GDL ANSWERED

SAMPLE NOTES FROM OUR GDL *CORE GUIDE*:

- Contract Law: Consideration, Promissory Estoppel and Economic Duress
- Criminal Law: Murder and Voluntary Manslaughter
- Land Law: Freehold Covenants

GDL Answered is a comprehensive, distinction-level set of exam-focused study notes for the Graduate Diploma in Law. This is a sample from our *Core Guide*.

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CONSIDERATION, VARIATION OF TERMS AND PROMISSORY ESTOPPEL

STEP 1:	**Is there a <u>new</u> contract being formed or is there an issue with a <u>variation</u> of an existing contract?**

<u>Briefly</u> establish the following to show that, but for any issue with consideration, there is a contract. Remember that a variation contract is itself a new contract and so any variation must also meet all of the usual requirements of a contract.

1) **Agreement:**

   Have both parties agreed to the same offer? Identify the offer and acceptance.

2) **Intention to Create Legal Relations ("ICLR"):**

   Did the parties intend that the contract would be legally binding?

3) **Consideration** (*see below*)

STEP 2:	**Define consideration. Note what the consideration in the scenario is.**

DEFINITION OF CONSIDERATION

> "*An act or forbearance of one party, or the promise thereof, is <u>the price for which the promise of the other is bought</u>* (***Dunlop Pneumatic Tyre v Selfridge***)."

There are two kinds of consideration:

1) **Executory –** the parties agree future performance after the contract has been made.
2) **Executive –** where performance has already taken place at the time of the contract (***Carlill v Carbolic Smoke Ball Company***).

Both the promisor and promisee must provide consideration.

- Have both parties provided consideration? Note what the potential consideration is. **State whether there is any issue with consideration**.
- If there is a variation, has each side given consideration for the variation? What is it?
- In respect of each example of consideration, establish who the promisor is, and who the promisee is. (**Remember** that the promisee **receives** the variation promise. The promisor **makes** that promise. Be clear about these terms.) For example: "*C wants to claim the £x bonus promised to him by D, but the issue is whether C provided consideration for this variation.*" (***Blue v Ashley***).

STEP 3:	**Decide what the issue is. There are a few potential issues – identify them and then select the correct steps below:**

The potential issues with consideration – which one is relevant for each issue?

1) **The consideration is <u>not good consideration</u> because it does not meet one or more of the criteria in Step 4** (because of *past consideration* or an *existing contractual obligation*) (→ *see Step 4 below*); **or**
2) **The variation is a promise to <u>pay more</u>** (→ *see Step 5 below*); **or**
3) **The variation is a promise to <u>accept less</u>** (→ *see Step 5 below*).

STEP 4:	**Go through the rules of consideration – has each party provided good consideration?**

1) Consideration must not be past.

Where one party has already acted, a **later** promise by another party to perform an act in return is not good consideration, as it is past consideration. In ***Eastwood v Kenyon***, Eastwood had supported his ward through childhood – later on, her husband, Kenyon, promised to repay him for having looked after his now-wife, but as Eastwood's consideration had been rendered in the past, Kenyon's promise was not enforceable.

EXCEPTION: in ***Pao On v Lau Yiu Long*** claimant purchasers agreed not to sell shares for 12 months. By a later agreement the defendants agreed to indemnify the claimants against any fall in value of the shares over that period. Although the consideration was past in relation to the indemnity, the court found it was good consideration, and set out the following considerations for past consideration to be good consideration:

1:	**Was it at the request of the promisor?** i.e. did the promise-maker (promisor) ask for the promisee to take the action? (***Lampleigh v Braithwaite***).
2:	**Was payment understood to be due?** i.e. did both parties assume that payment would be made for the variation? This is more likely in a commercial context (***Re Casey's Patents***) than in a domestic one (***Re McArdle***).
3:	**If the payment had been made in advance, would it have been legally enforceable?** i.e. there are no other consideration, acceptance or ICLR issues.

2) Consideration must move <u>from</u> the promisee to the promisor:

In return for receiving the promise-maker's promise, the promisee must have given consideration. Essentially, **both parties must provide consideration**. A claimant can only claim on a contract if consideration has been provided (***Tweddle v Atkinson***).

EXCEPTION: s. 1 Contract (Rights of Third Parties) Act 1999 – 3rd parties (people who are neither promisor nor promisee to the contract) **can** now enforce a contract between others which benefits that 3rd party, even though the 3rd party has not provided any consideration.

3) Consideration must be <u>sufficient</u>, but need not be <u>adequate</u>:

Consideration must have **some** value in the eyes of the law (i.e. be sufficient), even if it is inadequate (i.e. far less than the promise is worth). **Caselaw examples of sufficiency**:

- ***Chappell & Co v Nestle*** – Nestle was selling records at a discounted price to people who sent in three chocolate wrappers (which Nestle then threw away). The record's copyright holders contended that their percentage of royalties should be greater. **Held**: the wrappers were consideration for the records; they represented Nestle's increased sales of chocolate.
- ***White v Bluett*** – giving up a legal right is sufficient but promising not to enforce a right that you do not have is insufficient. In this case, a son promising not to complain about his father's disposal of property was not sufficient consideration.
- ***Hamer v Sidway*** – promising to abstain from drink and tobacco was giving up a legal right; a promise to do so did amount to sufficient consideration.
- ***Thomas v Tomas*** – in this US case a dying man intended a gratuitous gift of his house to his wife. He asked his trusteed to convey it to her on payment of a £1 annual rent and on condition she keep it in good repair. This was held to be sufficient consideration.

