Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2014 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1 (a)

Damages are monetary compensation for harm suffered. At common law damages for breach of contract are available as of right.

The purpose of damages in contract is to place the innocent party in the position s/he would have been if there had been no breach: Robinson v Harman (1848), per Parke B. Where it is possible to demonstrate breach but not loss, damages will not have this effect. Nominal damages are then awarded. Such damages are for a symbolic token amount.

Substantial damages are to be distinguished from nominal damages. Substantial damages reflect the true loss to the Claimant. The Claimant must show that there was a breach of contract that caused the loss suffered both in fact and in law.

Causation in fact may be established by showing that the breach was a substantial cause of the loss suffered, not that it was the only cause of loss: see (e.g.) Smith Hogg & Co v Black Sea Insurance [1939].

Causation in law is more commonly known as remoteness of damage. Damage that is too remote is not recoverable. The leading case on remoteness of damage in contract is Hadley v Baxendale (1854), where Alderson B stated that, to be recoverable, losses must be such as arise ‘...naturally, i.e., according to the usual course of things, from such breach of contract itself’; or ‘such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract...’
This two limbed test seeks to identify what damage must have been in the minds of the parties objectively, because it was very likely to result from the breach, or subjectively, because there was actual knowledge of facts which would give rise to the loss in question.

Attempts have been made to reformulate test for remoteness of damage in contract: see (e.g.) Victoria Laundry v Newman Industries [1949], The Heron II [1967] and The Achilleas [2008]. These may generally be characterised as substituting ‘reasonable foreseeability’ for ‘within contemplation’ (e.g.) Victoria Laundry v Newman Industries and attempting to construct a more extended test when, Alderson B’s formulation has been perceived to be less than adequate (The Achilleas). It is clear from the decision in The Achilleas itself and from subsequent judicial comment that the extended test (intended assumption of risk) will rarely be applicable and that for most situations the test laid down by Alderson B continues to be the correct one: see (e.g.) Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd, The Sylvia [2010] per Hablen J. In The Heron II the House of Lords decided that there were two distinct tests for remoteness of damage: the tortious test, which is ‘reasonable foreseeability’, and the contractual test, which is ‘within contemplation’. ‘Within contemplation’ is a stricter test than the test in tort.

Finally, the Claimant must show that he has attempted to mitigate his loss. Unmitigated losses are not recoverable. The duty is to take reasonable steps to minimise the loss. This includes but goes beyond a duty not to augment the loss. It may include (e.g.) accepting substitute performance from the Defendant even though it is in breach of the original contract: see Payzu v Saunders [1919]. It does not include running the risks of ‘complicated and difficult’ litigation: Pilkington v Wood [1953]. Where mitigation effectively eradicates the loss, nominal damages only will be awarded: British Westinghouse Electric & Manufacturing v Underground Electric Railways [1912].

(b)

The purpose of damages in contract is to compensate the Claimant for breach of contract. Per Parke B. in Robinson v Harman (1848) this means placing the innocent party in the position s/he would have been if there had been no breach. This is sometimes referred to as ‘carrying the Claimant forward’ and is to be contrasted with damages in tort, which ‘carry the Claimant back’ to his/her position before the tort.

The measure of damages known as expectation loss most closely meets the purpose stated by Parke B (ibid). Expectation loss is intended to place the Claimant in the position s/he would have been in had the contract been performed properly. It is said to compensate for loss suffered to the Claimant’s ‘expectation interest’: that is, to the loss of any benefit or gain that the Claimant should have received under the contract.

Thus expectation loss may, for example, take the form of loss of profit; where inferior or faulty goods are supplied, it may take the form of difference in value; and where faulty work is provided it may take the form of cost of cure.

Expectation loss, however, goes beyond this. It includes the loss of ‘subjective benefits’ such as disappointment, loss of enjoyment etc.: see Ruxley Electronics
v Forsyth [1996] and Farley v Skinner (No 2) [2001]. It includes compensation for loss of chance: see Chaplin v Hicks [1911].

Where the loss is too speculative the court may refuse to award expectation loss and award reliance loss instead: see Anglia Television v Reed [1972]. Reliance loss is simply out of pocket expenses spent upon the performance of the contract. Reliance loss fails to meet the purpose set out by Parke B. Rather it returns the Claimant to the position he was in before the commencement of the contract. As such it amounts to the same measure of damages as those awarded in tort.

