Land Law, Logic and Effectiveness.

An analysis by reference to seven published articles.

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ABSTRACT

This commentary was completed following acceptance for publication of seven sole authored articles ('the articles'). It examines the role which logic plays in the areas of Land Law to which the articles relate, and in Land Law more broadly. It creates a conception of 'logic', differentiates logic from certainty and complexity, and hypothesises that a classical exposition of Land Law as inherently logical is not wholly representative either of its current condition or of how users of Land Law experience it. It defines logic by reference to coherence and consistency, capable of recognition by landholders. It identifies that illogicality is incompletely acknowledged, that it takes diverse forms, and that it has adverse effects.

This commentary identifies six themes, relating to logic, which are common to the articles. It argues that incomplete recognition of illogicality's influence can impede attempts to devise and implement effective Land Law reform. It recommends that where and how the law is illogical should be better publicised, and that reducing or removing the adverse effects of illogicality requires precise and nuanced identification and examination of illogicality's nature, scope, causes and effects.

The Articles

The articles (abbreviated 'A1' to 'A7') for the purposes of this commentary are:

Poulsom, MW (2017) **S.62 LPA 1925 Restating the Case for Reform.** International Journal of Law in the Built Environment, 9(1). pp. 79-91. ISSN 1756-1450 ('A1')

Poulsom, MW (2018) **Taking a View: The protection of prospects in England and Wales.** The Conveyancer and Property Lawyer (2). pp. 133-144. ISSN 0010-8200 ('A2')

Poulsom, Michael (2019) **Acquiring Property Rights Ex Turpi Causa.** The Conveyancer and Property Lawyer (2). pp. 149-161. ISSN 0010-8200 ('A3')

Poulsom, Michael (2020) **Estate rentcharges and positive covenants: an analysis.** The Conveyancer and Property Lawyer, 84 (2). pp. 138-150. ISSN 0010-8200 ('A4')

Poulsom, Michael (2021) **Working from Home and Restrictive Covenants: An Analysis.** The Conveyancer and Property Lawyer (1). pp. 71-83. ISSN 0010-8200 '('A5')

Poulsom, Michael (2022) **Reassessing Forfeiture for Commercial Rent Arrears.** The Conveyancer and Property Lawyer, 2022 (2). pp. 155-166. ISSN 0010-8200 ('A6')

Poulsom, Michael (2022) **Homes and home working: a property law perspective.** Journal of Property, Planning and Environmental Law. ISSN 2514-9407 ('A7')

INTRODUCTION

The first part of this commentary comprises an examination of 'logic'. By reference to an American Realist perspective, it both explores how 'logic' is perceived to contribute to law generally, and introduces the relationship between the articles, their subject matters, their findings and logic. It undertakes this introductory investigation under the following headings:

1. Jurisprudential conceptions of 'logic'
2. A definition of logicality
3. Illogicality, complexity and uncertainty distinguished
4. Why illogicality matters
5. Illogicality and effectiveness
6. Can law be both illogical and effective?
7. Illogicality as a challenge to the vocabulary of legal thinking
8. Illogicality as a challenge to classical expositions of Land Law
9. Logic and reforming Land Law for its users

1. Jurisprudential conceptions of 'logic'

Analysis of the extent to which law correlates with logic is perhaps at its most visible in aspects of the American Realist jurisprudential movement. In 'The Common Law', Oliver Wendell Holmes, Jr. asserted that to present a general view of the Common Law, 'other tools are needed besides logic'[1] and that 'the life of the law has not been logic; it has been experience'.[2] Criticising a tendency to isolate the second assertion, and incorrectly to interpret it as arguing that logic is not central to law or judicial decision making, Lind argues that law and judicial practice lie 'somewhere between strict formalistic jurisprudence and outright disregard for logic and argumentative form'.[3] This commentary argues that law and legal practice in the

[1] Oliver Wendell Holmes, Jr, *The Common Law* (first published 1881, Dover Publications Inc 1991) 1
[2] Holmes (n1)1
[3] Douglas Lind 'The Significance of Logic for Law', The National Judicial College (2014), 2

areas to which the articles relate lie further from the first of these than is acknowledged.

Holmes' view that the law could only be fully explained by reference to logic *and* other factors explicitly challenged the perception of law as a 'fixed mechanical guide'[4] favoured by the 'historical school' which had dominated nineteenth-century American legal thinking.[5] Pound described this formalism as painting 'a simple picture' which attributed everything to, and believed everything could be solved by, the 'one ideal' of logic.[6] Formalism understood law as a science 'based on logic, meaning a conceptual system – ordered, formal and complete – capable of providing unique and correct answers for each case…under consideration'.[7] It created what Dewey described as 'mechanical jurisprudence', comprising a belief that 'for every possible case that may arise, there is a fixed antecedent rule already at hand; that the case in question is either simple and unambiguous, or is resolvable by direct inspection into a collection of simple and indubitable facts'.[8] Challenging the perceived dominance of logic, and with a direct focus on the misconceptions which the historical school had, by overstating its influence, created, Pound identified that 'the actual legal order is not a simple rational thing. It is a complex, more or less irrational thing into which we struggle to put reason, and in which… new irrationalities arise in the process of meeting new needs'.[9]

Each article originated in an initial view that the Land Law principles and processes to which it related contained a logical defect. Those initial views developed during the author's transition from working as a property solicitor to working in full time academia. Postgraduate studies and practice in the private and voluntary sectors encouraged a view that Land Law might 'work better' for landowners and land users if it were more logical. An LLM dissertation, completed while the author was in practice, examining easements by reference to the interests of commercial

[4] Julius Paul, 'Foundations of American Realism' 60 W Va L Rev (1957) 37, 38
[5] Roscoe Pound, *Interpretations of Legal History* (Harvard University Press 1946) 141
[6] Pound (n5) 141
[7] Carla Faralli, 'The Legacy of American Realism' Scandinavian Studies in Law (2005), 75
[8] John Dewey, 'Logical Method and Law' 10 Cornell Law Rev (1924) 17, 19
[9] Pound (n5) 141

landholders,[10] and frequent exposure to legal principles and professional practices which appeared to lack adequately logical justification strengthened this view. Academic research allowed further investigation into the recurrent lack of logical justification in routinely encountered Land Law principles, in aspects of their implementation, and in reform proposals.

It was identified that reform proposals sometimes prioritised the scale or visibility of the reform over accurate identification of the precise logical defect in the relevant Land Law principle or process, producing reform which was inadequately aligned with the everyday needs of landowners and their advisors. This approach to reform persists: Proposals to expedite residential conveyancing by requiring sellers to provide information earlier, and by adopting further digitisation are unlikely to succeed while they overlook the precise factors which cause delays.[11] This analysis uses proposed and implemented leasehold reforms in England and Wales as examples of how reforms can, by either correctly or incorrectly identifying the precise logical defect, succeed or fail in producing an effective response to that defect. It argues that wherever a logical defect is identified, correcting it requires precise and nuanced examination of, and better publicity of, its nature, scope, causes and effects.

2. A definition of logicality

This analysis does not attempt investigation into the role of logic in law as detailed as that undertaken by, for example, Lucas,[12] Summers[13] or Tammelo.[14] It adopts a perception of 'logic' which aligns with the findings of the articles. It broadly

[10] M W Poulsom, LLM Dissertation, 'A Study of the Laws Governing Enjoyment of Private Rights of Way by reference to the Interests of Commercial Landholders', The University of Birmingham, 2001

[11] Gazette Newsdesk, 'Veyo e-conveyancing project to be wound up' The Law Society Gazette, 3 December 2015, https://www.lawgazette.co.uk/news/veyo-e-conveyancing-project-to-be-wound-up/5052576.article; Monidipa Fouzder, 'E-conveyancing roadmap: steering group to consult on upfront information', The Law Society Gazette, 18 January 2024 https://www.lawgazette.co.uk/news/e-conveyancing-coalition-unveils-action-plan/5118

[12] Nicholas F Lucas 'Logic and Law', Marquette Law Review, Volume 3 Issue 4 (1919) 203

[13] Robert S Summers, 'Logic in the Law', (1963) Cornell Law Faculty Publications. Paper 1133. http://scholarship.law.cornell.edu/facpub/1133443.article

[14] Ilmar Tammelo, 'Logic as an Instrument of Legal Reasoning', Jurimetrics Journal Vol 10, No 3, (March 1970) 89-94

understands ‘logic’, as Formalists would, as connoting an ordered, mechanical and complete system, closely aligned with ‘rationality’. Rationality is used to mean that which is ‘based on [or] deriving from reason or reasoning’.[15] ‘Reasoning’, conventionally referring to the deduction of one judgment from another, is understood as Dewey would have understood it, in the sense of ‘deduction of *certainties’,* and the application of ‘fixed antecedent rules’. ‘Logic’ and ‘logicality’ are also used in this analysis in a broader sense of forming that basis of objective assessment and of the reasoning process by which an idea or proposition can be proved.[16]

Further explanation is required of what precisely this commentary means when it refers to a legal position being ‘logical’. This commentary defines ‘logical’ using three requirements: To be logical, law must firstly, having regard to Lord Nicholls’ statement in *Fairchild v Glenhaven Funeral Services Limited*, be *coherent.*[17] Secondly logical law is law characterised by ‘*consistency* [emphasis added] of concepts with one another’.[18] Thirdly, logical law is that which appears logical to ‘its users: the various audiences to whom it is addressed’:[19] A well-advised client will recognise logical law as being both coherent and consistent; on receiving, and having understood a comprehensive description of how the law relates to their circumstances, that client is better informed as to their legal position, even if that position is not what they would like it to be, rather than confused or frustrated.

3. Illogicality, complexity and uncertainty distinguished

A definition of ‘logic’ in this form means that its opposite, ‘illogicality’, is not synonymous with ‘complexity’ in the sense of ‘consisting of parts’ or ‘complicated’. An intricate and detailed legal regime, such as that governing the charging of VAT on commercial property, with its extensive, technically worded and precise provisions, is

[15] C T Onions, *The Shorter Oxford English Dictionary Vol 2* (3rd edn, The Clarendon Press 1965) 1660
[16] Onions (n15) 1668
[17] In *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32, at para 36, Lord Nicholls said, ‘To be acceptable the law must be coherent’.
[18] Dewey (n8) 19
[19] David Goddard, *Making Laws that Work: How Laws Fail and How We Can Do Better* (1st edn, Hart Publishing 2022) 136

both complex and complicated, but is not necessarily illogical; it may be that it is only with intricacy and detail that law can logically address complex facts. Likewise, 'illogicality' is not the same as inherent uncertainty or a lack of clarity. What, for example, is meant by 'the public good', which conservation covenants must serve to exist as such[20] is unclear. It is unclear because 'the public good' has not been adequately defined, but it is not suggested that the concept itself is illogical.

The same reasoning can be applied in reverse: A legal position may be clear and yet illogical: The premise that s62 LPA 1925 can convert permissive rights into new easements is not marked by a lack of clarity, but A1 identified that the justification for this effect is illogical. A4 identified that the same is true of descriptions of how estate rentcharges operate: The premise that they provide a mechanism to facilitate the enforcement of positive covenants is clear, but the underlying justification for *how* and *why* they do this is illogical. Two apparently clear legal positions can create an inconsistent, incoherent, and therefore illogical, contradiction: A3 identified that the law of easements does not recognise rights to views because a view is insufficiently certain to form the subject matter of a grant, but that the law of covenants and public law are equally clear that a view is sufficiently certain to be protected by them.

This commentary and the articles argue, in terms familiar to Holmes, Pound or Dewey, that in areas of Land Law, a belief in an exclusive, or even close, association of legal reasoning and legal development with logic, in the sense of coherence and consistency and conveying that coherence and consistency to the users of law is, in significant respects, misplaced. The commentary and articles argue that illogicality in the development of Land Law arises more frequently, and is more influential than is generally recognised. They identify that aspects of some ubiquitous and essential Land Law principles lack innate logic, or have initially logical origins, but have then developed illogically. They argue that subjective motivations and personal preferences, sometimes presented in objectively logical terms, contribute significantly, and more than is recognised, to Land Law's development. They

[20] Section 117(1)(a)(iii) Environment Act 2021

contend further that illogicality can arise from numerous and diverse sources. Some of these are acknowledged, others are not.

4. Why illogicality matters

A question which immediately follows the assertion that law is more illogical than it appears to be is why that finding matters. Other than contravening Lord Nicholls' statement aligning the coherence of law with its 'acceptability', an isolated finding that Land Law is less logical than it appears to be, or than it is portrayed as being, is perhaps neither surprising nor useful. The consequences of that finding are much more important. This commentary contends that illogicality creates types of complexity and uncertainty which are especially difficult for the users of Land Law to understand, and are especially resistant to correction. It has been identified that complexity and uncertainty can arise through routes other than illogicality: Legal complexity, for example in tax legislation, can result from the law having to operate in complex contexts. Uncertainty can result from the lack of adequate definitions or explanations. Both cases are, however, examples of 'isolated' complexity or uncertainty – The rules are complex or uncertain because that is their nature, or because of the variety of situations which they attempt to regulate. These types of complexity or uncertainty are resolvable: Detailed legal advice can be obtained to navigate complexity. Clear judicial or legislative definition can resolve uncertainty. Illogicality, however, can, and this commentary argues, does create *additional* and *different* complexity or uncertainty beyond that which arises from the law simply being unclear or being required to address complex facts. These 'different' forms of complexity and uncertainty are much less easily resolved. Here the complexity or uncertainty has 'deeper' origins, consisting of a logical defect in the underlying law.

