LEVEL 6 - UNIT 2 – CONTRACT LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 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 candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

SECTION A

Question 1(a)

In order to create a valid contract, there must be agreement, consideration and the intention to create legal relations. In order to evaluate the presence of the latter, the courts have created various rebuttable presumptions.

Regarding contracts made in a family, social or domestic context, the courts will presume that there is not an intention to create legal relations. This can be demonstrated in the case of Balfour v Balfour (1919) where an agreement between a husband and wife failed for the lack of the requisite intention. Jones v Padavatton (1969) demonstrates that the presumption will also apply in family relationships, in this case an agreement between a mother and her daughter.

However, while a contract made in this context raises the presumption, it is a rebuttable one. There are a number of factors which may rebut the presumption. Firstly, where the parties are dealing "at arm's length" or the context is one in which any agreement will have been intended to have legal effect, as seen in Merritt v Merritt (1970). In this case, a husband and wife were found to have the intention to create legal relations when agreeing a settlement after their separation. Furthermore the agreement was reduced to writing.

The presumption can also be rebutted where one party acts upon the agreement, demonstrating that they relied upon it being legally enforceable. This was the case in Parker v Clark (1960), where a niece and her husband sold their house on the basis of an agreement to live with her aunt and uncle. It was clear that they would not have acted in this way if they thought the agreement to provide them with housing was not enforceable. Similarly, where there is an element of mutuality in the bargain, such as in Simpkins v Pays (1955), the presumption may be rebutted.

Overall, the courts have good reason for presuming a lack of intention in social and domestic agreements – if they did not, the courts would be full of people trying to enforce casual promises. However, it is clear that where parties wish to create a binding contract despite the domestic context, they will be able to do so by ensuring they act in such a way as to rebut the presumption.

1(b)

Conversely, where a contract is made in a commercial context, the courts will presume that there is an intention to create legal relations. Even a relatively insignificant transaction, such as providing souvenir coins with the purchase of petrol, will fall under the presumption (see Esso v Commissioners of Customs and Excise (1975)). As such, it is clear that the presumption is a "heavy one" (per Megaw J in Edwards v Skyways (1964)) which is not easily rebutted.

Despite this, the presumption remains rebuttable where there is express evidence that the parties did not intend to be legally bound. One classic example of this is a so-called 'honour clause', which states that the contract is to be binding in 'honour only'. This was held to rebut the presumption in Rose & Frank v Crompton Bros (1925).

It has also been established that a 'comfort letter' does not create a legally binding contract. Such a letter is one in which a company assumes a moral rather than legal obligation, such as the letter in Kleinwort Benson v Malaysian Mining Corp (1989) in which the defendants assured the claimant that they would ensure their subsidiary business could meet its liabilities to the claimant.

Similar reasoning has been argued in cases involving 'letters of intent', i.e. those which include a declaration of intent to enter into a contract (which may still be being negotiated). However, such letters must contain sufficient evidence to rebut the presumption, or will otherwise be presumed to have been intended to be legally binding (see e.g. ERDC Group Ltd v Brunel University (2006)).

There are also statutory exceptions which will act to make an agreement not legally binding in specified circumstances, such as a collective bargaining agreement unless contained in writing and including a provision that it is to be legally binding, see Trade Union and Labour Relations (Consolidation) Act s179.

It is clear from the decided case law that the courts will always presume an intention to create legal relations where an agreement is made in a commercial setting. While it is possible to rebut the presumption, this can only be done on relatively narrow grounds and where the parties make it clear that they do not wish for contract to be legally binding.

(c)

Where a contract is made with a public body, or may affect the general public interest in some manner, the courts may find that there was not an intention to create legal relations. As such, as a matter of public policy a court may find that even if an apparently enforceable agreement has been made, a contractual relationship should not be found to exist.

