the person without title to a proprietary right. The authorities discussed above support an inference that a person seeking to rely upon possession without title must establish far more extensive acts of possession. This view is supported by the authorities in which reference is made to the possibility of possession in a licensee. In *Hounslow Borough Council v. Twickenham Garden Developments*[103] Megarry J. talks in terms of 'sole and undisputed control of the site'; in *National Provincial Bank v. Ainsworth*[104] Lord Upjohn describes the wife as having 'dominion over the house'; in *Marcroft Wagons Ltd. v. Smith*[105] Evershed M.R. talks of 'a right of exclusive possession as will entitle an action in trespass.'

These authorities suggest that where a person relies upon the exercise of rights conferred by a licence as constituting *de facto* possession it must be demonstrated that the plaintiff's activities are so extensive as to amount to an exclusive occupation or at least an extensive user of the land concerned. The exploration licence again springs immediately to mind. The above analysis supports the conclusion already suggested[106] that the holder of an exploration licence would have sufficient possession to sue in trespass.

CONCLUSION

This analysis of Australian mining titles and common law principles relating to trespass leads to the conclusion that the holder of a mining title would, in most cases, have standing to sue in trespass and therefore resist unauthorized overflying.

99 *Ibid.* 190.
100 [1968] 2 Q.B. 618.
101 *Ibid.* 630.
102 *Salmond on Torts.* (17th Ed. by R.F.V. Hueston 1977) 42.
'Actual entry by the true owner is not necessary to enable him to bring trespass, for against a wrongdoer the slightest acts indicating an intention to refrain or obtain possession by a person having title will be sufficient.'
103 [1971] Ch. 233, 357; [1970] 3 All E.R. 326, 346.
104 [1965] A.C. 1175, 1232; [1965] 2 All E.R. 472, 484.
105 [1951] 2 K.B. 496.
106 *Supra.*

It has been demonstrated that mining titles are capable of classification according to common law principles relating to proprietary interests in land. Such classification may be necessary in certain situations. It may, for example, be necessary to determine whether the holder of a mining title has rights enforceable against a successor in title of the grantor or whether the grantee can resist revocation by the grantor. The absence of an independent proprietary right appropriate to mining titles necessitates classification of complex sophisticated agreements according to principles not designed for this purpose.[107] The procedure is sometimes tortuous and strained and may produce undesirable results.[108] The authorities discussed in this article lead to the conclusion that classification of mining titles is also necessary when standing to sue in trespass is in issue. It is true that the crucial question is whether the plaintiff is in possession. How he came to be in possession is irrelevant where his rights against third parties are concerned. It matters not whether his possession is wrongful, pursuant to a licence, or pursuant to a recognized proprietary interest in land. Futhermore it is argued that the authorities concerned with possession on the part of licensees are consistent with the theory of relativity of possessory title.[109] Just as wrongdoer in possession has title against third parties but not against the true owner so a licensee in possession may have standing to sue a third party in trespass. However, as has been demonstrated, the fact that a person claiming to have taken possession can point to title to a proprietary right makes the task of establishing the fact of possession far less onerous. In this context, as in others, the need for the recognition of the mining title as an independent proprietary right is clear.

107 'The ancient seaweed cases, the basis for much of the lore concerning the *profit à prendre*, have little if any relevance to the interests created by instruments dealing with the exploration, developments and production of immensely important natural resources today. If any of this ancient lore is to be applied to the oil and subleases it should be applied selectively. What is really involved is the construction of a commercial instrument more closely related to one dealing with the erection and operation of a great manufacturing plant than to an agreement permitting a person to go upon the land of another to sever and remove seaweed to be utilized as fertilizer. The *profit à prendre* lore dealing with such matters as divisibility of the profit, surcharges of the profit, and abandonment of the profit are totally irrelevant to the oil and gas lease.' Williams 'Comments on Oil and Gas Jurispurdence in Canada' 4 *Alberta L.R.* 189, 192–3. In *Berkheiser v. Berkheiser* [1957] S.C.R. 387; 7 D.L.R. (2nd) 721 Rand J. suggested a system which he described as 'an irrevocable licence to mine'. [1957] S.C.R. 387, 392 (1957) 7 D.L.R. (2d.) 721, 725–6.

108 *E.g.* the common law rule regarding indivisibility of incorporeal interests may result in a conclusion that royalty rights may not be enforceable against assignees. *Haywood v. Brunswick Permanent Benefit Building Society* [1888] Q.B.D. 403; *Grant v. Edmonson* [1931] Ch. 1.

109 *Asher v. Whitlock* [1865) L.R. 1 Q.B. 1; *Perry v. Clissold* [1907] A.C. 73; *Allen v. Roughley* (1955) 94 C.L.R. 98.