This commentary contends not only that illogicality creates complexity and uncertainty which are particularly resistant to resolution, but that that illogicality results, through that complexity and uncertainty, in a consequent reduction in legal effectiveness, in the sense of producing outcomes which landholders recognise as coherent and consistent. Two examples drawn from A1 illustrate this consequence: In *Wright v Macadam*, Tucker LJ noted both the detriment to the defendant arising

from his ‘act of kindness’ and the likelihood that the court’s decision would deter landlords from similar acts, but, recognising the lack of an evident solution, concluded ‘…there it is: that is the law’.[21] Similarly, in *Green v Ashco Horticulturalist Ltd*, Cross J shared Lord Tucker’s view of the relevant law, but with evident reluctance, concluded ‘But there it is; there is no doubt what the law is.’[22] A6 identified further examples of ineffectiveness arising from this deeper illogicality in the court’s acknowledgment that forfeiting Mr Keshwala’s lease, while lawful, amounted to ‘sharp practice in a modern environment’,[23] that his inability to obtain relief was ‘very harsh’,[24] and in the description in *Kataria v Safeland Plc* of the finding that an assignee of a reversion, to whom no rent was yet owed, could forfeit a lease for historic arrears as ‘monstrous’.[25] Such illogicality cannot easily be resolved by professional explanation or clarificatory definition. Its resolution requires identification and recognition firstly that the law is illogical, and secondly of the precise nature and cause of that illogicality.

Wright, *Green*, *Keshwala* and *Kataria* can all be viewed as instances where courts acknowledge the adverse consequences of a legal illogicality. Further examples of such acknowledgement can be seen in *Hair v Gillman*, in which the court found the ‘inadvertent’ creation of an easement pursuant to s62 LPA,[26] in *Squarey v Harris-Smith*, in which Oliver LJ, with ‘very considerable regret’, was ‘driven’ to find that an exclusion by standard conditions of sale (which he acknowledged the parties ‘may well not actually have read’) denied the plaintiff the easement they claimed,[27] in Balcombe LJ’s acknowledgment in *Pitts v Hunt* that, ‘Ritual incantation [of Lord Mansfield’s definition of *ex turpi causa*] is more likely to confuse than illuminate’,[28] and in Lord Templeman’s recognition in in *Billson v Residential Apartments Ltd* of

[21] M W Poulsom (2017) ‘S.62 LPA 1925: restating the case for reform’, International Journal of Law in the Built Environment, 9(1),1,3
[22] Poulsom (n21) 3
[23] *Keshwala v Bhalsod* [2021] EWCA Civ 492 and M W Poulsom ‘Reassessing Forfeiture for Commercial Rent Arrears’ (2022) 86 Conv. Issue 2, 151, 157
[24] Poulsom (n23) 151
[25] *Kataria v Safeland Plc* (1997) P &CR D30 at D31 and Poulsom (n23) 155
[26] Poulsom (n21) 3
[27] *Squarey v Harris-Smith* (1981) 42 P & CR 118, 130 and Poulsom (n21) 8
[28] *Pitts v Hunt* [1991] 2QB 24,49 and M W Poulsom, ‘Acquiring Property Rights Ex Turpi Causa’ (2019) 83 Conv, Issue 2, 149, 151

the ‘unjust’ enrichment that ‘the forfeiture of any lease’ may confer on the landlord at the tenant’s expense.[29]

The articles, however, also identify instances where illogicality and its adverse consequences are less openly acknowledged: Examples include the assertions that, ‘There is no right known to the law as a right of to a prospect or view’[30] (challenging A2’s finding that express grants of rights to views were possible until the early twentieth century) and that a right of prospect has ‘a subject matter … incapable of definition’[31] (challenging A2’s finding that public law can and does define specific views). Other examples included the descriptions of *ex turpi causa* as ‘basic’ and ‘clear and well recognised’,[32] the description of how *Rolls v Miller* defined ‘a business’ as ‘so clearly right that one need not really bother with the facts’,[33] and the description of estate rentcharges as ‘straightforward in practice’.[34] Further examples, from A4 and A5 respectively, of underlying illogicality appearing to remain unacknowledged included the assertion in *Smith Brothers Farms Ltd v Canwell Estate Co. Ltd* that rentcharges ‘simply’ become unavailable to recover unreasonable service charges (contrary to what s2(5) Rentcharges Act 1977 appears to state),[35] and the decision in *C& G Homes Ltd v Secretary of State for Health* that housing Care in the Community patients breached a business use covenant, not by reference to the ‘chameleon like’ quality of the word ‘business’ but because ‘[parties to] a covenant in a … familiar form must have intended it [to] have the effect which earlier authorities have said it has.’[36]

[29] Poulsom (n23) 156
[30] *Phipps v Pears* [1965] 1 QB 76, 83 and M W Poulsom ‘Taking a View: The protection of Prospects in England and Wales’ (2018) The Conveyancer and Property Lawyer (2) 133, 136
[31] *Harris v De Pinna* (1886) 33 Ch D 238, 262 and Poulsom (n30) 136
[32] *Tinsley v Milligan* [1994] 1 AC 340, 354, *Scott v Brown, Doering, Macnab & Co 2 QB 724, 728* and Poulsom (n28) 151
[33] *Abernethie v Kleinman* [1970] QB 10, 17 and M W Poulsom, ‘Working from Home and Restrictive Covenants: An Analysis’ (2021) Conv, Issue 1, 71, 74
[34] M W Poulsom, ‘Estate Rentcharges and Positive Covenants: An Analysis’ (2022) 84 Conv, Issue 2, 138, 139
[35] Poulsom (n34) 147
[36] Poulsom (n33) 77

5. Illogicality and effectiveness

This commentary argues that both illogicality's influence, and extent to which that influence remains unacknowledged are significant obstacles to Land Law's effectiveness. This commentary defines 'logical' law is law which its users recognise as consistent and coherent. Illogical law, being law which its users recognise as lacking coherence or consistency results in those users being exposed to, and knowing that they are exposed to, incoherent or inconsistent law: Consequently they are less likely to know what the law requires of them than they would be if the law appeared coherent and consistent to them: Examples from the articles of how landholders do not know what legally is required of them (and of the absence of an immediate solution to that lack of knowledge) include residential occupiers not knowing if they can, or should, work in their homes,[37] freehold owners and mortgagees of managed estates not knowing precisely whether or how service charge covenants are enforceable and whether or how they can challenge unreasonable service charges,[38] tenants not knowing how and why landlords can forfeit their leases,[39] and claimants by prescription or adverse possession not knowing how the conduct on which they base their claims will be treated by the courts.[40]

6. Can law be both illogical and effective?

An argument that the presence of illogicality in the law can render the law less effective than it might otherwise be, and add to the ineffectiveness created by inherent complexity and uncertainty, prompts the counter argument that the law can be both illogical and yet still operate effectively. An example, subject to the qualification evident in *Squarey*, might be the extent to which the metamorphic effect of s62 LPA is routinely avoided by express contractual provision. One response to this counter argument, drawing on the field of Land Law more broadly, might refer to the volume of Land Law litigation, originating in insufficient legal certainty, to which

[37] Poulsom (n33)
[38] Poulsom (n34)
[39] Poulsom (n23)
[40] Poulsom (n28)

illogicality contributes, to enable earlier settlement.[41] It is plausible that the disputes in *Wright*, *Green*, *Keshwala*, *Kataria*, *Smith Brothers Farms Ltd* and *C & G Homes Ltd* might have been resolved earlier had the law underpinning those disputes had a more coherent and consistent, and therefore logical, foundation, which the parties recognised.

Another response is to consider the possible perspectives of litigants, both successful and unsuccessful, as to the effectiveness or otherwise of the law *for them*: It is perhaps unlikely that Mr Keshwala, denied relief from forfeiture for accidental nonpayment of £500,[42] or Johnson Security Ltd, liable for a tenfold increase in a service charge secured by an estate rentcharge,[43] or Mr and Mrs Hodgson,[44] prevented by a business use covenant from running their beauty business at a time when homeworking was strongly encouraged, felt that, from *their* perspective, the law was working effectively.

Even successful litigants might share this view: Both Mr Brandwood[45] and Mr Best[46] ultimately succeeded in their respective claims to an easement by prescription and title by adverse possession (as did Mr Bhalsod in his forfeiture claim), but might have considered the law more effective had they been spared the expense and effort of pursuing those claims to the House of Lords and Court of Appeal. Equally, unfavourable views as to the law's effectiveness are not confined to litigants: The Court of Appeal's recognition of Mr Keshwala's harsh treatment perhaps indicates not merely a view that he had been treated unfairly, but also judicial dissatisfaction with how *effectively* the law had operated in relation *to him*. Departure from the views of litigants and judges, which can perhaps can only be inferred, provides further evidence of legal ineffectiveness: Such evidence can be seen in the

[41] In 'What lies ahead in 2025?' EG 11 January 2025, 26-29 Guy Fetherstonhaugh KC identifies approximately thirty separate Land Law disputes due to be heard in 2025, remarking that these are 'just a selection' of those in which one set of Chambers is principally involved.
[42] Poulsom (n23) 151
[43] *Orchard Trading Estate Management Ltd v Johnson Security Ltd* [2002] EWCA Civ 406 and Poulsom (n34), 138
[44] *Hodgson v another v Cook and others* [2023] UKUT (LC)
[45] *Bakewell Management v Brandwood* [2004] UKHL 14, and Poulsom (n28) 156
[46] *R (on the application of Best) v Chief Land Registrar* (2015) EWCA Civ 17 and Poulsom (n28) 157

parliamentary reaction to the decision in *C & G Homes Ltd v Secretary of State for Health,*[47] in government legislative proposals,[48] in numerous Law Commission recommendations,[49] and in academic criticism.[50]

It might also be argued that this commentary's focus on isolated incidents of illogicality, and a consequent lack of effectiveness, disregards the way in which Land Law quietly and effectively governs the operation of many everyday property transactions: The picture is not, it can be argued, one of widespread disorder or total ineffectiveness. Nevertheless, the findings of the articles are evidence of frequent and recurrent illogicality: A1 identified both that in the last quarter of 2016, the Land Registry had received over 40,000 applications to register transfers of part, all of them potentially being subject to the metamorphic effect of s62 LPA and requiring contractual provision to be made for this,[51] and the judicial criticism which such provision had received.[52] A4 identified that the use of estate rentcharges had increased to the point that it was attracting the attention of institutional lenders who were requiring additional provision to be made for them.[53] A5 identified the conflict faced by high numbers of residential occupiers undertaking working in their homes between their conduct and covenants purporting to prohibit it.[54] The overall picture might, in simple terms, be described as one characterised by 'low level' but widespread illogicality and consequent, and cumulative, ineffectiveness.

Reflecting Lind's observations on misinterpreting Holmes' assertion on 'the life of the law', this commentary argues that Land Law *should* be logical; logic is, it is

[47] 112 Members of Parliament signed an Early Day Motion expressing their 'deep regret' at the Court of Appeal's decision that provision of supervised housing for former mental in-patients breached a covenant against business use. See M W Poulsom, 'Working from Home and Restrictive Covenants: An Analysis' (2021) Conv, Issue 1, 71

[48] As A4 recommended, the Leasehold and Freehold Reform Act 2024 Act will allow freehold owners to access redress schemes relating to service charges, which are only currently available to leasehold owners.

[49] For example, Law Commission, *Termination of Tenancies for Tenant Default* (Law Com No 303, 2006), Law Commission, *Transfer of Land Report on Rentcharges* (Law Com No 68, 1975) and the (significantly titled), Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* (Law Com No 327, 2011)

[50] A robust example is the description of the decision in *Dewsbury v Davies* as 'incoherent', see L Tee 'Metamorphoses and Section 62 Law of Property Act 1925' 62 Conv 115, 116 and Poulsom (n21) 5

[51] Poulsom (n21) 1

[52] Poulsom (n21) 8

[53] Poulsom (n34) 38

[54] Poulsom (n33) 71

suggested, a ‘minimum requirement’. Descriptions of the law in objectively logical terms, sometimes to the extent of leaving underlying illogicality wholly or partially unacknowledged, as previously seen, supports this view that close correlation with logic is an outcome to which the law should aspire. Adopting Holmes’ references to ‘logic’ and ‘other tools’ as descriptors of what is required to give a general account of the Common Law, the primary focus of this commentary is not on those ‘other tools’, but on the issue that logic frequently contributes less than it purports to, and that reform proposals should be directed at increasing that contribution. Not identifying, or misidentifying, the nature and scope of illogicality in distinct areas of Land Law can result in misplaced reform proposals: Generalised and insufficiently focused findings of illogicality are unlikely to lead to effective reform. Successful reform, not merely in the subject areas of the articles, but in logically deficient areas of Land Law more broadly, requires precise identification of *where* and *how* those areas lack logic, and the creation of precise solutions to correct those deficiencies.

7. Illogicality as a challenge to the vocabulary of legal thinking

The premise of this commentary, that the development and current forms of aspects of Land Law owe less to logic than they appear to, challenges descriptions, perceptions and the conventional vocabulary of law and legal thinking. These descriptions and perceptions are as familiar to twenty-first century lawyers as they would have been to nineteenth-century Formalists, and to the Realists who challenged them. Lawyers tend to articulate their ideas in terms which align closely with scientific methods of ordered, systematic thought, and logical, objective assessment. They refer to judicial ‘reasoning’, to ‘building’ or ‘constructing’ an argument, and, in caselaw, to the concept of the ‘*ratio decidendi*’ or ‘rationale for the decision’. What is measurably ‘reasonable’ in the sense of ‘not exceeding the limit prescribed by reason’ or ‘objectively fair, sensible and appropriate’ is prominent in the determination of liability in contract and tort. The prominence of standards of ‘reasonableness’ has extended to the creation of a type of ‘control’ in the form of an imaginary ‘reasonable man’, against whose conduct the behaviour of a litigant can

objectively and scientifically be compared and measured.[55] This prominence is reflected in statute, where what is 'reasonable' determines the legal effectiveness of such diverse matters as exclusion clauses in contracts[56], adjustments to reduce discriminatory disadvantage[57], the use of force[58] and alienation provisions in leases.[59]

It might be asked *why* lawyers perceive and describe law as having a close association with logic, despite evidence to the contrary. Holmes argues that they do so because they have been trained to, and because they want to.[60] He states that, 'The training of lawyers is a training in logic. The processes of analogy, discrimination and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic'.[61] He also identifies a frequently overlooked aspect of lawyers' thinking and behaviour, which is that lawyers are people, and they are consequently no less attracted than other people to 'the logical method and form [which] flatter the longing for certainty… which is in every human mind'.[62] It might even be argued that because of their training, lawyers are *more* likely than other people to identify and overemphasise logic where it appears, to overlook instances where it is deficient or absent, and consequently to overstate its presence and influence.

