



PGDL ANSWERED

SAMPLE NOTES FROM OUR PGDL *ULAW CORE GUIDE*:

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

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CONSIDERATION, PROMISSORY ESTOPPEL & ECONOMIC DURESS

STEP 1:

Is there a new contract being formed or is there an issue with a variation of an existing contract?

Briefly 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. State what the consideration in the scenario is.

Definition of consideration:

“ An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought (*Sir Frederick Pollock*, quoted in *Dunlop v Selfridge*). ”

Both the promisor and promisee must provide consideration.

- Have both parties provided consideration? State 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 C by D, but the issue is whether C provided consideration for this variation.*”

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 not good consideration 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 pay more (see Step 5 below); or
- 3) The variation is a promise to accept less (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 (*Roscorla v Thomas*).

EXCEPTION: in *Pao On v Lau Yiu Long* the 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 passed 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? (<i>Lampleigh v Braithwaite</i>).
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 (<i>Re Casey's Patents</i>).
3:	If the payment had been made in advance, would it have otherwise been legally enforceable? i.e. there are no other consideration, acceptance or ICLR issues.

2) Consideration must move from 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 the claimant has provided consideration.

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 sufficient, but need not be adequate:

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). **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. The court held that the wrappers did constitute consideration for the records; they represented Nestle's increased sales of chocolate bars.

- **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 (NOTE: US case)** – promising to abstain from drink and tobacco was giving up a legal right; a promise to do so did amount to 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 pay more, or a promise to accept less? Do not mix up these situations.

PROMISES TO PAY MORE (UPWARD VARIATIONS)

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) (**Collins v Godefroy**).

PUBLIC/LEGAL DUTIES:

- **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.
- **Glasbrook Bros Ltd v Glamorgan County Council** – in order to be good consideration something extra must be offered above one’s existing public/legal obligations; or
- **Williams v Williams** – per **Denning LJ**, such a transaction must not be “*contrary to public policy*.”

DUTIES OWED TO THIRD PARTIES:

- **Scotson v Pegg** – 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.

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**.

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.** But this is a matter of fact and degree; and public policy arguments must be considered (as in **Harris v Watson**). 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); and
3:	B approaches A and promises to pay A extra to complete on time; and
4:	B obtains a “ <i>practical benefit</i> ” or “ <i>obviates a disbenefit</i> ” NOTE: this was not defined in Roffey Bros. In Roffey the benefit 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 (<i>see below</i>); then
6:	The benefit to B is capable of being consideration, so B’s promise to pay more for the same will be binding.

Conclude your analysis of the **Roffey Bros.** criteria: a promise to pay more will be good consideration if it goes above and beyond, or if it fits the **Roffey Bros.** criteria.

When applying **Roffey Bros.**, you must be certain that the variation did not result from duress, so always go through the criteria for duress:

DURESS	“Some sort of violence, illegitimate threat or pressure.” (Pao On v Lau Yiu Long). You must know two types:
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1) Duress of the Person:

- E.g. threats to kill someone if they do not vary a contract.
- Test for causation: the duress need not be “*the*” reason for entering into the contract, just “*a*” reason for entering into it (**Barton v Armstrong**).

2) Economic Duress (this will probably be most relevant to your exam question):

E.g. I have a contract to drive someone to the airport. I then find out that no other taxis are free. I refuse to fulfil the contract unless I am paid double. The passenger has an urgent flight and no alternative, so accepts. This **variation** of the contract is agreed to under economic duress, and so is **voidable** by my passenger.

In *Carillion Construction Ltd v Felix*, Dyson J laid out the criteria needed for economic duress (following *DSND Subsea v Petroleum Geo*):

“ There must be pressure, resulting in (a) a lack of practical choice for the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract. ”

Work through these criteria:

(a)	<p>Lack of practical choice: did the victim have any realistic practical <u>alternative</u> but to submit to the duress?</p> <ul style="list-style-type: none"> • <i>Atlas Express v Kafco</i> – Christmas baskets had to be delivered on time. • <i>Carillion Construction v Felix</i> – sub-contractors delay exposed the main contractors to very significant penalty charges for late completion.
(b)	<p>Illegitimate pressure: Do any of the following apply?</p> <p>i) Threatened breach of contract? i.e. an illegitimate threat for an illegitimate purpose. This is not necessarily illegitimate but is highly likely to be so. Comment again on <i>Atlas Express v Kafco</i>.</p> <p>ii) Was the pressure applied in good or bad faith? “<i>Bad faith</i>” is an attempt to claim money to which you know that you are not entitled.</p> <p>iii) Did the victim protest? i.e. protest <u>at the time</u> that the threat was made. For example:</p> <ul style="list-style-type: none"> • <i>Atlas Express v Kafco</i> – even though Atlas submitted to the duress, they had protested at the time and sued immediately afterwards. <p>iv) Did the victim affirm? i.e. once the duress had been lifted, did the victim immediately seek redress, or did they affirm the contract by inaction? For example:</p> <ul style="list-style-type: none"> • <i>The Atlantic Baron</i> – the court held that waiting 8 months before going to court was too long a delay. The claimant was taken to have affirmed the contract.
(c)	<p>A significant cause: the claimant must be able to show that the duress induced (i.e. caused) the claimant to enter into the contract.</p>

The effect of duress is to render the contract voidable, which means that the contract remains valid until the victim takes the perpetrator to court to **rescind** or affirm the contract (***Adam Opel GmbH (2) Renault SA v Mitras Automobile***). Briefly discuss the remedy of rescission (See Misrepresentation chapter – remedies: rescission).

REMEMBER: if only the variation is the result of duress, and the original contract was freely negotiated, it is the **variation** which is voidable – the underlying contract is unaffected.

ALTERNATIVELY: PROMISES TO ACCEPT LESS (DOWNWARD VARIATIONS)

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 his word when it would be unjust or inequitable for him to do so (***Denning LJ in Central London Property Trust v High Trees House***).

PROMISSORY ESTOPPEL

Promissory estoppel was established (*obiter*) 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 (<i>Hughes v Metropolitan Railway</i>).
2:	A change of position by the promisee in reliance on the promise. In <i>Emanuel Ajayi v Briscoe</i> there was no change of position; the defendant had simply carried on his business when the lorries were laid up.
3:	The reliance need not be detrimental (<i>WJ Alan & Co v El Nasr</i> – NOTE: these were <i>obiter</i> comments only).

4:	<p>It must be inequitable for the promisor to go back on the promise.</p> <p>In <i>D&C Builders v Rees</i> Mrs Rees could not use the equitable remedy of promissory estoppel because she had not come to equity with “<i>clean hands</i>”. 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.</p> <p>NOTE: this is not a chance to discuss duress – use the equitable maxims instead.</p>
5:	<p>Promissory estoppel is a shield, not a sword.</p> <p>It can only be used as a defence, not a cause of action (<i>Combe v Combe</i>).</p>

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 Manufacturing v Tungsten Electric* – the first lawsuit 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: in 2018 the Supreme Court 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 stated (*obiter*) that the *Roffey Bros* exception only applies to promises to pay more.

However, the creation of new precedent would involve a re-examination of *Foakes v Beer*, which the Supreme Court declined to tackle in *MWB Business Exchange v Rock Advertising*.

Lord Sumption said: “*It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.*”

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.

STEP 6:	<p>Conclude. Is there valid consideration? Is there a valid contract? Who can recover what and from whom?</p>
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HOMICIDE (MURDER AND MANSLAUGHTER)

STEP 1: Line by line, find the crime.

LOOK FOR: a death.

STEP 2: State what the defendant's potentially criminal behaviour is and the offence.

EXAMPLE: D shoots V dead – murder.

NOTE: whenever V has died, **start with murder**, even if it is obviously manslaughter – always work through the elements of murder first.

Murder is not codified in statute, neither are the involuntary manslaughter offences (**constructive manslaughter, gross negligence manslaughter**) – their definitions come from case law.

If an **organisation** is involved – consider **corporate manslaughter** as well (*see below*), but **after** discussing whether the individuals involved are liable for murder/manslaughter.

STEP 3: Set out the AR and MR of the homicide offence you are discussing.

OFFENCE	ACTUS REUS	MENS REA
Murder (Coke)	Causing death of human being	Intent to kill <i>or</i> Intent to cause GBH
Constructive / unlawful act manslaughter (Newbury and Jones)	Doing an unlawful act (= AR of any offence) Which is dangerous Causing death of V	MR of the unlawful act
Gross negligence manslaughter (Adomako)	D owes duty of care to V D breaches this duty Which carries a risk of death Which causes V's death And amounts to gross negligence	N/A

STEP 4:

Work through the **actus reus** of the homicide offence you are discussing, applying the law to the facts.

