argument that inter-institutional comity would be at just as important, if not more so, under a single written document and it would be interesting to reason that through more carefully. Thirdly, the continuing speculation over the future of the HRA – arising not least from the Ministry of Justice’s recent Green Paper on a Bill of Rights and Responsibilities – means that what is a very good book may become purely academic. It is to be sincerely hoped that the HRA is around for long enough that other writers and the courts have the opportunity to consider and respond to Young’s valuable contribution to the continuing debate on sovereignty (and supremacy).

C.J.S. Knight


Though innocuously entitled “The Structure of Property Law”, this book is actually an attempt at a radical restructuring of property law. Though using an innocent bike to illustrate the subject-matter of personal property right throughout, the book in fact throws a monkey wrench into the proper understanding of the most venerable concepts in English commercial law.

Before considering the author’s surprising ideas, it is perhaps helpful to have an overview of the book’s coverage. It consists of three overlapping parts. Parts one and two overlap to some extent in introducing the author’s concepts of property law and equity. Also included in part two is an application of the author’s concepts to land law. Part three looks at land law again and some other property matters, such as ownership, co-ownership, trust and security interest.

The author’s ideas of property law include the following. First, property rights are confined to the right to use tangible things. “A right can only qualify as a property right if it relates to the use of a thing: an object that can be physically located” (p. 132, footnote omitted, original emphasis). There is thus no such thing as intangible property. Accordingly intellectual property rights are outside the scope of property law.

Second, B is on the conventional analysis said to have an equitable property right where (i) A is under a duty to B and (ii) A’s duty relates to a specific right held by A. One simple example is where A holds an account with Z Bank and declares that he holds that right on trust for B. The conventional analysis is incorrect; B should instead be seen to have a right against a right, or a persistent right. To prove the author’s view that “there is no such thing as ‘Equitable property right’” (p. 70), the following examples are used. “A owns a bike and declares that he holds the bike on Trust for B. X then carelessly damages the bike. A owns a bike and declares that he holds the bike on Trust for B. X then steals the bike” (p. 29). If “B’s right under the Trust counts as ‘Equitable property right’ … it is difficult to explain why … X does not commit a wrong against B” (p. 30).

Third, “ownership” is “the only property right that can exist in things other than land” (p. 526, original emphasis). “Ownership consists of B having: an immediate, unconditional right to exclusive control of a thing; forever” (p. 526).
Fourth, “possession” also counts as ownership, by reference to this example: “B has Ownership of a bike. C steals B’s bike, by taking physical control of it without B’s consent or other lawful authority. C2, acting without the consent of B or C or other lawful authority, takes the bike from C. When C2 takes the bike, he commits a wrong against both C and B. C2’s action is a wrong against C because C, by taking physical control of the bike, independently acquires a property right … As a result, C2 like the rest of the world, is under a prima facie duty not to interfere with any use C may choose to make of the bike … B’s right counts as Ownership as B has a right to exclusive control of the bike forever. As C’s property right has exactly the same content, it must also count as Ownership” (pp. 144–145, original emphasis).

So far so good. An author is clearly entitled to define “property right” widely or narrowly as he wishes. But from the above general propositions the author boldly proceeds to show how they could have relevance to specific rights in real life. Some of the specific applications of the above conceptual apparatus only need to be stated for their deficiencies to be apparent.

A few examples would suffice to illustrate the deficiencies. In the context of a security interest, it is said that the holder (B) of a mortgage, pledge or consensual lien “acquires a property right. In the case of a fixed charge transaction, B acquires a persistent right: a Purely Equitable Charge … In the case of a floating charge transaction, B acquires a power to acquire a persistent right: that power is itself known as a floating charge” (p. 585). Apart from contrary to authorities and statutes, this is a highly simplistic understanding of security interests. On the author’s understanding, if the security interest in question is an equitable mortgage over land, would the equitable mortgagee have a property right? What about the holder of a floating mortgage? What about a legal mortgagee of a bank account, as contemplated by the Financial Collateral Arrangements (No. 2) Regulations 2003?