The extent to which legal researchers, as opposed to practitioners, readily associate law with logic is perhaps more difficult to identify. It would be unsurprising if the prominence of logic in the minds of judges and legislators was reflected to some extent in the methods of researchers. This appears to be the case: Assumptions of how law 'is', of an underpinning 'order' or 'rationality' can influence perceptions of the forms which legal research can take. Analysing the meaning of 'doctrinal research', Hutchinson identifies that 'doctrine', deriving from 'doctrina', meaning '[that which is

[55] The 'man on the Clapham omnibus' appears to have originated in *McQuire v Western Morning News* [1903] 2 K B 100, 109, per Collins MR
[56] Unfair Contract Terms Act 1977 s 11(1)
[57] Equality Act 2010 s 20
[58] Criminal Law Act 1967 s 3
[59] Landlord and Tenant Act 1927 s 19(1)(a)
[60] O W Holmes, Jr, 'The Path of the Law' (1897) 10(8) Harvard Law Review 457, 465
[61] Holmes (n60) 465
[62] Holmes (n60) 466

imparted by] instruction, knowledge or learning', is 'a synthesis of…rules, principles, norms, interpretative guidelines and values' which 'explain, *makes coherent* or justifies a segment of the law as part of a larger system…' [emphasis added].[63] Hutchinson notes that doctrinal research, as research into the law and legal concepts, was the dominant influence in 19th and 20th century views of law and legal scholarship and 'tends to dominate legal research design'.[64]

The language here is again, implicitly or explicitly, and aligning with this commentary's conception of 'logic', a mechanical language of 'order' or 'coherence', of 'justification' of principles by reference to known rules. Hutchinson explicitly connects 'doctrinal' with the doctrine of precedent, noting that legal rules become 'doctrinal' because they are not merely 'casual or convenient norms' but because they are intended to 'apply *consistently*'.[65] The suggestion is that if order and coherence are not immediately apparent, they will, in time, reveal themselves by the rigorous application of instruction, knowledge and learning.

8. Illogicality as a challenge to classical expositions of Land Law

An association of law with logic is particularly prominent in Land Law. Cowan et al refer to a 'classical exposition' of Land Law as *'rational, logical, abstract and juridical* in character'.[66] They identify that Land Law supports 'a dispassionate, logical mode of reasoning',[67] that it is treated 'as a juridical category which must be internally coherent, and the rules of which are worked out only by reference to its internal logic',[68] and that 'rationality is frequently presented as *the* unquestioned and unquestionable foundation of land law thinking' [emphasis added].[69] From this

[63] Terry Hutchinson, 'Defining and Describing what we do: Doctrinal Legal Research', Deakin Law Review Vol 17 (1) 83, 84-5
[64] Hutchinson (n63) 85
[65] Hutchinson (n63) 85
[66] David Cowan, Lorna Fox O'Mahony, Neil Cobb, *Great Debates in Land Law* (3rd edn, Palgrave Macmillan 2012) 21
[67] Cowan et al (n66) 21
[68] Cowan et al (n66) 21
[69] Cowan et al (n66) 20

assertion, with its emphasis on a single foundation for Land Law thinking, emerges a 'fallacy' that 'the only force at work in the development of the law is logic'.[70]

This commentary and the articles incorporate many features of 'doctrinal' research. They examine rules, principles, norms, interpretative guidelines and values in distinct areas of Land Law. They do not, however, assume, as Formalists might, a foundation of order or coherence, or necessarily seek rational justifications for those rules or other provisions. They attempt, by detailed systematic analysis, to identify what logical justification there might be for the various principles investigated.

In many instances, that investigation reveals illogical initial principles or illogical legal developments, leading to a 'state of the law' which, as Pound observed, cannot now be explained solely by reference to logic. The consequence is that landowners asking questions which flow naturally from their own circumstances, such as 'Why has my permission become an irrevocable right?' 'Can I work in my home?' 'Can my view be protected?' or 'Why can my landlord forfeit my lease?' cannot be answered simply, precisely or even perhaps accurately. They frequently result in answers that leave the questioner no more certain of their legal position than they were before. The answers may even prompt responses in the nature of 'that does not make sense!', indicating a level of confusion or frustration which was perhaps not previously present. For those relying on Land Law to assist them in owning and using land effectively, this is unsatisfactory, in relation both to their specific concerns, and to their confidence in the utility of Land Law as a regulatory regime more broadly.

9. Logic and reforming Land Law for its users

This commentary is directed at this confusion or frustration in the minds of the consumers of Land Law, originating in incoherence or inconsistency which clients can identify. Unlike the articles, which recommend specific reforms, this

[70] Holmes (n60) 465

commentary does not seek to impose a view on what the substance of the law should be. An evident and acknowledged preference within it for logicality over illogicality merely reflects a preference for 'the logical method and form [which] flatter the longing for certainty… which is in every human mind'.[71] This commentary's position is not that the answers to the questions whether s62 LPA 1925 can create new easements, business use covenants prohibit home working, easements to views can exist or estate rentcharges properly secure the performance of positive covenants are undesirable; its position is that such answers as exist are insufficiently consistent or coherent, and landholders recognise them as being insufficiently consistent or coherent, to be as effective or useful as they might otherwise be.

This commentary contends that where illogicality is identified, effective law reform to correct it requires precise diagnosis of its nature, its causes and its effects. This body of work, comprising individual analyses and this overarching commentary, together constitute an examination of the nature, extent and consequences of Holmes' fallacy, and consider means by which it could be more readily recognised and effectively addressed.

This commentary identifies and discusses three broad areas:

A) The 'Land Law landscape' in which the subject matters of the articles are situated.

B) The articles' findings in relation to logic, and the reasons for, and consequences of, those findings.

C) Connecting findings of illogicality, causes of failure in Land Law rules and processes, and Land Law reform.

A) A 'Land Law landscape'

The articles concern aspects of Land Law in England and Wales. This commentary uses the term 'Land Law' to denote the Land Law rules operating in this jurisdiction.

[71] Holmes (n60) 466

The articles are closely connected with the author's background as a commercial property solicitor for 15 years and with the consequent direct experience provided by that background of the complexity and irrationality to which Pound refers.

The Land Law landscape has several features which perhaps distinguish it from landscapes of other legal disciplines. Land Law is uniquely pervasive and ubiquitous. Its relevance to people's everyday lives is constant and unavoidable. Citing Radin's assertion that 'To go to sleep in one's bed is as much and as little of a legal act *per se* as signing a deed',[72] Gray & Gray observe that 'Largely unnoticed, land law provides a running commentary on every single action of every day' and that 'No matter what we are doing, the law of land … constantly describes our jural status in relation to terra firma'.[73]

This commentary emphasises the ubiquity and fundamental importance of Land Law. Hume's description of the 'convention for the distinction of property, and for the stability of possession' as '…of all the circumstances, the most necessary to the establishment of human society',[74] Locke's assertion that 'the great and chief end…of men's…putting themselves under government, is the preservation of their property',[75] and Rousseau's condemnation of the 'many horrors and misfortunes' originating in allocation of, and disputes over, property rights[76] all point to Land Law's centrality to human co-existence.

This centrality is, it is argued, reflected in human experience. Many people live their lives with little direct reference to disciplines such as criminal, family or commercial law; they will seek advice on these areas only if events require them to do so, and often such events will not arise. By contrast, their need for land on which to perform almost all human activity means that constant exposure to the regulatory regimes

[72] Max Radin, 'The Permanent Problems of the Law' 15 Cornell LQ (1929-30) 1, 3
[73] Kevin Gray & Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) 3
[74] David Hume, *A Treatise of Human Nature*, Everyman's Library edn, London 1911) Vol II, 196
[75] John Locke, *The Second Treatise of Civil Government* (ed J W Gough, Oxford 1946), para 24
[76] J-J Rousseau, *Discourse on the Origin of Inequality* in *The Social Contract and Discourses* (Everyman's Library edn, London 1913) 76

which govern the ownership and use of that land is inevitable. Logical defects in those regimes means that exposure to those defects and a consequent reduction in effectiveness are, likewise, constant.

This pervasive nature is perhaps reflected in the volume of Land Law information (and often misinformation) freely available, particularly online: Land Law guidance can be obtained free from solicitors' websites[77] and online Land Law forums.[78] Action groups supporting or opposing particular land uses will frequently refer to Land Law principles in support of their campaigns.[79] Increasing ease of access to such resources means that since Gray & Gray's assertion, this pervasive quality is perhaps moving from being 'largely unnoticed' to being recognised more readily.

The ubiquity of Land Law must be viewed alongside the relatively limited range of methods of ownership and transactions which it permits. Land Law in England and Wales recognises only two legal estates in land, freehold and leasehold,[80] and five legal interests, of which easements and mortgages are the most common (although as A4 argues, the use of rentcharges, which are legal interests under s1(2)(b) Law of Property Act 1925 appears to be increasing).[81] A legal dealing with land must therefore relate to one of these estates or interests. The articles reveal logical defects in aspects of their creation, existence and operation. A restricted range of recognised legal estates and interests means that while individual land transactions will necessarily differ in their detail, their underlying nature when viewed collectively will tend to be highly repetitive. That repetitive characteristic is likely therefore to amplify the diminished effectiveness arising from these logical defects.

[77] For example, Hugh James Solicitors https://www.hughjames.com/blog/boundary-disputes-what-you-need-to-know/ https://, Parnalls Solicitors, parnalls.com/five-problems-with-a-leasehold-property, and WBW Solicitors, https://www.wbw.co.uk/restrictive-covenants-guide/
[78] For example, 'Garden Law', https://www.gardenlaw.co.uk/phpBB2/memberlist.php?mode=viewprofile&u=3&sid=6fbe398dd10cef06de2d1c058ddc92d0, LegalBeagles, https://legalbeagles.info/forums/forum/legal-forums/housing-property-and-neighbours, and 'Property Hawk' http://www.propertyhawk.co.uk/LandlordForum/index.php
[79] For example, Shropshire Star https://www.shropshirestar.com/news/local-hubs/shrewsbury/2023/03/01/greenfields-park-row-sensational-landmark-win-for-shrewsbury-residents-in-david-v-goliath-court-battle/
[80] Law of Property Act 1925 s1(1)
[81] Law of Property Act 1925 s1(2)

A further feature of the Land Law landscape is the relative legislative inattention it has received, particularly in recent decades. The ubiquity of Land Law, and the interest people have in the regulation of the land which they own and use, perhaps present a strong case for it to be subject to continued review and improvement, so that underlying illogicality and the consequent diminished effectiveness it causes are progressively reduced. Possibly because regimes which are widely, if not entirely correctly, viewed as being logical are not considered a high priority for legislative reform, however, substantial reform of Land Law systems, such as the Law of Property Act 1925 and the Land Registration Act 2002 are relatively rare. More frequent reforms tend to be either distinct responses to specific concerns, for example s144 Legal Aid, Sentencing and Punishment of Offenders Act 2011, which criminalised squatting in residential property following public concerns as to its prevalence, to have very precise purposes, for example the Leasehold Reform (Ground Rents) Act 2022, or to operate primarily as restatements of existing law, for example the Homes (Fitness for Human Habitation) Act 2018.

It cannot convincingly be argued that the absence of regular and significant legislative reform can be attributed to general satisfaction with the status quo: The Law Commission proposes Land Law reform, in part to address illogicality and consequent ineffectiveness, regularly. Some proposals have been implemented; Law Com. No. 181 resulted, seven years later, in the Trusts of Land and Appointment of Trustees Act 1996.[82] Many, however, including Law Com. No. 327,[83] Law Com. No. 303,[84] and Law. Com. No. 204[85] remain unimplemented, and illogicality and consequent ineffectiveness remain unaddressed. Enacted reform is sometimes less far reaching, and less directed either at underlying illogicality or at a logical response to that illogicality than campaigners might wish: As will be seen, prominent calls for the abolition of residential leasehold have received responses

[82] Law Commission, *Transfer of Land, Trusts of Land* (Law Com No 181, 1989)
[83] Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* (Law Com No 327, 2011)
[84] Law Commission, *Termination of Tenancies for Tenant Default* (Law Com No 303, 2006)
[85] Law Commission, *Transfer of Land – Land Mortgages* (Law Com No 204, 1991)

which are relatively cautious,[86] insufficiently attentive to the logical defects which may be apparent, or illogically aligned with those defects.

B) The articles' findings in relation to logic, and the reasons for, and consequences of those findings.

The articles therefore exist in a landscape in which Land Law is pervasive, ubiquitous and subject to relative legislative inattention. This commentary argues that that landscape is further characterised by the frequent and problematic occurrence within it of illogicality. The emergence from the articles of the six themes listed below supports the contentions as to the frequency and problematic nature of that occurrence:

Theme 1 – Ubiquity of Land Law concerns and of consequent illogicality
Theme 2 – Practical relevance
Theme 3 – Illogicality creating additional complexity and uncertainty
Theme 4 – Illogicality in practitioner behaviour
Theme 5 – Logical deficiency
Theme 6 – Ineffectiveness arising from illogicality.

