

REAL OBLIGATIONS AT THE EDGE OF CONTRACT AND PROPERTY

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CONTRACT AND PROPERTY

Siel DEMEYERE



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Intersentia Ltd
8 Wellington Mews | Wellington Street
Cambridge | CB1 1HW | United Kingdom
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Email: mail@intersentia.co.uk
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FOREWORD

The book in front of you is the commercial edition of the PhD Siel Demeyere successfully defended at the University of Leuven and the Université de Lille in September 2019. We had the honour and privilege to supervise the thesis, in a joint doctoral research project of Professor Vincent Sagaert of the University of Leuven and Professor Gaël Chantepie of the Université de Lille.

This book reflects, from a scientific point of view, a high level of legal reasoning. It investigates in a thorough and deep manner issues on the borderline between property and contract. The area of borders frequently reflects possible pitfalls and dangers. Some even would aim to erect walls on the borders. Siel Demeyere has taken the opposite angle in her research: she demolishes the – frequently high and massive – walls between property and contract. In a traditional, 19th century perspective, property law was the natural enemy of contract law. The commingling of property law and contract law resulted in a commingling of proprietary burdens and personal burdens related to real estate. In its turn, the latter risked to connect personal obligation to do something (“in faciendo”), which risks a submission of persons in relation to land. In a more societal perspective: too much interferences between property and contract risk to trigger a return of a feudal structure of society, as the commingling of both areas of law was the central pillar of this societal model.

This book can be situated in, and analyses the core elements, of that minefield. It tackles the borders of contract and property, which sometimes prove to be a war area. It focusses in the analysis on real obligations, a hybrid legal device, constituting a bridge between property law and contract law. The main stance the author takes is property law, taking into consideration the closed system of property rights (*numerus clausus*). However, she also has attention for the contract law issues related to the topic, such as the privity of contract, party autonomy, etc.

The book has an excellent scientific value. The author aims and succeeds to demolish the walls between contract law and property law, based on an inductive and comparative legal research. The comparative nature of the research forms the

basis of the scientific importance of the work: the author compares in a profound manner French, Scots, Belgian and Dutch law, and – in doing so – confronts the main dialectics between contract law and property law. The dogmatic rigidity and creativity of the book can be highly appraised and applauded. The analysis is highly creative and original, not avoiding any criticism of sacred principles. Traditional comparative research between national legal systems risks to be gradually more in the shadow of European and international developments. This is even more the case in property law, which tends to be very national – not to use the word “closed” – anyway. This work offers a great counter-example and can therefore show the path to follow for subsequent legal research.

It is rare that traditional (comparative) legal research is being conducted in English. On the one hand, it is an additional burden for the author to analyse on a majority of traditional civil law systems in a language which is not always adequate as instrument for a private law analysis. Siel has done so brilliantly, making use of a technical language which enabled her to create her own semantic framework. On the other hand, the language is a huge tool for the distribution of the work across legal borders. It will contribute to the use of the book also in other European and non-European legal systems.

The author has demonstrated to have the intellectual and scientific skills to conduct a creative individual research. After she had already had an exchange stay at New York University, she has – in the course of her thesis – benefited from research stays in Edinburgh and Nijmegen, for which I am very grateful to Kenneth Reid, Andrew Steven and Steven Bartels. She has published, besides this masterpiece, numerous other articles in journals and books. She also co-edited with Professor Vincent Sagaert a book on “Property and Contract with an Environmental Perspective”, which is the result of the international scientific seminar we organised the day before the public defence of the Doctorate. The conference demonstrates that the subject matter and analysis of this book is not only challenging from a conceptual and dogmatic point of view, but also triggers important societal perspectives. Real obligations could serve as legal device in order to enhance environmental obligations. Hence, it could form a stable theoretical foundation for a central element in the debate around sustainability and property law.

Both books are new in the Property Law Series, which includes thorough legal research on property law topics.

Siel Demeyere reflects the rigidity which she not only imposes upon students, but also on herself. After having obtained her master degree as an excellent

student, she was a very dynamic and pro-active member of the Leuven Institute for Property Law on a scientific and human level and was therefore an excellent ambassador of the Leuven Research Institute.

Leuven, 15 June 2020,

Vincent SAGAERT – Gaël CHANTEPIE

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This book is the commercial version of the doctoral thesis ‘Real Obligations at the Edge of Contract and Property’ I publicly defended at the KU Leuven’s Faculty of Law and Université de Lille on 6 September 2019.

At the end of this five year journey, it is time to express my sincere gratitude to the many people who supported me, not just academically but on many other levels. So here is an extensive, but far from exhaustive, list of thank you’s.

First of all, to professor Vincent Sagaert, my supervisor, for giving me the opportunity to conduct research in an atmosphere of freedom and trust for five years. For always challenging me and motivating me to dig deeper, and for your tall shoulders on top of which I could stand.

