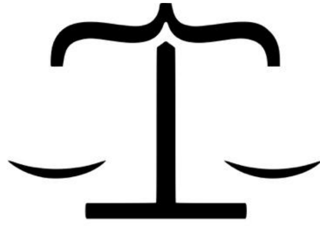

LPCANSWERED

SAMPLE NOTES FROM OUR CORE MODULES GUIDE:

- Civil Litigation: Pre-Action Considerations
- Property Law and Practice: Investigating Title and Analysing Official Copies

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LPC Answered is a comprehensive set of revision and study notes for the Legal Practice Course. Our *Core Modules* guide covers the first-stage core modules of the LPC:

- Civil Litigation
- Criminal Litigation
- Property Law and Practice
- Business Law and Practice
- Professional Conduct and Regulation
- Wills and the Administration of Estates
- Tax
- Solicitor's Accounts
- Skills

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PRE-ACTION CONSIDERATIONS

PRE-ACTION CONDUCT

Governed by the **Practice Directions – Pre-Action Conduct and Protocols** (“**PDPAC**”):

Litigation should be a last resort	The aim and spirit of the **CPRs** is to resolve disputes as cheaply and as quickly as possible. Parties should exchange information, consider Alternative Dispute Resolution (“**ADR**”) and attempt to resolve issues without beginning proceedings (**PDPAC para 8**). **The parties should always try to settle where they can**: courts are very keen on encouraging parties towards ADR. Before pursuing litigation, always explain the various types of ADR to your client and identify circumstances where ADR may be preferable to litigation. (S*ee the section “Arbitration and Alternative Dispute Resolution” for more detail*). Mediation is now mandatory for small claims under £10,000 in the County Court. Judges can impose sanctions for non-compliance.
Potential Claimants must comply with the CPRs	Claimants must comply with the **CPRs** if they wish to avoid **costs sanctions** against them (or even the **striking out** of their claims). Any potential Claimant should therefore first send a **Letter Before Claim** to the potential Defendant. The potential Defendant should reply within a reasonable time – no more than **3 months** in most cases (**PDPAC para 6**).
The Letter Before Claim must meet the requirements set out in the PDPAC	The **Letter Before Claim** should be a **genuine attempt to settle**. There is no point in sending an aggressive letter demanding enormous sums at short notice. This looks bad for the potential Claimant, negating the notion that there is a genuine intention to settle and implying an enthusiasm for litigation. The letter should state the basis of the claim, have a summary of facts and state what the Claimant wants. Key documents must be disclosed. If this information is not included, then a prospective Defendant should challenge the letter. A party's silence or negative **response** to a **Letter Before Claim** or ADR proposal may also be considered unreasonable (***PGF II v OMFS***). Aggression or silence may lead to **costs sanctions**. It is almost always in the interests of your client to make genuine attempts to settle a dispute before issuing a claim. The purpose of the **PDPAC** is to encourage early settlement and ensure the smooth running of the litigation. Beware – sending the Letter before Claim does not stop time running in respect of limitation periods.

NOTE: the **costs** of pre-action conduct should be minimal. The parties should only take “*reasonable and proportionate steps*” to identify, narrow and resolve any issues, and they cannot recover any disproportionately high costs incurred in doing so (**PDPAC paras 4 - 5**).

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If the parties have complied with the **PDPAC** and made genuine attempts to resolve the dispute, but have not settled, they must **review their case**, consider the evidence and attempt to avoid court proceedings or at least **narrow the issues** between them before going to court (**PDPAC para 12**).

NOTE: if a party makes an interim application, the court can order **pre-action disclosure** (**CPR 31.16**) and/or **pre-action inspection of property** (**CPR 25.1**). Any order is subject to the court's discretion; the applicant must demonstrate **something out of the ordinary** in order to persuade the court to make an order (***Taylor Wimpey v Harron Homes***). Any order made will be narrow and clearly defined. Third party confidentiality concerns will be considered along with the merits of the application.

NOTE: it is possible to make **Part 36** settlement offers during the pre-action phase (**CPR 36.7(1)**). (*See the section on Part 36 offers for more detail*). If the case does not settle during the pre-action stage then there are various issues to consider, including which court to bring the action in and how to fund the claim (*see immediately below*).

CHOICE OF COURT

The County Court and the High Court have a concurrent jurisdiction over most matters, meaning that a claim could be brought in either court, subject to the below. Consider the following factors to decide which court your client's claim should be brought in. When calculating the value of the claim remember to exclude interest, costs, the value of a possible counterclaim, contributory negligence and any deduction of social security benefits.