AR MURDER

CAUSING DEATH OF A HUMAN BEING (*Coke*)

- **Death** requires the **irreversible death of the brain stem** (*Malcherek and Steel*).
- A **human being** means a person **capable of independent life** – a baby must be born alive to be the victim of murder (*Poulton*).
- **Causation** requires detailed discussion of both **factual** and **legal** causation:
 - 1) **Factual causation** – **but for** D's conduct, would V have died as and when they did? (*White*)
 - 2) **Legal causation** – the **chain of causation** is intact if D's actions are a **continuing, operating and substantial** cause of V's death (*Malcherek and Steek*):
 - **operating**: still having **some effect**; **substantial**: more than **negligible** (*Cato*)
 - if V's death has **multiple causes**: D's act need to be the **sole/main** cause if it contributed **significantly** (*Pagett*)
 - determine if there has been a **new intervening act** (**NOTE**: avoid Latin) – the chain of causation is **not** broken provided this was either **foreseen** by D or would have been **reasonably foreseeable** (*Watson*) – e.g. hospital treatment, V's own actions, natural events:
 - a) **third party acts** need to be **foreseeable** as a reaction to D's actions (e.g. V being hit by police marksmen aiming at D) (*Pagett*);
 - b) V's **suicide** needs to be a **foreseeable** response to D's actions (i.e. it is not a free and independent decision) (e.g. V has been debilitated and left in unbearable pain) (*Wallace*);
 - c) **other actions by V** need to be a **natural result** of D's actions (e.g. jumping out of a car) (*Roberts*);
 - d) **medical treatment** will only break the chain of causation if it is
 - so **independent** of D's acts,
 - so **potent** in causing V's death,
 - that D's actions are made **insignificant** (*Cheshire*);

REMEMBER: the **eggshell skull** rule – D must take V as D finds V (e.g. if V has a pre-existing condition making them more susceptible to death/serious injury) (*Blaue*); this includes if V dies from a condition which they cannot have treated due to D's actions (*McKechnie*).

AR CONSTRUCTIVE / UNLAWFUL ACT MANSLAUGHTER

(*Newbury and Jones*)

NOTE: only discuss this **after** discussing murder, if the MR for murder cannot be made out (because D did not intend to kill/cause GBH).

Unlawful act

- D must have committed an **unlawful act** – i.e. **any** offence. The easiest and simplest to discuss will be an **assault** (simple/physical) – discuss the AR elements for this (e.g. inflicting unlawful personal force on V – *see Non-fatal offences*).
- **NOTE:** unlawful act manslaughter cannot be constructed from an **omission to act** – this must be a **positive** act (*Lowe*). If D's **omission** has caused V's death – consider **gross negligence manslaughter** instead (*see below*).

Which is dangerous

- D's act must have carried the risk of **some** harm (not necessarily **serious** harm or **death**). Whether or not this is the case is to be judged by a **sober and reasonable** person – would they consider that D's actions carried the risk of some harm, had they been present at the time and observed the circumstances? (*Church*)

Causing V's death

- Usual rules of legal and factual causation apply, but **NOTE:** you will have discussed this when discussing the AR of **murder** (*see above*).
- **REMEMBER:** D **has** caused the death of a human being if you are now discussing unlawful act manslaughter; what differentiates murder is that D did not **intend** this to occur (or to cause GBH).

AR GROSS NEGLIGENCE MANSLAUGHTER

(Adomako)

NOTE: only discuss this **after** discussing murder, if the MR for murder cannot be made out (because D did not intend to kill/cause GBH).

D owes duty of care to V

- Normal rules of negligence apply. Construe this widely (e.g. driver to other road-users; doctor to patient etc.), and do not discuss detailed principles of tort.

D breaches this duty

- Includes **omissions** (*Khan*), provided that there is a duty to act due to:
 - a **special relationship** (*R v Stone and Dobinson*);
 - **contractual** duty (*R v Pittwood*);
 - **statutory** duty;
 - or D created a **dangerous situation** (*R v Miller*).