Theme 1 – Ubiquity of Land Law concerns and of consequent illogicality

To the extent that illogicality characterises the content and development of Land Law, the effect of that characteristic is increased by the finding that concerns as to how Land Law operates on people's everyday lives are common; illogicality is present in a regime applying universally and constantly. The articles deliberately investigated Land Law issues that were widespread, frequently longstanding, and in many cases 'overlooked'. The subject matters of the articles tended to arise from aspects of Land Law teaching (A1 and A3), from discussions with practitioners (A4) and from emerging social and commercial concerns (A5-A7). The articles were produced as distinct exercises and, in each case, arose in part from a wish

[86] The Leasehold and Freehold Reform Act 2024 broadly prohibits the creation of leases of houses exceeding 21 years, and is subject to several exceptions. At the time of writing, dates for implementation of much of the Act are yet to be confirmed.

proactively to address an idea recently coming to the author's attention. The research question in each article frequently comprised enquiries into logical efficacy, in the form of '*Why* do practitioners routinely do x?' '*How* does x (for example, working from home) align with y (for example, covenants against business use)?' and '*How* do commonly found legal devices (for example estate rentcharges) have the effects which they are presumed to have?'.

The volume and variety of information sources, comprising caselaw, statute, professional and academic journal articles, Law Commission reports and government guidance, available for each of the research areas supported the assertion that Land Law concerns are common. That volume and variety indicated that while the operation of Land Law might be 'mundane' in a pejorative sense, it is also mundane in the sense of 'worldly', 'functional' or 'commonplace'. People's concerns as to how Land Law affects them arise from their innate interest in things which affect their everyday lives and those of people they know. A print media collaboration which the author wrote with The Guardian in association with A5 and A7, on whether leaseholders working in their homes were, in doing so, breaching covenants in their leases, was downloaded over 350,000 times in one week.[87]

Mindful of Gray & Gray's observation on the 'unnoticed' nature of Land Law's influence, several of the articles explicitly identified in their early stages the frequency with which the context for the specific research question arose. A1 identified how often Land Registry applications are made to register transfers of part, a process to which s62 Law of Property Act 1925 applies. The research questions in A2 and A4 related to commonly found questions about the opportunities of residential landholders to protect views and to have access to communal and green space, and to an emerging awareness of residential lenders of the defects inherent in devices used to ensure maintenance of those facilities. A5 and A7 explicitly examined the relationship between working from home and covenants against business use, and broader notions of 'home', in the context of the rapid increase in

[87] Shane Hickey, 'Working from home: Leaseholders warned they could face legal action' *The Guardian* (London, 8 October 2022) 57

home working in 2020, and of the ubiquity of title covenants which appear to prohibit it. Similarly, A6 used the temporary moratorium in England and Wales on forfeiture of business leases, and the historically universal practice of including forfeiture clauses in lease documents, as the basis for an examination of forfeiture more broadly.

Theme 2 – Practical relevance

It is perhaps logical that a finding that people's concerns regarding the operation of Land Law are common is accompanied by an associated finding that the research areas investigated all have contemporary practical relevance for owners and users of land and their representatives. The immediate consequence is a finding that illogicality is not arising in areas of arcane abstract thought, or in relation to legal processes with which people would not routinely engage, where it might be more tolerable, or at least more readily recognised and acknowledged, but in a regulatory environment which is intended to apply constantly and be practically useful. The articles all focus on aspects of Land Law that are fundamentally functional and related to the direct and current experiences of those who live in, occupy and deal with property in their personal and professional lives. They also seek to engage in part with the relationship between Land Law and emerging priorities in land use, for example the need of people to work in their homes, to be able to see and use open space for their health and wellbeing, and to ensure that they have adequate security of tenure of their business premises.

If the law in such pervasive and functional areas lacks an adequately logical foundation, the effect is to expose landowners and users to constant uncertainty about their everyday ownership and use. This would be unsatisfactory enough if that uncertainty were readily appreciated, but frequently it is not. On seeking legal advice, uncertainty is likely, in the absence of a logical explanation of the client's position, to be compounded by confusion and frustration.

The practical focus of the articles is readily identifiable: A1 is relevant to parties and their advisors in every case where the transfer of a piece of land forming part of a larger title is contemplated. Such transactions are frequently driven by practical concerns of limited land availability and increasing demand, particularly for housing. The illogicality of the issue, i.e. that failure to appreciate the metamorphic effect of s62 LPA can have unexpected and potentially damaging consequences for the parties and for their land, is fundamentally a practical one. A2 found that properties, particularly residential properties, with good views are more valuable than otherwise identical properties, and investigated the illogicality behind the refusal of Land Law to protect views as easements, as it does for rights of way, drainage or support. A3 examined the practical issue of how conduct which Land Law prohibits, specifically the encroachment by one landholder onto the land of another, may, using principles which frequently owe little to logic, give rise to valid ownership either of a right in land or of the land itself by way of prescription or adverse possession.

A4 focused on the specific mechanism of an estate rentcharge, the use of which is increasing. This focus took place in the broader context of the obstacles, themselves subject to accusations of illogicality,[88] which Land Law presents to enforcing positive covenants to maintain important communal facilities, including green spaces and communal play areas on residential housing estates. It also sought to place the discussion of those obstacles in a broader contemporary context in which the benefits to mental and physical health of access to such spaces is increasingly being recognised, and the availability of public funds to provide and maintain such spaces is diminishing.

A5, A6 and A7 all related to practical concerns originating in the Covid 19 pandemic, specifically the ability or otherwise of residential occupiers legally to work in their homes, the ability of commercial occupiers, prohibited from operating their businesses by Covid 19 restrictions, to resist forfeiture for non-payment of rent, and

[88] For example, the requirements imposed following *Tulk v Moxhay* (1848) 2 Ph 774 that for the burden of a covenant to run in equity, it must 1) be negative, and 2) benefit land owned by the covenantee at the time of the covenant. 'Land Obligations' as proposed by the Law Commission in *Making Land Work: Easements, Covenants and Profits a Prendre* (Law Com No 327, 2011) would address the first, but not the second of these.

the broader implications for perceptions of home of 'home working'. The practical relevance of aspects of A5 and A7 was evidenced by the direct contact made with the author by one of the parties (albeit the unsuccessful party) to *Hodgson and another v Cook and others*[89] which concerned the upholding of, and refusal to modify, a covenant prohibiting the use of residential premises for business use. In each case, the practicality of the issue investigated is closely aligned with an immediate logical question relating to the consistency of one regulatory provision with another: How can it be logical for homeworking to be actively encouraged without reference to its apparent prohibition in millions of residential property titles, and how is it logical that landlords may not forfeit leases for non-payment of rent (as agreed lease provisions allow them to) when tenants have the means to pay?

Theme 3 – Illogicality creating additional complexity and uncertainty

Perhaps the most serious consequence of law being illogical is that it becomes more difficult than it otherwise would be for landholders to use. Because of forms of underlying illogicality, aspects of Land Law have a complexity which can make understanding, explaining and applying them more difficult and uncertain than they would be if they were merely extensive, detailed or poorly defined. While complexity is not synonymous with illogicality, underlying illogicality can create complexity which is especially difficult to resolve; common and apparently simple questions regularly elicit responses which are insufficiently consistent or coherent to be readily accessible or useful.

Goddard emphasises that 'the complexity of a law needs to be assessed from the standpoint of its users: the various audiences to whom it is addressed'.[90] He argues that 'to equate complexity with length'[91] is incorrect, noting that 'long and detailed laws – such as tax laws in many countries – can be made very simple for most users to apply'[92] *if* the institutional mechanisms for applying them are accessible. He

[89] *Hodgson and another v Cook and others* [2023] UKUT 41 (LC)
[90] Goddard (n19) 136
[91] Goddard (n19) 136
[92] Goddard (n19) 142

argues that the process of identifying complexity needs to emphasize 'the day-to-day experience of users'[93] of the law.

Complexity which is resistant to resolution in this way can arise from law having illogical origins, from illogical developments, and from the illogical use of terminology. Land Law practitioners use technical terminology with disparate feudal, customary, judicial and legislative origins. It is perhaps surprising that such use can be illogical and therefore cause additional complexity or uncertainty: The use by subject specialists of technical words and phrases, often inaccessible to everyday legal 'consumers', would be justified if those terms were a mutually agreed shorthand to simplify communication between property professionals who must work with Land Law principles daily. It would promote professional efficiency. It appears, however, that many short 'descriptors' of fundamental principles may not achieve even this essentially functional purpose. Among Land Lawyers, the precise meaning of terminology is often, illogically, contested: A4 and A6 reveal professional disagreement on the nature and effect of an 'estate rentcharge' (i.e. whether it is a proprietary interest or a sum of money) and of 'forfeiture' (i.e. whether it is a proprietary right or a landlord's remedy). A3 identifies that the phrase '*ex turpi causa'* is widely used by lawyers to connote some form of illegal or immoral behaviour by a party claiming an entitlement, but the fact that the phrase is itself a contraction of a more detailed 'label', and that it is often confused with other similar 'labels' leads to uncertainty surrounding its precise meaning.[94] This illogical use of terminology even appears to extend to use by lawyers of language in everyday use, such as 'a business', the unresolved or flexible meaning of which for the purposes of covenants 'against business use' is explored in A5 and A7.

Complexity might reasonably be considered a necessary feature of any regulatory regime which seeks to engage with the diversity of human behaviour. But for several reasons, it is argued that the dominance of complexity in Land Law exceeds that which can be justified in a purportedly logical regime: The first reason relates to the

[93] Goddard (n19) 136
[94] Poulsom (n28) 152

‘type’ of complexity which can characterise aspects of Land Law: This is not ‘simple’, resolvable complexity, consisting of an abundance of intricate detail. This is complexity originating in a deeper illogicality much more resistant to resolution. Secondly, that complexity exists in an area of regulation which is pervasive and ubiquitous: Complexity originating in illogicality, and relating to an isolated event, especially one which is widely recognised as legally significant, such as the commission of a criminal offence, a divorce, or the administration of a deceased’s estate is perhaps more justifiable than such complexity in a regulatory regime which applies, largely unnoticed, to every moment of a person’s life.

Thirdly, that complexity frequently contrasts with the relative simplicity (and, reinforcing Goddard’s distinction, brevity) of questions which Land Law seeks to answer. Objectively simple questions from the audience to whom Land Law is addressed are likely to lead routinely, again without adequate logical justification, to ineffective answers. Whether a permissive right will on sale be converted into an irrevocable right, whether a right to a view exists, whether a person may acquire proprietary rights by illegal acts, whether estate rentcharges have the capacity to make positive covenants enforceable against covenantors’ successors in title, and whether people may legally work in their homes are simple and short questions, the scope and terms of which can be readily understood. A logical expectation in the questioner’s mind would be that the answer to each question will be ‘yes’ or ‘no’. If the received advice accurately reflects the underlying illogicality of the relevant law, the answer is likely to be neither.

A final objection to the illogical complexity of Land Law relates to the extent to which the illogicality giving rise to the complexity is acknowledged. This commentary contends that complexity arising from illogicality is best resolved by acknowledging both it and its adverse consequences. The articles, however, reveal instances of particular legal concepts being portrayed as simpler than they really are: A4 contrasted the complexity and uncertainty of the device of the estate rentcharge with its portrayal as straightforward: A5 and A7 likewise identified that the tentative and highly context specific description of a ‘business’ in *Rolls v Miller* was later described

as ‘so clearly right that one need not really bother with the facts’.[95] The articles also identified instances of the illogical development of legal principles from their earlier origins being insufficiently acknowledged. This development sometimes comprised embedding oversimplification, and sometimes even erroneous thinking, by subsequent repetition: A1 identified that a misleading conflation of a personal right with a proprietary right in *International Tea Stores v Hobbs,* and the subsequent repetition of that conflation, had resulted in an extensive line of authority on the ‘metamorphic’ (and, as A1 argues, incorrect) effect of s62 LPA. A2 similarly explored how adherence in *Phipps v Pears* to *Aldred’s case* appears, again in the author’s view incorrectly, to have excluded altogether the possibility of an easement to a view. Incompletely acknowledged illogicality, leading to uncertainty, was also evident in A3, which examined both the significant ambiguities inherent in Lord Mansfield’s uncertain definition of the *ex turpi causa* principle in *Holman v Johnson*, and the ease with which that definition has subsequently been described as ‘basic’ and ‘clear and well recognised’.[96]

Theme 4 – Illogicality in practitioner behaviour

A tendency by some practitioners to oversimplify complex principles (for example by describing rentcharges as ‘straightforward in practice’)[97] can be seen alongside a broader occurrence of illogical behaviour in aspects of everyday property practice. Dewey notes that ‘concepts once developed have a[n] intrinsic inertia’, that ‘the law of habit applies to them’ and that ‘It is practically economical to use a concept ready at hand rather than to take time and trouble and effort to change it or devise a new one’.[98] The effect of this intrinsic inertia is particularly evident in Land Law practitioners’ routine inclusion in documents of standard clauses, for example, forfeiture clauses in leases, business use covenants in transfers of homes and exclusions of s62 LPA 1925, with insufficient regard for their relevance, for the likelihood that parties might need to rely on them or for the context in which that inclusion occurs.