Where the existence of a contractual relationship might incur unwarranted costs on behalf of the general public, frustrate the will of Parliament in some way, or harm the functioning of a public service, the court may refuse to find an intention to create legal relations. In Willmore v South Eastern Electricity Board (1957) an agreement between a business rearing chicks and the electricity supplier was not

upheld because the electricity was supplied under a statutory duty. Similarly, a claim against the Post Office for loss of a package failed in Triefus v Post Office (1957).

Another area where the courts have been reluctant to find an intention to create legal relations is in agreements made around the provision of information to the police or other investigatory services. Thus, Robinson v HM Customs & Excise (2000) held that an agreement to act as an informer for HMRC would fail for lack of intention to create legal relations. It is clear that due to the issues surrounding the public interest, such decisions are more likely to be based on policy rather than any set test or presumption, and as such previous decisions are of only limited value.

Question 2

While the parties to a contract may well agree a considerable number of express terms, it is not the case that the express provisions will always be sufficient to regulate the contract in all possible situations. As such, it is a long-standing legal concept dating back to the 19th Century that terms can be implied into contracts for a number of reasons, such as to give effect to the bargain or to protect one of the parties. Terms may be implied by four different mechanisms – by statute, by custom, and by the courts either in fact or in law. The difference between the last two named is that a term implied in law will be implied into all contracts of that type, whereas a term implied in fact is merely implied into the specific contract before the court.

As such, implying a term in fact involves an element of subjectivity, as the court must look to the intentions of the parties. In order to avoid the vague and difficult process of establishing a parties state of mind at the time the contract was made, the common law developed two complementary tests to assist with the implication of a term in fact.

The first test was the 'business efficacy' test, first formulated by Bowen LJ in The Moorcock (1889). In the words of the judge, the law will imply a term in order "to give such business efficacy to the transaction as must have been intended at all events by both parties". In this particular case, which involved a contract to unload cargo from a ship, the court was willing to imply a term that the owners of the wharf would take reasonable steps to investigate the riverbed by the jetty, with the effect of deciding whether it was safe for the specified ship to dock there. It was held that this term was necessary in order for the contract to make business sense.

A different test was proposed by MacKinnon LJ in Shirlaw v Southern Foundries (1940), which has become known as the 'officious bystander' test. The test requires the judge to imagine a hypothetical bystander watching the parties come to their agreement. If the bystander was to propose the potential implied term, it should be implied if both parties would have responded with "oh, of course" this should be included.

Usually, the two tests will lead to the same answer – if a term is so necessary for the contract to be effective as a business agreement, it is also likely that both parties would have seen it as so obvious it went without saying. However, the requirement for both of the parties to agree the term does mean that the officious bystander test can be restrictive, especially where one party is ignorant of the term in question. One example is Spring v National Amalgamated Dockers Union (1956) where the judge thought "what's that" would be a more likely response than "oh, of course".

These tests were reviewed by the Privy Council in Attorney General of Belize v Belize Telecom (2009). Giving the leading judgment, Lord Hoffman de-emphasised the importance of the traditional tests, seeing all previous formulations as mere variations on what he saw as the central issue, whether the implied term would spell out in express words what the contract, read against the relevant background, would reasonably be understood to mean. In discussing the previous tests, the learned judge appeared to go further and suggest that the elements of what is 'necessary' (from the business efficacy test) and 'obviousness' (from the officious bystander test) could at times be unhelpfully restrictive.

However, this approach was itself questioned in the recent Supreme Court decision in Marks & Spencer plc v BNP Paribas (2016). This case involved a break clause in a rental agreement that would allow the tenant to terminate their lease. However, on termination the landlord refused to return advance payments made by the tenant for future rent. The tenant argued that there was an implied term in the contract that such payments would be returned if the break clause was activated. In deciding that there was no such term implied, the Supreme Court cast doubt on Lord Hoffman's analysis in Belize Telecom, suggesting that it had the potential to be misinterpreted to relaxing the strict approach required when considering whether to imply a term.