Breach carries risk of death

- Would a reasonable person foresee a serious and obvious risk of **death**? (e.g. in *R v Singh*, a lodger died from a carbon monoxide leak which the defendant (*Singh*) did not properly inspect; also see *R v Rose*:
 - This cannot just be **some** risk.
 - The risk must be **obvious**.

Breach causes V's death

- Usual rules of legal and factual causation apply, but **NOTE**: you will have discussed this when discussing the AR of **murder** (*see above*).
- **REMEMBER**: D **has** caused the death of a human being if you are now discussing gross negligence manslaughter; what differentiates murder is that D did not **intend** this to occur (or to cause GBH).

Breach amounts to gross negligence

- Did D's acts/omissions fall **so far below the standards of the reasonable person that they deserve criminal punishment?**

NOTE: if V has died as a result of D's **driving**, consider **gross negligence manslaughter before death by careless or dangerous driving** (the order of possible offences to consider being: murder → gross negligence manslaughter → death by careless / dangerous driving) (*see Driving offences*).

STEP 5: (If the AR is made out) **Work through the mens rea, applying the law to the facts.**

MR MURDER

(Coke)

Intent to kill or Intent to cause GBH

- **GBH**: really serious harm (*Smith*).
- **ASK**: was it D's aim/desire/purpose (*Moloney*) to cause at least **really serious harm** to V? E.g. how hard did D hit V? Was D aiming at V's head, or somewhere less vital?
- **Indirect intent** is available as recklessness is not: regardless of what D directly intended, was V's death/serious harm a:
 - **virtual certainty** as a consequence of D's act *and*
 - did D **subjectively** appreciate this?
 - If so, this may be evidence of D's intent to kill/cause GBH (*Woollin*).
- **Benevolent motives** ('mercy killings') are irrelevant: an intent to kill/GBH is still the MR for murder (*Inglis*).

REMEMBER: If D did not **intend** to kill/cause GBH, but V has died → consider **constructive manslaughter or gross negligence manslaughter** after discussing this (*see below*).

NOTE ON ATTEMPTED MURDER: remember that for D to be liable for attempted murder (AR = an act more than merely preparatory to murdering V – see *Attempts*), D must intend to **kill** only (i.e. an intent to cause GBH will **not** suffice for attempted murder) (*Whybrow*).

MR CONSTRUCTIVE / UNLAWFUL ACT MANSLAUGHTER

(Newbury and Jones)

MR of the unlawful act

- E.g. for **battery/physical assault** – intent *or* recklessness as to inflicting unlawful personal force on V.

NOTE: this is **involuntary manslaughter**, as D did not intend to kill or commit GBH, but V has died as a result of their actions.

MR GROSS NEGLIGENCE MANSLAUGHTER

(*Adomako*)

No MR required

- **REMEMBER:** crimes of **negligence** have no MR requirement. What D intended or foresaw is **irrelevant**. Their actions in breaching a duty of care have caused V's death, and this amounts to gross negligence. D's state of mind may, however, be evidence of D's being **grossly** negligent (e.g. turning up to work hungover and confused to A and E as a doctor, meaning they mistakenly administer an overdose of morphine).

NOTE: this is **involuntary manslaughter**, as D did not intend to kill or commit GBH, but V has died as a result of their actions.

STEP 6: (If the MR is made out) **Consider any defences, applying the law to the facts.**

Two **partial defences** apply – but only to **murder** (i.e. not to constructive or gross negligence manslaughter). If successful, D would be convicted of **voluntary manslaughter** (as D still intended to kill/cause GBH). You should discuss these in detail if they apply.

LOSS OF CONTROL (ss. 54-55 Coroners and Justice Act 2009):

There are three requirements, all of which must be shown for a successful defence. If the prosecution can prove that just one element is missing the defence will fail (*R v Clinton, Parker & Evans*):

- 1) D kills V as a result of **loss of control**;
- 2) This loss of control has a **qualifying trigger**;
- 3) Someone of D's sex and age with normal tolerance and self-restraint would have acted **similarly**.

Work through the following three requirements:

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

- The *evidential* burden is on D to raise loss of control as a partial defence – to the *civil* standard of proof (balance of probabilities); once raised in evidence, it is for the prosecution to then prove it does not apply – to the *criminal* standard of proof.
- Loss of control = a loss of the ability to act in accordance with **considered judgment** or loss of **normal powers of reasoning** (*Jewell*) – did this, *in fact*, cause D to kill V?

