

**LEVEL 6 - UNIT 2- CONTRACT LAW
SUGGESTED ANSWERS – JUNE 2017**

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 June 2017 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

In order for a valid contract to exist, there must be the element of agreement. Indeed, much of the theory and practical rules of contract law have developed from this basic requirement. Without agreement, a party could not be held to have either rights or obligations under a contract.

Traditionally agreement has been found by the courts using a set of rules which can be grouped under the heading of 'offer and acceptance'. An offer can be defined as a willingness to enter into a contract on clear and certain stated terms. The courts will not give effect to a mere invitation to treat, that is, an expression of willingness to negotiate. An example of where certainty and intention created a binding offer can be found in Carlill v Carbolic Smoke Ball Company (1893). An offer must also be communicated to the other party, the offeree.

On receipt of an offer, no contract is formed until the offeree has made an acceptance. This must comply in most cases with two strict rules. Firstly the acceptance must be a 'mirror image' of the offer, in that no terms are added, removed or altered (Hyde v Wrench (1840)). Secondly, the acceptance must be communicated to the offeror (see e.g. Entores v Miles Far East Corporation (1955)). When applying the offer and acceptance criteria the court strives to take an objective approach.

There are a number of situations in which the courts have found it difficult to apply the usual offer and acceptance approach. One example is the unusual case of The Satanita (1897). Here the two parties had entered their yachts into a race, as part of which they had signed a list of rules produced by their yacht club. One of these rules stated that the penalty for a failure to obey would be "all

damages arising therefrom." One of the yacht owners did indeed disobey the rules and collided with the other boat. Despite the lack of any traditional offer and acceptance by the two parties, the courts found a binding contract between them.

Another more substantial issue can be found in unilateral contracts. In a unilateral contract, only the offeror is bound ab initio and acceptance takes place by performance of the offeree. While in most situations performance can be found to have taken place or not, as a matter of fact, it remains unclear as a matter of law at what point acceptance takes place. Following the traditional rules acceptance should only occur at the point of full performance. However, there is also clear authority that an offeror may not revoke their unilateral once the offeree has begun to perform (Daulia v Four Millbank Nominees Ltd (1978)). This is conventionally explained by a collateral obligation arising which binds the offeror, but there is conflicting authority on the point, e.g. Luxor (Eastbourne) Ltd v Cooper (1941). The uncertainty of this area provides a clear example of how even well-established principles may not coincide with basic offer and acceptance analysis.

Indeed, acceptance by performance is often problematic when deciding agreement. It has been settled law for over a century that acceptance can be made in this manner (see e.g. Brogden v Metropolitan Railway (1877)) yet it remains an issue that troubles the courts. An important modern decision on the matter is Trentham v Archital Luxfer (1993) where the Court of Appeal was asked to decide if a court could find a binding contract where no formal offer and acceptance had taken place but instead there was a mixture of written and oral statements combined with performance. Lord Steyn, delivering the judgment of the court, made it clear that this was possible, especially given the 'commercial character of the transaction.'

In particular, it is common in the commercial world for an agreement to be made 'subject to contract' and thus not legally binding until the final contract is completed. However, one or both parties may begin performing their anticipated obligation under the contract before this moment of formal agreement. This was the situation in RTS Flexible Systems v Molkerei Alois Muller (2010). Here, the Supreme Court held that in the circumstances the parties 'communications and actions lead to the conclusion that they had agreed...' and that the parties had impliedly waived the 'subject to contract' provision. However, Lord Clarke was at pains to point out that in all such cases the factual circumstances were of paramount importance, and that it would be 'too simplistic and dogmatic an approach' to always assume that performance alone would create a binding agreement.

Even when a formal offer and acceptance is present, the traditional approach may be difficult to apply or lead to unjust results. A classic example of problems with offer and acceptance can be found in the so-called 'battle of the forms', typified by Butler v Ex-Cell-O Corporation (1979). In this case the claimant attempted to sell a machine tool using its standard terms of business. The buyers replied with an order on their own standard terms and a tear-off acceptance slip. The sellers signed the slip and returned it to the buyers, together with a letter stating they were delivering the order on the terms of their original offer.