4) Performance of an existing obligation, as between the same parties, is not good consideration (an existing obligation already binds and cannot be good consideration).

(*see STEP 5: Promises to Pay More for an existing obligation*).

5) Part payment of a debt is not good consideration (***Foakes v Beer; Re Selectmove***)

(*see STEP 5: Promises to Accept Less*).

STEP 5:	**Is this a promise to <u>pay more</u>, or a promise to <u>accept less</u>?** Do not mix up these routes.

PROMISES TO PAY MORE

Performance of an existing obligation is not good consideration (an existing obligation is something that you are already obliged to do and cannot be good consideration) –in order **to be good consideration something extra must be offered above one's existing obligations**.

Public duties- carrying out a public duty will not amount to consideration.

- ***Collins v Godefroy*** – a witness who had been subpoenaed could not enforce a promise to be paid to appear in court as the witness was already legally obliged to attend.

Exceptions:

- ***Harris v Sheffield Utd*** – the policing bill for a football match had to be paid by the club that requested it as it went beyond ordinary policing duties.
- ***England v Davidson*** – a police officer had provided valid consideration for a reward when he gave information to a householder about a break in. His duty was to prevent crime and the provision of information went beyond the duty.

Duties owed to third parties:

- ***New Zealand Shipping Co Ltd v Satterthwaite Ltd (The Eurymedon)*:** – promising to do something that you are already obliged to do under a contract with a third party **is** good consideration with the new party. The new party acquires a **direct right to sue** you if you fail to fulfil the promise. (Approved and extended in ***Pao On –*** *see above*).

Contractual duties:

GENERAL RULE: performance of an existing contractual obligation is **not** good consideration.

> ***Stilk v Myrick*** – on a voyage some sailors deserted, the remainder were offered extra money to crew the ship home with fewer hands. When the payment was refused, they could not enforce, because they had been employed to cover "*all reasonable endeavours*" – **always compare *Stilk v Myrick* with *Hartley v Ponsonby*** *(see immediately below)*:

EXCEPTION 1: going **above and beyond your existing obligations** is good consideration.

> ***Hartley v Ponsonby*** – additional payments offered to sailors following desertions were payable. So many had deserted that the work for those remaining became much more onerous. **Consider: have the claimant's actions gone above and beyond what they were contracted to do?** If so, that can be good consideration. Remember that in addition all the criteria for good consideration must also be met (→ *see Step 4)*.

EXCEPTION 2: if the claimant is not going above and beyond, consider the exception set out by Glidewell LJ in *Williams v Roffey Bros*.

Go through all of the following criteria:

1:	**Where A already has a contract with B** to supply goods or services; and
2:	**B has reason to doubt that A will complete** (A cannot approach B and say this though, as it would be duress – *see point 5 below*); and
3:	**B approaches A and promises to pay A extra to complete on time**; and
4:	**B obtains a "*practical benefit*"** or "*obviates a disbenefit*" [**NOTE:** this was not defined in ***Roffey Bros***. In this case it was avoidance of a penalty clause – is the example in your question similar? What exactly is the benefit afforded/disbenefit avoided?]; and
5:	**B's promise was not given as a result of duress or fraud**; then
6:	**The benefit to B is capable of being consideration, so B's promise to pay more for the same will be binding**.

In short**,** a promise to pay more will be good consideration if it goes above and beyond, or if it fits the ***Roffey Bros.*** criteria.

NOTE: this case is precedent only for situations where the contract is renegotiated and applies only where there is an offer to **increase** the contract price.

When applying *Roffey Bros.*, you must be certain that the variation did not result from duress (*point 5 above*), so go through the criteria for duress (*see next chapter*). The effect of duress would be to render the contract voidable.

PROMISES TO ACCEPT LESS

GENERAL RULE: part payment of a debt is not good consideration – it is merely fulfilling an existing obligation to pay money. Even where the other party promises to waive that obligation, they can still claim the balance of the debt back at any later point (***Foakes v Beer; Re Selectmove***).
There are three exceptions to this:

- **EXCEPTION 1: *Pinnel's Case***: a debt can be part paid with either: (1) a different thing ("*a hawk, a horse or a robe*"); (2) in a different place; or (3) earlier, any of which will count as good consideration.
- **EXCEPTION 2: *Welby v Drake***: part payment of a debt by a 3rd party is good consideration.
- **EXCEPTION 3: Promissory Estoppel**: this means that the claimant may be obliged to stand by what they said, even where they are not contractually bound to do so. The claimant cannot go back on their word when it would be unjust or inequitable for them to do so (**Denning**).