The Claimant may elect to claim reliance loss but the court will not allow such a claim if it results in the Defendant being liable to compensate for losses resulting from a bad bargain rather than the Defendant’s breach: see C&P Haulage v Middleton [1983]. It is not necessary for the Claimant to demonstrate that the contract would have been profitable in order for reliance loss to be awarded. It is necessary to show that the contract would have, at least, broken even. Where the contract would have resulted in a loss then a claim for reliance loss would have to be reduced.

Question 2

A contract in restraint of trade is one which restricts a person’s right to exercise his trade or carry on his business.

Such contracts are found in a wide range of situations including employment contracts, contracts for the sale of businesses, solus agreements, and publishing contracts. Whilst decisions in such cases are fact sensitive, they are governed by clear principles of law.

The basis of the modern law on restraint of trade is to be found in Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company Ltd [1894]: per Lord MacNaghten ‘All … restraints of trade of themselves…are contrary to public policy, and therefore void…But there are exceptions … It is sufficient justification … if the restriction is reasonable … in reference to the parties concerned and reasonable in reference to the interests of the public…’.

Therefore all covenants in restraint of trade are prima facie void. They are subject to a rebuttable presumption that they are unenforceable. The presumption is rebutted by showing that the restriction is ‘reasonable’ both with regard to the public interest and between the parties. The burden of proof lies on the person seeking to rely on the covenant.

Reasonable with Regard to the Public Interest

A party seeking to take advantage of the restriction must have a legitimate proprietary interest that is worthy of protection: i.e. not ‘in gross’ see (e.g.) Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd (1934). The court will not enforce mere anti-competition agreements. They are contrary to public policy. Covenants that damage a trade or business by diminishing, without proper justification, those who may engage in it are contrary to the public interest: see (e.g.) Wyatt v Kreglinger & Fernau [1933] and Kores Manufacturing v Kolok Manufacturing [1959].
Reasonable as between the Parties

'Reasonable' between the parties means that the covenant acts to protect a legitimate interest. Where it goes beyond what is needed to protect the legitimate interest in question it is unreasonable and consequently it will not be possible to rebut the presumption that the covenant is contrary to public policy and so void.

When assessing reasonableness in this context the courts traditionally look to three criteria: duration, area, and scope of activity prohibited. Where the covenant seeks to prohibit activity that is greater than the proprietary interest for which protection is sought, or lasts for longer than is necessary to protect that interest, or covers a geographical area greater than that necessary to protect the interest it is likely to be struck down by the court.

Decided cases do offer guidance on what may be reasonable but the issue is essentially one of fact, turning on the nature of the interest for which protection is sought, the relationship between the parties, the nature of the business or trade in question, and its location.

In contracts between businesses/business people the court is more likely to find the covenant reasonable, provided there is some equality of bargaining power, than in an employment contract: see (e.g.) British Reinforced Concrete v Schelff [1921]. Thus, in a contract for the sale of a business, it is perfectly possible to protect the value of the goodwill by preventing the vendor setting up business in competition: see (e.g.) Herbert Morris v Saxelby [1916] (HL). It should also be born in mind that the purchaser has actually purchased something: where that includes the goodwill of the business, he has a right to protect a legitimately acquired interest.

The questions of the reasonableness of duration and geographical extent of the prohibition turn on the peculiarities of the business or trade and may take in such considerations as: how long is loyalty to the vendor likely to endure and how far are customers typically likely to travel in order to maintain a relationship with the vendor.

Where the contract is one of employment it is necessary for the employer to show not merely that a person affected by the covenant worked for him and that the covenant in restraint of trade would protect the employer's business. He must show a 'proprietary interest', which includes trade secrets, trade connections, and goodwill. 'Trade secrets' include formulae, processes, and 'know how'. Such confidential information is capable of protection by way an express or, alternatively of an implied term: see (e.g.) Foster v Suggett [1918], Littlewoods v Harris [1977], Faccenda Chicken v Fowler [1986] etc.

An employer may not, however, prevent a former employee using his skill in a particular trade or business, even if that skill was acquired whilst working for the employer: see Morris v Saxelby [1916].

Assessments of reasonableness, as with contracts for the sale of businesses, are questions of fact. The court will look to the nature of the interest that the employer seeks to protect, the nature of the employer's business, the status of the employee, and the scope of the employee's employment (see (e.g.) Home Counties Dairies v Skelton (1970)). It will then look to the duration,
geographical area, and scope of the prohibition in question. The essential question is: whether the nature, duration and geographical extent of the prohibition are reasonably necessary to protect the proprietary interest in question.