The majority of the Court of Appeal saw the requisite moment of agreement at the point the slip was returned by the sellers. At this point they could be held to have accepted the terms sent by the buyers. However Lord Denning expressed *obiter* that he considered traditional models of offer and acceptance 'out of date'

and suggested that instead the court should look at all documents and conduct on both sides to find agreement. However, an attempt by the Court of Appeal, led by Lord Denning, to impose this new approach was rejected by the House of Lords in Gibson v Manchester City Council (1979).

It can be argued that recent decisions such as Trentham suggest that at least some of Lord Denning's arguments are now being reconsidered. As with other areas of contract law (see e.g. the development of the doctrine of 'practical benefit' in consideration) the courts appear more ready today to consider commercial reality above legal fiction. The Supreme Court made it clear in RTS Flexible Solutions that individual circumstances are what should guide the court in any particular case, rather than strict rules of offer and acceptance.

However, it can certainly be argued that such an approach only provides flexibility at the cost of greater uncertainty. For every business which benefits from a more discretionary approach, one could imagine another which suffers from being unable to be sure whether or not a binding contract has commenced. There is also a danger that by moving away from clear rules of offer and acceptance and choosing instead to examine individual factual scenarios, the courts may unconsciously be slipping into a more subjective mindset. Indeed, it could be argued that by considering 'all the circumstances' the courts are already beginning to place weight on the thoughts and intentions of the parties, rather than merely the evidence available to the objective observer.

What is clear is that there remain situations where traditional offer and acceptance is insufficient to judge agreement, and thus the courts will continue to require alternative approaches.

Question 2(a)

Damages is the standard remedy in contract law and is usually available as of right for breach of contract. When awarding substantial damages, the courts calculate the sum as being that which would put the claimant in the position they would have been in had the contract been performed fully. The aim is to thus meet the claimant's expectation interest. However, an important caveat to the above is that damages are only available if they are not too remote a consequence of the breach.

The leading case on remoteness of damages remains Hadley v Baxendale (1854). In this case the defendant carriers were contracted to bring a replacement shaft to the claimant's mill. In breach of contract, they delayed delivery, causing losses due to the mill's inactivity. It was held by Alderson B that the test for remoteness is whether the loss 'may fairly and reasonably be considered either arising naturally, that is, 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, as the probable result of the breach of it.' In this particular case, the defendants were unaware of the significance of delaying delivery of the mill shaft and thus the damage was too remote.

This created a two-limbed test. The first limb, loss arising naturally in the usual course of things, was reconsidered in The Heron II (1967) as covering loss which the reasonable defendant could imagine was "not unlikely" or a "serious possibility". That case also made clear that while this is the limb which includes losses a reasonable man could see arising naturally, it is a different and stricter test to that of "reasonable foreseeability" which is used in the law of tort.

The second limb, losses in the contemplation of both the parties, is easier to define, as it is a question of fact in each case as to whether a particular loss was in the contemplation of both claimant and defendant. An example is Victoria Laundry v Newman Industries (1949) where the defendant sellers were late in delivering a boiler for use in the claimant's laundry. While lost profits equivalent to usual business were recoverable under the first limb, a particularly lucrative government contract which the claimant had been unable to fulfil could not be compensated, as it was not within the knowledge of the defendant.

In recent years the test has again been examined by the higher courts, notably in Transfield Shipping Inc v Mercator Shipping Inc, The Achilleas (2008) where the House of Lords upheld the test but stated that in certain circumstances it may be departed from in order to give effect to the presumed intentions of the parties. Thus in that case, the House held that in the commercial context of the agreement it had not been intended that the charterer of the vessel would bear the loss of his breach, even though the damage caused by the breach was "not unlikely". This authority has been followed in a number of Court of Appeal decisions, e.g. John Grimes Partnership Ltd v Gubbins (2013). However, it is clear that the Achilleas exception will only apply when there is clear evidence that there are unusual circumstances justifying departure from the general Hadley v Baxendale approach. Quite what circumstances will be judged to be sufficiently "unusual" is a matter that remains unclear, and it can be argued that the recent decisions have not been successful in clarifying the application of the traditional test.