Promissory estoppel was established by **Denning** in ***Central London Property Trust v High Trees House***. In this case the claimant promised to reduce the agreed rent "*for the duration of the war*." The property became fully let in 1945, and when the claimant sued for the full back rent, it was held that the rent could be claimed in full for the period for which it was fully let, but that the landlord could not claim for the wartime period when it was partly vacant.

Promissory Estoppel has 5 elements – go through them in detail using the cases:

1:	**A clear and unequivocal promise** to suspend or waive existing contractual rights. This can be by words or conduct (***Hughes v Metropolitan Railway***) but must be sufficiently clear (***Woodhouse Cocoa v Nigerian Produce*** – in this case it was not clear how payment was affected by currency market changes).
2:	**A change of position by the promisee in reliance on the promise**. In ***Emmanuel Ajayi v Briscoe*** there was no change of position; the defendant had simply carried on his business when the lorries were laid up. "*Reliance*" was given a wide interpretation in ***Brikom Investments v Carr***. **Arden LJ** took this approach even further in ***Collier v P & MJ Wright (Holdings) Ltd.***, seemingly dispensing with the need for any meaningful idea of reliance.
3:	**The reliance need not be detrimental** (***The Post Chaser***).

4:	**It must be inequitable for the promisor to go back on the promise**. In ***D&C Builders v Rees*** Mrs Rees could not use the equitable remedy of promissory estoppel because she had not come to equity with "*clean hands*". She had known that the builders were in financial trouble and that they would have no choice but to accept her offer to pay them less for their work. **NOTE**: this is **not a chance to discuss duress** – use the equitable maxims instead.
5:	**Promissory estoppel is a shield, not a sword**. It can only be used as a defence, not a cause of action (***Combe v Combe***).

EFFECT OF THE ESTOPPEL

Generally **suspends** rights (***CLP Trust v High Trees***), which means that rights could be resumed later.

Rights can be **resumed** later on:

1) following reasonable notice (***Tool Metal v Tungsten Electric*** – the first law suit was reasonable notice); **or**

2) when the circumstances giving rise to estoppel cease (in ***CLP v High Trees*** the properties were fully let before the war ended, unlike during the Blitz in 1940).

If the money is due in instalments (like rent), the claimant cannot recover the money that was waived – they can only receive **future** payments. Any past periodic payments are extinguished. **This implies** that **if the money is due as a lump sum** (one debt payment), then the **payment is merely suspended** for the period that the estoppel lasts – afterwards the claimant can resume their rights for the **whole sum**.

NOTE: the Supreme Court has recently overturned a Court of Appeal decision creating a possible fourth exception to the rule that part payment of a debt cannot be good consideration: in ***MWB Business Exchange v Rock Advertising*** the Supreme Court did not specifically rule on whether the receipt of a practical benefit alongside an agreement to pay less could amount to good consideration. The Supreme Court noted that ***Foakes v Beer*** should be reconsidered before a full panel of the court when the opportunity arises.

Draw a conclusion regarding any promise to accept less: if the claimant has promised to accept less, the defendant will be able to rely on this variation if payment is made with a different thing, if a 3rd party pays, or if promissory estoppel applies.

NOTE: duress is **not** relevant to promises to accept less – do not discuss it. **Draw a conclusion regarding any promise to accept less:** if the claimant has promised to accept less, the defendant will be able to rely on this variation if payment is made with a different thing, if a 3rd party pays, or if promissory estoppel applies.

You may want to be aware of **estoppel by convention**. This is where the parties act on the common assumption that a set of facts or situation in law is true. In ***Tinkler v HMRC*** the Supreme Court approved the following five principles for an estoppel by convention to arise:

1) The common assumption must be expressly or impliedly shared by the parties not merely understood by them;

2) The party raising the estoppel must have "*assumed some element of responsibility for it… in the sense of leading the other party to understand they would rely on it*";

3) The person raising the estoppel must have relied on the common assumption;

4) Reliance must have occurred in some subsequent mutual dealing between the parties; and

Some detriment must have been suffered by the person defending the estoppel or some benefit accrued to the other party so that it would be unconscionable to assert the true legal position.

STEP 6:	**Conclude. Is there valid consideration? Is there a valid contract? Who can recover what from whom?**

MURDER AND VOLUNTARY MANSLAUGHTER

MURDER	Murder is defined under the common law as: "*the unlawful killing of a reasonable person in being under the King's peace with malice aforethought"* (***Coke***).

THE *ACTUS REUS* FOR MURDER

The AR of murder is "*the unlawful killing of a reasonable person in being under the King's peace.*" Breaking this down into its individual components, this means:

"Unlawful"	Killing will generally be unlawful – only the killing of soldiers in battle, the death penalty and certain self-defences could be "*lawful*".
"Killing"	D's act(s) must result in V's death. This has a clear element of **causation**, so consider the section below on establishing causation.
"Under the King's peace"	An ordinary state of affairs in society, i.e. not during a time of war or rebellion. It would be rare for a court to find that D's actions were not committed under the King's peace (***R v Adebolajo***).
"Reasonable person in being"	This means a "*person*". It does not matter whether or not the victim is "*reasonable*". Think of this as meaning "*viable*". A person is someone capable of independent life. The grey area here is around pre-natal cases. Following ***R v Poulton***, an unborn child cannot be murdered as it is not a "*reasonable person in being*" for the purposes of murder (note that there are separate offences relating to unborn children). However, murder would arise where injuries are inflicted on the unborn child, which is then born alive, but dies as a result of the injuries inflicted while it was in the womb.