To professor Gaël Chantepie, my co-supervisor, for guiding me through this adventure of a joint PhD and for welcoming me at Lille multiple times, as well as for your useful comments on French law and concerning the structure of this work.

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To professor Steven Bartels and professor Kenneth Reid, for welcoming me on a research stay to Nijmegen and Edinburgh respectively.

Thanks to my colleagues in Kortrijk and Leuven, this research never felt like a lonely work. Thank you for all of the relaxing lunches, pleasant talks, office shares, and activities with the ABAP delegation, the Ecoteam and Lean In.

Thank you Elien, Dorothy, Ann and Michiel, for welcoming me as a newbie to the Institute for Property Law's experienced team. And thank you Benjamin, Ghijsbrecht, Sander and Bram, for not letting research in property law be a lonely challenge. I not only owe thanks to my fellow PhD researchers, but also to other KU Leuven personnel, especially to Angélique and Linda and the staff from the law library in Leuven and from the library at Kulak.

I am very thankful to my parents, who always supported me and gave me both a warm home and a healthy work attitude. You have drilled in useful mottos to successfully perform PhD research, such as “finish what you start”, and “if you do something, do it well”. Thijs, thank you for keeping my feet on the ground with witty comments from time to time.

Tom, thank you for keeping an eye on my work life balance, and reminding me that there is more to life than law and research. Thank you also for following me all over the world, from New York to Nijmegen, from Edinburgh to Mexico.

Siel DEMEYERE

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LIST OF ABBREVIATIONS

1. LEGISLATION AND PREPARATORY WORKS

Act of 10 July 1965	Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis, <i>JORF</i> 11 July 1965, 5950
AFTSA	Abolition of Feudal Tenure etc. (Scotland) Act 2000
BCC	Belgian Civil Code
Book 3 “Property”	Book 3 “Property” of the Belgian Civil Code, introduced by the Act of 4 February 2020
C.civ.	French Civil Code
CCH	French Code de la construction et de l’habitation
CGI	French Code général des impôts
DCC	Dutch Civil Code
Decree of 17 March 1967	Décret n°67-223 du 17 mars 1967 pris pour l’application de la loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis, <i>JORF</i> 22 March 1967, 2742
DMS Order	Development Management Scheme Order 2009
Draft Bill (Property Law)	Belgian Government Bill of 31 October 2018 on the introduction of Book 3 “Property” in the new Civil Code
Draft Bill (Property Law) 2017	Belgian Preliminary Draft Bill concerning the insertion of Book II “Property law” in the new Civil Code, drafted by the Commission for property law reform, erected by Ministerial Decree of 30 September 2017
Draft Bill Law of Obligations	Belgian Draft Bill approved by the Council of Ministers, on 30 March 2018, as prepared by the Commission for reform of the law of obligations
Draft Bill Liability Law	Belgian Preliminary Draft Bill concerning insertion of provisions on extra-contractual liability in the new Civil Code, drafted by the Commission for reform of liability law, erected by Ministerial Decree of 30 September 2017
Explanatory Memorandum Property Law	Explanatory Memorandum on the Government Bill of 31 October 2018 on introduction of Book 3 “Property” in the new Civil Code, <i>Doc.Parl. Chambre</i> 2018-19, no. 3348/001, www.dekamer.be

Hypothec Act	Belgian Act of 16 December 1851 amending the Hypothec System
LBTT(S)A	Land and Buildings Transaction Tax (Scotland) Act 2016
LLSA	Long Leases (Scotland) Act 2012
Loi Elan	Loi n°2018–1021 du 23 novembre 2018 portant évolution du logement, de l’aménagement et du numérique
LR(S)A 2012	Land Registration etc. (Scotland) Act 2012
M.v.A. II	Memorie van antwoord aan de Tweede Kamer
M.v.T.	Memorie van toelichting
NCPC	Nouveau Code de Procédure Civile
Parl. Gesch.	Parlementaire Geschiedenis
PL(S)A 1973	Prescription and Limitation (Scotland) Act 1973
Rv	Wetboek van Burgerlijke Rechtsvordering
T.M.	Toelichting Meijers
TCSA	Title Conditions (Scotland) Act 2003
TSA	Tenement (Scotland) Act 2004
V.V.II	Voorlopig verslag van de vaste Commissie voor Justitie uit de Tweede Kamer
VCF	Flemish Code on Tax Law of 13 December 2013
W.Reg.	Wetboek der registratie-, hypotheek- en griffierechten
WBRV	Wet op belastingen van rechtsverkeer
WOZ	Wet waardering onroerende zaken van 15 december 1994

2. COURTS AND TRIBUNALS

Please note that French and Belgian case law from a court of appeal (*cour d’appel*, *hof van beroep*) is merely indicated by a place-name, not by ‘court of appeal’ (or an abbreviation thereof). This brief notation is common in both French and Belgian law.

