

## *Preface*

This volume contains refereed papers from the ninth Biennial Modern Studies in Property Law Conference that took place at the University of Southampton in March 2012. The conference series has its origins in the Centre for Property Law at the University of Reading, which held its first conference in 1996. These conferences gave rise to the book *Modern Studies in Property Law*, the volumes of which have, since 2001, been the medium for refereed publication of the conference proceedings. The conferences provide a snapshot of debates and developments in property law research for an international audience of speakers, delegates and readers of the proceedings. Collectively, they provide a representation of recurring and emerging themes in property jurisprudence. It is a testament to the vitality of the research in the field that the inaugural Postgraduate Research Student stream of the conference that took place on the final day in Southampton attracted speakers from the UK, Asia and South Africa.

This published volume opens with the text of the keynote address given by Lord Walker of Gestingthorpe. In his speech, 'The Saga of Strasbourg and Social Housing', Lord Walker reviews the case law on social housing and Article 8 of the European Convention on Human Rights (ECHR) and the 'clash of the Titans' between the English domestic courts and the European Court of Human Rights. He describes the saga as 'the most important concluded struggle, so far, between our courts and Strasbourg'. The remaining chapters in Part I of this collection, 'Property and Housing', focus on what is perhaps the most socially, politically and practically significant use of property; its use as a home. In Chapter 2, Susan Bright, Nicholas Hopkins and Nicholas Macklam continue the theme of human rights and social housing in the specific context of English shared ownership schemes. The authors consider how human rights and domestic public law can be used to protect those who 'own part' but risk 'losing all' as a result of the legal model used to deliver this form of low-cost home ownership. In Chapter 3, Warren Barr considers the impact of the Big Society initiative for charities involved in social housing provision. He suggests that despite the shared rhetoric of the Big Society and charitable providers of social housing, the initiative has ultimately provided more of a challenge than an opportunity. Part I concludes with an analysis of the regulation of private residential tenancies in Ireland by Áine Ryall. Written against the background of an increased demand for private residential housing as the 'dream' of home ownership has ended for many in the global economic crisis, Ryall examines the Residential Tenancies Act 2004. Against the background of proposed reform of the Act, she argues that the legislation is in urgent need of substantial amendment.

The contributions in Part II are themed around 'Challenging Perceptions of Property and Trusts'. In Chapter 5, Adam Hofri-Winogradow examines the phenomenon of 'shapeless trusts': those arising through legislation which does not require title to the trust assets to vest in the trustees. His focus is on two jurisdictions; Israel, whose shapeless trust is set to come to an end, and China. By setting

the 'old' alongside the 'new', he suggests that shapeless trusts do have their use, particularly in making trusts more accessible outside the Anglo-Saxon legal tradition. In Chapter 6, Leslie Turano-Taylor challenges the assumptions that underpin the decision in *Hammersmith and Fulham LBC v Alexander-David* and the statutory regime that imposes a trust on the grant of a legal lease to a minor. She highlights the practical and theoretical difficulties caused by the trust against the substantively different relationship between a landlord and tenant and a trustee and beneficiary. In Chapter 7, Magdalena Habdas takes us to condominium schemes in Poland and examines the competence of the 'community of owners' in respect of common parts. Common parts remain the focus for Sarah Blandy in Chapter 8. Drawing on empirical research undertaken in 'cohousing' developments, she challenges the perception of property as being confined to externally imposed 'rights' and argues that recognition should be given to a property regime that emerges from the 'lived experience' of residents. Underlying both of these chapters is the difficulty presented to property law by any move away from individual, private property. In Chapter 9, written by Sue Farran, the division between private and public property is seen to have become increasingly blurred as people go 'back to the land'. Tracing a growth in collective use of land, Farran questions whether the property law 'menu' (the *numerus clausus*) needs to be reviewed to reflect a move away from individualism.