COUNTY COURT	If a claim is for **£100,000 or less** (**PD 7A para 2.1**), it should be commenced in the County Court; claims for less than this started in the High Court in London are likely to be transferred down unless certain conditions apply (**PD 29 para2.2**).
HIGH COURT	The following factors point to using the High Court (**PD 7A para 2.4**): • High value claims; • Claims involving complex facts or points of law; • Where the outcome is important to the public; or • If the Claimant believes that the High Court is the suitable venue. The court can consider whether an action should remain in the court of issue (**CPR 30.2**), But claims founded in certain causes of action **must** be brought in the High Court. These include claims in libel, judicial review and the Human Rights Act. The High Court is divided into three main divisions – the King's Bench Division (KBD), the Chancery Division and the Family Division. These each deal with different types of law, e.g. the KBD deals with planning, admiralty and general commercial law (among others), whereas the Chancery Division deals with Business, Intellectual Property and Insolvency and Companies (among other matters).
EITHER	If the claim is worth **more than £100,000**, it can be brought in either court (**PD 7A para 2.1**). For **personal injury claims** the threshold is **£50,000 (PD 7A para 2.2)**. A claim should be started in the High Court if the financial value is very high, the complexity is considerable and/or the outcome is of general importance **(PD7A para 2.4).**

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FUNDING AND FEE ARRANGEMENTS

You should explain to your client that the responsibility to pay your legal fees and disbursements is not automatically absolved by success at trial. Even if your client is successful and the court makes an order for payment of your client's legal fees, there will be a percentage (at least 10 – 30%) which the other side will not be ordered to pay. Nevertheless, your client will owe you that money.

PROFESSIONAL CONDUCT POINT

Consider the following when advising on fee arrangements/funding:

Rule 8.7 of the SRA Code of Conduct for Solicitors: you should inform the client, both at the start of the matter and as it proceeds, of the likely overall cost of the matter and any disbursements likely to be incurred.

In practice, the information you provide should include a discussion of the possible funding arrangements and the potential costs and risks of funding options, including other payments or fees for which the client may become liable. You should discuss the method of payment, including consideration of Legal Aid, insurance or a third party paying, as appropriate. Remember that clients must be given information in a way they can understand so that they can make informed decisions (**Rule 8.6**).

In addition to the traditional approach where your client pays your fees as they arise, **conditional or contingency fee arrangements are possible**.

NOTE: there are only **two** possible types, despite what they might be called:

Conditional Fee Arrangements ("CFAs")	A.k.a. "*no win, no fee*" agreements. Under a CFA, your fees are conditional on your client's success. If your client loses, then no fees (or reduced fees) are due. If your client wins, then your fees **plus a success fee** become payable. **NOTE:** your client must provide informed consent to the level of the success fee, or the court may reduce it (***Herbert v HH Law Ltd***). THE CFA must also comply with **ss. 58-58A Courts and Legal Services Act 1990** non-compliant CFAs will be unenforceable (***Diag Human v Volterra Fietta***). It is important to note that whilst the court may order the other side to pay your client's costs, it does not normally order the other side to pay the success fee – that will be paid by your client. Accordingly, it reduces the quantum of "*take home*" compensation. (*See the table below for further details*). **NOTE:** a client has always been able to terminate a CFA, but now solicitors can also do so if the client unreasonably rejects their advice regarding settlement (***Butler v Bankside***).

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Damages-Based Agreements ("DBAs")	Also known as a **contingency** fee arrangement, under a DBA if the client succeeded, a percentage of the damages awarded would be payable to the funder (often the solicitor). These have been popular and are effectively joint ventures between solicitors and their clients - if the client made a very small recovery a solicitor received very low fees. If the client was unsuccessful they had no liability for fees. In ***R (PACCAR) v Competition Appeal Tribunal*** the Supreme Court declared these agreements to be unenforceable unless they complied with the requirements set out in ***s.58AA Courts and Legal Services Act 1990.*** It is thought that many did not comply and this has led to something of a crisis in litigation funding. The Conservative administration under Mr Sunak introduced legislation to restore the position to that pre ***PACCAR*** but the legislation did not pass before the dissolution of Parliament. It will be for the incoming Labour government to decide whether to take any action.

WHAT IS PAYABLE AND/OR RECOVERABLE WHEN A CFA HAS BEEN USED?

What is payable to the solicitor and/or recoverable from the other side will depend on whether your client has been successful in their claim. Look at the precise wording of the CFA. If it specifies that success is recovery of the substantive claim **and** an award of *inter partes* costs, then solicitors' costs will not be recoverable unless that costs order is made (***Plevin v DAS Legal Expenses)***.