It is clear that following the decision in the Marks & Spencer litigation, the traditional position has been reaffirmed. It is true to say that the courts have always striven to give effect to the intentions of the parties and to save contracts wherever they can. However, the courts should avoid the temptation to 'improve' the contract, and only imply a term where it is necessary in order to make the contract work. There are good policy reasons not to go beyond the minimum required and the various formulations of the test(s) have recognised that.

As such, the traditional tests of business efficacy (which includes that element of necessity) and the officious bystander test (which makes clear that merely because a contract is silent on a provision, that provision may not have been intended to be included) remain relevant when the court consider whether to imply a term in fact.

Question 3

Where a pre-contractual statement is made which does not form a term of the contract, a party may still potentially have an action under the doctrine of misrepresentation. In order for such a representation to be actionable, it must be a false statement of fact (or law) which induces the other party to enter into the contract, as a result of which that party suffers loss.

Contract law has developed to recognise three categories of such misrepresentations: fraudulent, negligent and innocent. It is important to decide which category a particular misrepresentation belongs to, as this will determine the remedies available to the claimant. A fraudulent misrepresentation is one made knowing that it is untrue, or with no belief in its truth, or recklessness as to whether it is true or false (Derry v Peek (1889)). A negligent misrepresentation is one which is actionable and where the representor cannot demonstrate a belief in the truth of the statement and reasonable grounds for that belief – if he can, it will be an innocent misrepresentation.

The remedy available for all three types of misrepresentation is rescission. The effect of rescission is to 'rewind' the contract, restoring the parties to their original, pre-contractual, positions. As such, any payments made or goods

transferred will be returned. However, rescission will only be available when *restitutio in integrum* is possible, i.e. both parties can be fully restored to their original position. Therefore where, for example, goods transferred under the contract have perished, it will not be possible to grant rescission.

There are a number of other bars to the use of rescission as a remedy. One bar is where the innocent party has affirmed the contract, as demonstrated in the case of Long v Lloyd (1958). In this case, a contract to purchase a lorry was entered into after misrepresentations about the vehicle, which proved false. The claimant, on discovering defects in the vehicle, had allowed the defendant to attempt a repair. This was held to constitute affirmation and thus rescission could not be available as a remedy.

As rescission is an equitable remedy, the usual maxims of equity will apply and third parties will be protected from harm. Thus if rescission will require affecting the rights of third parties (for example goods have already been sold to a third party purchaser for value without notice) it is unlikely to be granted. It is also clear that unreasonable delay in claiming the remedy may be a bar to rescission, such as the five year delay in Leaf v International Galleries (1950).

As such, damages may be the preferred remedy and these are available as of right in an action for fraudulent misrepresentation. This is due to the fact that the action is based on the historic tort of deceit, which also means that the damages awarded will be based on the tortious measure, i.e. to put the claimant in the position they would be in had the statement not been made, rather than if the statement was true (Doyle v Olby (1969)). While this may appear restrictive (and is a reason why a party may strive to show a pre-contractual statement was a term of the contract rather than a mere representation) the courts do allow some level of opportunity-based loss due to the fact that there is no principle of remoteness in the tort of deceit (see East v Maurer (1991)). Therefore in cases such as Smith New Court Securities v Citibank (1996) the defendant was found liable for all clauses flowing directly from the transaction, i.e. a test of causation but not of foreseeability.

It would appear that S2(1) of the Misrepresentation Act 1967 will be interpreted to allow recovery for damages for negligent misrepresentation on the same basis, leading to the so-called 'fiction of fraud', see Royscot Trust Ltd v Rogerson (1991). Indeed, the only form of misrepresentation where the claimant may not claim damages is innocent, although under S2(2) of the Act the court has the discretion to award this remedy in lieu of rescission. This power has been seriously curtailed by the decision in Salt v Stratstone Specialist (2015), which appears to have accepted the view that damages in lieu can only be awarded when rescission itself is available.