(b)

Specific performance is an equitable remedy, and thus granted at the discretion of the court. The effect of the remedy is to compel a party to perform as required under the contract. As such, it is of particular value in certain situations, for example where a party has contracted to purchase a unique item.

However, due to the equitable nature of specific performance, there are a number of bars which may prevent it being granted to a claimant. First and foremost, as noted above damages are the usual remedy in a contractual dispute and the court will need to be persuaded that such a remedy would be inadequate.

Other restrictions include the refusal to grant specific performance in a contract for personal services (De Francesco v Barnham (1890)) as to compel a person to work for another would be tantamount to slavery; the order would cause undue hardship to the defendant (Patel v Ali (1984)); there is a lack of mutuality of obligations (Price v Strange (1978)); and where performance is impossible (Watts v Spence (1976)). Furthermore, the usual maxims of equity will of course apply, and so for example the remedy is not available to those who fail to "come with clean hands", nor will equity assist a volunteer. These restrictions are long-established and leave little scope for criticism.

The House of Lords decision in Beswick v Beswick (1968) to grant an order of specific performance to an executrix in order to avoid the rule of privity appeared to presage a wider use of the remedy. However, the more recent authority of Co-Operative Insurance Society v Argyll Stores (1998) appears to have limited the development of the doctrine. The House of Lords expressed serious reservations about the use of specific performance in all but exceptional circumstances, particularly because, in the words of Lord Hoffman: "the only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt. This is a powerful weapon; so powerful, in fact, as often to be

unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order."

Question 3

Established during the nineteenth century, the rule of privity is as simple as its many exceptions are complex. It states that only the parties to a contract may sue or be sued upon it, and thus third parties will have no rights in contract law. Classic examples of the rule of privity are Dunlop v Selfridge (1915) and Tweddle v Atkinson (1861), where a bridegroom was unable to enforce a promise made by his father-in-law to his father that he would pay the young couple money upon the occasion of their marriage, as he was a stranger to the contract (and had provided no consideration in exchange for the promise).

However, while the doctrine itself has been upheld ever since, many exceptions to the rule have arisen. One simple method of avoiding the rule of privity is to create a direct contractual relationship between the promisor and the third party seeking to enforce the promise. Even when this does not appear to have been done by the parties, the courts may imply a collateral contract as in Shanklin Pier v Detel Products (1951). Another method of achieving the same goal is by considering the promisee as the agent of the third party, which was used in The Eurymedon (1975) to extend the benefit of an exclusion clause to subcontractors.

In certain cases the courts have appeared ready to find new methods to mitigate the harshness of the rule. In Beswick v Beswick (1968) a widow was prevented by privity from enforcing a promise made to her husband to pay her a weekly sum of money. However, as executrix of her husband's estate, the court granted her an order of specific performance on the contract. Lord Denning provided another exception in the "holiday cases" such as Jackson v Horizon Holidays (1975), where he allowed the claimant to recover damages to compensate family members who did not have a contract with the holiday provider. It should be noted though that this exception was limited to contracts for recreation and enjoyment by subsequent authority (Woodar Investment Development v Wimpey Construction (1980)). Other exceptions include statutes such as the Married Women's Property Act 1882 and the availability of an alternative claim in the tort of negligence.

However, the most wide-ranging exception to the rule came with the passage into law of the Contracts (Rights of Third Parties) Act 1999. Under S1(1) of this Act, a third party may enforce a term of a contract if he is either expressly given the right to do so by that contract, or the term purports to confer a benefit upon him. The latter right is limited by the requirement that it will not apply if upon a proper construction of the contract it appears that the parties did not intend the term to be enforceable by a third party (S1(2)). Whichever way the party claims the right to enforce, he or she must also demonstrate that they are expressly named or described in the contract (S1(3)).