ESTABLISHING CAUSATION

Consider the three questions below:

1:	**Can Factual Causation be established?**

Here one must apply the "***but for***" test: The prosecution must prove that, *but for* D's actions, the death of V would not have occurred.

R v White	D put arsenic in his mother's drink, intending to kill her. She died that night of an unconnected heart attack. There was insufficient poison in her body or in the drink to have killed her. The court held that her death would have occurred irrespective of D's actions. D was not liable for her murder.

2:	**Can Legal Causation be established?**

Did the defendant's culpable act cause the death?

R v Dalloway	D was driving a horse and cart along a road. A child ran out in front of the cart and was killed. D had not been holding the reins at the time of the accident. Even if D had been in control of the cart, the accident would still have occurred – the cart could not have stopped in time even if D had been able to pull the reins as the child ran out. The culpable act (failure to hold the reins) was not the cause of the child's death. The driver was not guilty of murder.

NOTE: where there are several causes of an incident, the defendant may still be guilty of murder if their actions were a "*material and substantial cause*" of the injury, unless there was a *novus actus interveniens* (***R v Benge***).

3:	**Is there a *novus actus interveniens*?**

A *novus actus interveniens* is a new act from the victim, a third party or an Act of God, which intervenes in a chain of events started by D to affect the outcome significantly. This event must **break the chain of causation** (*see the chapter on the Core Principles of Criminal Liability for more details*).

R v Pagett	D was convicted of murder. He used his girlfriend as a human shield in a shootout. A police officer shot, fired in self-defence, killed her. This was a natural and foreseeable response; the chain of causation was unbroken.
R v Blaue	An example of the "*thin skull*" rule, D was convicted. He had not known that V was a Jehovah's Witness. The direct cause of her death was refusal of blood transfusion following the injury D had inflicted. For the thin skull rule consider also ***R v Holland*** and ***R v Hayward***.
R v Mackie	This was a "*fright and flight*" act of the victim. V was a three-year-old child, he was scared of D, who had a history of violence and had in this instance smacked V, thrown a book at him and threatened him. V tried to run away but fell down a flight of stairs, sustaining fatal injuries. D was convicted of manslaughter.

R v Smith (the soldier)	The original injury was held to still be an "*operating and substantial*" cause of death even though the subsequent medical treatment was negligent.
R v Dear	D slashed V with a knife. V did not die immediately, but succumbed days later following a possibly deliberate suicidal action by V (it was alleged that V either deliberately reopened the wounds or failed to treat them). V's actions were held not to break the chain of causation, as the injuries inflicted by D were still an "*operating and substantial cause*" of V's death.

THE *MENS REA* FOR MURDER

The MR of murder is "*with malice aforethought*". There is no alternative MR of recklessness here.

"with malice aforethought"	This means intention to kill or to cause GBH (grievous bodily harm). GBH is defined as serious or really serious harm (***R v Vickers; R v Saunders; DPP v Smith***).
"Intention"	Intention is given its ordinary linguistic meaning by the jury (***R v Moloney***) of direct aim or purpose (***Smith and Hogan's Criminal Law textbook***). **NOTE:** for murder only, it is possible for D to be found to have indirect or "*oblique*" intent. To find out whether D had oblique intent to commit murder, ask: was death or serious injury a virtual certainty of D's actions? And did D appreciate this to be the case? (***R v Woollin***) If so, the jury may find that D intended to kill or cause GBH (***R v Nedrick; R v Matthews & Alleyn***). Indirect intent only applies to murder – it cannot be used in offences where there is an alternative *mens rea* of recklessness.

DEFENCES TO MURDER – AND VOUNTARY MANSLAUGHTER

The following defences may be available to D on a charge of murder:

INFANCY		**INTOXICATION**
SELF-DEFENCE	**INSANITY**	**AUTOMATISM**

NOTE: there are other defences, which are usually open to D for other offences, but which are never available for murder, such as **consent**, **duress** and **necessity**.

See the "Defences" chapter of this guide for the details of the above defences.

There are also **two special defences that only apply to murder**:

LOSS OF CONTROL	DIMINISHED RESPONSIBILITY

NOTE: these are not full defences but are **partial** defences. If they are raised successfully, the defendant is liable for **voluntary manslaughter** instead of murder. The significance of this is that the mandatory life sentence will no longer apply (**Murder (Abolition of Death Penalty) Act 1965**).

LOSS OF CONTROL

A new defence under **ss. 54-56 Coroners and Justice Act 2009** that replaces the old defence of "*provocation*". Leading criminal law experts have argued that this cannot be used as a defence to a charge of attempted murder. A defendant is not precluded from using this defence just because he is drunk, provided that a sober person in his position would have met the three conditions below. (***R v Asmelash***).

All three requirements for loss of control must be shown for a successful defence. If one element is missing the defence fails (***R v Clinton, Parker & Evans***).