Thus, where the prohibition relates to the use of information, it is restricted by the 'shelf life' of that information; where it goes to protecting the goodwill of the employer’s business it will be restricted by considerations of the extent to which an employee had contact with customers (see (e.g.) Austin Knight v Hinds [1994], how long goodwill may endure (see (e.g.) M & S Drapers v Reynolds (1956)), and the geographical area in which goodwill may be affected (see (e.g.) Mason v Provident Clothing & Supply [1913], Fellows v Fisher [1976] etc.).

Where covenants in restraint of trade are found to be void it may be possible to sever them from the rest of the contract. This may only be done if it does not damage the grammar, or the sense, of the clause, and it does not undermine the whole contract: see (e.g.) Goldsoll v Goldman [1915] and Napier v National Business Agency [1951].

If it is not possible to sever the offending covenant the whole contract may be invalid.

**Question 3**

Anticipatory breach of contract occurs where, before the time for performance has arrived, a party expressly or impliedly makes it known that it does not intend to honour its obligations: see (e.g.) Hochester v De La Tour (1853).

Such conduct before the date of performance is better known as anticipatory repudiatory breach.

As in the case of other forms of repudiatory breach it does not automatically terminate the contract. It gives the innocent party a right to elect to accept the repudiation and seek an immediate remedy against the party in breach or to affirm the contract.

Election, once made, is said to be irrevocable in the period between election and the time for performance: see Fercometal SARL v Mediterranean Shipping Co. SA, The Simona (1989), per Lord Ackner. Where, however, a repudiatory breach is continuing and continues after affirmation this may not prevent the innocent party electing to terminate in the period before the date set before performance: see (e.g.) Thomas J’s obiter comment in Stocznia Gdanska SA v Latvian Shipping Co [2001] and the Court of Appeal’s decision in Stocznia Gdanska SA v Latvian Shipping Co (no 3) [2002].

Risks attach to whichever course of action is followed. If the innocent party elects to affirm the contract it is obliged to comply with its own contractual obligations under the contract. It cannot use the breaching party’s repudiation as an excuse for its own subsequent breach: Fercometal SARL v Mediterranean Shipping Co. If the contract is frustrated between affirmation and the date for performance the discharge is by way of frustration and any right to damages will be lost: see Avery v Bowden (1855)
Election is an important and potentially costly decision. If the breach amounts to what may be described as a warranty rather than a condition then liability for breach may attach to the innocent party: see Decro-Wall International v Practitioners Marketing [1971].

If the non-breaching party is mistaken in its belief that there has been a repudiation of contract a purported election to accept the breaching party’s repudiation may itself amount to repudiation of contract: see Federal Commerce & Navigation Ltd v Molena Alpha Inc [1979]. The House Lords in Woodar Investment Development v Wimpey Construction (UK) [1980] took the view that a mistaken acceptance of repudiation, in the absence of bad faith, did not itself amount to a repudiation. This view creates considerable practical uncertainty for parties. It was not followed by the Privy Council in Vaswani v Italian Motors [1996].

Further problems arise in relation to affirmation in that, by affirming and carrying out its own obligations under the contract, thus increasing its losses, the non-breaching party can then seek to recover all its losses despite being informed earlier that the breaching party did not intend to honour its obligations: see White and Carter (Councils) Ltd v McGregor (1962). Per Lord Reid, a party must have a legitimate interest in performing the contract rather than in claiming damages if it is to exercise the power to affirm. Lord Reid’s comment was approved and followed in (e.g.) The Alaskan Trader (No 2) (1984) and The Dynamic [2003], in which case Simon J said that the burden of proving lack of legitimate interest lay with the breaching party, which must go beyond establishing small benefit to the innocent party and greater loss to the breaching party.

In Reichman v Beveridge [2006] the Court of Appeal affirmed and followed Lord Reid’s statement in White and Carter (Councils) Ltd v McGregor, stating that it was, unreasonable for a landlord to elect to affirm the contract, following an anticipatory breach by the tenant, where damages would be an adequate remedy. The landlord was not protecting a legitimate interest by affirming the contract. A new tenant could be found.

A further restriction on the principle in White and Carter (Councils) Ltd v McGregor is that the affirming party must be able to continue with performance without the co-operation of the breaching party if it is to be able to recover the contract price agreed: see Hounslow Borough Council v Twickenham Garden Developments Ltd (1971). If it is unable to demonstrate this, the affirming party’s remedy will be limited to damages.

