Modern Studies in Property Law, Volume 8, Edited by Warren Barr, Hart Publishing 2015

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Book Review

Modern Studies in Property Law, Volume 8, Edited by Warren Barr,
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The book contains a collection of eighteen peer-reviewed papers presented at the Tenth Biennial Modern Studies in Property Law Conference held at the University of Liverpool in April 2014. It is the eighth volume to be published under the name of the conference. This collection showcases current and modern property law research in the common law world[1] and reflects the diversity and contemporary relevance of the discipline.

Incorporating a keynote address by Sir John Mummery, retired Lord Justice of Appeal on ***"Property in the Information Age"*, part I** of the book deals with Law Reform and Property Law. Besides the keynote address, the contribution of Andrew JM Steven discusses the ***impact of the Scottish Law Commission*** on property law and Professor John Mee writes about the ***reformation of the law of prescription in Ireland***, pointing out the negative impact of a too aggressive approach to the destruction of claims based on the old law on belligerence.

Part II is dedicated to the issue of property and planning. Charles Mynors, a barrister in practice in London, emphasizes the need of ***simplifying planning law*** and advocates a programme of consolidation with a measure of codification: as an indication of one possible pattern that might emerge from such an exercise, it is argued that 43 statutes could be repealed as a whole and a further fourteen partly. Instead, nine new statutes could be enacted. The charm of the exercise is that it not only seeks to cover planning but also cognate topics, such as the built heritage, access to land and compulsory purchase. According to Barbara Bogusz, the current policy trend in England within land regulation appears to broadly maintain the approach adopted since the industrial revolution: land continues to be viewed primarily as an ***economic facility***, whereby urbanisation is promoted to the extent of fulfilling the demand for housing. In her opinion, it is somehow a missed chance to leave protection of the ***land for***

1 To be precise, only the last contribution deals with civil law jurisdictions, namely the Netherlands and South Africa.

social purposes primarily in the hands of the citizen to determine the extent of their access to open spaces and rural areas. Adam Baker then investigates whether there is any sound reason for allowing ***contractual licensees***, who are not in actual possession, to bring actions for the recovery of land. After having contextualised such claims and overviewed the famous case *Manchester Airport plc v Dutton* [2000] 1 QB 133, he identifies two options: the first is to interpret the legislation governing ***possession claims*** in conformity with the decision that one can have a right to take possession that is not title-based. The second is that in some extreme cases a failure to make a possession order in favour of a Dutton licensee would infringe their rights under article 1 of the First Protocol to the European Convention on Human Rights.

Part III deals with property and death. Heather Conway asks whether parents do always know best when making their wills. This is because in England and Wales, the Inheritance (Provision for Family and Dependants) Act 1975 allows specific individuals to ***claim against a deceased person's estate*** if dissatisfied with an intestacy or wills distribution.[2] The 1975 Act lacks of guidance, it simply limits such claims to "maintenance". After a critical analysis of the existing legal framework and several English court decisions, it would according to the author be wrong to suggest that English law is drifting towards a system of forced heirship or that parents have an unassailable posthumous duty to support their adult children where the latter challenge an estate distribution. What seems to be emerging, however, is a sense in which such applications may be increasingly successful – as well as the applicant's economic situation and financial needs having much greater say in the outcome. Testamentary freedom tends to be seen within the context of family responsibilities. Fiona Burns then focuses on the ***property of the mentally incapacitated and statutory wills in England and Australia***. There were (and are) a trio of testamentary gaps where the insistence on testamentary capacity and/or the operation of the current intestacy scheme could be insensitive to a deceased's particular circumstances, resulting in perverse results far removed from what the deceased would have liked. These gaps occur when: the deceased lacks testamentary capacity from birth; the deceased becomes incapacitated and had never made a will; and the deceased becomes incapacitated after making a will which is no longer current because of changed circumstances. Both England and Australia have implemented statutory wills regimes for persons without testamentary capacity, initially having a common

2 Known as the family provision jurisdiction in England and Wales (and in Northern Ireland where identical legislation is in force), see Conway, footnote 1 on page 117.

heritage. The major problem with the English scheme is that there is insufficient consideration of the wills perspective; the Australian statutory wills provisions are largely located in the legislation of the states and lack uniformity in key criteria. In addition to these respective weaknesses, both jurisdictions may have to reconsider the statutory wills legislation in view of the UN Convention on the Rights of Persons with Disabilities to which they are both signatories. Siôn Hudson and Brian Sloan remind us that despite they are rarely made, mutual wills in informal care situations "might let you down": the contractual rigidity of a ***mutual wills arrangement*** in English Law has the effect that despite the care recipient's superficial testamentary freedom, a carer who has hold out with the care recipient through a long illness or old age to his detriment is currently likely to be let down by the effective inability of a court to look behind the contract-based constructive trust. Caryl A. Yzenbaard has a closer look at ***intestate property distribution at death in the United States***. Although the fact of increasingly diverse and complicated family structures (serial marriages, stepchildren, etc.), at least half of the decedents in the United States still die intestate. So intestate statutes – designed to provide for the distribution of property at the time of death when an individual dies without a will – are needed. Intestate statues today are efficient and easy to administer. Although the distribution scheme of such legislation aims to reflect the intent of the typical individual, it is not necessarily just or fair in the individual case. Therefore, the author claims that in the exceptional case of an individual being able to prove that he either was dependent on the decedent or that the distribution under the statute is unfair or unjust, adjustments can and should be made upon clear and convincing evidence.