SOLICITOR'S FEES	*If client wins:*	Payable and normally recoverable from the other party; client must be advised that the recovery will not be 100% of the costs likely to be charged – otherwise CFA will be invalid and solicitors will not be able to recover costs.
	If client loses:	Not payable (or only reduced fees depending on the arrangement).
DISBURSEMENTS	*If client wins:*	Payable and normally recoverable from the other party.
	If client loses:	Payable, but not recoverable from the other party.
SUCCESS FEE	*If client wins:*	Payable, but not recoverable from the other party (except in limited circumstances – recovery was allowed in a claim under the **Inheritance (Provision for Family and Dependants Act 1975**) (***Higgins v Morgan***)).
	If client loses:	Not payable.

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DAMAGES	*If client wins:*	Not payable to the solicitor, and recoverable from the other side. (However, note that the success fee is effectively paid out of the damages).
	If client loses:	Where the Defendant counterclaimed successfully, damages may be payable to the Defendant.
INSURANCE (**NOTE:** *see section on insurance below*)	*If client wins:*	Payable, but not recoverable from the other party.
	If client loses:	Payable, but not recoverable from the other party.
THE OTHER PARTY'S COSTS	*If client wins:*	Generally, if the client wins they will not have to pay the other party's costs.
	If client loses:	It is likely that if the client loses they will have to pay the other party's costs (or at least a proportion of them) (**CPR 44.2(2)(a)**).

LEGAL AID

The **Legal Aid, Sentencing and Punishment of Offenders Act 2012** ("**LASPO**") has reformed legal aid funding. One of its aims was to reduce the amount of public money being used via public funding, limiting eligibility for legal aid. Many claims will not now qualify for legal aid. **Schedule 1 LASPO** contains all the details of those that are disqualified. To qualify, all claims must be governed by English law.

There are different options available if a claim is potentially eligible for legal aid:

LEGAL HELP	This involves the client being helped to **prepare** their case, but **not litigate it**.
HELP AT COURT	During a court hearing, a legal aid an **advocate** can speak for the client but will not have been formally taken on by the client. This could be on a one-off basis.
LEGAL REPRESENTATION	If the client is involved in a matter which is contested as a Claimant or Defendant, legal representation can cover the **preparation and litigation**.

Only individuals (and sometimes individuals who are partners in business) can make use of legal aid. If the claim is not an excluded type, you should consider whether the client has an appropriate case for legal aid funding. In order to do so you will need to carry out **merits** and **means** tests. Only if these tests are met will the Legal Aid Agency ("**LAA**") consider the client suitable for legal aid funding.

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- **Merits test**: consider how likely a client is to **succeed** and what the benefit will be to the client. If there is a reasonable chance of success, then you should consider whether the amount which is likely to be won by the client will warrant the likely costs that will accrue. Legal Aid funding could be refused if the client has resorted to this method without trying other alternatives first, so these should be considered. Apply for Legal Aid only if this is the single/best option (i.e. it must be **reasonable** to grant this kind of public funding).

- **Means test**: this is essentially a "***financial eligibility check***". Currently, a client's disposable capital must not be more than £8,000 (reduced to £3,000 for an immigration matter) and the client's gross monthly income should be less than £2,657 with a monthly disposable income limit of £733 in order to qualify i.e. only those with low income and capital will be eligible.

If the client is successful and wins some money, then some of the Legal Aid costs may be repaid using this money. This is known as the **statutory charge**. You must advise the client from the outset, that this charge could apply (**SRA Code Rule 8.6**). If there has been a costs order in favour of the client and there is a shortfall between the costs recovered from the other side and the LAA's costs, this difference will be deducted from the client's damages. The statutory charge which the client must pay is any difference between the costs order and the actual costs incurred.

CLS FUNDING

COMMUNITY LEGAL SERVICE ("CLS")	Sometimes informally referred to as "*Legal Aid*", CLS may provide a loan from the state to allow less affluent clients to pursue litigation.

It is important to stress that CLS is a **loan**, not a **grant:** if a party which is CLS-funded wins their case, then they will have to repay the loan. If necessary, they may have to pay this out of their damages but will never have to pay back more than was lent. If the fees and damages awarded are less than the amount of the CLS funding, then they will not have to pay more than the awarded amount.

A CLS-funded party will never end up out of pocket.

Beware if your opponent is CLS-funded because you will not get your costs awarded if you win. The state will not pay your legal fees – the only exception is where your client is a Defendant who would suffer hardship unless their reasonable costs were paid.

A **Claimant** who cannot recover legal fees from a state-funded Defendant, will nevertheless owe you the legal fees incurred. Always advise a Claimant who is considering suing a CLS-funded Defendant that your legal fees could **substantially reduce** the amount of compensation recovered.