[95] *Abernethie v AM & J Kleinman Ltd* [1970] QB 10, 17
[96] *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, 728 (Lindley LJ)
[97] Sweet & Maxwell’s Conveyancing Practice, Editor David Rees, (Conv Prac R.82: September 2017) 7036
[98] Dewey (n8) 26

Dewey's reference to practical economy recognises that characterisation of such behaviour as wholly illogical is unjustified: Some behaviour, for example the routine exclusion of the effect of s62 LPA 1925 in transfers of parts of larger titles represents an attempt to displace the illogicality which that section, if left to have the effect which it has been held to have, can create. The imposition of identical covenants on all houses on new estates, without regard for the individual circumstances of those houses or of their future owners, or the routine inclusion of forfeiture clauses in business leases, irrespective of whether such clauses are proportionate or will be acted upon, is often driven by entirely logical considerations of efficiency and cost. A5 noted that the law sometimes requires a 'standardised' approach to achieve a particular effect, for example in relation to the creation of building schemes with mutually enforceable covenants.

Nevertheless, it can be argued that many practitioners' practices owe more to convention, to a wish to adhere to established ways of operating, or to an aversion to novelty than they do to justification on logical grounds. One example is the routine and growing use of estate rentcharges to support positive covenants without, it appears, apparent logical justification for this perceived effect. It might reasonably be expected that increased use of this device would be accompanied by detailed professional guidance as to how it works to achieve its intended effect, but this appears to be absent. The outcome is an apparent belief that they have that effect because property practitioners collectively wish them to do so.

Another example of such habit driven behaviour is the use of forms of wording, for example in relation to business use covenants, which appear to have originated in previous centuries in wholly different social and economic circumstances. A logical justification offered for this practice is that such wording has been extensively litigated and that its meaning is therefore well established. A finding that over 200 years of disagreement and litigation on what 'business' means, or what 'forfeiture' is, have in fact created significant uncertainty, complexity, and sometimes contradictory, illogical and decontextualised reasoning appears substantially to undermine that justification.

A further observation can be made in relation to such practices and Goddard's observations on the importance of assessing the effectiveness of law from the standpoint of its users. A practitioner representing, for example, the grantor of a lease would argue that the routine inclusion of forfeiture clauses protects landlords as a class and provides them with remedies which would not otherwise exist. It is contended, however, that such inclusion is either habitual or is intended by practitioners primarily to avoid negligence claims which might otherwise arise. Its inclusion, particularly if the likelihood of that clause being used is low, is beneficial for practitioners, but contributes little to the 'day-to-day experience of users'.[99]

Theme 5 – Logical deficiency

The most direct challenge to the purported dominance of logic in Land Law arises from the finding in several of the articles of clear logical defects. These defects take different forms: In some instances, the defect appeared to be one of 'principle' or a defect in the relevant 'concept'. Either in its recognition of a concept or in its imposition of limitations on a wider concept, aspects of Land Law appear to allow or encourage illogical forms of behaviour. They also adopt inconsistent positions on how proprietary rights might be acquired, or accommodate or recognise proprietary rights of a particular type, but not others which appear to be of a similar type: Illustrating this type of defect, A2 explored the well-established principle that a right to a view is not a recognised easement, in part because it is perceived to be incapable of precise definition. The logical defect arises because such rights *are* sufficiently precise to be capable of protection by covenants and by public law, and appear to have been capable of existing as easements in England and Wales until the early nineteenth century, and remain so in Scotland.

Illogicality was similarly evident in A3, which identified that where the claimant of a proprietary right bases that claim on their conduct, or that of their predecessors in title, courts may deny that claim on the basis that the conduct was 'wrongful'. The conceptual defect is the lack of clear guidance on whether 'wrongful' conduct must

[99] Goddard (n19) 136

be, or can be, a breach of the criminal law, tortious or merely morally objectionable. A6 identified that the precise nature and purpose of a right to forfeit is contested, and sought to challenge the widely accepted notion that the loss of leasehold ownership is a logical response to breach by a tenant of a leasehold covenant.

Other logical defects take the form of defects of 'process': The articles identified that aspects of Land Law appear to permit or to encourage the use of statutory provisions, judicial authorities or drafting devices as attempts to achieve specific effects, but that whether, how or why those provisions or devices achieve those effects frequently does not withstand detailed analysis, or cannot logically be explained. A1 explored how, under s62 LPA, a purely permissive right can without apparent justification become an irrevocable easement, and identified that this unintended and unanticipated consequence creates a 'trap for the unwary'. Not only does the law operate illogically, but it does so in a way that allows landowners unwittingly to perform acts of 'good neighbourliness', which they perceive as revocable when they perform them. Only latterly do they realise that those neighbourly acts have become irrevocable rights. A4 similarly explored how the device of an estate rentcharge, itself a poorly defined 'concept', is widely believed to be an effective mechanism for enforcing positive covenants, but that neither the conceptual basis for this belief, nor the practical mechanism by which it achieves this effect is susceptible to logical proof.

A third type of logical deficiency, explored at length in A5 and A7, might be termed a deficiency in 'application', or a deficiency in how people perceive the law applies, or does not apply, to them and to the use of their properties. One example of a deficiency of this type is the 'trap for the unwary' as illustrated in A1: Parties to a transfer of part of a larger title would not logically expect permissive neighbourly acts predating the transfer to become irrevocable rights subsequently. A5 and A7 identified a similar deficiency in application in relation to public perceptions of working from home: Despite the widespread imposition of covenants against business use in residential property titles, a common belief (based largely on a wish

that it should be so) that working in homes is either permitted or inconsequential appears, subject to occasional discussions over its legitimacy, to prevail.[100]

Theme 6 – Ineffectiveness arising from illogicality.

Referring specifically to legislation, Goddard defines the 'effectiveness' of a law as 'whether it does in fact produce the changes in behaviour that it was intended to bring about'.[101] If Land Law is identified not as an intermittent source of regulation, but as a constant regulatory narrative on people's everyday engagement with land, refinement of this definition of 'effectiveness' is perhaps necessary. It is suggested that the changes in behaviour which Land Law is intended to produce do not merely consist of specific responses to distinct situations, for example disputes over leases, boundaries, easements or covenants, although it will include these: 'Effectiveness' in this context connotes an ongoing understanding by landholders and users that in their daily dealings with land, and in the event of disputes, Land Law will, if they need it, be available to them as a 'predictable constant' to support, protect or at the very least not undermine them.

Parties who understand aspects of Land Law in this way, particularly if they then rely on that understanding, may not experience the operation of Land Law as they might wish. The articles indicated, using Goddard's phrasing, that in relation to aspects of Land Law, the 'experience [of] the operation of the law in practice' is unsatisfactory.[102] The law in those areas 'does not work' as well as landholders, land users and their advisors might reasonably want. The simplicity of phrasing here is deliberate. It is suggested that landholders reasonably want the regimes which govern their ownership and use of land to 'work' for them, in the sense of controlling and guiding that ownership and use in ways that they perceive to be identifiable, coherent and consistent. Perhaps more specifically, they are likely to expect the regulation of that ownership and use to facilitate *their* desired use of the relevant land, whatever that use might be. Their priorities will be living their domestic lives,

[100] Hickey (n87)
[101] Goddard (n19) 17
[102] Goddard (n19) 136

running their businesses, or otherwise using the land either for its intended purpose, or for other purposes which meet their current needs. They are unlikely to expect Land Law regimes to confuse, obstruct or mislead them, to encourage or permit unconscionable behaviour, or to present them with 'traps' to be avoided.

The articles reveal the 'real world' implications of ineffectiveness arising from illogicality: A1 identified how 'acts of kindness' or the demonstration of a 'neighbourly spirit' had in *International Tea Stores v Hobbs, Wright v Macadam* and *Hair v Gillman* caused permissive use of an accessway, a shed and a parking area to become irrevocable easements with evident disadvantage for the servient landholder,[103] an illogical and adverse consequence which practitioners drafting transfers of part must routinely guard against. A2 identified both the clear financial value of views and the inconsistent and at times incoherent approach taken to their protection by easements, covenants, noting the apparent inconsistency between *National Trust v Midlands Electricity Board*, *Gilbert v Spoor* and *Davies v Dennis*, and public law.[104]

The parties in *Bakewell Management Ltd v Brandwood* and *R. (on the application of Best) v Chief Land Registrar* likewise faced considerable uncertainty, resulting from illogicality in the law relating to their circumstances, on fundamental questions of access to, and ownership of, the relevant plots of land until final resolution of their disputes.[105] Johnson Security Ltd and Smith Brothers Farms Ltd were both motivated to challenge the validity of estate rentcharges by the imposition upon them of service charges which they felt were excessive,[106] and *Keshwala*, *Bank of New York Mellon (International) Ltd* and *Commerz Real Investmentsgesellschaft* all relate to the significant financial implications of illogicality in the law relating to forfeiture.[107] While the specific issue of home working in breach of covenant appears only to have

[103] Poulsom (n21) 3
[104] Poulsom (n30) 139
[105] Poulsom (n28) 156
[106] Poulsom (n34) 145-148
[107] Poulsom (n23) 151-152

been litigated once,[108] A5 and A7 explored the wider obstacles which covenants against business use pose to providing care to vulnerable groups[109], and, it is suggested, the extent to which a media article on the issue of homeworking in apparent breach of leasehold covenants was downloaded indicates a high level of public interest, if not concern, about the illogicality of the public being presented with inconsistent, and therefore illogical, legal positions.[110]

This analysis divides causes of ineffectiveness into 'functional' causes and 'conceptual' causes. 'Functional causes' relate to 'what law is'. It is used to describe the 'content' of law and the mechanisms by which laws 'work' or 'do not work'. 'Conceptual causes' describes the factors contributing to perceptions of law, and in particular the perception that law is more logical than it really is. This distinction is in part artificial: The characteristics of a law and how that law is perceived will often align. A law may be simple or complicated, accessible or inaccessible, or logical or illogical, and be accurately perceived as such. This commentary contends, however, that ineffectiveness can arise from either illogicality in the law, or from perceptions, whether correct or not, that it is illogical, or both. Reforms to address ineffectiveness will succeed only after precise diagnosis of whether defects lie in the content of the law, in public perceptions of it, or in some combination of the two.

Functional Causes of Ineffectiveness

An examination of functional causes can be aligned with Fuller's description of unsuccessful attempts by an allegorical monarch to reform a country's legislation, and to the consequent possible 'eight routes' to failure of laws to achieve their desired effect.[111] Perhaps the most pertinent of these to this discussion are 'a failure to publicize, or at least to make available to the affected party, the rules which he is expected to observe', and 'a failure to make rules understandable'.[112] To a lesser

[108] *Hodgson v another v Cook and others* [2023] UKUT (LC)
[109] Poulsom (n33) 76-79 and M W Poulsom, 'Homes and Home Working: A Property Law Perspective' 2023 Journal of Property Planning and Environmental Law 15(1) 1
[110] Hickey (n87)
[111] Lon L. Fuller, *The Morality of Law* (Revised edition, Yale University Press 1969) 39
[112] Fuller (n111) 39

extent, the articles also identified the effect of two other routes to failure; 'the enactment of contradictory rules' and '[the enactment of rules] that require conduct beyond the powers of the affected party'.[113] Fuller explicitly correlates these routes to failure with the lack of a logical basis for an expectation of compliance, stating:

'Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that …is kept secret from him…or was unintelligible…or was contradicted by another rule of the same system, or commanded the impossible or changed every minute'.[114]

Two aspects of Fuller's assertion are significant. The first is the explicit connection of the moral basis on which people can be expected to obey legal rules with the extent to which the content of those rules, and the ways in which those rules are communicated, are logical. The second is the emphasis on *who* must be persuaded that laws and their means of communication are logical. Fuller's view is evidently that whether laws are inaccessible, unintelligible, contradictory, or impossible to obey must be assessed from the position of the party to whom the law is addressed, and from whom compliance is expected, not from the standpoint of the legislator. This emphasis aligns directly with Goddard's view that 'how *a user* will experience the operation of the law in practice' must determine the effectiveness of that law.[115] Where users perceive that experience to be illogically uncertain, frustrating or obstructive, the moral imperative to comply with that law is, following Fuller's reasoning, consequently undermined.

It might be argued that this determination of the effectiveness of the law by reference to the viewpoints of its 'users' assumes that the primary aim of law is to be accessible, intelligible and possible for them to obey; it might be argued that law's primary purpose is not to *be* anything specific, but rather to serve a broader purpose, such as the regulation of society generally, the promotion of commerce or equality, or a reduction of discrimination, unfair treatment or other harm; provided that 'bigger' purpose or aim is served, the logicality or otherwise of the law that achieves that is immaterial. A response to this argument is that the fulfilment of *any* purpose which is

[113] Fuller (n111) 39
[114] Fuller (n111) 39
[115] Goddard (n19) 136

law is designed or intended to achieve must surely depend, as Fuller and Goddard state, on the law being capable of implementation by those to whom it is addressed. The consistency and coherence of law, and their recognition as such by the users of law are, collectively, means to an end. Whatever that end is argued to be, it cannot be achieved without coherent, consistent law which its users recognise as such.

The distinction drawn in this commentary between illogicality and complexity, or uncertainty, is perhaps worth restating here: It is correct to argue that complexity can be resolved with attentive legal advice. Uncertainty can be removed by the application to the uncertain concept of a clear definition. Illogicality, however, is much less easily resolved by consulting a practitioner, whose advice is likely to be confined to a description of, but not justification for, that illogicality. Moreover, and as will be seen, legal advice is not always sought, perhaps because of landholders' previous exposure to incoherent or inconsistent law, or law which they perceive does not 'make sense' or 'work for them'.