Because the author framed the content of personal property right as ownership of tangibles which in turn means an immediate, unconditional right to exclusive control of a thing forever, the author was apparently forced to say that possession equals ownership. But even in its own terms, the author’s thesis appears self-contradictory, as demonstrated in this passage: “A has Ownership of a bike. A agrees to give B a right to exclusive control of the bike for the next six months. B takes physical control of the bike … B cannot claim that A has transferred his Ownership to B: A clearly has not given B a right to exclusive control of the bike forever. However, when B takes physical control of the bike, B independently acquires a property right. That right is sometimes known as Possession but is better seen as an example of the core property right: Ownership” (p. 148, original emphasis). But why should B be seen to have an “unconditional right to exclusive control of a thing forever”? Perhaps the author would say that B has that right vis-à-vis the world, apart from A; thus B can sue those who take the bike from him without consent for conversion. But does this example really show that the concept of possession should be replaced with ownership? On the author’s definition of property right, all bailees are to be equated to owners. This seems to be wearing blinkers purposely and refusing to acknowledge the concept of beneficial ownership.

Indeed the author’s apparent unwillingness to recognise the concept of beneficial ownership leads to a forced conclusion that a mortgagor’s equity of redemption is a right against the mortgagee’s right: the mortgagor’s right to regain Ownership (p. 587). The content of a mortgagor’s equity of redemption is much more than just about the mortgagee’s security interest. The former is
the sum total of the mortgagor’s rights in the mortgaged asset – in equity he is
the owner of the asset subject to the mortgage, while the mortgagee is a mere
incumbrancer (Ultraframe (UK) v. Fielding [2005] EWHC 1638 (Ch) at [1403]).
To say that a mortgagor’s right as an owner is a right against the mortgagee’s
right as a mere incumbrancer is almost like saying that a child gives birth to his
parents.

This reviewer is all for rationalising the law and challenging existing
precepts if it leads to a better understanding of the law, but cannot in all hon-
esty feel enthusiastic about the restructuring of property law proposed in
this book. As an academic exposition, it is regressive in that it adds more
confusion than clarification. From a practical perspective, one struggles to see
its impact.

Look Chan Ho

The Rome II Regulation: The Law Applicable To Non-Contractual Obligations.

Andrew Dickinson’s excellent and timely book addresses the Rome II
Regulation, Regulation 864/2007 (hereafter “the Regulation”). The Regulation
became applicable on the 11th of January 2009 in all EU jurisdictions, other
than opted-out Denmark, and contains provisions which determine the choice
of law in relation to a wide range of non-contractual claims. The Regulation is
of general application within the courts of the EU and, in common with the
approach taken under its “sister” provision, the Rome Convention of 1980
(which is to be replaced by mid December 2009 by the Rome I Regulation,
Regulation 593/2008), such law selection is not dependent upon either the
litigants or the non-contractual obligations being located within the territorial
limits of the EU. Although the Regulation may be described as a sister to
the earlier European choice of law rules for contractual obligations, with
which it was, as a much earlier draft measure, originally conjoined, it is
possibly useful, for English readers, to note that as well as choice of law
rules for the expected non-contractual obligations represented by torts
and delicts, the Regulation also makes provision for the non-contractual
obligations arising from unjust enrichment, negotiorum gestio and culpa in
contrahendo. Dickinson’s book addresses all of these areas in commendable
detail and thus provides a most useful guide to the application of the new
Regulation.

That such a guide will be most welcome and necessary for both
academics and practitioners is a direct consequence of significant differences
of opinion – which have materialised over the course of the Co-Decision
Procedure – between the approach to choice of law rules favoured by the
European Parliament and that favoured by the European Council and
Commission. Such firmly held differences of opinion led to re-drafting, re-
re-drafting, and, when taken together with sundry matters of genuine legal
complexity, have made for what may sometimes appear to be a somewhat
Delphic Regulation. Dickinson’s book does all that is currently possible to
either “light the way” or at least indicate as plausible a direction as may, in
default of practice, presently be discerned.