Consider the following three requirements:

1:	**Did the defendant kill someone as a result of losing control (s. 54(1)(a))?**

- Loss of control need not be complete (compare ***R v Cocker,*** where the defence failed because the defendant checked (before killing his wife in response to her requests) that she still wanted to die, with the later case of ***R v Richens*** where the defence succeeded).
- ***R v Ahluwalia***: loss of control need not be sudden (**s.54(2)**), though the greater the delay the less likely the defence is to succeed.

2:	**Did the loss of control have a qualifying trigger (s. 54(1)(b))?**

There are two possible triggers:

- Subjective "*fear of serious violence*" aimed at defendant or another. E.g. ***R v Martin (Anthony)*** defence failed because burglar was shot as he ran away.
- Things said or done that "*constitute circumstances of an extremely grave character*" (**s. 55(4)(a)**) which "*caused D to have a justifiable sense of being seriously wronged*" (**s. 55(4)(b)**). Ill-defined but probably an objective test. E.g. ***R v Ahluwalia***; ***R v Thornton***; ***R v Humphreys***.

NOTE: if either of the qualifying triggers (fear or being wronged) was caused by something that D incited to be done as an excuse to use violence (**s.55(6)**); or resulted from sexual infidelity without additional reasons for the loss of control (**s.55(6)**); or was a "*considered desire for revenge*" (**s54(4**)); then it is indefensible.

3:	**Might a "reasonable person" have acted in a similar way (s. 54(1)(c))?**

- **DPP v Camplin**; **A-G Jersey v Holley**; **R v Morhall**: "A *person of D's age and sex, in the circumstances of D, but with a normal degree of tolerance and self-restraint*."
- **R v Morhall**: the defence will not apply if D was drunk or high (intoxicated) at the time. The defendant in **Morhall** was a glue-sniffer.
- **R v Wilcocks** and **R v Rejmanski**; a personality disorder which affects a defendant's general tolerance and self- restraint will not be relevant, but the extent to which that personality disorder affects the magnitude of the trigger can be considered.

For recent applications of this defence refer to ***R v Clinton*** and ***R v Dawes, Hatter & Bower***.

NOTE: under s.54(5-7) on a murder charge, if the trial judge concludes that sufficient evidence is adduced to raise an issue under s.54(1), the burden of proof moves to the prosecution to prove beyond reasonable doubt that the defence is not satisfied. If the tests are satisfied the defendant becomes liable for conviction for voluntary manslaughter rather than murder. The judge is not obliged to put the defence to the jury if the judge concludes that there is no supporting evidence ***R v Jewell.***

DIMINISHED RESPONSIBILITY

The burden of proof is on the defence, on the balance of probabilities (**s. 2(2) Homicide Act 1957** ("**HA 1957**") and ***R v Sutcliffe***). The **four** requirements are set out in **s. 2(1) HA 1957**:

1:	**D was suffering from an "*abnormality of mental functioning*"…**

R v Byrne: Established the classic definition of abnormality of the mind. "*A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal*". It is not the same as insanity.

2:	**which arose from a recognised medical condition…**

This could be a physiological or psychological condition, e.g. schizophrenia in ***R v Joyce and Kay***.

3:	**… which substantially impaired the defendant's ability to do certain things…**

These things are:

a) to understand the nature of his conduct,

b) to form a rational judgment, or

c) to exercise self-control (**s. 2(1A) HA 1957**). (**R *v Fenton***; ***R v Simcox***.)

The jury may assess all relevant circumstances preceding and following the killing (including circumstances that took place a long time before the killing). This may involve appraising the impact

of the abnormality of mental functioning both on D's decision-making generally and also on the particular decision to kill V (***R v Conroy***).

"*Substantially"* should be given its ordinary English meaning (***R v Golds***). The impairment must be more than merely trivial, but it is not the case that any impairment beyond the trivial will suffice.

4:	**… and which provides an explanation for D's acts and/or omissions in killing V.**

- An abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct (**s. 2(1B) HA 1957**). There must be a causal link between the abnormality and the killing.
- Planning may be relevant in assessing D's level of self-control, but an ability to plan may well still be consistent with disordered thinking (***R v Golds***).
- The jury decides this as a matter of fact. The role of medical experts is generally key. The burden of proof is on the defendant and is determined on the balance of probabilities.
- Consider ***R v Byrne*** contrasting ***R v Sutcliffe***.
- Medical evidence is relevant and helpful, all four of the elements relate to psychiatric issues. (***R v Brennan***).

NOTE ON INTOXICATION

Being drunk is not a separate defence to murder, but it does **not** necessarily negate the defence of diminished responsibility **if** the drunkard also had an abnormality of mind caused by a recognised medical condition which had some effect on the killing (***R v Dietschmann***). Alcoholism could indicate that being drunk was not voluntary. E.g. ***R v Tandy***; ***R v Wood***.

- ***R v Stewart***: Jury to consider the seriousness of D's dependency; the extent to which D's ability to control his drinking was reduced; whether D was capable of abstinence (if so, for how long); and whether D was choosing to drink more than usual for a particular reason.
- D must still demonstrate that D was suffering from a recognised medical condition, e.g. alcohol dependency syndrome. Heavy binge drinking alone is insufficient (***R v Dowds***).