Relevant route to failure 1 - 'a failure to publicize, or at least to make available to the affected party, the rules which he is expected to observe',

Paradoxically, Land Law can be viewed as simultaneously pervasive and frequently less visible than it needs to be to be effective. Goddard notes that, 'one depressingly common problem is that the people whose behaviour … legislation is intended to influence are not aware of it, or don't understand it' and that 'if key actors are not aware of the law or of its implications for them – what it enables them to do, or requires them to refrain from doing – then their behaviour will not change, and the law will not work'.[116]

There are perhaps few expectations less logical than one that people should obey rules which they do not know exist, cannot find, or cannot understand. Without professional help, however, many Land Law rules are surprisingly difficult to locate

[116] Goddard (n19) 17

and then to interpret. Reflecting their disparate origins, finding them often requires reference to disparate sources. Covenants against business use, for example, are typically found in the conveyance created when the property bound by the covenant was first sold. That conveyance may be structured in many different forms and be drafted in one of a range of styles. The precise location and drafting of a covenant are in large part a matter of discretion for the property practitioner representing one of the parties on the original disposal. By professional convention and for reasons of commercial efficiency, drafting covenants for large developments will normally be the responsibility of the seller's representative. This perhaps appears illogical; it is likely to be buyers, not sellers, who is more concerned with the long-term effects of covenants. For each buyer's solicitor to draft and negotiate individual covenants would, however, be unjustifiably impractical and costly.

Even when the relevant covenant has been identified, the party seeking to identify its effect would then need to refer to caselaw which is neither wholly consistent nor adequately coherent, or which originates in an illogically unacknowledged historic context, relating to, for example, what 'business' means and to how the context of the covenant determines its proper interpretation.[117] If, having correctly located and interpreted a covenant which appears to prohibit a current or intended use, a party wishes it to be discharged or modified, they will then need to find the statutory provisions of s84 LPA 1925 and a further range of caselaw on the application of that provision to identify the likelihood of success.

In a similar way, a landlord's right to forfeit a business lease will be located within the lease. Practices vary, however, in where precisely in a document, possibly exceeding 100 pages, this will be and how it is drafted. Many forfeiture clauses do not use the word 'forfeiture', preferring to refer to a landlord's 'right to re-enter'. In the event of an attempted forfeiture, the response available to a tenant, that of an application for relief, will not, as might be expected, be found in the lease, but is conferred by statute.

[117] Poulsom (n33) 156

The problem of Land Law rules being found in different places is compounded by understandable uncertainty, resulting from an illogical lack of adequate explanation of the relative priority of these diverse sources of regulation, on the part of landowners and users as to how those sources relate to each other: The 'hierarchy' between, for example, provisions in a leasehold title and in a tenant's handbook, or between statutory provisions and courts' decisions, or between title restrictions and government guidance is not immediately apparent. Landowners and land users are likely to perceive all of them simply as 'rules'. The publication of those rules in different places and in different ways means that landowners and users are likely to be aware of some of them, perhaps through direct communication, or through broader awareness of their operation, but not others.

The process of identifying and locating Land Law rules is both difficult and imprecise. In addition, there is frequently no certain way of knowing when that process of identification and location is complete. Landowners who have identified, or been alerted to, a rule that appears to apply to their circumstances, particularly one which appears to provide the desired outcome, are unlikely then to seek out further rules which might provide a different answer. This problem of selecting specific rules from a broader body of regulatory material of unknown size is perhaps particularly prominent where different sets of rules are better publicised than others. In 2020 in the UK, daily televised broadcasts publicised new 'rules' which required or encouraged people to work from home. Existing rules in the form of covenants prohibiting them from doing so, evident only from examination of property title documents, possibly with professional assistance, were much less well publicised.

Perhaps the most serious consequence of there being disparate rules in different places is that those rules may conflict. Identifying in stark terms the 'route to disaster' resulting from contradiction, and again aligning the logicality of expecting compliance with a law with the morality of doing so, Fuller quotes Vaughan C.J. in *Thomas v Sorrell*[118] to the effect that '*[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to*

[118] *Thomas v Sorrell* [1673] EWHC (KB) J85

them'.[119] An obvious example of contradiction is that relating to working from home already described. Another arises from contrasting the evident legislative intention that s62 LPA 1925 be merely a 'word saving provision' with the judicial decision that it should have a creative function, to which the section makes no reference. A third example is the contradiction between the rules relating to easements which prohibit landholders from creating rights to a view because views cannot adequately be defined, and the rules relating to covenants and planning law, both of which recognise that views can be defined precisely, and therefore protected.

Relevant route to failure 2 - 'a failure to make rules understandable'.

The illogicality of expecting people to comply with rules they cannot understand is perhaps self-evident, but 'failure to make rules understandable' appears to arise frequently in Land Law. It does so in different ways. One reason why a rule cannot be understood might be that its wording is insufficiently 'accessible, clear and predictable'.[120] An extreme example of defective wording in a Land Law context is perhaps ss2-3 Prescription Act 1832, the wording of which has been described as 'mystifying' and the effect of which is 'unclear'.[121] Another, more common, reason that a rule might not be readily understood is that while it appears initially comprehensible, imprecision renders it open to a range of interpretations: People reading it perhaps believe that they understand it, but that understanding is not uniform.

Illustrations of diverse views on what rules mean include the different interpretations identified in A5 and A7 of what 'a business' is, in A2 on what '*ex turpi causa*' means, in A4 of what an 'estate rentcharge' is, and of how it works, and in A6 of the nature and purpose of a right of forfeiture. It is worth re-emphasising that these diverse opinions are not those of landowners and land users, who in the author's experience tend, if adequately advised, to have broad understandings of such principles, often in terms quite different from those used by their advisors. These diverse opinions are

[119] Fuller (n111) 33
[120] Goddard (n19) 28
[121] Martin Dixon, *Modern Land Law* (9th edn, Routledge, 2014) 329

those of practitioners, courts and legislators from whom, in a purportedly logic-based regime, a higher degree of consensus might reasonably be expected. An associated reason why rules might not be understandable is that they have been interpreted by courts to have meanings which are not readily apparent: A1 explored how the original wording of s62 LPA 1925 appears unremarkable. No reading, however careful, of it in isolation would reveal that caselaw has interpreted it as having the ability to create wholly new rights as irrevocable easements.

It might reasonably be argued that landholders and users can resolve uncertainty as to what such terminology means by consulting legal advisors. The usefulness of the advice, however, is limited if those advisors merely increase their clients' uncertainty by describing the law as it really is, or, replicating unacknowledged illogicality, misrepresent the law as simple and logical. Nor should practical barriers to obtaining legal advice be underestimated. Goddard identifies that '[a] common barrier to … effectiveness … is that the people [law] is intended to benefit do not have the knowledge, skills and resources (in particular, financial resources) to be able to invoke it effectively'.[122]

A distinction can perhaps be drawn between 'knowledge and skills' and 'resources': Those without knowledge and skills to resolve their uncertainty must either have financial resources with which to fund legal advice, or leave that uncertainty unresolved. The significant issue in England and Wales of unequal access, for geographical and financial reasons, to legal advice is beyond the scope of this commentary, but A7 was careful to identify the particular conflict faced by social tenants in relation to home working: It identified those landowners as the group most likely to require continued work when workplaces were closed, to be prohibited from home working by their leases, and (supporting Fuller's observation on rules requiring 'conduct beyond the powers of the affected party') least likely to have both adequate

[122] Goddard (n19) 18

working space in their homes and the resources to identify and challenge lease provisions which appear to prevent them doing so.[123]

Conceptual Causes of Ineffectiveness

Many landowners and users are likely to identify with Cowan et al's 'classical exposition' of Land Law as *'rational, logical, abstract and juridical* in character':[124] People unfamiliar with Land Law may, on initial exposure to archaic terminology, statutory and caselaw authorities which are decades or sometimes centuries old, and reforms which are slow to emerge, see it, as Formalists would, as an established but unemotive body of historic rules, remotely and clinically governing their everyday experience of owning and using land. They might perceive it as similar in nature to the rules governing how they drive a car, or form a contract of employment. They are likely to expect it to 'make sense' by exhibiting a direct connection with internal coherence and logic, and to provide workable, predictable solutions by the objective application to their circumstances of fixed rules, identified by consultation with experts. They are unlikely to perceive any 'emotional element' or any immediate similarity between Land Law and, for example, the rules which allow litigants to recover for emotional distress, injury to feelings or other forms of highly personalised harm.

Both the focus of the articles on practical, functional and relevant concerns, and their findings already described, present several immediate challenges to this 'classical exposition'. The first is the finding of frequent logical deficiency, which directly challenges an inevitable association of Land Law with logic. The second is the finding that Land Law concerns are directly relevant to the everyday experiences of landowners and users, countering its characterisation as 'abstract', in the sense of 'separated from practice or particular examples' or indeed 'idealistic [or] not practical'.[125] The characterisation of Land Law as 'abstract' also requires a certain disregard for its ubiquity and practical application. The concepts of ownership of

[123] Poulsom (n109) 8
[124] Cowan et al (n66) 11-12
[125] Onions (n15) 5

land, of holding of rights in land or being subject to obligations in relation to land are abstract only to the extent that 'ownership', 'rights' and 'obligations' are intangible, unlike the subject matter itself, the land, to which the ownership, the rights and the obligations attach.

The third objection relates to what might be viewed as the underpinning justification for an expectation that Land Law should be logical. Holmes' observations on the capacity of the 'logical form and method' to 'flatter the longing for certainty' concisely summarise the issue: Lawyers like to think that the law is fundamentally logical because doing so reassures them, whether with logical justification or not, that their advice and recommendations are correct. In a similar way, clients take comfort from unambiguous advice on which they can act. The articles reveal, however, that owing to instances of illogicality being incompletely acknowledged, certainty is frequently not a conspicuous feature of aspects of Land Law. Holmes casts doubt on the notion of any form of generally applicable certainty, stating that 'certainty generally is illusion'.[126] It might be argued that a legal principle can be both illogical and certain: An example might be the metamorphic effect of s62 LPA 1925 which is illogical, but also 'certain' to the extent that it is well recognised. In such a case, however, the certainty exists because the nature, scope, sources and consequences of the illogicality have, as this analysis advocates, already been carefully and precisely identified. Where that process has not been conducted, and the illogicality remains undiagnosed, the inevitable consequence must be an absence of certainty.

This 'classical exposition', in which the idea of Land Law having an emotional dimension is frequently regarded as 'antithetical' or 'heretical' can also be challenged by the argument that in theory and in practice, law 'always has a subject' and that that subject is the 'notional person[s]' governed by it.[127] This view aligns with Gray's observation that 'The law of property is not particularly concerned with 'things'; it is concerned much more deeply with the relationships which arise between persons in

[126] Holmes (n60) 466
[127] Cowan et al (n66) 12

respect of things'.[128] This view argues that perceptions based on logic tend to begin from the premise that 'formal equality requires that all subjects of property are treated equally in law'.[129] This uniform characterisation of the notional persons who own and use land then tends to result, incorrectly, in exclusion of their individual 'subjective characteristics' and of their highly personalised circumstances.

The articles reveal instances of representation of Land Law's close relationship with logic, and a consequent distance from notions of subjectivity and emotion which can be inaccurate. These instances can become apparent when disputes arise, in litigants' arguments, and in judicial reasoning. The articles provided several illustrations of this tendency to project as coherent or logical that which, on closer examination, appears to be based more on subjectivity or 'personal preference' than the parties might appreciate, or be willing to reveal.

An aspect explored in A5 and A7, as part of the broader discussion of using residential premises for commercial purpose, was the use of residential premises for housing Care in the Community patients. The issue in both *C&G Homes Ltd v Secretary of State for Health*[130] and *Re: Lloyds' and Lloyd's Application*[131] was in part whether this use was a 'business', thereby breaching the covenants against such use to which the properties were subject. It is not unreasonable to assume that the primary motivation of the neighbouring householders who objected to the use was not the technical or objectively logical point of a potential breach of covenant, which was the basis of the claim, but the more subjective, personal and emotive 'dislike' of the proposed use, and of its claimed effect on the values of nearby property. Nor is the importance of personal preference confined to litigants: Demonstrating a similar attachment to personal sentiment, and possibly mindful of the adverse Parliamentary reaction to the finding in *C&G Homes*, Judge Marder QC *in Re: Lloyd's Application* was unusually open in rejecting the authority of the previous cases and clearly indicating his own preference for the development

[128] Kevin Gray, *Elements of Land Law* (1st edn, 1987, Butterworths) 5
[129] Cowan et al (n66) 12
[130] *C&G Homes Ltd v Secretary of State for Health* [1991] Ch 365
[131] *Re: Lloyds' and Lloyd's Application* (1993) 66 P&CR 112

proceeding, allowed it. It is significant, however, that even in reaching a decision which appeared to derive in large part from personal preference, he articulated his decision as being based on objective assessment of the suitability of the applicants and of the premises and on the objective identification of a broader social need for the proposed use.[132]

A4 identified a similar recasting of personal grievance into objective forms in both the leading cases on estate rentcharges. In those cases, the claimants sought to challenge the level of service charges imposed upon them, relying on intricate and technical arguments concerning the Rentcharges Act 1977 and the validity of the rentcharge to support their challenge. Beneath the technical complexity of the arguments, however, can be detected a rather simpler, more emotive motivation that the claimants simply did not consider the charges imposed to be 'fair'.[133]

A similar finding was made in A6, which explored the moratorium on forfeiture for commercial premises imposed in 2020. It identified that while the moratorium was designed to protect businesses which were unable to pay rent, and which would otherwise be exposed to the risk of forfeiture, it also extended to businesses able, but disinclined, to pay: In *Bank of New York Mellon (International) Ltd v Cine-UK Ltd*[134] and *Commerz Real Investmentgesellschaft gmbH v TFS Stores Ltd*,[135] tenants unable to trade adopted a number of technical 'rules based' arguments (including that the leases had been frustrated, or that they should be entitled to part of the proceeds of the landlords' loss of rent insurance) to claim that they should not be required to pay rent. It is suggested that their primary motivation was not one fundamentally grounded in 'rules based' arguments, but was based on a subjective belief that it was unfair that they should have to pay rent when they were unable to trade.