INSURANCE

You should always check whether an existing insurance policy would cover your client's matter. If you do not do so, this could impact the fees you can later recover. If the client does not already have insurance, then you should consider whether they could take out a specific insurance policy to cover the matter.

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Claimants can get the following types of insurance policy to cover the cost of litigation:

- **Before the event** (“**BTE**”): taken out as a general policy against the risk of future claims before a specific claim is begun; or
- **After the event** (“**ATE**”): taken out after a specific claim has been made solely to cover the cost of that litigation, particularly if the insured party loses. The premium is higher than for BTE and is only available if the insurance company judges that the risk of losing is low.

NOTE: even if your client wins, recovery of the cost of any **BTE** premium from the other party is unlikely. If your client wins and is awarded costs, but took out an **ATE** insurance policy after **1 April 2013**, the premium will not be recoverable from the other party.

LIMITATION PERIODS

You should beware of limitation periods. The **Claim Form** must be issued within:

BREACH OF CONTRACT CLAIMS	**6 years from when the cause of action accrued**, which means 6 years from the date when the contract was breached, even if nobody was aware of the breach and the damage was not suffered until a subsequent date.
CLAIMS WHERE THE CONTRACT WAS MADE UNDER A DEED	**12 years** from when the cause of action accrued.
TORTIOUS CLAIMS	**6 years from when the loss/damage was suffered** (or, for latent damage, **3 years** from the Claimant’s date of knowledge with a **15-year-long stop**). Where a defendant **deliberately** conceals the existence of a claim from a potential claimant time does not start to run ***Canada Square v Potter***. Negligence or recklessness is insufficient to stop time running. For fraud claims 6 years from when the Claimant knew enough to start the preliminary work to make a claim (e.g. evidence gathering). **15 years** for some defect claims under the **Building Safety Act 2022**. For claims under the **Building Safety Act 2022** – 30 years.

NOTE: the court will **not** permit the amendment of a claim after service in order to advance a **further** claim which would otherwise be time-barred (***One Blackfriars Ltd v Nygate***).

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COURT ISSUE FEES

Claimants have to **pay issue fees** to the court when **commencing** proceedings. You may not need to know the exact figures for your exam. **NOTE:** these fees change regularly. Example paper form fees (as of May 2024):

VALUE OF CLAIM	FEE PAYABLE
Up to £300	£35
£301 - £500	£50
£501 - £1,000	£70
£1,001 - £1,500	£80
£1,501 - £3,000	£115
£3,001 - £5,000	£205
£5,001 - £10,000	£455
£10,001 - £200,000	5% of the value of the claim
£2,00,001 +	£10,000

The fee for possession proceedings in the County Court is £391 and £528 in the High Court. For claims other than money the County Court fee is £365 and the High Court £626.

NOTE: *see below for details of the new online claims portals* - costs are lower if the online process is used. You will need to check with your provider as to whether you need to know about the portals. In practice they will certainly be relevant to you.

ONLINE CLAIMS PORTALS

BACKGROUND TO THE DIGITISED PROCESS

The Online Money Claims Portal ("**OCMC**") was first introduced in March 2018 and the online Damages Claims Portal ("**DCP**") was introduced in June 2019, both by way of pilots. Since then the digital portals have been incrementally developed and it is anticipated that they will become a permanent feature. They remain pilots but the periods have been extended and will continue until October 2025. *You should check with your provider as to whether or not you need to know about them*. In any event this short section will be useful background information.

The OCMC may now be used for claims up to £25,000 in value and for multi-party claims with up to three parties. The use of the **DCP is now mandatory for all claims for unspecified damages in the**

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County Court provided that all parties are legally represented and that there are no more than three parties**.** There are a few exceptions including low value product liability claims.

Claimants' solicitors must give Defendants 14 days' notice of their intention to bring a claim through the portal. The DCP must also be used by Defendants if they are legally represented (**PD 51ZB**).

CASE MANAGEMENT IN THE PORTALS

The portals offer Standard Directions Orders ("**SDO**s"). These specify dates by which preparation steps must have been completed. Notification of the issue of SDOs is made by an email and parties must log onto the portal to download the order. Statements are exchanged and documents disclosed by being uploaded to the portals. It is now possible to apply for default judgment through the portals. The cases exit the portals if they are contested and a court hearing is required.

OFFICIAL INJURY CLAIM SERVICE

Do not confuse the **OCMS** and **DCP** with the Official Injury Claim ("**OIC**"). The OIC was set up to allow individuals to make their own claims following road traffic accidents. It is to be used where the claim for injury does not exceed £5,000 in value and where the total claim (including expenses etc.) does not exceed £10,000.