C.E.	Conseil d’Etat
Cass. be.	Belgian Cour de cassation / Hof van Cassatie
Cass. fr.	French Cour de cassation
Const. be.	Belgian Constitutional Court (<i>Cour Constitutionnel / Grondwettelijk Hof</i>)
CSIH	Court of Session – Inner House
CSOH	Court of Session – Outer House
HL	House of Lords
HR	Hoge Raad
IH	Court of Session – Inner House
J.P.	Justice of the Peace (<i>justice de paix / vrederechter</i>)

OH	Court of Session – Outer House
Rb.	Rechtbank
SC	Supreme Court
Sh. Ct.	Sheriff Court
TGI	Tribunal de grande instance
Trib.	Tribunal civil (French or Belgian)

3. LEGAL JOURNALS¹

AC	Law Reports, Appeal Cases (Third Series)
AJDI	Actualité juridique de droit immobilier
Arr.Cass.	Arresten van het Hof van Cassatie
BJ	La Belgique judiciaire: gazette des tribunaux belges et étrangers
BRH	Belgische rechtspraak in handelszaken
BS	Belgisch staatsblad (= Moniteur Belge)
Bull.civ.	Bulletin des arrêts de la Cour de cassation (chambres civiles)
Constr.-urb.	Construction – Urbanisme
Conv.	Conveyancer and Property Lawyer
D.	(Receuil) Dalloz
D.	Dunlop, Bell & Murray’s Reports, Second Series Session Cases
D.H.	Dalloz (hebdomadaire)
DP	Dalloz périodique
Edin. L.R.	Edinburgh Law Review
EPLJ	European Property Law Journal
ERPL	European Review of Private Law
F.	Fraser’s Court of Session Cases, 5 th Series
FJF	Fiscale jurisprudentie / Jurisprudence fiscale
G.W.D.	Green’s Weekly Digest
Gaz.Pal.	Gazette du Palais
JCP (G/N)	La Semaine Juridique (édition générale / notariale)
JDF	Journal de droit fiscal
JJP	Journal des juges de paix (et de police)
JL	Jurisprudence de Liège
JLMB	Revue de jurisprudence de Liège, Mons et Bruxelles
JLSS	Journal of the Law Society of Scotland

¹ Only the abbreviations of the most common legal journals are mentioned here. The meaning of other abbreviations can be found at www.legalabbrevs.cardiff.ac.uk/ and for Belgian journals specifically at www.rechtsaf.be.

JORF	Journal officiel de la République française
JT	Journal des tribunaux
Jur.rev.	Juridical review
Jura Falc.	Jura Falconis. Juridisch wetenschappelijk studententijdschrift
Limb.Rechtsl.	Limburgs rechtsleven
M. or Mor.	Morison's Dictionary of Decisions
MB	Moniteur Belge (= Belgisch Staatsblad)
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJF	Nederlandse Jurisprudentie Feitenrechtspraak civiele zaken
NJW	Nieuw Juridisch Weekblad
Not.Fisc.M.	Notariaat: notarieel en fiscaal maandblad
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
P.C.B.	Private Client Business
Pand.pér.	Pandectes périodiques
Pas.	Pasicrisie belge
Prop.L.B.	Greens Property Law Bulletin
R	Rettie, Crawford & Melville, Session Cases (4 th Series)
RABG	Rechtspraak Antwerpen Brussel Gent
RCJB	Revue critique de la jurisprudence belge
RDC	Revue des contrats
RDI	Revue de droit immobilier
Res Jur.Imm.	Rest et jura immobilia: driemaandelijks tijdschrift van zaken- en bouwrecht
RM Themis	Rechtsgeleerd Magazijn Themis
Rob.	Robertson's Scotch Appeal Cases
RTD civ. (or RTDC)	Revue trimestrielle de droit civil
RW	Rechtskundig Weekblad
S	(Receuil) Sirey
S.	Shaw's Session Cases, 1 st Series
S.C.	Session Cases
S.L.G.	Scottish Law Gazette
SCLR	Scottish Civil Law Reports
SLPQ	Scottish Law & Practice Quarterly
SLT	Scots Law Times
SPEL	Scottish Planning and Environmental Law
T.Aann.	Tijdschrift voor aannemingsrecht
T.App.	Tijdschrift voor appartements- en immorecht
T.Not.	Tijdschrift voor notarissen
T.Vred.	Tijdschrift van de vrede- (en politie)rechters

TBBR	Tijdschrift voor Belgisch burgerlijk recht
TBO	Tijdschrift voor bouwrecht en onroerend goed
TFR	Tijdschrift voor fiscaal recht
TGR/TWVR	Tijdschrift voor Gentse / West-Vlaamse rechtspraak
TPR	Tijdschrift voor Privaatrecht
TvI	Insolventierecht
W	Weekblad voor het recht
WLR	Weekly Law Reports
WPNR	Weekblad voor privaatrecht, notariaat, registratie
Yale LJ	Yale Law Journal