When considering the remedies for an actionable misrepresentation it could be argued that rescission remains the more practical approach, aiming as it does to restore the parties to their pre-contractual position and thus erasing the harm done as a result of the misrepresentation. However, it is clear from the cases where damages have been awarded that the courts see rescission as insufficient in protecting the innocent party's interests. It could even be argued that the more extreme applications of the rule allowing recovery of direct losses allows for an expectation-based remedy under the guise of a tortious one. However, Court of Appeal authority such as Parabola Investments Ltd v Browallia Cal Ltd (2010) would suggest that the courts are still willing to extend the scope of damages awarded for misrepresentation.

Question 4

The starting point when considering whether a party has discharged a contract by performance and/or wishes to enforce their rights as against the other party is to require full and exact performance of all contractual obligations. This can be seen in a pair of cases, Arcos v Ronaasen (1933) and Cutter v Powell (1795). Regarding full performance, Cutter v Powell established the 'entire obligations' rule which requires a party to carry out all of his obligations under the contract in order to enforce it. Here, the widow of a sailor who had died during a voyage was unable to claim the wages he had been promised, as he had not performed fully i.e. worked on the vessel for the full duration of the voyage. In Arcos, supply of wooden staves 9/16ths of an inch thick was held to constitute breach of contract rather than performance, as the contract stated that the staves would be 8/16th of an inch. Thus it is clear that a party must fully perform all obligations, and do so exactly as the contract specifies.

However, the courts have shown a willingness to depart from these strict positions in certain circumstances. Considering first the entire obligations rule, there are now a number of recognised exceptions where a party may recover at least some of their promised consideration under the contract. One major exception is the doctrine of substantial performance, as demonstrated by the case of Hoenig v Isaacs (1952). Here an interior decorator contracted to carry out various works with the balance to be paid on completion. The decorator carried out the work, but some of it was defective. Rather than allow the other party to withhold payment, the court held that there had been "substantial performance" of the contractual obligation, and that this was sufficient to allow for recovery against the other party. However, it should be noted that in such a claim, the paying party is entitled to set off against the payment due the amount it would cost to remedy the defective elements of the work.

While substantial performance can be sufficient to constitute performance, mere partial performance is not. Thus where a contract was for the installation of a water heater which in the event did not heat the water and gave off fumes, the threshold of substantial performance was not met, Bolton v Mahadeva (1972). However, partial performance will be acceptable if the other party expressly accepts the part performance, or prevents the party from completing performance.

Despite these exceptions, the general position is that where partial performance leaves the other party with some form of benefit, the party failing to perform substantially will not be able to recover a *quantum meruit* award for the work done. This was the case in Sumpter v Hedges (1898) where a builder who failed to complete his contractual work could not recover a sum for the materials left on the site, which the other party was able to use to complete the building works. While it has been strongly argued by some commentators that this decision has been overtaken by the development of the law on unjust enrichment, the Court of Appeal refused to accept this point and applied Sumpter v Hedges in the recent decision in Cleveland Bridge Dorman Long Engineering Ltd v Multiplex Constructions (UK) Ltd (2010).

One other doctrine which may avail the defaulting party who fails to achieve even substantial performance is the concept of 'divisible contracts'. This applies where rather than seeing the contractual duties as an 'entire obligation', the various duties under the contract can instead be divided into distinct and separate obligations. Thus in Regent ohG Aisestadt & Barig v Francesco of Jermyn Street Ltd (1981) the defendant was unable to claim breach of contract

when in an agreement to deliver consignments of men's suits in instalments, one consignment was a single suit short.

It is also possible for a contract to end through the agreement of the parties, either through accord and satisfaction (which requires consideration where only one party has outstanding obligations) or release through a deed. It is also worth noting that a party may terminate the contract before completing their own obligations when there has been an anticipatory breach of a condition (or possibly an innominate term if the breach is sufficiently serious).

The above cases demonstrate that while the starting point remains that a party to a contract is expected to perform all obligations as exactly as the contract may specify, the courts have been willing to allow some flexibility when considering whether performance has taken place. The doctrines of substantial performance and of divisible obligations have, in particular, allowed the courts to 'save' contracts where the failure to perform fully or exactly is relatively minimal. That said, it is also still clear that a wider failure to perform will still fail to constitute performance and may leave a party with no claim as to anything promised in return.