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INVESTIGATING TITLE

SEARCHES & ENQUIRIES

EXAM TECHNIQUE

IDENTIFY	the potential issues;
EXPLAIN	why those issues could cause problems for your client; and
SOLVE	provide options for the client and recommend the most appropriate.

Using the exam technique above, run through this checklist of potential issues:

1)	**DESCRIPTION OF LAND**	Is it correct and in line with the client's expectations?
2)	**RIGHTS / EASEMENTS**	This will most commonly be a right of way. Consider the following:

ADEQUACY	Is the easement adequate for the client's needs? (E.g. if considering a right of way, is the roadway wide enough to allow suitable vehicles through?) If it is not adequate, a Deed of Variation can be requested from the owner of the servient land.
MAINTENANCE	Is the easement in need of maintenance? If so, advise the client that this could mean ongoing costs. In the case of rights of way over private roads, you should also consider whether the road is likely to be adopted. If this is a possibility advise the client that this could mean incurring costs to bring the road up to the standard required by the council, but that after this the client will save on ongoing maintenance costs.
ADOPTION	In the case of a right of way, does the Local Authority have any plans to adopt it? This should be revealed by the results of Local Authority Search **CON29**.
REGISTRATION	Has the right been registered? For registered land, check the Charges Register of the servient land. If the servient land is unregistered, check the Land Charges Register. You should also check if there is a caution against first registration by searching the Index Map.

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3)	TITLE ABSOLUTE?	Any mortgagee is likely to require a client to show that they have Title Absolute to the land as a pre-condition to any loan. Title Absolute is the strongest form of title that a landowner can have – it means that they have the strongest possible proof that they are the lawful owners of the land.

TYPES OF TITLE

ABSOLUTE	Shows that LR is satisfied that the Seller is the true and proper owner.
QUALIFIED	Ownership has only been established for a short period of time, or there are reservations or missing documents – can be upgraded to absolute if the issues are rectified (**s. 62 Land Registration Act 2002** ("**LRA**")).
POSSESSORY TITLE	Where the Seller is in actual occupation without documentary evidence as to how the property was acquired. This can be upgraded to Title Absolute after someone has owned the land for 12 years, provided no adverse claims against it have been made during that period.
GOOD LEASEHOLD	Where the Tenant cannot provide evidence of the Landlord's title.

4)	CHECK THAT THE REGISTERED PROPRIETOR OF THE LAND IS THE SAME PERSON AS THE SELLER	Depending on who the seller/proprietor is confirm that you understand who can execute the relevant deed on transfer.

COMPANIES	Check name, company number and solvency at Companies House ("**CH**") – companies can execute deeds. Is an overseas company registered?
INDIVIDUALS	Can execute deeds.
JOINT TENANTS ("JTs") HOLD LEGAL ESTATE	Where more than one person is a legal owner assume that the beneficial estate is held as a joint tenancy unless there is a **restriction on the Proprietorship Register** (which will look something like this: "*no disposition by a sole proprietor…*"). If there is, that means there has been a severance of the joint tenancy at some point, and so the beneficial estate is now held as a tenancy-in-common. Check how many of the JTs or TiCs are surviving: • **All JTs alive** – all of them must execute the deed. • **All TiCs alive** – all of them must execute the deed.

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JOINT TENANTS SURVIVORS EXECUTION OF DOCUMENTS	• **1 surviving JT –** the survivor can execute as they have both the legal and beneficial interest vested in them – but remember that the Land Registry ("LR") need to see the **death certificate(s)** (or a certified copy) for the other(s). • **1 surviving TiC** – the purchaser can overreach all beneficial interests if another trustee is appointed, and the purchase monies are paid to both the surviving TiC and that second trustee. An exception is if there is a Personal Representative ("**PR**"), in which case there is no need to appoint another trustee to overreach). **Remember** that the LR needs to see both the **death certificate(s)** of the other TiC(s) and also the **deed of appointment** of the second trustee, if relevant.
PERSONAL REPRESENTATIVES	The Buyer needs to see the PRs' Grant of Representation – PRs must then assent to the sale in writing (use a deed), and all must execute. Remember that payment to one PR overreaches any beneficial interests, as above.
ATTORNEY	The Buyer needs to see a certified copy of the Power of Attorney, check that it was validly granted, has not been revoked and that this property sale is within the attorney's powers. **REMEMBER:** –the sale can still be valid if the power has been revoked and the buyer is unaware of that.
MORTGAGEE	Buyer must check that a power of sale exists (inspect the mortgage deed) and has arisen.