It is clear that the Act did much to enable third parties to enforce contracts. Were Tweddle v Atkinson to be decided today, William Tweddle would have been able to rely on the fact that the contract was made for his benefit. Indeed, it may seem *prima facie* that few third parties would wish to enforce a contract unless a term or terms were for their benefit. Decisions such as Nisshin Shipping Co v Cleaves & Co (2004) where a third party was able to use an arbitration clause in a contract to which they were not a party would support this view, especially as

in that case the court held that S1(2) is a rebuttable presumption that the contract is intended to be enforceable by a third party.

However, it would be incorrect to state that privity has become irrelevant in modern contract law. There may well be a presumption under S1(2) of the Act but it can be rebutted – for example, in Bhamra v Dubb (2010) a claim by the estate of a wedding guest who died after eating food to which he was allergic failed in contract law as the contract between the caterer and the organisers of the wedding was not intended to be enforced by guests at the occasion (although an action did succeed in the tort of negligence). Section 1(3) has also proved a stumbling block in some potential claims, as often third parties are not expressly or specifically identified within a contract.

Where the Act does not apply, the common law exceptions still remain, but the very fact of this makes it clear that the rule they deviate from still exists as well. While third parties have greater opportunities to enforce contracts than at any point since the mid-1800s, it is a definite overstatement to suggest that the rule of privity is dead.

Question 4

Alongside agreement and the intention to create legal relations, consideration is a crucial element in order to form a valid contract. Consideration can be defined as “some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other” per Lush LJ, Currie v Misa (1875). It has also been said to be “the price for which the promise of the other is bought” (Dunlop v Selfridge (1915) per Lord Dunedin).

When parties wish to amend an existing contract, they must do so by creating a new agreement. This agreement will have the same requirements as all contracts, thus including consideration. Therefore, where party A and party B contract for A to lend B a sum of money, an agreement under which B will pay back less than the whole sum will, *prima facie*, fail for want of fresh consideration. A is suffering the detriment of receiving less than he or she is legally entitled to, but B is not providing a commensurate benefit or suffering a detriment. This was the reasoning of the court in Pinnel’s Case (1601), as upheld by the House of Lords in Foakes v Beer (1884) – payment of a lesser sum in satisfaction of a greater cannot be any satisfaction for the whole.

However, there are ways in which the debtor may provide fresh consideration in exchange for the promise to accept less. Giving the lender a chattel along with the lower sum would be one way to do this, mentioned in Pinnel’s Case as being for example “a horse, a hawk, a robe.” Another benefit which could be provided would be payment before the sum became due under the original contract – while the lender is still suffering the detriment of receiving less, he or she is gaining the benefit of gaining the money earlier. The same reasoning allows for payment in a different place than originally agreed, if requested by the lender.

Two other historic examples should be noted, although their modern relevance is slight. In Hirachand Punamchand v Temple (1911) the court upheld a contract under which a third party paid a lesser sum on the debtor’s behalf and in Sibree v Tripp (1846) payment via a negotiable instrument was held to constitute fresh consideration. However, this latter case has been frequently criticised and is unlikely to have any modern relevance after the decision in D&C Builders v Rees (1966) where payment by cheque was held to have no effect on the lack of consideration.

More recently, the widening of the definition of consideration to include a "practical benefit" in Williams v Roffey Brothers (1991) offered a brief hope of the rule being finally overturned, however the Court of Appeal was forced to accept in Re Selectmove (1995) that the binding nature of the House of Lords decision in Foakes v Beer prevented the "practical benefit" analysis from being expanded from cases of "giving more" to those of "accepting less". However, the recent Court of Appeal decision in MWB Business Exchange Centres v Rock Advertising (2016) may indicate a loosening of this approach and should be noted. This decision has certainly created a renewed discussion about the issue but it is at this stage difficult to judge whether it signifies a permanent change in the law.