SECTION B

Question 1

In order for a valid contract to be formed there must be evidence of agreement between the parties. The usual approach of the court is to look for a clear offer met by a 'mirror image' acceptance to establish agreement. An offer can be defined as a clear and certain statement of terms, made with the intention to be bound. An offer should be distinguished from an invitation to treat, which is merely an indication of a willingness to receive offers and has no legal force *per se*.

The usual position in contract law is that advertisements only constitute an invitation to treat. This rule was explained in Partridge v Crittenden (1968), when the court noted that the fact that the person advertising the goods only has a limited number to sell precludes the advertisement being an offer. Otherwise the advertiser could end up liable to sell more goods than he or she may possess.

When Andy advertises his Rolls-Royce in the magazine, this will constitute an invitation to treat. Andy only has one car to sell and so cannot be bound to sell to everyone who may reply to his advert. Furthermore, the elements of certainty and intention that were found in exceptional cases such as Carlill v Carbolic Smoke Ball (1892) do not appear to be present.

Assuming Andy's advertisement is an invitation to treat, Benjani's letter is then an offer to buy the Rolls Royce. It is clear and contains certain terms (the price for the car). An offer must be communicated to the offeree, and the postal rule does not apply to offers. Thus Benjani's offer will be available for acceptance by Andy when he receives it. However, on the facts there is no point at which Andy purports to accept the offer.

Turning now to the actions of Cristina, her first email to Andy is also an offer. She has set out a certain price for the car which Andy is free to accept. However, rather than accepting, Andy replies asking for £55,000 rather than £50,000. When a party replies to an offer with different terms, this is a counter-offer. The effect of a counter-offer is to kill the original offer (Hyde v Wrench (1840). Therefore the only offer available is that of Andy to Cristina.

Cristina replies by asking whether she can pay in instalments. This could be seen as a counter-offer, as it is arguably changing the terms (i.e. payment over time rather than in a lump sum). However, it could be argued that it is merely a request for further information, as to how the payment can be made, and that as such it has not destroyed the offer Andy has made. This could be supported by the case of Stevenson Jacques v McLean (1880) where the offeree's request for further information as to the time of delivery and payment was held not to constitute a counter-offer and so not to kill the original offer.

If the court finds that Cristina's email is another counter-offer, then her last email at 3pm has no effect, as Andy's offer is dead and Cristina cannot accept her own offer. Therefore Derek may accept Andy's offer to him at 5pm via email, and has a valid contract to purchase the car for £55,000.

However, if it was merely a request for further information, then Cristina's 3pm email will be an acceptance of Andy's offer, communicated at the point it arrives and could reasonably be read (Brinkibon v Stahag Stahl und Stahlwarenhandelsgesellschaft (1983)) and therefore a contract is likely to be formed with Cristina at just after 3pm. In this situation Derek's acceptance at 5pm remains valid and he also has a contract to buy the Rolls Royce. As such, if Andy supplies the car to Cristina then Derek would have a claim for breach of contract and may potentially recover his expectation loss if the car is worth more than £55,000. Of course, the same would apply to Cristina if Andy gives the car to Derek.

Question 2

Along with agreement and the intention to create legal relations, it is a requirement for all valid contracts that they are supported by consideration, provided by both parties to the contract. Consideration can be defined as a benefit to the promisee or detriment to the promisor (Currie v Misa (1875)) or as the 'price for the promise' (Dunlop v Selfridge (1915)). When a contract is altered, it is important that both parties provide fresh consideration in order for the new, amended contract to take effect.

Regarding Gloria, her first agreement with Franz appears to be a valid contract. Under this contract Franz will provide consideration of a salary, in exchange for Gloria's promise to work until the following October. However, in the following May they purport to make an additional agreement, whereby Fritz will pay Gloria £8,000 in exchange for a further promise to work until October 2017.

