
Advice to Ivana regarding MTRC

You may be able to bring an action in **trespass to land** against MTRC to vindicate your right to exclude others from property you possess. You may also be able to bring an action in **private nuisance**, because exclusive possession over land entitles you to use and enjoyment of that land free from interference.

Trespass to land

You should contend that MTRC trespassed on your land, as it tunnelled beneath the surface of your property, and that they are liable for the damage caused to the house. For an action in trespass, you have the onus of proving that the trespass occurred, and then it is for MTRC to justify its actions (*McHale v Watson*¹).

The act must be direct for it to be considered trespass, and the injury must be so closely connected with the act that it would be considered part of the act (*Reynolds v Clarke*²). MTRC, by making direct contact with your property, violated your right to exclude others from property over which you have exclusive possession.

¹ (1964) 111 CLR 384.

² (1725) 92 ER 410, per Fortescue J.

Title to sue

Although you are the owner of the property, it is possession that entitles you to sue in trespass (*Newington v Windeyer*³). Thus, if you have leased the property to a tenant, you will not have title to sue; however, you may be able to bring an action on the case for damage done to your reversionary interests, and recover damages for injury of a sufficiently permanent nature done to the property (*Rodrigues v Ufton*⁴).

Underground trespass

Historically, trespass to land was guided by the *curius est solum* maxim, which states that “whoever has the earth also has the heavens above and the depths beneath it”⁵. Although the maxim has been challenged successfully for aerial trespass (*Bernstein v Skyviews & General*⁶), it still holds true for underground trespass generally (*Edwards v Sims*⁷). In *Edwards v Sims*, the plaintiff was found to have rights over a cave hundreds of feet below the surface; it is therefore trivial to contend that tunnelling work 30 metres below the surface of your property constitutes trespass. MTRC cannot argue, in its defence, that they have not infringed your rights because they were at a depth below what is required for the ordinary use of the land (*Di Napoli v New Beach Apartments*⁸).

³ (1985) 3 NSWLR 555.

⁴ (1894) 20 VLR 539.

⁵ M Davies & I Malkin, *Torts* (4th ed) Butterworths, Sydney, 2003.

⁶ [1978] QB 479.

⁷ 24 SW 2d 619 (1929).

⁸ [2004] NSWSC 52.

Fault

Fault is an essential element of trespass (*Holmes v Mather*⁹). It is likely that MTRC made contact with your land intentionally, because such large-scale projects involve extensive planning.

Defence of statutory authority

It is likely that the State government's permission was given in the form of a statute. Only if the statute expressed, in unambiguous language, that MTRC was permitted to disregard common law rights and commit trespass would a defence of statutory authority be available. Such diminution of rights cannot be implied (*Coco v R*¹⁰).

Other defences

Although there is an implied licence to enter private property for communication or other lawful purposes unless explicitly withdrawn (*Halliday v Nevill*¹¹), it is unreasonable to compare permanent excavation work with transient communications. Furthermore, it is not a defence that the railway line constitutes public benefit (*Didow v Alberta Power*¹²).

Damages and remedies

To recover damages arising from an intentional tort, the damage must be a natural and probable consequence of that tort (*TCN Channel Nine v Anning*¹³). MTRC trespassed by

⁹ (1875) 10 LR Exch 261.

¹⁰ (1994) 179 CLR 427.

¹¹ (1984) 155 CLR 1.

¹² [1988] 5 WWR 606.

¹³ (2002) 54 NSWLR 333.

means of its tunnelling activities, which caused vibrations. You would contend that a natural and probable consequence of vibrations on a house is that cracks appear on the walls.

The amount of damages that you are awarded is dependent on your intentions in the use of the property (the test in *Evans v Balog*¹⁴). By *Evans v Balog*¹⁵, if you intend to reside in the house, you should be able to recover the cost of restoring the house. If you do not intend to reside in the house, you may be able to appeal to the principle of restitutio in integrum to restore the house to the condition it would have been but for the tort.

Aggravated damages may be available if your feelings have been hurt, but it is unlikely MTRC has displayed sufficient contumelious disregard for you to recover exemplary damages (*TCN Channel Nine v Anning*¹⁶). At the very least, however, you should be able to recover damages to vindicate your right of exclusive possession (*Plenty v Dillon*¹⁷) – trespass is actionable per se.

Furthermore, you may be able to seek an injunction, although the court will seek an equitable solution that minimises the intrusion to your rights, while allowing the construction to go continue (*LJP Investments v Howard Chia Investments*).

¹⁴ [1976] 1 NSWLR 36.

¹⁵ *Ibid.*

¹⁶ Note 13.

¹⁷ (1991) 171 CLR 635.

Private nuisance

Brenner¹⁸ suggests that nuisance is “an actionable annoyance that interferes with the ability of another to use or enjoy his land”. Unlike trespass, nuisance deals with injury that is consequential. You should contend that, due to MTRC’s actions, your property has suffered material damage, and that your right to use and enjoyment has been eroded.

After *St Helen’s Smelting Co v Tipping*¹⁹, nuisance is divided into interference with use and enjoyment of property rights, and material damage to property.

Title to sue

You will have title to sue if you are the exclusive possessor (*Hunter v Canary Wharf*²⁰). As mentioned before, if the property has been leased out, you may only sue in respect of your reversionary interests; furthermore, Brenner²¹ notes that impermanent irritations or a reduction in rent do not fall under reversionary interests.

You may sue MTRC even though it does not have any property rights over the land in which it creates the nuisance (*Fennell v Robson*²²).

¹⁸ Brenner JF, “Nuisance Law and the Industrial Revolution”, (1974) 3 *The Journal of Legal Studies* 403.