Part IV is the most extensive part of the book and deals with property and ownership. Chris Bevan evaluates how far assertion of judicial engagement with the ***concept of "home"*** in English and Welsh property law can be substantiated and what lessons can be learned from the Supreme Court in cases (*Stack v Dowden* [2007] 2 AC 432; *Jones v Kernott* [2012] 1 AC 776) in which the fact of property as "home" formed a material consideration. According to his findings, the central tension between housing as a physical shelter and "home" as an emotional, subjective attachment still requires resolution in the legal context. The analysed case law evidences an engagement with housing only and not with "home". Alison Clarke investigates how ***communal land and resource use rights*** should be accommodated within a ***land titling system***. This is a current pressing interest because land titling is enjoying a renaissance in different parts of the world, e.g. in post-socialist states in Africa, Asia and Eastern and Central Europe as part of overall land privatisation programmes. Traditional land registration systems especially fail in sub-Saharan Africa be-

cause they do not fully take into account the legal complexity of the land tenure systems, e.g. communal property. Registration of town and village green rights and rights of commons in England and Wales provides some indication of how this might be done. Primarily the commons Register demonstrates that mixed private/communal rights can be recorded on a register and that it is possible to particularise communal rights falling short of ownership without sacrificing the flexibility necessary to accommodate the shifts in patterns of usage which occur in customary communal usage of resources. The next chapter, written by Jill Morgan, is dedicated to ***subsurface ownership***, which has primarily within the context of carbon capture and storage (CSS) become the subject of renewed academic debate. Subsurface property rights are in the United States subject to state rather than federal law with states applying either the so-called ***"American" or "English" rules***. According to the American rule, the surface owner who transfers the mineral estate to a third party retains the right to use the remaining space after the removal of underground minerals, oil or gas for storage purposes, while the English rule (which is said also to be practised in much of Canada) holds that the mineral owner owns the subsurface space even after the minerals have been removed. The author concludes that the cases which are said to form the basis of the English rule were decided in the context of a factual matrix which is distinguishable from pore space ownership for CSS purposes and that the Anglo-Welsh law has already moved towards the more practical American rule. Then Chris Willmore explores ***property partnerships in the voluntary sector***. Establishing a mechanism within a property law framework to provide for temporal sharing of property, where the same space is used by different organisations at different times, is complex. The assessment of limited use and discontinuous lease brings the author to the conclusion that both approaches suffer from an unclear scope/status and a lack of guidance or precedent. The chapter infers that a licence coupled with an estoppel might be a solution. Graham Ferries then follows with a chapter on ***reflections on formalities***. He argues that a "speech act" is constitutive of all dispositions of property. He introduces the philosophical analysis of a speech act and argues that this analysis enables us to distinguish more clearly between different types of failures that dispositions prone to. In the last chapter of this part, Juanita Roche conducts an exploration of the issues of deemed tenancies for life raised by the UK Supreme Court in *Mexfield Housing Cooperative Ltd v Berrisford* [2012] 1 AC 955 by a historical analysis of what the author names "constitutional land law". She promotes that ***constitutional land law*** should not be overlooked when investigating the roots of today's land law, since some of the most important debates as to the definition of particular interests in land law will have taken place in the context of disputes about property qualifications.

