

BOOK REVIEW

New Perspectives on Land Registration: Contemporary Problems and Solutions

by Amy Goymour, Stephen Watterson, and Martin Dixon (eds). Oxford: Hart, 2018, 490 pp (£110.00 hardback). ISBN: 978-1-50990-603-1.

Sarah E Hamill*

School of Law, Trinity College Dublin, Ireland

*Email: sarah.hamill@tcd.ie

The issues with the Land Registration Act 2002 are well known. Despite the high hopes which accompanied its coming into force in 2003, the LRA 2002 has not delivered on its key promises of a stronger title guarantee and a more certain and reliable Land Register.¹ As is a recurring theme for significant amendments to English land law, amendments arrive only to be swiftly overtaken by social and technological change. Not surprisingly, two years ago, the Law Commission (England and Wales) indicated that it intended to recommend amendments and clarifications for the LRA 2002 to ensure that it will be fit for whichever future it finds itself in.² One of the goals of *New Perspectives on Land Registration: Contemporary Problems and Solutions* is to aid the Law Commission in its task by gathering leading academics and practitioners in the area of land registration to suggest some solutions to the more vexing problems with the LRA 2002. Shortly after *New Perspectives*' publication, the Law Commission released its report on updating the LRA 2002.³ It is evidence of how useful this collection will be that, despite the close publication dates, the Law Commission's report makes several references to *New Perspectives*. Nonetheless, the editors also hope that their book 'will stand the test of time' and have relevance beyond the current process of law reform. The editors anticipate that the problems examined are likely to persist even after reform,⁴ which speaks to the gravity and intricacy of the issues facing the LRA 2002.

The many problems with the LRA 2002 have received ample attention in articles and book chapters. The strength of Amy Goymour, Stephen Watterson and Martin Dixon's book is that the most pressing issues are gathered in one place and subjected to a sustained and detailed investigation. The level of detail is perhaps the book's greatest strength and it should be closely studied by anyone interested in designing or reforming a system of land registration. So too is the book as up-to-date as is possible. In the preface, the editors note that the chapter authors revised their contributions in light of the Law Commission's proposals and recent judicial decisions.⁵ However, in allowing the book to be so current a degree of cohesiveness and interaction between the chapters themselves has been lost. This collection, with a few exceptions, lacks cross-referencing between chapters and this has led to some degree of overlap, to say nothing of how the discussions could have been enriched by more direct engagement with each other. *New Perspectives* also lacks an introductory chapter or concluding chapter to tie key themes together.

As is to be expected, the bulk of the focus is on land registration in England and Wales, but there are also thoughtful treatments of recent changes to Scotland's law of land registration as well as

¹A Goymour et al (eds) *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Oxford: Hart, 2018) pp v–vi.

²Law Commission *Updating the Land Registration Act 2002* (Law Com No 227).

³Law Commission *Updating the Land Registration Act 2002* (Law Com No 380).

⁴Goymour et al, above n 1, p vi.

⁵Goymour et al, above n 1, p vi.

perspectives from Australasia. Thematically, the book is split into two parts, with the first part offering four perspectives on land registration systems while the second part examines contemporary problems and solutions. The second part is itself further subdivided to examine five troublesome areas: the nature of registered title; the power to alter the register and the related provisions for the granting of an indemnity; the priority of registered interests; the interaction between the LRA 2002 and the common law; and the mechanics of land registration.

There are two main recurring themes across the chapters in this collection, especially those focused on the LRA 2002. The first and the most pressing one is how the common law rules about title allocation interact with the LRA 2002's provisions. The chapters in *New Perspectives* are hardly the first to deal with this issue; the bijurality of England's land registration has become something of an academic cottage industry as scholars seek to explain it away or justify it.⁶ Such is the significance of the relationship between the common law and the LRA 2002 that even though *New Perspectives* grants it its own subsection, other chapters also speak to the relationship between the two. Amy Goymour and Robin Hickey, for example, seek to query whether a pre-registration doctrine governing title registration is still relevant by asking 'whether the idea of title relativity sits comfortably with the policy ambitions of our land registration system'.⁷ Their answer is a qualified yes. They note that the LRA 2002, with its references to absolute and qualified title, assumes the continued possibility of relative titles,⁸ though the doctrine will not be useful in every title dispute and context matters.⁹ In so doing they echo Aruna Nair's earlier argument about the continuity of the LRA 2002 with what preceded it.¹⁰

In contrast to Goymour and Hickey's approach, Emma Lees disavows a policy driven approach in her chapter on what, exactly, the title guarantee guarantees.¹¹ She seeks to 'take a step back' and try to get 'some sense of the overall picture for guaranteed title' by reading the case law and searching for patterns.¹² Her conclusion, that there 'is no coherent whole' and 'no clear justification' for the divergences seen, is a powerful call for reform.¹³ In Lees' view, legislative reforms ought to explain what a mistake is and what the Register actually guarantees both in terms of what does exist and what does not.¹⁴

A third approach to the relationship between the common law and the LRA 2002 is seen in Stephen Watterson and Amy Goymour's four co-authored chapters, which form a separate sub-section on the LRA 2002 and the general law. They set out three promises under the LRA 2002 which, they argue, should see an outcome different than would be seen under the common law rules. In their sights is Lady Hale's comment that the 'land registration tail' should not 'wag the land ownership dog'.¹⁵ The three promises Goymour and Watterson examine are the title promise, the priority promise, and the empowerment promise, with each promise explored in its own chapter after a short introductory chapter. The first chapter sets out the interaction issue and notes that land registration schemes are not and should not be 'fully autonomous' but are 'necessarily parasitic'.¹⁶ Watterson and Goymour's analysis reveals that each promise is 'compromised or qualified', sometimes as a result of the Act itself, sometimes by interpretation, and sometimes by both.¹⁷

⁶See eg P Carruthers 'A tangled web indeed: the English Land Registration Act and comparisons with the Australian Torrens system' (2015) 38(4) UNSWLJ 1261; M Harding and R Hickey 'Bijural ambiguity and values in land registration systems' in S Bright (ed) *Modern Studies in Property Law*, Vol 6 (Oxford: Hart, 2011) p 281.