A recognised medical condition such as schizophrenia coupled with drink / drugs dependency syndrome can be sufficient to meet the **s. 2(1)** criteria, where together they substantially impaired D's responsibility (***R v Joyce and Kay***). However, if the abnormality of mental functioning was caused by voluntary intoxication and not the recognised medical condition, D cannot rely on diminished responsibility.

FREEHOLD COVENANTS

This structure plan is based on an example scenario with two tenements, a mansion and a gatehouse, where the original owner of the gatehouse gave a covenant to the owner of the mansion. Both freeholds have since been sold.

STEP 1:	Define the issues:

Issues with freehold covenants often arise when one freeholder sells **part** of their land and wants to **restrict** the new owner's use of that land.

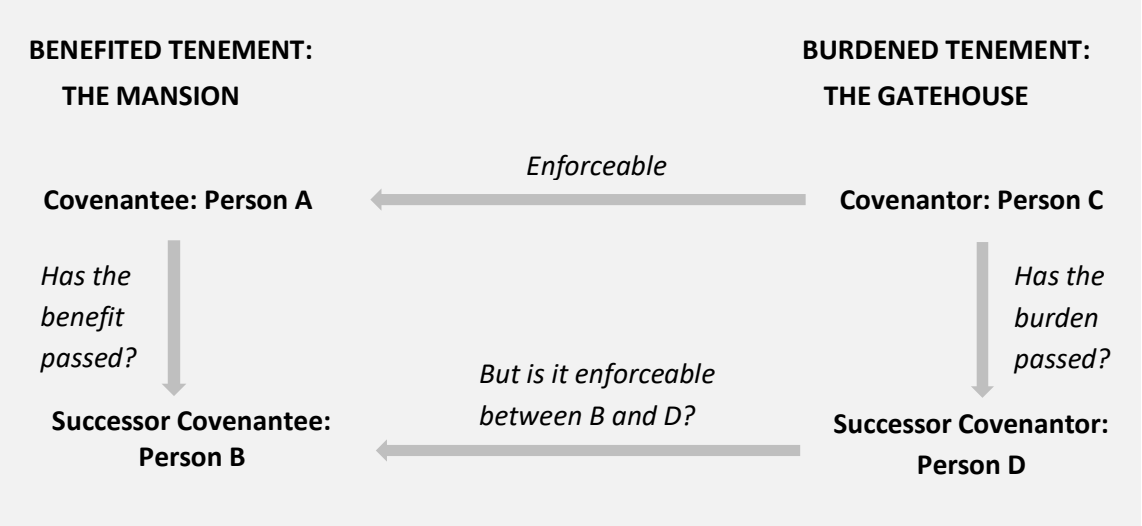
COVENANT	A covenant is a promise made by one party (the "*covenantor*") for the benefit of another party (the "*covenantee*") which is (usually) contained in a deed (**MacKenzie**).

Begin by identifying the **benefited and burdened tenements.** Then identify **the original covenantees and covenantors** and the **successor covenantees and covenantors.**

Define these terms when you first use them – remember that covenants relate to **land**:

"*BENEFITTED*" LAND	The "*benefitted*" land is the land which **benefits** from the covenant. It is owned by the **covenantee**.
"*BURDENED*" LAND	The "*burdened*" land bears the **burden** of carrying out the covenant. It is owned by the **covenantor** – the landowner who made the promise of the covenant to the original owner.

Drawing a rough diagram might help you identify the tenements and prevent basic errors**:**



State that the issue is with enforceability: successor covenantees will only be able to enforce performance of the covenants **if the benefit** enjoyed by the predecessor covenantees **passes**, **and if the burden** agreed to by predecessor covenantors **passes** to successor covenantors, because there is no longer privity of contract between the parties.

Explain what the covenants are, and what the potential breaches are:

Point out whether the covenants are positive (to do something) or negative (to not do something) covenants. Here are some **examples based on the above diagram**.

1) *Not to use The Gatehouse for teaching.* This is a negative covenant, as it restricts the covenantor's use of the land. It was breached when Person D bought The Gatehouse and set up a boarding school there.
2) *To submit building plans to the owner of The Mansion before building any extension to The Gatehouse.* This is a negative covenant with a positive condition. It was breached when Person D built a new school building without submitting plans.
3) *To pay half of the costs of the maintenance of the conservatory in the back garden of The Mansion, which both owners are entitled to use.* This is a positive covenant, as it requires the covenantor to act in order to comply with it. It was breached when Person D stopped paying.

The successor covenantee may be able to **choose who to sue**: the original covenantor or the successor covenantor. The original covenantor can be sued for damages at common law. But only the successor covenantor can be ordered to remedy the breach in equity. **State that it is preferable to sue the successor covenantor**, and that in order to have this option, **both the benefit and burden must pass in equity, or both must pass at common law**. You cannot mix and match. A covenant will only be enforceable between persons B and D in the above example if the benefit has passed to person B and if the burden has passed to person D.