Anticipatory breach of contract is, in its basic concepts, relatively simple. The remedies and courses of action open to the parties involved are complex and hazardous. The law is complex, detailed, and on occasion contradictory

**Question 4**

Sir Frederick Pollock, in ‘Principles of Contract’, defined consideration as: ‘An act or forbearance or the promise thereof is the price for which the other is bought, and the promise thus given for value is enforceable.’ This was approved by Lord Dunedin in Dunlop v Selfridges [1915]; it therefore has the highest judicial authority. This definition retains the ideas of benefit and detriment but
emphasises the idea of exchange or bargain. It is this analysis which has been most influential in the modern English law of contract.

To be valid consideration must be ‘sufficient’. Executed and executory consideration are sufficient: they comply with Pollock’s exchange concept of consideration. Past consideration is insufficient: it does not comply with that model.

Executory consideration is an exchange of promises of performance at some later date. Executed consideration is an act or forbearance in return for a promise. An example of this is giving information in return for a reward. No obligation arises on the part of the promisee until the promisor has completed (executed) the act.

Past consideration is no consideration. It is found where the act or forbearance precedes the promise. It is therefore not possible to show any causal connection between promise and act and consequently it is not possible to show the element of exchange.

The classic examples of past consideration are to be found in Roscorla v Thomas (1842) and Re McCardle [1951]. In Roscorla the plaintiff purchased the defendants horse. A day after the contract of sale was complete Roscorla’s servant called on the defendant to pay the purchase price for the animal. The seller then warranted that the animal was ‘sound and free from vice’. It transpired that the horse was vicious. The purchaser tried to sue on the promise as to the animal’s character and failed. It was held that the promise was unsupported by valid consideration. The only possible consideration for the later promise was to be found in the earlier agreement. That consideration was past.

Similarly, in Re McCardle a son and his wife lived in his mother’s house. The son’s wife paid £488 for repairs to the house. The mother later made her four children promise to reimburse the wife from the mother’s estate (in which they had a beneficial interest). The mother died and the children refused to reimburse the wife. When the wife attempted to enforce the contract her action failed. Her consideration was past: it had come before the promise to pay.

There are situations which give rise to an exception to the rule against past consideration or, effectively, fall outside the rule. In Lampleigh v Braithwait (1615) the defendant requested that the plaintiff undertake certain actions. When those actions were completed the defendant promised to pay the plaintiff £100. The promise was never kept. It was held that a binding contract existed. The defendants promise to pay ‘couples itself’ with his request to the plaintiff to act on his behalf.

A more recent application of the rule in Lampleigh v Braithwait is to be found in Re Casey’s Patents [1892]. The owners of certain patents wrote promised Casey one third share in their patents in return for services rendered. Bowen LJ held that there was an implied promise, which existed at the time the services were rendered, that Casey would be paid for his services.

The principle was approved and restated by Lord Scarman in Pao On v Lau Yiu Long [1980]: ‘An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise.'
The act must have been done at the promisor’s request, the parties must have understood that the act was to be remunerated further...or the conferment of a benefit must have been legally enforceable had it been promised in advance.

There are also statutory exceptions to the rule against past consideration.

(b) ‘Consideration must move from the promisee’. The promisee is one to whom the promise is made. The rule means that a person cannot sue under a contract unless he has provided consideration: see Price v Easton (1833) and Tweddle v Atkinson (1861). The rule is closely bound to the doctrine of privity of contract, which provides that only parties to a contract can sue or be sued under it: see Dunlop Pneumatic Tyre v Selfridge [1925].

There are a number of exceptions to the doctrine of privity: (e.g.) collateral contracts, agency, the rule in Tulk v Moxhay, the Contracts (Rights of Third Parties) Act 1999 etc.

‘Not necessarily to the promisor’. The promisor is one who has already provided consideration by way of a promise to the promisee. This aspect of the rule means that the consideration may go to a third party. Consideration to a third party is good consideration even where it is in performance of an existing duty: see (e.g.) Shadwell v Shadwell (1860), Scotson v Pegg (1861), The Eurymedon [1975].

Third parties may now protect their interests directly in such circumstances under the Contracts (Rights of Third Parties) Act 1999.

SECTION B

Question 1

In order to advise Smith it is necessary to consider:

(a) Relevant Terms of the Contract

The question does not mention a written contract. It is therefore necessary to look to the pre-contractual discussions between the parties.