Part III of the collection, 'Intersections between Private Property, the Public and the State', picks up on the themes emerging from Part II. The preceding chapters by Habdas, Blandy and Farran have taken us away from the idea of property rights as individual rights to collective rights and uses of land. In Chapter 10 by John Page, which opens Part III, we move from collective ownership to public property. Page seeks to help fill the gap in the lack of theoretical understanding of such property. Janet Ulph's contribution in Chapter 11 then considers the sometimes controversial issue of the sale and transfer of items in museum collections. She argues that the guidance provided by law is inadequate, but that the gap should be filled by ethical principles. A theme thus recurs between Parts II and III as to the limits of property law, which appears an inadequate expression for the values and interests in issue beyond wholly 'private' rights.

In Chapter 12, Frankie McCarthy poses the challenging question of whether terrorists are entitled to peaceful enjoyment of their possessions. She considers whether anti-terrorist finance measures, designed to stop the flow of money to fund terrorist activities, would and should be found compatible with Article 1 of Protocol 1 of the ECHR. Part III concludes with two chapters focused on property and planning. In Chapter 13, Rachael Walsh explores planning law to cast light on the relationship between property and participation. She argues that the major role afforded to participation in the English planning system is evidence of the increasing 'democratisation' of property. In Chapter 14, Peter Williams considers the rise of property and development rights in Australia and the implications for urban planning policy and law.

The final part of the collection, Part IV, is entitled 'The Nature, Content and Acquisition of Property' and opens with a contribution by Simon Gardner in Chapter 15. Gardner's audio-visual keynote address presented at the conference is not one that could translate to writing. Instead, Gardner uses his contribution to this collection to provide an appraisal of the theory of 'persistent rights' developed

principally by Ben McFarlane. It is particularly appropriate for Gardner to choose this collection to do so, as one of the key texts of the theory is published in the previous volume of *Modern Studies in Property Law*. Gardner rejects the theory, but not without praise for its ambition. Chapters 16 and 17 address the ‘content’ of property. In Chapter 16, Simon Douglas raises the question of whether a freeholder has ‘a right to use’ land. He concludes that while a freeholder has ‘liberties to use’ land, it remains unclear to what extent these liberties impose duties on others. In Chapter 17, Scott Grattan focuses attention on the right to alienate. Locating his discussion in the broader inquiry of the relationship between property and rights, Grattan considers different contexts in which the right to alienate is absent *ab initio* or has been removed. The final two chapters are each concerned with the ‘acquisition’ of property. In Chapter 18, written by Robin Hickey, the original acquisition of title to personal property by theft is examined. Hickey questions the use of standard actions for interference with goods in situations of ‘wrongful’ possession and argues that rather than recognising a relative title, in some instances the objects of the law may be better served by the imposition of a personal right. In Chapter 19, written by Emma Waring, the ‘acquisition’ has taken the form of compulsory purchase, but for private purposes. Waring places current concerns with private takings in the US and the UK in their historical context. She argues for the need for modern private takings to be ‘scrutinised carefully and used sparingly’ to ensure that their benefits do not come at the expense of the stability of the property regime.

Collectively, the contributions to this volume demonstrate the breadth, depth and variety of modern property scholarship. One of the great benefits of the *Modern Studies in Property Law* series is the ability to bring together a rich diversity of research at an international gathering. The conference owes this to the vision of Professor Lizzie Cooke and her colleagues at the University of Reading and, in no small part, to Richard Hart for his ongoing commitment to the series. On a personal level, I would like to thank my fellow members of the series’ Editorial Board for entrusting the ninth conference to me. I am extremely grateful to the keynote speakers, Lord Walker of Gestingthorpe and Professor Simon Gardner, and to the Rt Hon Sir Terence Etherton, who addressed the conference at its dinner. At Southampton, special thanks are due to my colleagues Emma Laurie and Sarah Nield for their continuous support and involvement in the organisation of the conference. To preserve the integrity of the process, Emma and Sarah also arranged for Chapter 2, on which I am co-author, to be refereed. It would not have been possible to hold the event at Southampton without the backing of Professor Natalie Lee as Head of School, whose support was wholehearted and enthusiastic. Finally, the practical administrative burden of organisation was handled with the utmost efficiency by Jo Hazell.

As this book goes to press, we look forward to the tenth *Modern Studies in Property Law* conference that will take place at the University of Liverpool in 2014.

*Nicholas Hopkins*  
*Professor of Law, University of Southampton*  
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