¹⁹ (1865) 11 ER 1483.

²⁰ [1997] AC 655.

²¹ Brenner, note 18.

²² [1977] 2 NSWLR 486.

Nuisance from interference with use and enjoyment of property rights

For this type of nuisance, you must show that the interference was unreasonable; you must balance your desires for property use with MTRC's desires, using the principle of "live and let live"²³. Newark²⁴ suggests that trespass and nuisance differ "according to whether the act was done on or off the plaintiff's land", but even if some nuisance originated from the plaintiff's property, it is conceivable that there still would have been vibrations while MTRC was excavating on other properties.

The following issues are relevant in balancing conflicting interests:

- *Sturges v Bridgman*²⁵ suggests that **locality** is to be considered when determining whether the act is unreasonable. You could argue that such vibrations are unreasonable in an area with residential properties, and that freedom from vibrations is consistent with "plain and sober and simple notions"²⁶.
- *St Helen's Smelting Co v Tipping*²⁷ also suggests that the discomfort must be **substantial**²⁸. Vibrations that cause living in the house intolerable are, arguably, substantial. Alternatively, you could propose that the reasoning in *St Helen's* case regarding discomfort is unsuitable, as it was partly based on (now outdated) policy decisions protecting the development of the Industrial Revolution²⁹.

²³ *Bamford v Turnley* (1962) 122 ER 25, per Bramwell B.

²⁴ Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480, as cited in *Hunter v Canary Wharf* [1997] AC 655, per Lord Goff of Chieveley.

²⁵ (1879) 11 Ch D 852.

²⁶ *Walter v Selfe*, 64 ER 849, per Bruce VC, as cited in Brenner, note 18.

²⁷ Note 19.

²⁸ Brenner, note 18.

²⁹ *Ibid.*

- If you are **unduly sensitive** to vibrations, and MTRC acted in a legal and reasonable manner, it might not be liable for nuisance (*Robinson v Kilvert*³⁰). However, if you can show that the vibrations were of a nature and extent that would have affected even a plaintiff of normal sensitivity, MTRC may still be liable (*Mckinnon Industries Ltd v Walker*³¹).
- **Malice** (*Christie v Davey*³²), on the facts, does not appear to be a consideration.
- In *Hunter v Canary Wharf*³³, it was stated (in obiter) that vibrations could interfere with the plaintiff's **recognised rights**.

Nuisance from material damage

The cracking of the walls is consequential (by comparison with *Hutchins v Maughan*³⁴); MTRC did not use machinery to induce cracks directly. However, strict liability applies and you only need to prove the fact of damage (*St Helen's Smelting Co v Tipping* and *Kraemers v Attorney-General (Tas)*³⁵).

If MTRC can establish that its use of land is reasonable, it will have a defence against nuisance from material damage (*Kraemers v Attorney-General (Tas)*³⁶). You could argue that their use is unreasonable, because committing trespass to land for the sake of profit is unreasonable; even if there was statutory authority for the trespass, it is arguable that trespass is unreasonable per se.

³⁰ (1889) 41 ChD 88.

³¹ [1951] 3 DLR 577.

³² [1893] 1 Ch 316.

³³ Note 20.

³⁴ [1947] VLR 131.

³⁵ [1966] Tas SR 113.

³⁶ *Ibid.*

Defence of statutory authority

Permission from the State government is likely to have come in the form of a statute. Its construction will determine whether MTRC has a defence of statutory authority (*Allen v Gulf Oil Refining*³⁷). If the statute merely permits the construction of a railway line, MTRC needed to have respected your rights over your property (*Managers of the Metropolitan Asylum District v Hill*³⁸). However, if the construction of the railway is mandated by the statute, MTRC is protected from liability for the necessary consequences of an underground railway line; you would only be able to recover damages for nuisance that goes beyond what Parliament implicitly authorised in the statute.

Other defences

Because MTRC's tunnelling goes through numerous properties, it may expose them to a significant burden due to litigation; this is not a defence (*Leakey v National Trust for Places of Historic Interest or Natural Beauty*³⁹). It is also no defence that their construction work is of public benefit (*Munro v Southern Dairies*⁴⁰).

Damages and remedies

The court might be more inclined to award damages over an injunction to halt construction due to the railway's public benefit (*Munro v Southern Dairies*⁴¹), or the oppressiveness of forcing the railway to relocate (*Miller v Jackson*⁴²). However, an injunction

³⁷ [1981] 1 All ER 353.

³⁸ (1881) 6 App Cas 193.

³⁹ [1980] QB 485.

⁴⁰ [1955] VLR 332.

⁴¹ [1955] VLR 332.

⁴² [1977] 1 QB 966.

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may be granted that prevents construction work during specific times of the day (*Seidler v Luna Park Reserve Trust*⁴³), together with some damages (with reference to the working rules interchanging injunctions with damages in *Shelfer v City of London Electric Lighting Co*⁴⁴).

Material damage should be met with compensatory damages (*St Helen's Smelting Co v Tipping*⁴⁵). Furthermore, you should be entitled to recover all reasonably foreseeable consequences of the nuisance (*Overseas Tank Ship (UK) Limited v Miller Steamship Co Pty Limited (Wagon Mount (No 2))*⁴⁶); for instance, staying at a hotel is a reasonably foreseeable of the property rendered unliveable by vibrations.

⁴³ SC(NSW), Hodgson J, 21 September 1995, unreported BC9505507.

⁴⁴ [1895] 1 Ch 287.

⁴⁵ Note 19.

⁴⁶ [1967] 1 AC 617.