Printo’s representative appears to have made three distinct representations: the ZX could reproduce drawings of up to two square metres; was the fastest and most economical of its kind; and produced copies of outstanding clarity and precision.

The tests for deciding when a representation is a term have been criticised as being imprecise and inconsistent in their use by the courts. Per Lightman J in Inntrepreneur Pub v East Crown [2000] the essential question is whether, objectively viewed, the statement maker intended to guarantee the truth of the statement.

Were the written contract to exclude or remain silent on the qualities of the ZX that might indicate that such a term is not incorporated: see Routledge v McKay [1954]. However, in Birch v Paramount Estates [1956] a verbal assurance by a seller was relied upon by the claimant and so held to be a term of the contract. If Smith is able to show reliance on Printo’s representations they may be regarded as terms of the contract.
Where there is a disparity of expertise, the more expert party’s statements are likely to be found terms of the contract. Printo is a dealer in reprographic machinery and consequently has specialist knowledge. The court is therefore more likely to find John’s statements a term of the contract: see Dick Bentley Productions v Harold Smith (Motors) Ltd (1965).

Lapse of time between representation and entering into the contract may lead the court to a finding of representation rather than term. In this problem there was a lapse of almost three weeks, which may lead the court to regard them as representations: see Routledge v McKay (1954). Arthur’s comments immediately before entering into the contract will negative the effect of passage of time. It also has the effect of making known to Printo the importance of capacity to Smith (see Bannerman v White (1861)) and reliance (Birch v Paramount Estates).

Smith has an arguable case that Printo’s representations as to capacity and quality of reproduction are terms of the contract. Whether the representation as to economy would pass Lightman J’s test in Inntrepreneur Pub is another matter.

b) Whether they have been breached

A breach of contract is committed when a party fails to perform what is due under the contract. In contracts for the supply of services and components (the ZX), liability for the components is strict. Performance does not comply with the terms of the contract: the term (if such it is) is that the ZX can copy up to two square metres. In fact it can copy only one square metre. Printo is in breach.

(c) The Status of the Term(s)

If the term as to the ZX’s capacity is a condition of the contract Smith may terminate the contract and claim damages: see Poussard v Spiers (1876). If it is a warranty Smith is able to claim damages only: see Bettini v Gye (1876). The test for distinguishing between the two classes of term is to ask: does the term go to the root of the contract? If it does then the term is a condition.

The term may be considered an innominate term. The test then is: does the breach effectively deprive the innocent party of the whole benefit it was intended should be obtained from the contract: see the Hong Kong Fir [1962], per Lord Diplock. If it does then the term may be treated as a condition.

The question is essentially one of fact: given the nature of Smith’s business, does the ZX’s lack of capacity deprive Smith of the whole benefit to be obtained under this contract? If it does then Smith is free to terminate the contract and claim damages.

(b)

A misrepresentation is a false statement of fact (or possibly law), made by one party of the contract to the other party, before the contract was made, with a view to inducing the other party to enter the contract, which does induce the other party to enter into the contract.
Smith entered into a contract with Printo. Printo’s representative, John, made representations to Smith as to the Printo Desk Top’s reliability. The fact that John supported his assertion with reference to European and American research may indicate an intention to induce Smith into entering into the contract. It apparently did induce Smith into entering into the contract.

The facts of the problem indicate that John’s statement were false. The elements necessary for a successful action in misrepresentation are present.

There are three kinds of misrepresentation: fraudulent, negligent and innocent. There is nothing in the facts to support a claim for fraud. This answer will therefore concentrate on negligent and innocent misrepresentation.

Section 2(1) of the Misrepresentation Act 1967 provides: ‘... if the person making the misrepresentation would be liable to damages ... had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe ... the facts represented were true.’

In Howard Marine and Dredging Co Ltd v A Ogden and Sons (Excavation) Ltd (1978) Bridge LJ stated: ‘the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe’.

This effectively transfers the burden of proof to the defendant. The burden of proof therefore lies with Printo to prove that it had reasonable grounds for its belief. It may be able to do this by establishing (a) that the research actually existed and (b) that it was reasonable to rely on that research as the basis for the statements made to Smith. If Printo is unable to do this it will be liable in negligent misrepresentation.

Section 2 (1) makes remedies usually available in fraudulent misrepresentation available in negligent misrepresentation. They are damages and rescission.

Misrepresentation is a tort and damages are intended to place the claimant in the position he would have been in had the tort not been committed.

