

9.2 Trespass to land



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The old test of *usque ad coelum et ad inferos* offers the great advantage of certainty and the better view is that it should remain the law.^[43] The matter of overflying aircraft has been resolved by the [Civil Aviation Act 1990](#). Parliament has also provided a legislative solution to the remaining problem area concerning projecting scaffolding and swinging crane booms. The [Property Law Act 2007](#) empowers a court to make an order, on such terms and conditions as it thinks fit, authorising a landowner or occupier to enter onto or over adjoining land to "erect, repair, alter, add to, paint, or demolish" any structure on the applicant's land, or "do any other necessary or desirable thing in relation to the structure", in pursuit of personal economic interests, deliberately intrudes upon a neighbour's airspace without obtaining consent. Section 20 of the Property Law Act is undeserving of judicial sympathy.

Text includes inline links to cases and legislation.

9.2.04 The plaintiff: who can sue?

The action for trespass to land is primarily intended to protect possessory rights, rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass.^[45] Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons.^[46] Either element may be proved by evidence control over the land.^[48]

Footnote: 45

If the occupier has granted an enduring power of attorney, arguably the attorney and not the occupier has the right to sue (by analogy with [GM v Police \[Appeal against conviction\]](#) [2011] NZFLR 747 (HC) per Andrews J: see [\[9.2.07\(1\)\]](#)).

The type of conduct necessary to evidence possession varies with the nature of the land. Possession may be evidenced by occupation of the building. If the building is vacant, possession may be evidenced by fruit trees on it,^[53] cultivating it,^[54] or building a wall on it.^[55] Possession of a profit à prendre can be established by proving that a person in possession, as it owns the land and has control of it.^[56] In the case of

of land that has not been built on, possession may be evidenced by fruit trees on it,^[53] cultivating it,^[54] or building a wall on it.^[55] Possession of a profit à prendre can be established by proving that a person in possession, as it owns the land and has control of it.^[56]

Where land is owned by two or more people as joint tenants or tenants in common, any one of them may license a third party to enter upon the land.^[60] or independently license a third party to enter upon the land.^[62]

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Cited Documents

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Commentary

Adams on Criminal Law

- [CA26.02-CA26.04](#) Execution of sentence
- [CA56.01](#) Reasonable defence of land

Aviation Law

- [CV97.01](#) Liability for "surface damage" (s 97 Aviation Act 1990)

Civil Procedure: District Courts and Tribunals

- [DTA45.01](#) Enforcement of orders (s 45 Disputes Tribunals Act 1988)
- [DC17.01](#) Powers and duties of bailiffs (s 17 District Courts Act 1947)
- [DC99.01](#) Warrant for the recovery of land (s 99 District Courts Act 1947)

Employment Law

- [ER141.04](#) Enforcement of orders of Authority or Court by District Court (s 141 Employment Relations Act 2000)

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