Part V of the book is dedicated to property and title. Simon Cooper states that the defining feature of systems for ***registration of title*** is that the information about title displayed by the register is in some sense ***reliable***. His chapter dwells on the issue of the operation of and justification for the rectification and indemnity provisions in relation to persons other than prospective purchasers seeking a good root of title, showing that it is inadequate to describe English land registration as merely a purchaser's system. This insight leads the author to a review of the wider impact of protecting the register-induced expectations of all registered proprietors even though they could or should not have relied on the entry. Then follows a chapter, written by Lu Xu, with notable empirical research on the diffusion of ***commonhold in practice*** roughly ten years after the introduction of this form of land ownership in England and Wales. The owner of a commonhold unit (e.g. an apartment) owns the freehold estate of the unit. The common parts of the apartment building (e.g. stairs and surrounding grounds) are owned by the commonhold association, a company limited by guarantee. Each unit owner is automatically a member of the commonhold association, hence enjoying a sense of ownership and certain level of collective control over the parts that he does not individually own. The freehold status of commonhold makes it distinguishable from the system of long leasehold which governs the vast majority of existing apartment buildings in England and Wales. The owner of a leasehold apartment holds only a lease, often for an artificially long period such as 100 years so that it resembles ownership in some regards. The leaseholder is bound by covenants in the lease such as the obligations to pay for maintenance and repairs. Such arrangements sidestep the difficulty of imposing positive obligations on freehold land under English law. However, this is done at the cost of sacrificing ownership and creating its own problems (e.g. conflicting interests of landlords and tenants). For many years, commonhold has been envisaged as the modern replacement of leasehold that would solve such problems, since many jurisdictions have systems similar to commonhold, though under different names such as condominiums or strata titles, governing hundreds of thousands of flats, houses and complexes. Despite a lengthy legislative process that stretched back more than 20 years, having the support of three successive governments and receiving much attention from academics, there were only 16 commonhold schemes in operation as of 1 January 2014. As the author puts it in a nutshell, there is hardly any word to describe the insignificance of such a number amongst thousands of new leasehold schemes being created every year, or the shortfall from the governmental estimate of 6'500 new commonhold units per year. The author identifies multiple factors which contributed to the failure of commonhold and they tended to self-aggravate as time went on. The legal profession as a whole never truly embraced this idea and the level of understanding only deteriorated due to non-use. Major

property developers and estate agents never felt an incentive to understand commonhold. And a large number of financial institutions were not willing to finance commonhold transactions. The slide from curiosity to indifference, then to ignorance and suspicion came in only a few years. The legislators largely got things right, but it was the follow up efforts to the introduction of a good idea that failed commonhold. Today commonhold is a dying concept on a downward spiral in England and Wales, becoming less and less attractive and feasible. According to the author, it is time for policymakers to become active: either to promote and revive commonhold or closing the book and helping existing schemes to find an alternative. Finally, Hanri Mostert and Leon Verstappen close the last part of the book with an essay on how ***legal professionals in South Africa and the Netherlands deal with Certainty and Flexibility in Property Law***. Both jurisdictions strongly subscribe to the civil law tradition of property but categorise real rights according to content and type differently: the Dutch system uses a strict numerus clausus as a starting approach, whereas the South African system begins with an open system of registration of rights in land. The analysis of the authors shows that these two systems seem to be converging in their approaches. The specific problems of both systems – rigidity in the Dutch and uncertainty in the South African one – drive each jurisdiction to gravitate towards qualities from the opposite spectrum. The South African registrars turn out to be conservative in their acknowledgement of unorthodox real rights. And the Dutch notaries – besides legislative intervention – have carved creative solutions out of existing law when they stack various real and personal rights to meet the needs of their clients.

To conclude, the book with its nineteen contributions is a bouquet of current and modern property law research and reflects as previously mentioned the diversity of the discipline. Due to the diversity, not every contribution might be of interest for all readers, but for sure every reader will find a contribution that is of interest to him. The reflections and investigations upon the use of innovations in property law in practice caught my attention, since I currently do research on how people at old(er) age could shape their homeownership under consideration of family law and law of succession. It astonished me that a carefully designed, new legal category such as the English commonhold – that has so well established and widely accepted equivalents in other jurisdictions – turned out to be such a complete failure. This is not because of malfunctioning on the legal basis, but obviously because of denial (or ignorance) of the involved groups, especially legal professionals, property developers, estate agents and mortgagees, as Lu Xu reports. Chris Willmore expresses similar concerns with respect to new solutions for property partnerships in the voluntary sector, stating: "However, with funders having a surfeit of applications there is no incentive for them to explore beyond

the confines of the basic lease/licence, secure/insecure analysis."[3] These gloomy statements are contrasted by the report of Hanri Mostert and Leon Verstappen about successful innovations in terms of gradual progress towards more flexibility in the Dutch setting through the introduction of the new Dutch Civil Code property law and contract law books in 1992 and inventive notaries. They underline the need of further innovation by mentioning the following: the current catering for two-dimensional property rights is outdated and the law pertaining to the cadastre needs to start taking account of at least a third dimension (height), perhaps even a fourth (time). Additionally, new property types appear in practice (e.g. emission or production rights, intellectual property etc.) and there is also an increasing need for financial instruments to accommodate multi-use and multi-storey buildings. Moreover, interests in these projects must be marketable and fit to be used as a collateral. This shows us that there is a fine line between successfully implemented legislative innovations and inertia towards and failure of innovations. A fundamental aspect seems to be an ongoing communication between all of the involved parties to keep them on board. Communication is also expressed by books – e.g. by the reviewed one. Hence, as Hanri Mostert and Leon Verstappen terminate the last contribution of the book: the law must adapt to society's needs; not vice versa.

3 p. 268.