5)	**ARE THERE ANY LEASES OVER THE LAND?**	Advise the client that they could be bound by them and so become a Landlord on purchase.
6)	**ARE THERE ANY EASEMENTS BURDENING THE LAND?**	For example, rights of way over the land enjoyed by a neighbour.
7)	**MORTGAGES?**	There must be an **undertaking from the Seller's solicitor to discharge the Seller's mortgage** – otherwise the Buyer could be bound by the mortgage. The Seller must discharge the mortgage using either a **DS1**, Electronic Discharge ("**ED**") or an **e-DS1**.
8)	**ARE THERE ANY POSITIVE COVENANTS (WHERE AN INDEMNITY WAS GIVEN BY THE PREVIOUS OWNER(S)) OR RESTRICTIVE COVENANTS?**	If so, go through the steps overleaf:

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STEP 1:	**Will the covenant be enforceable against the buyer?** Consider your knowledge of the passing of the burdens of covenants from the conversion course, PGDL or LLB.
STEP 2:	**Will the covenant be a problem for the buyer?** **Are there any continuing, past or future breaches of the covenants?** Has the old owner been breaching the covenant? Will the Buyer want to breach it? Consider the use they want to make of the land (e.g. a restrictive covenant preventing the Buyer using the land for heavy industry may not be a problem if they want to open a shop). **Apply the facts in the scenario – is this covenant a problem for this Buyer?**
STEP 3:	**Find out who has the benefit of those covenants.** (The Person with the Benefit, or "**PWB**") can be determined via a search of the Index Map.
STEP 4:	**Is there a solution available.** Solutions vary depending on the timing of the breach and the age of the covenant. • **A past breach, where the covenant is >50 years old** – take out insurance (*conduct point - remember that **s. 19 FSMA** limits a solicitor's ability to advise on, or broker insurance). Do not tell the PWB of the breach. • **A past breach, where the covenant is <50 years old** – seek the PWB's consent. • **Intend to breach in future** – seek the consent of PWB **or** obtain insurance. Insurance will be unavailable if you have spoken to the PWB about it. It is possible to apply to the Lands Tribunal (under **s. 84 Law of Property Act 1925**) to have the covenant discharged. This is a last resort, as it will take a long time, cost a lot, and in any event the Tribunal may decide against your client. It is only for **restrictive** covenants. **NOTE:** the beneficiary of a covenant has the right to modify or vary restrictive covenants (***Cheung v Mackenzie***).

9)	**ARE THERE ANY OTHER CHARGES NOT ON THE REGISTER?**	The following unregistered charges could override a purchase, and so the Buyer must be aware that they could be bound by them:

- **Interests of persons in actual occupation.**
- **Leases** – but only if ≤ seven years in length, or ≤ 21 years if granted before 13 October 2003.
- **Easements** – only legal easements created under the rule in ***Wheeldon v Burrows*** and equitable easements created before 13 October 2003 override.

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The Buyer's solicitor must **raise requisitions** (i.e. make enquiries) with the Seller's solicitor and **inspect the property** in order to check for such interests.

10)	**ANY ISSUES ON THE ENQUIRIES BEFORE CONTRACT?**	The **CPSE.1** is the questionnaire on which the Seller answers the Buyer's questions in commercial transactions. Forms **TA 6-10** are used for most residential questions. The Seller could be liable for **misrepresentation** if they have lied on it. The Seller must also provide an Energy Performance Certificate
11)	**ANY ISSUES VISIBLE ON INSPECTION?**	Also advise that a structural survey should be carried out by a professional surveyor or structural engineer.
12)	**POSSIBLE ENVIRONMENTAL ISSUES – CONTAMINATED LAND**	Where there is "*significant harm*" or the possibility of harm or water pollution (**s. 78A (2) EPA**).

Check:

- Is there any hint of contamination on the facts (e.g. there was previously a warehouse on the land which could have stored industrial chemicals)? If so, it is advisable that a Phase I inspection / survey is carried out. If anything is found, the Buyer may need to commission an expensive Phase II inspection.
- Where there is pollution on the land, it is the original polluter who is responsible, but beware that the current owner will be liable if the polluter is untraceable and the local authority serves a Remediation Notice. To prevent the Buyer becoming liable, ensure that the Seller cleans up – and check on the **CON29** whether the Local Authority has served, or will serve, a Remediation Notice.
- The Buyer may need to do more detailed searches, e.g. for flood risk or coal mining. Consider the answers in the **CON29M** as to whether this could be needed.

13)	**DRAINAGE & WATER**	Is the property connected to the mains water and a public sewer? Lateral drains should now all have all been adopted by the local utility company. Check this – ask the utility supplier if it is commercial property, or commission a **CON29DW** if residential.
14)	**CHANCEL REPAIR LIABILITY?**	**NOTE:** there was a requirement that all such liabilities should be registered as of **13 October 2013** and so this should be visible on the **Official Copies** – but the position is not entirely clear. The LR has guidance indicating that it will still accept registrations for notices that lost their automatic protection after 13 October 2013. There is, as yet no case law. It is common to search and to take out insurance.