The traditional position at common law is that such an agreement will fail for a lack of fresh consideration. This was the situation in the case of Stilk v Myrick (1809) where after two sailors deserted a ship, the captain promised extra wages to those who remained if they sailed the ship home. The court held the captain did not have to pay the extra monies as the sailors were simply doing what they were already contractually bound to do. Applying this to Gloria, she is not promising to do anything she has not promised already, i.e. to work in the restaurant until October.

An exception to the rule in Stilk came from Hartley v Ponsonby (1857), where again sailors were promised additional wages to sail a ship home. However, in Hartley a much larger proportion of the crew had deserted, and the court held that this made the voyage more dangerous in character and created extra work for the remaining sailors. Thus when they agreed to the extra payment, they provided fresh consideration by agreeing in turn to the additional duties and

danger. Gloria could argue that she was performing additional duties in exchange for the £8,000 payment, as the restaurant has become increasingly busy. However, this argument is unlikely to succeed as the actual work involved has not changed in the way it did in Hartley – Gloria is not exposed to extra danger nor, as far as the facts tell us, is she working any additional hours.

However, the Court of Appeal decision in Williams v Roffey Brothers (1990) suggested that modern contract law may take a more flexible approach to such contractual promises. In Williams v Roffey, a promise to carry out work which Williams was already contractually bound to do was held to be supported by the consideration of a 'practical benefit'. This benefit consisted of the contractor avoiding a disbenefit (a major penalty under the main contract) and the trouble and expense of finding a replacement carpenter. Gloria could argue that in this situation, Franz has avoided the disbenefit of needing to find a replacement employee to take on Gloria's duties, especially considering that she is particularly experienced for her role.

However, Glidewell LJ limited the doctrine of practical benefit to situations where duress was not present. In Williams v Roffey it was Roffey Brothers idea to pay Williams more money to complete the work he had already agreed to. Here, it appears as though Gloria may be the one who is instigating the extra payment, especially as she hints she may leave her employment if Franz does not hire extra staff. In order for economic duress to be shown, there must be coercion of the will (i.e. no practical alternative for the party being pressured) and illegitimate pressure. Arguably Franz does have an alternative, i.e. hiring another member of staff and Gloria will suggest that her threat was made as mere 'commercial pressure'. It could also be noted that Franz does not appear to protest at the time. However, it could be considered as to whether hiring extra staff was practical for Franz to do, and Gloria's 'hint' may be seen as a threat to breach her contract, which would indeed be illegitimate pressure.

In conclusion, it is difficult to say whether Gloria will be able to rely on the Williams v Roffey principle and it may well be that her 'threat' is enough to prevent the court from extending this more flexible approach to her situation.

Regarding Harry, there are two promises he wishes to enforce – the promise of £1,000 and of the painting of his grandfather. The £1,000 is promised by Franz in October 2017 as a reward for work that Harry has been doing over the past year. It is a principle of consideration that it must not be past, i.e. the act being promised in exchange must not have been already carried out – see e.g. Re McArdle (1951). Here, Harry has already invented the cocktails and so cannot use this as consideration to support Franz's promise. As such, the promise is merely a gift and not a contract, and cannot be enforced.

Franz also promises Harry the painting of his grandfather in exchange for an extra month's work. It is well established that consideration must be sufficient, i.e. of some value, but need not be adequate, i.e. a fair exchange. This was demonstrated in Chappell v Nestle (1959), where used sweet wrappers could be seen as sufficient consideration even though they were of extremely small economic value. Applying this case to the facts, it is clear that as the painting will have some (albeit negligible) value as a physical object, it can be sufficient consideration in exchange for Harry's promise to work. Assuming Harry has worked for the next month as agreed, he is entitled to the painting.

Question 3(a)

The doctrine of privity states that only the parties to a contract may sue or be sued upon it. An example of the rule in practice is Tweddle v Atkinson (1861) where a young man was unable to enforce an agreement between his father and his father-in-law to pay him a sum of money upon his marriage. However, the courts (and more recently Parliament) have developed a number of exceptions to the strict rule.