NOTE: the loss of control does **not** need to have been **sudden** (s. 54(2)).

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

FEAR TRIGGER (s. 55(3))	<ul style="list-style-type: none"> • This means D feared serious violence from V – either against D, or against a 3rd party • This fear cannot have been caused by something D incited in order to justify D’s violence (s. 55(6)(a)). • Also consider self defence – which would be a full defence to murder (<i>see Defences</i>).
ANGER TRIGGER (s. 55(4))	<ul style="list-style-type: none"> • This means thing(s) said or done which: <ul style="list-style-type: none"> (a) constitute circumstances of an extremely grave character (b) caused D to have a justifiable sense of being seriously wronged. • This cannot be V’s sexual infidelity (s. 55(6)). <i>However</i>, V’s sexual infidelity does not prevent other possible triggers being used as evidence for D’s loss of control (<i>Clinton, Parker & Evans</i>) • This anger cannot have been caused by something D incited in order to justify D’s violence (s. 55(6)(b)).

NOTE: If either of the qualifying triggers (fear or being wronged) was caused by a “*considered desire for revenge*” (s. 54(4)); then it is indefensible (e.g. ‘honour’ killing).

3) Consider a comparator – would they have acted in the same/a similar way to D (in the circumstances D was in) (s. 54(1)(c))?

- This means someone of **D’s sex and age**, with a normal level of tolerance and self-restraint **for someone of that sex and age**.
- Consider *all* the circumstances D found themselves in – how would this other person (of D’s sex and age, with a normal level of tolerance and self-restraint) have acted?

NOTE: if D is **voluntarily intoxicated**, this is *not* to be considered relevant as a circumstance to determine whether someone of D’s sex and age, with a normal level of tolerance and self-restraint, would have acted similarly – the comparator must be considered **sober** (*Asmelash*).

DIMINISHED RESPONSIBILITY (s. 2(1) Homicide Act 1957):

The burden of proof is on the defence, on the balance of probabilities (*see s. 2(2) Homicide Act 1957* (“HA 1957”). The **four** requirements are set out in s. 2(1) HA 1957:

1) D was suffering from an ‘abnormality of mental functioning’...

- This arises from **recognised medical condition**;
- This **substantially impairs** D’s ability to do one/more of three things;
- This **explains** D’s actions in killing V.

2) which arose from a recognised medical condition...

- This could be a physiological or psychological condition contained in the World Health Organisation International Classification of Diseases.
- It also includes conditions which are not on the WHO's ICD list but are generally recognised in medicine (*CPS Legal Guidance on Homicide: Murder and Manslaughter*).
- There must be evidence that this is a **recognised medical condition** (N.B. 'battered spouse syndrome' may be such a condition).

3) ... which substantially impaired the defendant's ability to do certain things...

- **understand** the nature of D's conduct *and/or*
- form a **rational judgment** *and/or*
- exercise **self-control**
 - a) 'Substantially' means the impairment must be "more than trivial or minimal" (*R v Golds; R v Lloyd*).
 - b) **NOTE:** consider D's ability to do *each* of these things – was this ability **substantially** affected by D's medical condition?

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**).
- 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*).

NOTE: there must be a **direct causal link** from D's medical condition → abnormality of mental functioning → substantial impairment of D's ability to understand nature of conduct/form rational judgment/exercise self-control → D killing V.

NOTE: If D was **voluntarily intoxicated** at the time, they could still rely on an underlying medical condition, provided this fulfils the other criteria (it caused abnormality of mental functioning, substantially impaired D's ability to understand/rational judgment/self-control, and explains D killing V) – e.g. alcoholism (*Dietschmann*).