However, long before these decisions one clear exception was developed to mitigate the harshness of the rule from Foakes v Beer. This is the doctrine of promissory estoppel. Based on reasoning from Hughes v Metropolitan Railway (1877) the modern statement of the law comes from the judgment in Central London Property Trust v High Trees House Ltd (1947). In this case, it was held that where there is a clear promise to accept less than a party is legally entitled to, and the other party relies on that promise, then if it would be inequitable for the promisor to go back on their word, equity will stop them from doing so. Thus in High Trees, a promise to accept half the rent due during the Second World War was upheld.

However, there are two restrictions upon promissory estoppel which may have a serious impact on the party looking to enforce a promise to accept less. Firstly, estoppel is a "shield, not a sword" (Combe v Combe (1951)). This means that the doctrine operates only as a defence, not a cause of action. In the case of an agreed part payment, this means that the debtor must wait until the lender sues for the balance of the debt before being able to plead estoppel, and thus such a promise is of uncertain value until decided after potentially expensive and lengthy litigation.

Furthermore, there has been considerable dispute as to whether promissory estoppel can fully extinguish rights or merely suspend them. As Denning J's comments on previous rent being unclaimable were merely *obiter* in High Trees, the point was left open for subsequent cases. Decisions such as Tool Metal Manufacturing v Tungsten Electric Co (1955) appear to suggest that the promisor need only give reasonable notice in order to withdraw their promise, although there is some recent authority which suggests that in certain circumstances at least, rights may be estopped indefinitely (see e.g. Collier v P & MJ Wright (Holdings) Ltd (2007)).

Therefore it is still true to say that at common law, the courts are unlikely to depart from the rule that part payment is no satisfaction for the whole, although as noted above this may not always be the case. However, it is unrealistic to expect any more than a limited exception until and unless the Supreme Court chooses to over-rule Foakes v Beer, or Parliament legislates on the matter. Some relief may be provided in equity, but while promissory estoppel may be of great value in upholding limited promises to forebear for a set period of time, it is far from certain that a court would allow it to effectively cancel a legal right to the balance of a debt.

SECTION B

Question 1(a)

When a contract cannot be performed as the parties intended, there is the possibility that the contract will be discharged by the doctrine of frustration. Historically, frustration was introduced into the common law as a species of implied term, however the modern approach is to see the doctrine as a separate method of discharge: Davis Contractors Ltd v Fareham Urban District Council [1956]. Cases such as Davis have made clear that frustration will occur when, after the contract has been formed and through no fault of either party, the contract becomes either impossible to perform, or performance would be radically different than that intended by the contract. The courts will interpret this test conservatively and will not allow the doctrine to be suborned to allow a party to escape from a bad bargain. The effect of the doctrine is to bring a contract to an end and this cannot be contested by either party.

The contract with the Arch Theatre

The first requirement for frustration, as outlined above, is that a contract has already been formed. It is clear in this scenario that Katrina has already made a contract with the Arch Theatre, at the point when she purchased three tickets for the performance (in exchange for £150). Furthermore, it is also clear that the potentially frustrating event itself was beyond the control of either party – a storm. The final question is whether it is impossible to perform the contract. While we are not given full information regarding the damage to the concert hall, it certainly appears to be such that it would not be possible to stage the opera as planned.

As such it would appear the contract is frustrated. In Taylor v Caldwell (1863) there was a similar factual situation, where a contract to use a music hall was frustrated when the music hall was destroyed. The fact that in this case the theatre was only damaged is unlikely to alter this position. Furthermore, the damage may be such that it would not be safe to allow the performance to go ahead and it could be argued that the breaches of e.g. health and safety regulations would make the contract illegal to perform and thus frustrated.

The contract with the Britannic Theatre

Again it is clear that a contract has been formed, and that the possibly frustrating event (the illness of Jimmy Charles) was outside of the control of either Katrina or the owner of the Britannic. However, it is arguable whether the event has truly frustrated the contract. It is clear that the contract is not impossible to perform and so one must consider whether there has been frustration of the common purpose for which the contract was entered into to.