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[132] *Re: Lloyd's and Lloyd's Application* (1993) 66 P & CR 112, Casebook, Law & Justice, The Christian Law Review, No 122/123 (1994) 125, 126

[133] In *Orchard Trading Estate Management Ltd v Johnson Security Ltd* [2002] EWCA Civ 406, the defence that the sums charged were 'not reasonable in relation to the covenant' (para 7) appears only as an argument in the alternative (behind those relating to the validity of the rentcharge in its entirety) at paragraph 5. The defendant was also one of 5 unit holders, on an estate comprising 15 units, who challenged the validity of the rentcharge.

[134] *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB)

[135] *Commerz Real Investmentgesellschaft gmbH v TFS Stores Ltd* [2021] EWHC 863 (Ch)

Perhaps the most compelling evidence of this tendency to conceal emotional arguments beneath technical 'logic-based' reasoning was identified in A5 and A7, which examined whether homeworking amounts to a breach of a covenant against business use. They identified that parties to disputes and debates concerning home working will readily present their arguments in terms which rely heavily on the technical definition of a 'business' or on the legality or otherwise of home working more broadly. The approach of those promoting or opposing working from home appeared to be to reach for a technical argument, not an emotional one. Beneath these arguments (possibly, as A7 argued, motivated by highly personalised understandings of what 'home' means) appears to be a personal unease, motivated by personal preference for or against homeworking, that it will either be prohibited, imposed upon them, or allowed to grow unchecked. A related and similarly highly personalised explanation is that, as with the Care in the Community caselaw (or indeed the 'AirBnB cases' to which A7 refers), people have little objection to home working as an abstract concept, but are disinclined to allow it to be imposed upon them or to permit it 'near them'.[136]

If the articles reveal a tendency to present what are in essence personalised subjective arguments in objective 'logical' terms, it might be asked what causes this tendency, and what its consequences might be. It is suggested that the main cause is essentially functional: To obtain the remedies which Land Law affords them, parties and their advisors are compelled, in accordance with the 'classical exposition', to recognise Land Law as an environment in which, superficially at least, logic equates to 'value' or 'credibility', and that which is 'personal' or 'subjective' is equated with being 'vague', 'unsubstantiated' or 'illogical'. That recognition then encourages litigants to recast their very real personal experiences, often comprising frustration, fear or anger, or more generalised feelings of having been unfairly treated or disadvantaged, into artificial, 'logical', 'objective' and 'internally coherent' forms.

[136] The Author was advised at the 2022 MSPL conference that home working was a significant cause of neighbour disputes in exclusive residential areas in South Africa, where those working from home complained of disturbance from children playing.

A ‘gap’ between the perception of Land Law as unemotive and logical, and a reality in which Land Law has a strong emotional component, and the consequent recasting of subjective preference into new objectively logical forms perhaps has several related consequences. The first is a conceptually unsatisfactory position in which an argument artificially phrased in logical terms, for example in relation to the validity of an estate rentcharge, is perceived to be more credible (and therefore presumably more ‘true’) than a truthful argument, explicitly describing a belief that the service charge sum being demanded is excessive. The unsatisfactory nature of that position is compounded by a form of ‘circularity’ in which parties are induced to obscure the personal nature of their experiences, preferences and requirements in favour of a more objective and logical recasting of those experiences, in order to seek redress from a system which is significantly less objective and logical than it purports to be.

A second consequence relates to Goddard’s observations on ‘knowledge, skills and resources’ needed to invoke law effectively; the exercise of ‘recasting’ arguments opposing conduct to which the claimant personally objects into something more ‘logical’ or ‘objective’, for example opposing the level of a service charge by challenging the validity of the estate rentcharge which supports it, or arguing the frustration of a lease in order to avoid rent payments, requires wide and detailed legal knowledge and technical expertise. Perhaps surprisingly in an area which purports to be based on logic, this recasting exercise can also require significant input of two of the most human of characteristics, imagination and creativity. These are expensive and time consuming to obtain, and consequently inaccessible to many landholders.

A third result of an uncorrected perception that Land Law is underpinned by logic is a consequent perception by landowners and users, perhaps originating in a false conflation of logic with simplicity, that Land Law principles are universally conceptually straightforward and therefore operate according to conventional principles of ‘common sense’. This can lead to them not seeking legal advice when they should. Just as individuals might reasonably decline legal advice on a contract for a straightforward purchase of a household item, they might also do the same, but

this time with rather more profound consequences, on what they perceive to be a straightforward property dealing, for example the creation of a short lease or a right of way, or the transfer of a share in property held under a tenancy in common.

The problem of parties facing legal issues either not seeking advice, or seeking to resolve legal issue themselves, or both, appears to be common: Research by the Legal Services Board ('LSB') demonstrates that a high proportion of consumers with legal problems do not seek legal advice. Its 2012 Legal Needs Survey identified that 'less than half of legal needs resulted in the individual obtaining advice, assistance or professional help (44%)'.[137] Its 2015 Small Business Legal Needs Survey, while being limited in its scope to commercial clients, rather than private clients, found that 'over half of firms experiencing a problem tried to resolve it by themselves'.[138] Subsequent LSB research[139] reinforced this finding, identifying that 'when responding to a legal issue, 8% of small businesses took no action, while 44% sought to resolve it entirely on their own.'[140]

For reasons associated with client confidentiality and with the difficulties inherent in demonstrating why action is not taken, and owing to significant numbers of what the LSB terms 'silent sufferers',[141] identifying why those who might benefit from legal advice do not obtain it is necessarily a highly speculative exercise. One possibility is that already identified, that of landholders believing the law relevant to them to be logical, straightforward and therefore capable of implementation without expert help. Another possibility is that having sought legal advice in the past, and having not received coherent and consistent advice that 'works for them', they are disinclined to seek it subsequently. Very tentative inferences might usefully be drawn from the LSB's findings as to why those who *do* receive legal advice and assistance are

[137] Legal Services Board, 'Lowering barriers to accessing services, Lessons from other sectors' March 2016, http://legalservicesboard.org.uk/news_publications/publications/pdf/2016/20160331_Lowering_Barriers_Final_Report.pdf (accessed 11 August 2023) 5

[138] Legal Services Board (n137) 5

[139] Legal Services Board 'Small business legal needs wave four survey 2021' (April 2022) https://legalservicesboard.org.uk/wp-content/uploads/2022/05/20220406-Small-business-legal-needs-FINAL.pdf (accessed 13 March 2025)

[140] Legal Services Board (n139) 41

[141] Legal Services Board (n139) 53

dissatisfied with the service received: The top three reasons cited were ‘delay/took too long’, ‘not kept up to date with progress’ and ‘general quality of service provided was poor’.[142] A reasonable supposition might be that they would view the quality of service more favourably if the legal advice they received were more coherent and consistent (and perhaps therefore capable of being imparted and implemented more quickly), ‘made sense’ and ‘worked for them’. Significantly, the cost of legal advice was only indirectly relevant at the fourth reason, ‘Poor value for money’. A finding that cost was not necessarily the primary obstacle to accessing legal help is perhaps predictable when, as the LSB identified, 46% of those who received legal advice did not have to pay for it, or had already paid as part of another service, such as an insurance premium or legal services subscription.

It might be argued further that a presumed alignment of Land Law with logic, and a consequent reluctance to take expert advice which might rebut that presumption, can lead to a fourth adverse consequence, that of widespread popular misunderstanding of how some Land Law principles operate. This problem is not unique to Land Law. The House of Commons Women and Equalities Committee found, for example, that ‘almost half (46%) the total England and Wales population wrongly assumed cohabitants living together form a ‘common law marriage’.[143] In households with children, that percentage rose to 55%.

The pervasive nature of Land Law means that widespread misunderstandings, even if those misunderstandings relate to narrow legal issues, are particularly problematic. A useful example of a conceptual cause of ineffectiveness, in the form of a gap between how law is perceived and how it in fact works, is readily identifiable in perceptions of leasehold in England and Wales: Many such perceptions have little logical connection with the reality of the nature and function of leases. Fundamentally incorrect beliefs that ‘If you own a leasehold property, you do not own

[142] Legal Services Board (n139) 61

[143] House of Commons Women and Equalities Committee, ‘The rights of cohabiting partners, Second Report of Session 2022–23’, https://publications.parliament.uk/pa/cm5803/cmselect/cmwomeq/92/report.html# (accessed 11 August 2023) 10

the land it stands on',[144] that 'there is no justification for a house to be sold as leasehold',[145] and that leasehold is merely 'a right to live in a property'[146] appear to circulate widely. Such assertions appear to have resulted in what Walsh describes as 'far too much loose talk about abolishing the leasehold estate and not enough about serious reform that will make it fit for the modern era of property ownership'.[147]

Walsh's observation, while being made in the context of leasehold, illustrates more broadly how defects in law may be misconceived, and how those misconceptions can adversely affect the process of devising and implementing effective reform: Many tenants evidently feel that the law governing their leases is ineffective. They attribute that ineffectiveness to functional causes, for example that leases unduly restrict their conduct, subject them to excessive financial obligations or give them 'lesser' ownership than a freehold owner would have. Where lease terms have the effects to which tenants object, for example by including rapidly escalating ground rents, or onerous restrictions on alterations or alienation, those views are logically justifiable; tenants' perceptions match reality. But many opinions on leases, including those identified earlier, are not formed logically, but are aligned with a false perception, driven by misinformation. They arise from conceptual causes, comprising fundamental misunderstandings of what leases are and of how they operate.

C) **Connecting findings of illogicality, causes of failure in Land Law rules and processes, and Land Law reform**

Identifying problems of recurrent illogicality and a consequent reduction in legal effectiveness is not the same as the identifying or creating solutions. This commentary argues that addressing the presence and effects of illogicality requires two acts to be conducted sequentially. The first is more readily to identify, recognise

[144] Surprisingly, from The Law Society, 'Buying and owning a leasehold home', https://www.lawsociety.org.uk/en/public/for-public-visitors/common-legal-issues/buying-and-owning-a-leasehold-home (accessed 11 August 2023)

[145] Michael W. Poulsom, 'Leasehold Benefits', *The Times*, Letters (London, 30 November 2022) 44
[146] Poulsom (n145) 44
[147] Michael Walsh, 'What's the point of leasehold?', Estates Gazette, 18 February 2023, 42

and publicise the existence, nature, causes and effects of the illogicality. The second is to design and implement 'targeted' reforms which precisely resolve the relevant illogicality. In some instances, the first act might reasonably be regarded as an end in itself; affording adequate publicity to the nature and potential effect of the logical defect can encourage the development of adequate preventative measures; the widespread conveyancing practice of excluding the creative effect of s62 LPA 1925 illustrates how publicity on its own can have a beneficial effect.

Successful design and implementation of targeted reforms, however, requires the exercise of identifying, recognising and publicising the logical defect to be undertaken comprehensively beforehand. Effective responses to illogicality must begin from precise and accurate understanding of why the current law is illogical and how that illogicality has rendered the law ineffective. Misdiagnosis in the form of, for example, a misconception that the law in a specific area is wholly or substantially 'unfit for purpose' is likely to lead to calls for its total or partial replacement. Conversely, a more nuanced conclusion, based on logical assessment of reality rather than on illogical perception, that specific aspects of that law are ineffective because they are unclear, logically deficient or illogically complex is required. This conclusion is likely to lead to a more tightly focussed reform with a greater likelihood of success.

The introduction of commonhold in England and Wales by the Commonhold and Leasehold Reform Act 2002, in part to address perceived failings in the leasehold system, illustrates well how and why reform attempts can fail. The intention behind the Act was overambitious and has not been achieved. The level of ambition is evident from the scope of the Law Commission's report entitled 'Reinvigorating Commonhold'.[148] It is over 600 pages long. It also represents an attempt fundamentally to alter one of only two permitted forms of legal ownership in relation to millions of properties. In the current Land Law landscape, this is too wide ranging to be capable of implementation.

[148] Law Commission, *Reinvigorating commonhold: the alternative to leasehold ownership* (Law Com No 394, 2020)

The lack of success of commonhold is evident from the low rate at which it has been used. The Law Commission reported that 'fewer than 20'[149] commonhold developments had been established in two decades. It attributed that failure to diverse causes including 'an unwillingness of mortgage lenders to lend on commonhold units', a 'lack of consumer and sector-wide awareness', a 'lack of incentives for developers to use commonhold' and 'inertia among professionals and developers'.[150] Perhaps tellingly, the Commission reported that 'We have been told that there is insufficient incentive (financial or otherwise) for developers…to change their practices and adopt a whole new system while the existing one (from their perspective at least) *does the job* [emphasis added]'.[151]

What perhaps unites these disparate possible reasons for the failure of commonhold is that they are all evidence of an illogical response to reported problems with leasehold. The response is illogical because it is insufficiently attentive to the experience of those who own and have interests in land in practice, including developers, buyers, mortgagees, and their advisors: The reforms are not adequately directed at the 'users of the legislation':[152] People who might use commonhold either perceive little or no advantage in doing so, or perceive that doing so is less favourable to their interests than using leasehold. More specifically, the reforms tend to disregard, or are perceived by their audience to disregard, the personal characteristics and motivations of those users who deal with land on a commercial, as opposed to a charitable or altruistic basis. It is illogical to expect these audience members to change their behaviour unless they perceive a commercial advantage in doing so. For them, the motivation to use existing understood systems which provide them with relative certainty, and which are known from experience to 'do the job', is powerful.