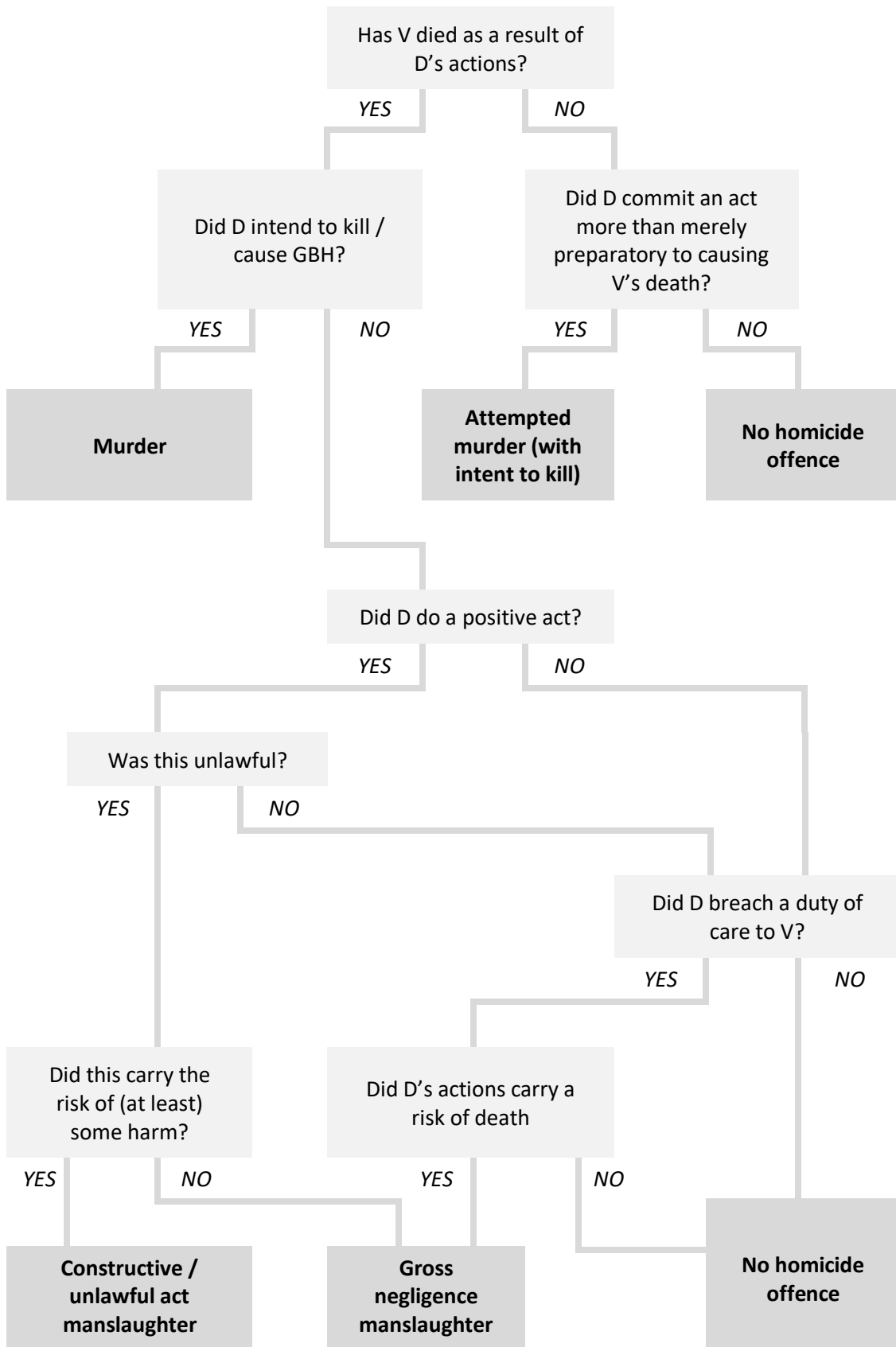
Section 76 Serious Crime Act 2015 created a new offence of coercive control in family relationships. It is possible that this will be a defence to murder where a defendant can demonstrate a history of coercive control against them.

GENERAL DEFENCES

- The common law defences can apply to any of the homicide offences – murder, constructive manslaughter, gross negligence manslaughter.
- **Voluntary intoxication** is only a defence to **murder**, as murder is a **specific intent crime**; constructive/unlawful act manslaughter may be committed recklessly (if the unlawful act is assault), meaning voluntary intoxication is not a defence (see *Defences*). This means even if D successfully raises voluntary intoxication as a defence to murder, they may still be liable for **constructive/unlawful act manslaughter** (if the unlawful act is a **basic intent crime**, capable of being committed recklessly).

