

## **Title guarantee vs title indefeasibility – That is the question**

**Martin Dixon, Professor of the Law of Real Property, University of Cambridge**

The Law Commission of England & Wales have just produced a set of recommendations for the reform of that jurisdiction's primary registration statute – the Land Registration Act 2002. That legislation itself represented a significant reform of the founding statute, the Land Registration Act 1925.

The 2002 Act had many objectives, but two leading and interlinked ones were to introduce e-conveyancing and to change the system from "registration of title", to "title by registration". The first of these objectives – e-conveyancing - remains elusive (at least in the sense that it was originally proposed) and while it is now clear that there is "title by registration" in England and Wales, this has attracted both judicial and academic criticism. On the one hand, it is suggested by some that it places too high regard on "conveyancing machinery" and fails to reflect where the "true" ownership of land lies. On the other hand, some criticise the Act because its version of "title by registration" does not provide an unchallengeable title even when there is no fraud.

The acceptance by the courts that the 2002 Act did indeed establish "title by registration" came an unexpectedly long time after the 2002 Act came into force (despite the clear words of the statute). It was confirmed in a case where, bizarrely, the Land Registry were arguing against it. This highlights another feature of the system that has given rise to controversy: the fact that the Land Registry indemnifies – effectively insures – persons prejudiced by the operation of the system even if the Registry is not at fault. This costs money, running into millions of £sterling and results in higher Registry fees. So, by arguing against "title by registration", the Registry were seeking to reduce the amount they paid out in indemnity. A cynic might think this was to make the Registry more profitable in a time of financial austerity. It is, perhaps, a classic example of attempted short-term gain for definite long term pain, and rightly was rejected.

However, the uncertain ambit of "title by registration" also led to much debate about other aspects of the system, particularly around the meaning of "mistake" (in respect of which the register could be changed) and the reach of "overriding interests" (proprietary rights which have priority without registration and whose existence does not justify indemnity and which challenge the priority of a registered title).

This paper seeks to show that the system established by the Land Registration Act 2002 is, in fact, a coherent, workable and integrated system that has established "title by registration" in the sense of "title guarantee". It was the product of a well thought out and well executed policy. It will examine what "title guarantee" means. In particular, it will seek to distinguish title guarantee from title indefeasibility. The former is the subject of the Land Registration Act 2002; the latter is a Torrens concept. Neither is, in my view, "better" than the other; but they are different and they reflect the jurisdiction they operate in.

Further, the paper argues that many of the uncertainties in the present case law are caused by a failure to understand what title guarantee means and the integrated way it operates: both those cases that seek to detract from it and those where there is hesitancy in giving it its full meaning.

With a clear understanding of title guarantee as executed by the 2002 Act, it will be argued that many of the apparent difficulties melt away. There might still be policy objections to the system as established, but not uncertainties about its operation.

Finally, the paper will consider the Law Commission's July 2018 proposals. A tentative conclusion might be that the Commission have, unfortunately, produced a set of reforms that in part, veer towards title indefeasibility and, in part, enhance title guarantee. If this is accurate, there must be concerns that, being neither fish nor fowl, the proposed reforms will not achieve their objectives and could actually produce negative results.