It is unlikely that the burden will have passed at common law (***Austerberry v Oldham Corporation*** and ***Rhone v Stephens*** – *see STEP 5 below*), so first consider whether the burden has passed in equity. Note that **equitable remedies are preferable** as injunctions are available to prevent or remedy a breach, whereas only damages are available at common law.

STEP 2:	**Has the burden passed in equity?**

The four requirements are set out in *Tulk v Moxhay*:

1) THE COVENANT IS NEGATIVE IN SUBSTANCE:

- **Test:** the covenant will be negative if it can be complied with by doing nothing, i.e. by not expending any money, time or effort – the "*hand-in-pocket*" test (***Haywood v Brunswick***).
- If the result is unclear, it may be possible to sever it into two or more covenants, allowing just the negative part to pass the test (***Shepherd Homes v Sandham (No.2)***). Alternatively, consider whether, as a whole, the covenant can be seen as mainly positive or negative. It may be negative with a positive condition attached (e.g. a covenant not to build without first informing the dominant owner), or vice-versa. If this is the case the covenant will be viewed as entirely positive or negative, despite the contrary minor condition (***Powell v Helmsley***).
- Equity will never enforce positive covenants against successors-in-title (***Rhone v Stephens***).

2) THE COVENANT MUST ACCOMMODATE THE BENEFITED TENEMENT:

This has three parts:

i) The **original** covenantee had an estate in the benefited tenement **at the time the covenant was created**, and the **successor** has an estate in the benefited tenement **at the time of enforcement** (***London County Council v Allen***).

ii) **The covenant touches and concerns the benefited land**: "*touch and concern*" was explained by **Lord Oliver** in ***P&A Swift Investments v Combined English Stores*** as affecting "*the nature, quality, mode of use, or value of the covenantee's land*", and is not expressed to be personal – i.e. it must only benefit the landowner for as long as they own the benefited land. This could include restrictions on business use, e.g. "*no ironmongery*" (***Newton Abbott Cooperative Society v Williamson & Treadgold Ltd***). **REMEMBER**: the test is whether it benefits the land, not just the landowner.

iii) **The benefited and burdened tenements are sufficiently proximate**, i.e. neighbouring or at least closely adjacent (***Bailey v Stephens***).

3) THE ORIGINAL PARTIES INTENDED THE BURDEN TO PASS:

This can be shown through the express words of the title deed. If it is not shown in the deed, it will be implied by **s. 79 LPA 1925**, unless it is expressly excluded.

1:	**ANNEXATION:** This means that the benefit of the covenant is tied to the land **at the time that the covenant is made**. It becomes an incorporeal hereditament that **passes automatically with the land**. This may be achieved expressly, impliedly, or by statute. It does not matter how large the parcel of land is (***Wrotham Park Estate v Parkside Homes***). Annexation means annexation to each and every part of the land (***Federated Homes v Mill Lodge Properties***). **a)** Express: clear language stating that the benefit is annexed to the land, not to persons (***Wrotham Park***). E.g. "*to the vendor's assignees and heirs*" is not express language as it refers to persons instead of land (***Renals v Cowlishaw***). For there to be annexation it is not essential for the Land Registry to have entered the burden on the charges register of the servient land (***Rees and another v Peters***). **b)** Implied: this is rare, *so unlikely to be relevant to your exam question*. **c)** Statutory: express language is not always necessary, as annexation will be assumed under the interpretation of **s. 78 LPA 1925** given in ***Federated Homes***, unless expressly excluded (***Roake v Chadha***).
2:	**ASSIGNMENT:** If not annexed on creation, the benefit can be assigned (transferred) to the successor **expressly**. Any assignment must be in writing and signed (**s. 53(1)(c) LPA 1925**). The benefit must be assigned **every** time the property is transferred (***Miles v Easter***).

3:	**A SCHEME OF DEVELOPMENT:** Only mention this where a property developer subdivides a large plot of land and creates covenants that bind all plots and are enforceable by and against all purchasers. Conditions for the benefit to pass come from ***Elliston v Reacher***: **a)** the benefited and burdened tenements must derive title from one seller; **b)** the common seller divided the land, intending the covenants to apply to all plots; **c)** all the plots are burdened for the benefit of all the other plots; **d)** the benefited and burdened tenements were purchased on that basis; and ***Reid v Bickerstaff*** added that the scheme of development must be clearly defined on a plan.

4) NOTICE PROVISIONS:

A **s. 32** notice must have been entered on the charges register of the burdened freehold for registered land (or a class **D(ii)** at the LCR for unregistered land) prior to the sale of the burdened land. If notice is entered, the covenant will bind a successor purchaser. If not, only a volunteer successor (someone given the land as a gift or inheritance) will be bound.

STEP 3:	**Has the benefit passed in equity?**

REQUIREMENTS:

1) The covenant touches and concerns the benefited tenement (***P&A Swift***) (*see above*).

2) The covenantee's successor-in-title became entitled to the benefit of the covenant either by annexation, assignment or a scheme of development (***Renals v Cowlishaw***)**:**

STEP 4:	**Draw an interim conclusion:**

For which of the covenants has **both** the benefit and burden passed in **equity**? Point out that these covenants have passed, and so the successor covenantee can enforce them in equity and apply for equitable remedies such as injunctive relief, such as a negative injunction to prevent The Gatehouse being used as a school. Only discuss passing at common law (*see below*) for those covenants which have **not** passed in equity.