The wording of s2(1) also means that the rules of remoteness of damage in fraudulent misrepresentation apply to claims in (statutory) negligent misrepresentation. Smith will therefore be able to claim damages in respect of all losses flowing directly from the tort: see (eg) Watts v Spence [1975] Naughton v O’Callaghan [1990], Royscott v Rogerson [1996].

If Printo is able to establish that the research existed and that it was reasonable to rely upon it then Smith’s claim will lie in innocent misrepresentation: see Oscar Chess v Williams [1957]. The primary remedy for this is rescission. Damages in lieu may be awarded provided the right to rescission has not been lost: see s2(2) Misrepresentation Act 1967.

Question 2

In advising Daria it is necessary to consider whether or not a binding contract had come into existence.

An invitation to treat is an indication that the maker is prepared to accept offers. Save where they meet the requirements for a unilateral offer (see Carlill v
Carbolic Smoke Ball Company [1893]) newspaper advertisements are regarded as invitations to treat: Partridge v Crittenden (1968). The announcement in the Money Times constitutes an invitation to treat.

An offer is an expression of willingness to contract on certain terms without further negotiation. It requires only acceptance.

Daria’s completion of the form and sending it to Goldspec with a cheque for £10,000 constitutes an offer.

An acceptance is an unequivocal agreement to the offer. It must match the offer exactly. It may take the form of words or conduct. Simon’s sending of the share certificates to Daria, on behalf of Goldspec, constitutes an acceptance.

The general rule is that acceptance must be communicated. In Adams v Lindsell (1818) it was established that where communication is through the post acceptance takes place as soon as the letter is validly posted (‘the postal rules’). This rule has been affirmed in numerous cases since: see (e.g.) Household Fire and Carriage Accident Insurance Co. v Grant (1879) and, more latterly, Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH (1983).

The postal rules do not operate where it is manifestly absurd that it should do so or where it has been expressly excluded by the offeror: Holwell Securities Ltd v Hughes (1974); Manchester Diocesan Council for Education v Commercial and General Investments Ltd (1969).

It therefore appears that a valid contract for the sale of the shares came into existence when Simon posted them to Daria on Wednesday 3rd May.

Daria, however, attempted to revoke her offer on Tuesday 2nd May. The general rule is that an offeror can revoke his offer at any time up until acceptance of the offer: see Payne v Cave (1789). The postal rules do not apply to revocation. Revocation of an offer must be communicated to the offeree before acceptance: Byrne v Van Tienhoven (1880) if it is to be effective. Daria’s letter of revocation was not received by Goldspec until Friday 5th May. It was therefore ineffective.

Goldspec sought to revoke its acceptance, on the evening of Wednesday 3rd May, by leaving a message on Daria’s answer machine. This raises two issues: (a) is it possible to revoke a valid acceptance by way of a speedier method of communication and (b) was the purported revocation communicated effectively. There appears to be no English authority on the first issue. The balance of authority from elsewhere suggests that it is not possible: see Wenckheim v Ardt (1873) (New Zealand) and A to Z Bazaars v Ministry of Agriculture 1974 (South Africa). Whilst this approach has been criticised as being inflexible it is a logical consequence of the objective rules laid down by the English courts.

Normally instantaneous communications are only effective when received: Entores v Miles Far East Corporation (1955); Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH (1983).

In the case of a message on a telephone answering machine the question is whether the communication was effective when received or when heard. If the general principle is applied then the message is communicated when heard.
Some have argued that there is an analogy to be drawn with the postal rule: in which case it is communicated when the message is left on the machine.

Leading cases on the point such as The Brimnes (1975) and Mondial Shipping and Chartering BV v Astarte Shipping Ltd (1995) may be distinguished: they are concerned with business communications and business practices. The present case is concerned with an individual, a consumer.

If the established rules of formation are applied there is a valid contract for the sale of shares, which came into being on the morning of Wednesday 3rd of May and which appears to have already been discharged by performance. Subsequent attempts to revoke the agreement appear to be ineffective. Consequently Daria is entitled to keep the share certificates.

**Question 3**

The contract between Gerald and Byways for the hire of a car and driver is contract for the supply of services. It therefore falls to be considered under the Supply of Goods & Services Act 1982, s13 of which implies into all such business contracts a term that the service will be carried out with reasonable skill and care. The facts of the problem indicate that the accident was brought about by the carelessness of Byways’ driver. Byways is consequently in breach of contract. There is also a potential claim in the tort of negligence. Agnes provides no consideration. She is consequently not privy at common law and so cannot enforce any rights under the contract. Section 1(1) of the Contracts (Rights of Third Parties) Act 1999 provides that a person who is not a party to a contract may enforce a term of the contract if the contract expressly so provides, or if a term purports to confer a benefit on that person.