HOMICIDE OFFENCE FLOWCHART

(where D is an individual)



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.

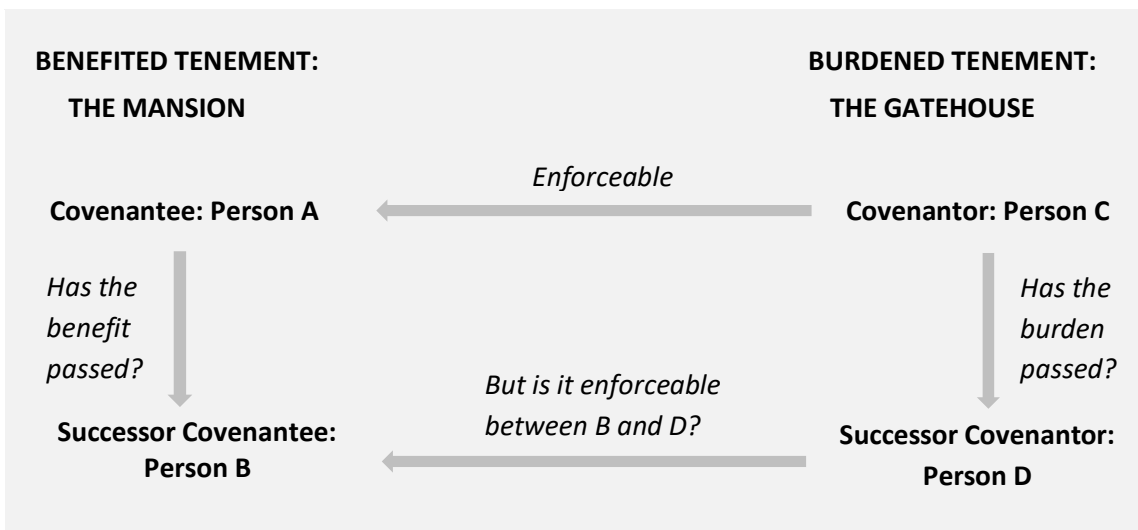
COVENANT	A covenant is a promise made by one party (the “ <i>covenantor</i> ”) for the benefit of another party (the “ <i>covantee</i> ”) which is (usually) contained in a deed (MacKenzie).
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Begin by identifying the **benefited and burdened tenements**. 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 “ <i>benefitted</i> ” land is the land which benefits from the covenant. It is owned by the covantee .
“BURDENED” LAND	The “ <i>burdened</i> ” 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:	<p>ANNEXATION:</p> <p>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.</p> <p>This may be achieved <u>expressly</u>, <u>impliedly</u>, or by <u>statute</u>. It does not matter how large the parcel of land is (<i>Wrotham Park Estate v Parkside Homes</i>). Annexation means annexation to each and every part of the land (<i>Federated Homes v Mill Lodge Properties</i>).</p> <ol style="list-style-type: none"> a) <u>Express</u>: clear language stating that the benefit is annexed to the <u>land</u>, not to persons (<i>Wrotham Park</i>). E.g. “<i>to the vendor’s assignees and heirs</i>” is <u>not</u> express language as it refers to <u>persons</u> instead of <u>land</u> (<i>Renals v Cowlshaw</i>). 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 (<i>Rees and another v Peters</i>). b) <u>Implied</u>: this is rare, <i>so unlikely to be relevant to your exam question</i>. c) <u>Statutory</u>: express language is not always necessary, as annexation will be <u>assumed</u> under the interpretation of s. 78 LPA 1925 given in <i>Federated Homes</i>, unless expressly excluded (<i>Roake v Chadha</i>).
2:	<p>ASSIGNMENT:</p> <p>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 (<i>Miles v Easter</i>).</p>

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***:

- 3:
- 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 Cowlshaw***):

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

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 (<i>see above</i>).
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 <u>land</u> or for successors in title to the land, <u>this intention will be implied under s. 78(1) LPA 1925</u> , unless it has been expressly excluded.
3:	At the time the covenant was created, the covenantee must have had a <u>legal estate</u> 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 <u>legal estate</u> in the benefited land , though it need not necessarily be the same estate (<i>Smith & Snipes Hall Farm v River Douglas Catchment Board</i>).

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 <i>Re 141a Dunstons Road</i>).

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:
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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?