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15)	**ROADS**	The **CON29** will provide answers as to whether the Local Authority has any plans to adopt any private roads. Where the boundary of a road is unclear the Highways Authority will clarify.
16)	**TREE PRESERVATION ORDERS / SMOKE CONTROL ORDERS?**	The Buyer will be bound by such orders, so check the **LLC1** to see whether there are any orders over the property.
17)	**PLANNING?**	Check the answers provided by the "*Local Search*" (which is just a term for the **LLC1** & **CON29**) in respect of the following potential issues. *(The points below are a summary – full details about potential planning issues are explained in the next section.)*

IS THE LAND IN A CONSERVATION AREA?	If so, the Buyer will need consent for tree felling / demolition – and planning permissions generally will be harder to obtain. Check that planning permissions for any works carried out from 2013 had been obtained (if required) and that anything before 2013 had Conservation Area Consent.
IS THERE A LISTED BUILDING ON THE LAND?	If so, Listed Building Consent will be needed for any changes – and planning permissions generally will be harder to obtain.
CHANGE OF USE?	Planning permission is needed to change between the classes of use of land that are set out in the **Use Classes Order** ("**UCO**") unless there is a **General Permitted Development Order** ("**GPDO**") exception. Check all planning permissions – if there was a change of use recently where no planning permission was granted, then the council has ten years to enforce. The Buyer would be bound to use the land in accordance with the use class(es) to which it was restricted previously.
BUILDING WORKS?	Planning permission is needed, unless it is a minor permitted development – council has ten years to enforce in respect of the **completion of a dwelling** built without planning permission being granted, and **where a condition or limitation on planning permission has not been complied with the council also has ten years to enforce**. If the Seller has carried out recent works without planning permission, the Buyer must insist that the necessary permissions are obtained prior to exchange. Be aware that permitted development rights can be withdrawn by a Local Authority when planning permission is granted, so that all subsequent developments, no matter how minor, will require planning permission.

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BUILDING REGULATIONS	These must be complied with for any building works, and there is no time limit on enforcement. Has the seller complied? If not, the Local Authority can inspect and issue a **Regularisation Certificate** – otherwise the Buyer could be bound to carry out expensive remediation works to ensure compliance.

18)	**ARE THERE ANY PUBLIC RIGHTS OF ACCESS OVER THE LAND?**	Answers will be revealed on the **CON29.**

WHAT SEARCHES SHOULD BE CARRIED OUT?

Always search the following and **advise carrying out a physical inspection/survey** of the land:

- Official copies (*see below for more details*);
- Pre-contract enquiries form;
- Register of Local Land Charges – Requisition for Search and Official Certificate of Search **LLC1**; (this information is being migrated to HM Land Registry, once the information has migrated the search will be conducted there);
- Chancel repair search;
- **CON29** (enquiries of Local Authorities) (these searches remain with the local authorities);
- **CON29O** (a series of optional supplementary questions to **CON29** on a range of topics, such as pollution, noise abatement, urban development areas and pipelines);
- **CON29DW** (drainage and water);
- Environmental searches (*see above*); and
- Highways search.

If **unregistered**, always also:

- **Search** the Index Map; and
- **Search** the Land Charges registry using form **K15.**

Other searches to perform **if the facts suggest** there might be an issue:

- **CON29M** (mining);
- Companies House search;
- **K16** search for bankruptcy (where acting for a lender against an individual borrower);
- **Commons** registration search;
- Canals / rivers search; and
- **Railways**.

NOTE: when you are acting for a vendor and have replied to pre-contract enquiries and something occurs to make an answer inaccurate, you should advise the purchaser's solicitors of the change rather than keep quiet and hope that you can escape liability for the inaccuracy on the basis of a non-reliance clause in the contract. In ***First Tower Trustees Ltd v CDS Superstores International Limited*** replies to enquiries correctly noted that there was no environmental concern regarding asbestos. When the vendor became aware of issues the purchasers were not advised. This was held to be an actionable misrepresentation.

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If the invasive plant, Japanese Knotweed is growing on the property, neighbours may have a claim for diminution of value which occurred after a defendant breached their duty by failing to deal with the plant (as clarified by the Supreme Court in ***Davies v Bridgend CBC***). You will need to ensure that the existence of the plant is declared on form **TA6**.