Section 1(2) provides that s. 1(1)b does not apply if on a proper construction of the contract it appears that the parties do not intend a term to be enforceable by the third party.

Clause c) of Byways ‘Terms & Conditions’ expressly indicates that there is not an intention on the part of Byways to confer a contractual benefit. Agnes is therefore unable to enforce any rights under the contract in her own person.

Because Agnes is not privy to the contract she is not bound by its exemptions: Adler v Dickson [1954].

Nevertheless Gerald contracted on his own and on Agnes’s behalf. In which case it is possible for Gerald to claim for his own losses and for Agnes’s: Jackson v Horizon Holidays Ltd (1975), per Lord Denning MR. These include disappointment, distress and vexation resulting from Byways’ breach: see Jarvis v Swan Tours Ltd (1973).

There is an obstacle to a successful action by Gerald: Byways’ exemption clauses.

For Byways to rely on those clauses it must establish that they were incorporated into a contract. Incorporation may be demonstrated by way of signature, notice, or course of dealings.
In the absence of fraud or overriding oral representation a signature is taken to bind the person who signed, whether he has read the document in question or not: *L'Estrange v Graucob* (1934).

There is nothing in the facts of the problem to indicate that Gerald signed the contract. It is, however, a contract of hire and so highly likely that he did. In which case he may be bound by the terms of the exemption clause. However, there is also nothing to indicate that the ‘Terms and Conditions’, handed to him after the point of contract, were incorporated into the signed document.

In that case the ‘Terms and Conditions’ fall to be considered under the rules for unsigned documents.

The terms in question could be incorporated if reasonable notice had been given: *Parker v South Eastern Railway* (1877). Reasonable notice requires that notice be given at or before the point of contract: *Olley v Marlborough Court Hotel Ltd* (1949). The notice must be contained in a document that is identifiable as having legal significance: *Chapleton v Barry UDC* [1940]. The test for reasonable notice is objective and acting under a disability does not automatically invalidate the notice: see *Thompson v LMS* [1930]. However, if the party seeking to rely on the exemption was actually aware of the disability then the notice will be ineffective: see (e.g.) *Geier v Kujawa Western and Warne* [1970].

Notice was given after the point of contract and on and in a context which rendered the document not easily identifiable as having legal significance. It is unclear whether Gerald’s defective eyesight was obvious. If it were, this could render notice ineffective. For all these reasons it is unlikely that the exemption clauses were incorporated.

If they are incorporated, it needs to be considered whether the exemptions cover the losses suffered. Exemption and limitation clauses are construed contra proferentem. Where a claim is in tort the exemption must be sufficient to cover tortious as well as contractual liability. It is generally thought that the clause should expressly exclude liability in negligence. In *White v Blackmore* (1972), however, it was held that the expression "howsoever caused was sufficient to include negligence and thus it is possible Byways has effectively excluded liability.

In the present circumstances s2(1) Unfair Contract Terms Act 1977 (UCTA) renders void any attempt to exclude or limit liability in negligence for death or personal injury. Section 2(2) permits the exclusion or limitation of liability in negligence only in so far as it is reasonable.

Where one party acts as a consumer or on the other’s standard terms, s3 (2)(a) of UCTA permits the exclusion or limitation of liability for breach of contract only in so far as it is reasonable.

‘Reasonable’ has a technical meaning under UCTA and is to be judged by the criteria set out in S11 and Schedule 2. Section 11(1) provides that the clause must be fair and reasonable having regard to the circumstances that were or ought reasonably to have been known to or were in the contemplation of the parties at the time the contract was made. Section 11(4) provides that where a person seeks to restrict liability to a specific sum of money the court shall have regard to the resources available to the person relying on the clause and how far
it was open to him to cover himself by insurance. Schedule 2 has been applied by the courts to s.2 (2) and s.3 when deciding issues of reasonableness. Schedule 2 permits the courts to assess the relative strength of the bargaining positions of the parties.