Regarding Lisa's contract with Superstar Travel, as a party to the contract she has privity and will be able to sue for breach of contract. Under the traditional rule neither her daughter Olivia nor her husband Peter will be able to claim, as they are not parties to the contract. Lisa would be able to claim for the cost of the holiday.

However, one of the exceptions to the strict doctrine of privity may apply in this situation. After the Court of Appeal allowed for recovery of damages for distress or disappointment in Jarvis v Swan Tours (1972), the principle was further widened in Jackson v Horizon Holidays (1975). In this case the claimant was able to recover these damages for distress not only for himself but on behalf of his family as well.

While the application of Jackson has been limited by subsequent cases such as Woodar Investment Development Ltd v Wimpey Construction UK Ltd (1980) the case remains good authority that where a contract with the object of is made for convenience by one party on behalf of a group, in a non-commercial context, it is possible for the contract-maker to claim on their behalf. Therefore it is clear that Lisa can rely on Jackson to also claim for both her own and Olivia and Peters' distress and disappointment as a result of the breach of contract.

(b)

As explained above, the strict rule of privity prevents a third party from enforcing a contract they are not party to. Therefore at common law the starting point is that Mary has no right to enforce the contract between Lisa and Withdean University, so has no action to prevent the university from limiting their teaching provision.

However, the harshness of the common law rule was considerably mitigated by the introduction of the Contracts (Rights of Third Parties) Act 1999. Under S1(1) of the Act, a third party may enforce a term of a contract if the contract either expressly provides that he may, or the term purports to confer a benefit on him. It would appear that the term regarding teaching purports to confer a benefit on Mary, i.e. to be entitled to this level of teaching, and thus she is covered by S1(1).

There are two further restrictions on when a third party may rely on the Act – section 1(2) states that a party cannot enforce a term which confers a benefit on him if the parties did not intend for him to be able to do so, while section 1(3) requires any person relying on the Act to be named in the contract. It would appear that Mary is named in the contract so S1(3) is met. Regarding S1(2), more information may be needed but there is no evidence on the facts that the parties did not intend for Mary to be able to enforce the term.

Mary may be able to enforce the contract for teaching, but it is less likely that the 1999 Act would apply regarding the contract for the books. While the contract is actually for Mary's benefit, it does not state this as Mary was not

mentioned when Lisa bought the books. Furthermore, Mary is not identified in the contract and so S1(3) would also prevent a claim based on the Act.

While the Act was a major change to the law of privity, it preserves the common law rule and thus the common law exceptions can still apply. One relevant exception is the concept of a collateral contract, as demonstrated in Shanklin Pier v Detel Products (1951). In this case the owners of a pier had contracted with painters, who in turn contracted with Detel to buy paint. The paint turned out to be defective and it appeared the owners were prevented from suing Detel due to the rule of privity. However, the court found that by encouraging the painters to use Detel paint, the Pier owners had provided consideration for a collateral agreement with Detel directly, in return for which Detel made a promise as to the longevity of the paint.

Applying this case to Mary's situation, it could be argued that by recommending Withdean Books to Lisa, she has provided the bookshop with a benefit and thus consideration. Mary would argue that the promise in return was that the bookshop was indeed reliable and would deliver the books as required.

(c)

If Lisa died and Mary was appointed as executrix of her estate, this would potentially allow her to rely on another of the common law exceptions to the rule of privity. The relevant case is Beswick v Beswick (1968) where a man sold his business to his nephew in exchange for a promise to pay him a regular sum of money for the rest of his life, and on his death to instead pay his widow, Mrs Bewick. When the nephew ceased payments on Mr Beswick's death, Mrs Beswick wished to enforce the contract. It was held that she could not do so in her own right, as she was a third party to the agreement. However, acting on behalf of Mr Beswick's estate, she could sue for breach of contract and claim the remedy of specific performance, which would compel the nephew to carry out his contractual obligations. Therefore Mary could attempt to claim in her mother's name for this remedy (but damages would be nominal only due to Lisa's estate having suffered no loss).