More detailed investigation into the unsuccessful introduction of commonhold is beyond the scope of this commentary, but two further features of the reforms are

[149] Law Commission (n148) 14
[150] Law Commission (n148) 14
[151] Law Commission (n148) 14
[152] Goddard (n19) 136

pertinent. One is the diverse range of 'positions', in the sense of findings or opinions, from which they began. Some of these are based on a public misconception of leasehold as 'feudal',[153] and therefore incompatible with current social value. The Law Commission acknowledged that while 'feudal' 'misdescribes' the landlord/tenant relationship, it is 'not necessarily a mischaracterisation'.[154] In conceding that the incorrect and emotionally loaded term 'feudal' might accurately characterise the landlord/tenant relationship, the Commission is perhaps allowing a misleading perception of historic power structures to dominate discussions of lease reform, at the expense of focus on more relevant, specific and contemporary concerns.

A second significant feature of the reforms is perhaps a lack of logic in the way in which their starting points are considered.[155] These starting points identify many entirely reasonable objections to *aspects* of the leasehold system, for example the obstacles (including high consent fees) to obtaining landlords' consent for works or for alienation, high and escalating ground rents, excessive service charges, the absence of regulation of managing agents, and landlords' rights of forfeiture. When viewed collectively or cumulatively, it is perhaps tempting to conclude that these legitimate sources of complaint are evidence of fundamental defects in the leasehold concept. But to view them in this way is not a logical analysis of the personal experience of individual tenants: Individual tenants may experience some of these, but are unlikely to experience all of them. An incorrect diagnosis of a series of complaints as evidence of a problem experienced by tenants uniformly has created an ineffective legislative response.

Furthermore, it appears that insufficient consideration has been given to what precisely these sources of complaint really represent. To view them as a composite challenge to the *use* of leasehold, or as evidence that the leasehold estate is inherently defective and should be replaced with commonhold is incorrect. An objective and logical assessment of the experience of individual tenants, rather than

[153] Law Commission (n148) 9
[154] Law Commission (n148) 9
[155] Law Commission (n148) 10-11

of the collective experience of tenants as a body of landowners, indicates that these sources of complaint should properly be viewed as evidence, in specific cases, of the *abuse* of leasehold. The almost universal practice since 2002 of using leasehold for residential flats, and the absence of any prominent objection to the routine use of leasehold for commercial property, even where commonhold is available, supports the view that developers and purchasers have no fundamental objection to the use of leasehold in itself: While buyers can only buy what is available, developers will only offer for sale what is commercially acceptable to buyers. In 2022 in England and Wales, 24% of residential property transactions, comprising around 207,000 transactions in total, were leasehold.[156] It is suggested, therefore, that the nature and scope of the defects in leasehold and of the purported resolution are illogically misaligned.

Land Law reform need not have this overambition or lack of focus. Reform can precisely identify defects and make unambiguous changes. The lack of an adequate logical basis for the introduction of commonhold, and the predictable disinterest subsequently shown in it, can be contrasted with the precision with which specific leasehold abuses have been addressed: In fewer than 20 operative sections, the Leasehold Reform (Ground Rents) Act 2022 prohibits monetary ground rents on new residential leases. A similarly logical approach is evident in The Tenant Fees Act 2019, which prohibits signing-on fees for tenants by letting agents and limits deposits paid to landlords; when implemented, the Leasehold and Freehold Reform Act 2024 will set maximum times and fees for provision by landlords to sellers of information required on sale, and abolish the presumption that leaseholders pay their landlords' legal costs when challenging poor practice. As A4 recommended, the 2024 Act will allow freehold owners to access redress schemes relating to service charges, which are only currently available to leasehold owners.

The approach towards reform adopted in the articles aligns closely with this tightly directed approach, not merely because a focused reform has greater clarity but

[156]UK Parliament House of Commons Library, Briefing Paper No 8047: Leasehold and commonhold reform, 22 September 2023, 6

because such a reform is likely to be more effective. It has been identified that ineffectiveness can arise from laws following one or more of Fuller's 'routes to disaster', and from defects in aspects of the 'interplay between [Land] Law and the institutions which administer it'.[157] The importance of reforms aligning with 'how a user will experience the operation of the law in practice'[158] cannot be overemphasised: In this regard, it is suggested that reformers should, in relation to devising reforms, adopt the logical deductive methods which Formalists support. Logical and ordered thinking must precisely determine the uncertainty or other illogical defect, and its effect on the experience of those to whom the law is addressed, and propose a targeted and proportionate response.

Some reforms proposed in the articles recognised Land Law's pervasive nature, the amount of existing Land Law regulation, and the infrequency with which substantial legislative changes occur, by recommending the pragmatic adoption in one area of Land Law of principles currently used in another. While this adoption might be criticised as an exercise in what Dewey called the practical economy of 'using a concept ready at hand',[159] it could logically be justified on the basis that using established and understood principles is preferable to creating potentially uncertain new principles. Examples included using an existing definition of 'home business' in s54ZA Landlord and Tenant Act 1954 to aid interpretation of covenants against 'business use' more broadly (A5 and A7), applying the existing provisions of s84 LPA on the modification of covenants to their construction and interpretation (A7), and adopting existing arbitration regimes applicable to rent review to create a similar regime applicable to forfeiture (A6).

Adopting a similarly logical preference for the known over the novel, the articles also suggested that effective Land Law reform might adopt existing principles from other legal disciplines. An example was the recommendation in A5 that covenants against business use should only be breached by conduct that also amounts to a legal

[157] Goddard (n19) 136
[158] Goddard (n19) 136
[159] Dewey (n8) 19

nuisance. Further recommendations based on the use of existing legal principles included the introduction of land obligations as proposed by the Law Commission in 2011 to address difficulties associated with the running of positive covenants (A4) and the implementation in statutory form of Government Guidance on home working (A5).

Other proposals were directed at addressing illogical complexity or logical inconsistency. In many instances, these proposals recognised pressures on Parliamentary time and the relative inattention that Land Law reform receives, and recommended alteration, rather than replacement of, existing legislation. These recommendations adopted different approaches. Aligning with the principle that logically justifiable reform must be confined to those aspects of a law which are defective, some recommendations proposed the 'minimum possible' reform needed to correct the defect. To address the problem of excessive charges on freehold land being sought, A4 proposed precise changes, consisting of the addition of a small number of words, to ss 2(4) and 2(5) Rentcharges Act 1977 to correct specific ambiguities which were capable of exploitation.

In other instances, it was argued that the 'minimum possible' approach to reform might be ineffective. This was particularly relevant where an illogical interpretation of a statutory provision, invisible on inspection of the provision, had been allowed to develop. In such cases, it was argued that the correction of a 'concealed' defect logically required a deliberately visible response. A1 considered the merits of altering the wording of s62 LPA 1925 (as proposed in Tasmania, and in Trinidad and Tobago) and of replacing it with a new section (as recommended in Northern Ireland). In that case, it favoured replacement. This would be a more emphatic change and one focused directly on the source of the defect i.e. the illogical state of the law in which the meaning of the section was concealed. A demonstrative replacement of the section with a new section would be more likely to correct the fundamental misinterpretation to which it has been subject.

Other recommendations focussed on the interplay of the law and the institutions which administer it with specific reference to how property practitioners draft documents for their clients. Such recommendations create difficult questions of whether practitioners departing from longstanding conventions and indeed from established legal principles are acting in the best interests of their clients or are exercising due care and skill. They must also have due regard to practitioners' requirements that working methods be economically viable. It was the author's view, however, that many professional practices originate from a *desire* to conform rather than from rigid professional or legal requirements to do so, and that a more selective use of specific drafting practices could be justified on logical grounds.

A2 recommended that practitioners might, where appropriate for their clients, draft easements of view, clearly defining those views (as planning law does), supported by covenants as a precaution. A4 recommended that estate rentcharges should be used sparingly, and where appropriate be replaced with other, conceptually simpler devices for enforcing positive covenants. A6 recommended that practitioners should reconsider the routine inclusion in leases of forfeiture clauses. In each case, the decision as to whether to include a particular clause or drafting device could become more the result of measured consideration and logical assessment of the client's circumstances and needs, and less the result of habit or 'intrinsic inertia'.[160]

The articles also explored the interplay between the law and the institutions which administer it in relation to the resolution of Land Law disputes, with recommendations that courts might approach aspects of legal decision making differently: A2 suggested that courts might more explicitly recognise the illogicality of allowing the protection of views by covenants and by planning law, while denying the availability of similar protection by easements. A3 recommended that courts might follow their own advice to avoid the 'ritual incantation' of the *ex turpi causa* principle, and A5 recommended that they should similarly avoid the artificial elevation to the

[160] Dewey (n8) 19

status of undisputed principle of the tentative definition of ‘a business’ in *Rolls v Miller*.

The problem of widespread public misunderstandings of essential Land Law principles is more difficult to solve. It is possible that regular legislative interventions in selected areas, visibly and accurately reported, and properly separated from the ‘loose talk’ to which Walsh refers, might to some extent correct such misunderstandings. The precise drafting and well publicised implementation of the Leasehold Reform (Ground Rents) Act 2022 provide a useful model in this regard. While so many landowners and users do not obtain legal advice in relevant circumstances, however, such approaches can only have a limited effect. In the author’s experience, and as the Legal Services Board found,[161] those who might benefit most from legal advice specific to their circumstances may not seek it. Solicitors’ guidance notes provided freely online, of the type described, are useful, but unless these are actively and visibly distributed, they must be found by those who would benefit from them. It is perhaps to be hoped that the Law Society’s promotion of Public Legal Education, could, with an emphasis on common and pervasive Land Law problems be influential.

Conclusions and Further Enquiries

Conclusions that aspects of Land Law are illogical, that illogicality is inadequately recognised, and that the effectiveness of those aspects, and of attempts to devise and implement Land Law reform are consequently impeded might be accused of being unsurprising, limited in scope or lacking ambition. The correct conclusion to be drawn from this commentary and the articles is perhaps not that illogicality exists and that it can be harmful, although both are true, but that the nature and scale of its existence and of that harm have been, and continue to be, inadequately recognised: A continued adherence by practitioners and by courts to the classical exposition of Land Law as inherently logical mis-states both its current condition and more importantly, how its users experience it.

[161] Legal Services Board (n139) 5

Developing his view that 'The life of the law has not been logic; it has been experience',[162] Holmes defined 'experience' as 'the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy [and] … even the prejudices which judges share with their fellow men'.[163] In his view, the contribution of these to law and legal practice needed to be considered alongside that made by logic. This commentary and the articles demonstrate the influence of that experience: The discussions of the regulation of home working, of access to views and green space, of the unintentional creation of rights, and of the acquisition of rights by wrongful conduct arose in part from an interest in how the operation of purportedly abstract, logical regimes was influenced by the human concerns of 'felt necessities', prevailing theory and public policy. A preconception in the form of a misplaced confidence in the existence and applicability of logic, as conceived by this commentary, was a recurrent finding.

Holmes' reference to 'experience' indicates how the articles present opportunities for further investigation into the influence on legal development of 'experience'. The relationship between A5, A7 and the Guardian article which accompanied them illustrates how further enquiries might be undertaken. A5 is a 'logic based' technical enquiry into the relationship between homeworking and business use covenants. A7 developed the findings made in A5 more fully to create a more 'experience-based' enquiry to examine how homeworking and its regulation related to sometimes highly personalised perceptions of 'home'.

A7 referred to the substantial body of researchers' findings gathered from direct questioning of owners and occupiers of homes. Further enquiries might undertake similar questioning of the users of Land Law to make more explicitly experience-based findings relating to how they experience that use. The 'ordering' of these types of investigation, and the recognition that they are potentially closely related are significant: If, as this analysis contends, what landowners may experience in their interactions with Land Law are fundamentally the consequences of diverse logical

[162] Holmes (n1) 1
[163] Holmes (n1) 1

deficiencies, improving that experience necessarily requires effective correction of those deficiencies. To undertake experience-based enquiries prematurely is likely to distract reformers from what *precisely* it is that harms landowners' experience, and consequently to result in unrealistically ambitious and poorly focused reform proposals. Only when it can be argued convincingly that a legal principle or process is logically coherent should further investigation be undertaken into other reasons, for example cost or accessibility of legal advice, why landowners' experience of engaging with Land Law is unsatisfactory.

A1 might be developed into a broader investigation of public policy and other considerations applicable on the subdivision of plots of land, which will remain relevant while the 'felt necessity' for more housing remains acute. Similarly, A2 and A4 could be developed into a broader investigation of the inadequate means by which rights to see and enjoy open and green space are protected, having regard to prevailing concerns about their association with health and wellbeing. A2 in its current form is primarily a logic-based enquiry into restrictions on the acquisition of proprietary rights by wrongful acts, with only supplementary reference to the experience of broader public policy. A re-examination of its findings could place a stronger emphasis on how landowners and users experience the influence of public policy on their daily engagement with land. A2 is also closely related to failure by landowners and users to take adequate legal advice on their land dealings. This might be developed into a broader exploration of why legal advice is not considered a 'felt necessity' when it should be.

Holmes' assertion argues explicitly that what gives law its 'life' is not its mechanical features or its internal characteristics: Its life derives from its position within a complex relationship of human concerns, behaviours, preferences and prejudices. Logically, therefore, an accurate and comprehensive study of any legal question must engage with that position and that relationship. This necessitates engagement, as A7 undertook, with perspectives (in that case from psychology, human geography, architecture and behavioural sciences) from outside law. Effective investigations of how Land Law 'works' for landowners and users cannot be

conducted without reference to diverse concerns beyond those of Land Law specialists. But to engage with these perspectives before resolving logical deficiencies in Land Law presents the risk that unresolved absences of logic in one discipline will be combined with similar absences in another. This might result in analysis of complex webs of illogicality, potentially of interest and benefit only to academic researchers. Inter-disciplinary and experience-based investigations should not, in the author's view, be conducted before, or prioritised over, more detailed investigations into logic. While illogicality remains a characteristic of Land Law principles and processes, correcting that is paramount.