Gerald’s claim in negligence for personal injury is likely to succeed Byways attempt to exclude or limit liability is ineffective (s 2(1) UCTA). His claim in negligence for harm to the luggage is also likely to succeed, as is his claim in breach of contract for damage to his and Agnes’s luggage and their distress and disappoint. Byway’s attempts to exempt itself from liability will succeed only in so far as they are reasonable. Exclusion and limitation is unlikely to succeed because Gerald was unaware of the exemption clauses at the point of contract (s11.1). An additional argument in respect of the attempt to limit liability is Byways’ ability to obtain insurance (s11.4). Application of UCTA Schedule 2 criteria indicate that Byways is likely to be regarded as the party with the stronger bargaining position, thus strengthening Gerald’s argument that the exemptions are unreasonable.

**Question 4**

The contract between Boris and Mary for the making of a wedding dress for Sophia’s wedding is predicated on the happening of a specific event: Sophia’s wedding. Following substantial performance of the contract, the prospective groom was killed. The wedding cannot therefore take place. It is therefore likely that the contract is frustrated.

The basis for the doctrine of frustration has varied over time. The modern view is to be found in *Davis Contractors Ltd v Fareham Urban District Council* (1956), per Lord Radcliffe: frustration occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract”.

Death, physical impossibility, non-availability or the loss of the main object of the contract have all been regarded as sufficient to frustrate a contract: see *Jackson v Union Marine Insurance Co Ltd* (1874); *Krell v Henry* (1903) etc.

Frustration is not available where it is self-induced (see (e.g.) *The Super Servant Two* [1990]); nor where it is foreseen and provision made (see (e.g.) *The Eugenia* [1974]). Mere hardship, material or practical loss or inconvenience will also not cause the doctrine of frustration to operate: see (e.g.) *Tsakiroglou v Noble & Thorl* [1961].

Where there is more than one foundation for the contract and not all are lost, the contract is not frustrated: see *Herne Bay Steam Boat Co v Hutton* (1903).

*Krell v Henry* is one of 20 cases brought by those who had entered into contracts to obtain places from which to watch the coronation procession or regatta that were associated with Edward VII’s coronation. The King was diagnosed as having appendicitis. The coronation was cancelled. Per Vaughan Williams LJ the essential question was ‘whether the contract needs for its foundation the assumption of a particular state of things’. If it did, and that ‘state of things’ was within the contemplation of the parties, and that ‘that state of things’ did not
take place, the contract was frustrated. The plea of frustration succeeded in this case. Krell v Henry bears certain similarities to the present problem, most notably the failure of the main purpose of the contract.

Herne Bay Steam Boat Co v Hutton is also a ‘coronation case’. The defendant hired a boat, The Cynthia, from the plaintiff with a view to taking friends to see a review of the British Naval Fleet and an associated naval regatta. The review of the Fleet was cancelled because of the King’s illness. The Court of Appeal held that the contract was not frustrated. The purpose and foundation of the contract had not been destroyed. It was still possible to view the regatta.

There is nothing to suggest that either Mary or Boris was responsible for the death of Sophia’s fiancée. There is no point in having a wedding dress if there is to be no wedding: the main purpose of the contract has therefore been lost: Krell v Henry. Whilst there may be an argument that a dress could be used for more than one purpose, and analogies drawn with situation in Herne Bay Steam Boat, given the nature of the event and the dress, this is likely to be received with little sympathy. The contract is therefore likely to be found frustrated.

Frustration acts to discharge a contract, not vitiate it. The contract is discharged automatically and immediately. At common law it is said that ‘the loss lies where it falls’. The parties are discharged from all future obligations. Rights and liabilities that have already arisen continue to subsist and remain enforceable: see (e.g.) Appleby v Myers (1867).

The Law Reform (Frustrated Contracts) Act 1943 s.1(2) provides that all sums paid to any party before the frustrating event are recoverable. Boris should be able to recover the £4,000 deposit he has paid. Section 1(2) also provides that any money remaining to be paid ceases to be payable. Boris would therefore not be obliged to pay any outstanding sums under the contract.

However, 1(2) also provides that if the party to whom any sums have been paid or are payable has incurred expenses before the time of discharge in performing the contract the court has the discretion to order that that person retains moneys paid or to recover expenses in appropriate circumstances. Mary has, then, a claim in respect of her expenses incurred in the producing of the dress.

Section 1(3) of the 1943 Act gives the court discretion to reduce any sum accruing to the payee under s1(2) to take into account any valuable benefit obtained. It will be within the discretion of the court to assess what proportion should be allowed in this instance: see (e.g.) BP v Hunt (1979).