Specific performance is an equitable remedy and thus awarded at the discretion of the court. The court will be reluctant to do so where the remedy may require constant supervision, as it would be impractical for parties to be returning to court repeatedly to argue as to whether they were performing as expected, see e.g. Co-op Insurance Society Ltd v Argyll Stores (1998). Specific performance is also not permitted if the effect of the order would be to compel personal services. Arguably both of these reasons may prevent Mary from being awarded specific performance of the teaching contract, although there seems to be no reason it could not be awarded regarding the delivery of the textbooks.

Question 4(a)

An exclusion, or exemption, clause is one which seeks to restrict liability in some way. In order for such a clause to be effective, it must be incorporated into the contract, interpreted to cover the loss suffered, and valid under statute. There are three methods of incorporating an exemption clause: by signature, by reasonable notice and by a consistent course of dealing.

Looking first at the clause excluding liability in personal training sessions, this would appear *prima facie* to be incorporated by signature. L'Estrange v Graucob (1934) is authority for the proposition that a party is bound by the terms of any contractual document which they sign, whether or not they have read the

document. However, an important exception to this rule is where there has been a misrepresentation as to the effect of the clause, see Curtis v Chemical Cleaning (1951). Here, Tia has signed the 'Gym Member agreement' but Usman appears to have misrepresented the clause by telling her that it only applies above a certain age. Thus the clause is likely not incorporated into the agreement.

Tia will also wish to claim regarding the loss of her diamond necklace from her locker. Looking first to incorporation, there is nothing in the facts given to suggest that it has been incorporated by signature. The second method is where the party is given reasonable notice of the clause. For such notice to be effective, it must come before the contract is made. Thus in Olley v Marlborough Court (1949) an exclusion clause contained in a notice on the back of a hotel room door came too late when the contract was made at the front desk. Tia's situation appears to be most similar to the facts in Thornton v Shoe Lane Parking (1971) where a clause contained on a ticket given by an automated machine came too late, as the contract was formed at the moment the money was placed in the machine to gain the ticket in exchange.

Here, Tia has to place her pound coin in the locker before it opens, and as the sticker is on the inside of the locker door she cannot see it until the locker is opened. In the words of Lord Denning MR in Thornton, "The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time."

Assuming the clause has not been incorporated by reasonable notice, Crazy Fitness will need to demonstrate that it has been incorporated by a consistent course of dealing. This will apply when a clause has been consistently included in previous contracts (see e.g. Henry Kendall & Sons v William Lillico & Sons (1966)). However, to rely on the clause the defendant must demonstrate that the course of dealing was consistent (McCutcheon v MacBrayne (1964)), and this is highly debateable if Lisa has only used the lockers on two previous visits.

(b)

As discussed above, it is unlikely that the clause regarding personal injury is incorporated into the contract. However if it was, it would also be invalid under statute. As a consumer contract, the clause will be governed by the Consumer Rights Act 2015 (rather than the Unfair Contract Terms Act 1977) and section 65 of that Act prevents the exclusion of liability for personal injury when caused by negligence. Crazy Fitness will not be able to exclude liability for Tia's physical injury.

There is no equivalent provision regarding loss of property, so the clause excluding liability for loss of belongings must be assessed under the general test for fairness provided by the 2015 Act. This can be found in section 62(4), which states that a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

Considering the term excludes all liability for loss from an area controlled by Crazy Fitness (the locker room) and more specifically from secured lockers which one would assume are provided to safely store belongings, it could be argued that the term is unfair by the imbalance of Crazy Fitness claiming no liability whatsoever. Tia's claim may be supported by some of the example terms in Schedule 2 of the Consumer Rights Act, which provide a guide to terms which

may be seen as unfair. Paragraph 20 is of particular note, suggesting a term may be unfair if it excludes or hinders the consumer's right to take legal action.