STEP 5:	**Has the burden passed at common law?**

General rule: the burden does **not** pass at common law (***Austerberry v Oldham Corporation***).

The only exception is the mutual benefit and burden rule (***Halsall v Brizell***), e.g. a covenant to maintain half of the shared conservatory in the above example – the benefit is the use of a conservatory and the burden is the cost of its maintenance.

The benefit and burden must be explicitly interlinked, i.e. it is not possible to take the benefit without also having to take the burden (***Rhone v Stephens***). The principle does not apply in reverse. There is no authority to suggest that "*he who bears the burden*" is entitled to the benefit (***Parker v Roberts***). The benefit and burden must pass in the same transaction (***Davies v Jones***). The successor covenantor must also have a genuine choice to take both the benefit and burden, or to take neither (***Thamesmead Town v Allotey***) – if there is no choice, then the burden will not pass (e.g. a covenant to maintain a road, which is the only means of access to the covenantor's land, would not pass; the covenantor has no real choice as they would need to maintain the road to get access to their own land).

In the above example, Person D can choose to: (i) use the conservatory and help maintain it; or (ii) not use it. Depending on the decision the burden could potentially pass.

If the burden does not pass, there are other options for the successor covenantee:

1:	**Pursue the original covenantor.** The original covenantor remains liable under common law for any breaches of the covenant, even if it is the successor that commits the breaches (***Tophams v Earl of Sefton***, applying **s. 79 LPA 1925**). However, the original covenantor can only pay damages – they are no longer in occupation so cannot remedy the breaches – so this is of limited use for the successor covenantee.
2:	**Indirectly pursue the successor covenantor by a chain of indemnity covenants.** If the original covenantor ensured on sale of the estate that a successor provided indemnities against any breaches, the successor would have to reimburse the original covenantor for any losses arising from breaches. So, if the original covenantor were pursued successfully (*see immediately above point 1*), there would be a claim for damages back from the successor. Again, only damages are available, but the threat of damages might deter the successor covenantor from starting or continuing to breach a covenant.
3:	**The covenantee could place a s. 40 LRA 2002 restriction on the register of the servient land** so that no transfer of the burdened land can take place without the covenantee's consent. What this means in practice is that the covenantee will ask for a new covenant directly from the potential successor covenantor (only allowing the land to be sold if it is given). This is a new covenant, so all issues of the burden passing are irrelevant – the burden will be taken by the successor covenantor. Note that you will still have to discuss the passing of the benefit if the covenantee sells their benefited tenement.

STEP 6:	Has the benefit passed at common law?

REQUIREMENTS:

The benefit may be expressly assigned under s. 136 LPA 1925: the original covenantee must do so in writing and give this to the successor covenantee. Written notice must also be given to the covenantor.

Alternatively, the benefit could be impliedly assigned (***P&A Swift Investments v Combined English Stores***). This requires that the covenant:

1:	"***Touches and concerns***" the benefited tenement (*see above*).
2:	**Demonstrates the original parties' intention that the benefit should pass with the land retained by the covenantee.** If it is not expressly stated that the covenant is for the benefit of the land or for successors in title to the land, this intention will be implied under **s. 78(1) LPA 1925**, unless it has been expressly excluded.
3:	**At the time the covenant was created, the covenantee must have had a legal estate in the benefited land** (i.e. one recognised by **s. 1(1) LPA 1925**).
4:	**At the time of enforcement, the successor-in-title must hold a legal estate in the benefited land**, though it need not necessarily be the same estate (***Smith & Snipes Hall Farm v River Douglas Catchment Board***).

STEP 7:	Formalities:

State that freehold covenants cannot be legal interests, only equitable interests (**s. 1(3) LPA 1925**), so they must be protected in order to bind a successor owner of the servient land (**s. 29 LRA 2002**). Otherwise, only volunteer successors (those receiving land as a gift) will be bound.

This is done by notice (*see STEP 2 above*). Next, consider:

- Have the covenants in the question been protected?
- Is the successor covenantor a purchaser or a volunteer?

REMEMBER: if the successor covenantor is a purchaser and no notice (or D(ii)) has been entered, then the covenants will not bind the successor.

Only state this part if relevant: have the covenants been extinguished or modified? This is only possible in one of the following ways:

An express agreement	between the dominant and servient landowners;
An implied agreement	(e.g. if the dominant landowner acquiesces to long-standing breaches by doing nothing over the years);
A declaration by the court	under **s. 84(2) LPA 1925**; or
A declaration by the Lands Tribunal	under **s. 84(1) LPA 1925**. (It is very difficult to obtain such release ***Re 141a Dunstans Road***).

REMEMBER: if one of the parties in the question claims that the covenant is extinguished or modified, it will only be so if one of the above methods is strictly followed.

STEP 8:	**Conclude:**

Which covenants pass? Do they pass in equity or at common law? Who now bears the benefit(s) and burden(s)? Which remedies are available for each of the covenants as a result? Is the enforceability issue solved and have all formalities been complied with?