ANALYSING OFFICIAL COPIES

EXAMPLE OFFICIAL COPY

- TITLE NUMBER : RE32510

A: PROPERTY REGISTER

OXFORDSHIRE: OXFORD

1. (3 July 1986) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 14 Rayleigh Road, Oxford, OX1 3NP.
2. (3 July 1986) The land tinted yellow on the title plan has the benefit of the following rights granted by the Conveyance dated 27 July 1968 referred to in the Charges Register: “TOGETHER WITH the benefit of a right of way on foot only over that part of the shared accessway belonging to 14 Rayleigh Road.”
3. (3 July 1986) The land has the benefit of the rights granted by the Transfer dated 21 August 1974 referred to in the Charges Register.

NOTE*: the Property Register describes the land and estate comprised in the title. It details the location and gives a brief description of the property. This is usually the address. It may include reference to rights that benefit the land, such as legal easements.*

B: PROPRIETORSHIP REGISTER

TITLE ABSOLUTE

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1. (28 September 2001): PROPRIETOR: PETER SMITH and ANNE SMITH of 14 Rayleigh Road, Oxford, OX1 3NP.
2. (28 September 2001) The price stated to have been paid on 2 September 2001 was £500,000.
3. (28 September 2001) Except under an order of the registrar no disposition by the proprietor of the land is to be registered without the consent of the proprietor of the charge dated 2 September 2001 in favour of the Goldfarm Building Society referred to in the Charges Register.

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4. (28 September 2001) RESTRICTION: No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.

NOTE*: the Proprietorship Register records the quality of the title, for example absolute or limited title. It identifies the owner of the property, giving details such as their name and address. It shows whether there are restrictions on the power to sell the property or otherwise deal with the land. It may give a price paid for the land on a specified date.*

C: CHARGES REGISTER - ABSOLUTE FREEHOLD

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1. (3 July 1986) A Conveyance of the land tinted pink on the title plan dated 18 December 1960 made between (1) Gary Phillips (Vendor) and (2) George Roney (Purchaser) contains the following covenants:-

   "THE Purchaser hereby covenants with the Vendor so as to bind the land hereby conveyed into whosoever hands the same may come that the Purchaser and his* successors in title will not use the premises hereby conveyed for any purpose other than as a flower shop." (***NOTE**: in 1960 the pronoun "his" would have been used).

2. REGISTERED CHARGE dated 2 September 2001 to secure the moneys including the further advances therein mentioned.

   PROPRIETOR Goldfarm Building Society of Manor House, High Road, Oxford, OX4 4NP.

NOTE*: the Charges Register identifies charges and other matters that affect the land.*

A PRACTICAL APPROACH TO ANALYSING OFFICIAL COPIES

1:	**Identify** the issue. **a)** In which register does the issue appear? Property, Proprietorship or Charges? **b)** What is the number of the entry?
2:	**Describe** the entry and the issue which is noted. Why is this a problem? **a)** Does it relate to a particular sensitivity on the part of the client or to a particular way in which they wanted to use the land? • Are they a certain type of business? • Are they sensitive in some way? • Do they want to undertake a particular action, such as building works? **b)** Is it a more general problem relating to the land itself (e.g. environmental issues or lack of planning permission)?

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3:	What is the **appropriate action** in the circumstances? **a)** Initially: **i)** Make enquiries of the seller; **ii)** Make enquires at the Land Registry; and/or **iii)** Inform the client. **b)** Is further action required? Consider: **i)** Surveys **ii)** Expert advice
4:	**Is there a solution to the issue. Consider:** **a)** Defective title indemnity insurance **b)** Putting a special condition into the contract **c)** Appointing a second trustee

PROFESSIONAL CONDUCT POINT:

Remember the general prohibition in **s.19 Financial Services and Markets Act 2000.** Providing advice on insurance is a regulated activity, which may not be carried out unless the advisor is authorised or exempt. You should remember this in relation to the suggestion regarding insurance. (*You will find more detail on this in the Conduct section of this guide*.)

EXAMPLE OF OFFICE COPIES ANALYSIS

1:	There is a potential issue in the **Proprietorship Register** at **entry 3**: No disposition without the consent of the proprietor of Goldfarm Building Society.
2:	The entry states: "*RESTRICTION: No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court*." This means that a single owner cannot sell the property on their own as the property is owned beneficially as **TiCs**.
3:	This may be an issue for the client if one of the owners does not want to sell the property or if one owner is deceased; in that case a **second trustee will need to be appointed**. If a second trustee is appointed, the purchase price should be paid to both trustees in order to overreach any beneficial interest which may remain under the trust. This is a safe method to ensure that the buyer is free from liability in relation to the second trustee.
4:	The client will have to ensure that a new trustee **has** been appointed and will require **evidence** of the appointment. If the second owner is deceased, it may be possible for the seller to prove that the deceased's share in the property passed to the seller.

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