⁷A Goymour and R Hickey 'The continuing relevance of relativity of title under the Land Registration Act 2002' in Goymour et al, above n 1, p 66.

⁸Ibid, pp 68–69, 82–84.

⁹Ibid, pp 88–89.

¹⁰A Nair 'Morality and the mirror: the normative limits of the "principles of land registration"' in Bright, above n 6, p 263.

¹¹E Lees 'Guaranteed title: no title, guaranteed' in Goymour et al, above n 1, pp 98–99.

¹²Ibid, p 98.

¹³Ibid.

¹⁴Ibid, pp 115–116.

¹⁵S Watterson and A Goymour 'A tale of three promises: setting the scene' in Goymour et al, above n 1, p 277, quoting *Southern Pacific Mortgages v Scott* [2014] UKSC 52, [2015] AC 385, at [96].

¹⁶Watterson and Goymour, above n 15, p 277.

¹⁷Ibid, p 280.

In carefully setting out each promise, Watterson and Goymour's goal is to set the stage for future discussion and reform. While primarily of interest to land law scholars, their chapters offer an illustration of how legislative ambiguity, when combined with judicial interpretation, can result in outcomes which run counter to the policy which the legislation was thought to be advancing. It is hardly a new lesson that when a law does not do what it purports to do, public confidence in that law will be undermined, but it remains an important lesson and one which is applicable more broadly.

Watterson and Goymour's recognition that the LRA 2002 seems to undermine its own promises points to the second theme of *New Perspectives*, which is: what do we want a system of land registration to do and why, and *how* should it do this? *Why* is it that the promises of the LRA 2002 are qualified? Simon Cooper's chapter in the collection offers a tantalising glimpse at a potential answer. His focus is on the ways a 'lack of proper care' can affect the exercise of the power to rectify the Register.¹⁸ He opens with a reference to Gray and Gray's 'castigat[ion]' of land law's 'highly abstract nature' which is ill-suited to 'the complexity of human interactions'.¹⁹ This briefest of theoretical interventions in *New Perspectives* and, indeed, Cooper's chapter is not fully fleshed out; instead Cooper works through the application of the care requirement in the case law and distils what care means for owners, acquirers, and the potential for an indemnity. As useful as Cooper's analysis is, his opening provokes the question of whether or not Gray and Gray's assessment was premature. Lees argues that the courts continue to show a preference for the 'off-Register position' and a willingness to 'manipulate indemnity provisions to produce a "fair" outcome', which rather suggests the technicality feared by Gray and Gray has not come to pass.²⁰ The reference to 'lack of care' in the LRA 2002 and the fact its promises are qualified suggests a degree of continuity which might well cheer Gray and Gray.

The problem with the evidence of significant continuity between the LRA 2002 and the 'off-Register' position is the effect on the definitiveness of the Register. Here the lack of engagement with other chapters reveals itself as a weakness, especially given Kenneth Reid's chapter on recent changes to title registration in Scotland.²¹ Though Reid is loath to make recommendations for England, Scotland's decision to make a 'decisive break with title by registration'²² is one which deserves close attention in England if only for the willingness to admit when a rule does not work. It is regrettable that the chapters examining the LRA 2002 did not have a chance to consider Reid's analysis, as it could have raised the question whether similar changes would work for the reform of the LRA 2002. The question which is tacit in Reid's chapter and in the chapters exploring the LRA 2002's title guarantee is that of the role of the state in land registration. More specifically the question is does the state, in the form of the Registry, actually grant title or are titles only something which titleholders can transfer? The problem with the role of the state in title registration is whether and to what extent land law is public law or private law. The LRA 2002, like the Land Registration Act 1925 before it, does represent significant state involvement in land law. Yet, as several chapters in this collection along with other articles and chapters make clear,²³ the mere fact of registration is not nearly as constitutive of title as it purports to be. This is not simply a result of courts being reluctant to give effect to the LRA 2002's provisions but, as several chapters in *New Perspectives* hint at, an ambivalence in the Act itself. It is this ambivalence which needs to be addressed in any future reform. Though the focus of *New Perspectives* is heavily doctrinal, it illustrates, perhaps inadvertently, the doctrinal confusion which flows from the lack theoretical clarity over the role of the state in land registration.

¹⁸S Cooper 'Lack of proper care' in Goymour et al, above n 1, p 175.

¹⁹Ibid, p 175 referring to K Gray and S Gray 'The rhetoric of reality' in J Getzler (ed) *Rationalizing Property, Equity and Trusts* (London: Butterworths, 2003) pp 205–206, pp 244–253 (no pinpoint is given by Cooper).

²⁰Lees, above n 11, p 116.

²¹Kenneth GC Reid 'De-throning king Midas: the new law of land registration in Scotland' in Goymour et al, above n 1, p 157.

²²Reid, above n 21, p 160.

²³See eg Carruthers, above n 6; Harding and Hickey, above n 6.

While none of the chapters in this collection tackled such large, theoretical questions, they still offer a valuable and detailed engagement with land registration issues. This collection will be an important resource for anyone interested in the design and operation of land registration systems.

Author ORCIDs.  Sarah E Hamill, [0000-0001-7876-7701](https://orcid.org/0000-0001-7876-7701)