Katrina will argue that it was the entire purpose of the contract that they saw Jimmy Charles in the role of Macbeth. In Krell v Henry (1903) a contract to hire a London flat with the express purpose of watching the coronation procession of King Edward VII was held to be frustrated when the coronation was postponed as the purpose of the contract was frustrated. Here, Katrina and her family were not interested in the play beyond Mr Charles' performance and did not enjoy watching it without him and so will argue that the same reasoning should apply.

However, Herne Bay Steam Boat Co v Hutton (1903) was another case relating to the postponed coronation. Here, the contract was for hiring a ship for the

purpose of viewing the Royal Naval review, but also for a day's cruise around the fleet. It was held that simply because the royal review did not take place, the contract was not frustrated because the hirer still could enjoy the day's cruise. Therefore, the contract survived because the event was not "the common foundation of the contract." The Britannic Theatre may argue the same point – Katrina and her children were still able to watch the production and the availability of an understudy meant that the role was still filled. As such, it is perhaps more likely than not that the contract will not have been frustrated.

(b)

Assuming one or both contracts have been frustrated, Katrina will wish to recover the sums spent on tickets (£150 on the first night and a further £300 on the second night). Historically, sums already paid before the frustrating event occurred could not be recovered (see e.g. Chandler v Webster (1904), where a prepaid booking fee was lost to the claimant). This harsh rule, that the loss lay where it fell, was partly mitigated in common law in cases such as Fibrosa Spolka Ackcyjna v Fairbarin, Lawson Combe Barbour (1943) and was finally disposed of by the passage of the Law Reform (Frustrated Contracts) Act 1943.

Under S1(2) of the Act, all moneys paid before the frustrating event are recoverable. This would suggest that if Katrina is able to show frustration, she will be able to recover the cost of the tickets. However, it should be noted that under the same subsection, a party may set off against the sum returned any expenses incurred for the performance of the contract. Potentially this may be used by the owner(s) of the theatres as they will, one assumes, have spent considerable money in preparing for each performance.

(c)

It would seem clear that the Royal Hotel is in breach of their contract with Katrina. The issues of frustration discussed above do not apply here, as the problems are the direct consequences of the choice of the Royal Hotel to house the affected guests, and thus the "fault" of the Hotel. Katrina contracted for two rooms containing a total of three beds, and has instead been given one room with one bed. The usual remedy for breach, and the one of most relevance here, is substantial damages. Substantial damages mean those calculated to put the claimant in the position he or she would be in had the contract been performed properly, thus meeting the claimant's expectation interest.

As such, Katrina will be able to claim the portion of the £650 which represented the double room for herself and Mandy. She will not be able to recover the amount for the single room, as this was provided by the hotel. However, Katrina may also be able to rely on the cases of Jarvis v Swan Tours (1972) and Jackson v Horizon Holidays (1975). In these cases, which involved breach of a contract for a holiday, the claimant was able to recover damages for the distress and disappointment suffered when the primary object of a contract was to obtain some mental satisfaction. Furthermore, in those cases Lord Denning suggested that the amount claimed should represent the mental distress suffered not only by the claimant himself but also by the family members who had also been part of the holiday.

While this exception has been limited in later cases, notably Woodar Investment Development v Wimpey Construction (1980), it is clear that it continues to apply to "holiday" contracts undertaken on behalf of a small social group. As such, Katrina may well be able to recover a sum above the amount paid for the room,

signifying the distress she and her children undeniably suffered (i.e. their lack of sleep and comfort).

However, there is one further principle of damages which may apply to Katrina's claim. This is the concept of mitigation of loss. It is a settled principle of law that a claimant, while free to act as he or she wishes, must not incur unreasonable expense subsequent to the breach of contract; and more importantly for Katrina, must take reasonable steps to minimise the loss caused by the breach (see e.g. British Westinghouse Co v Underground Electric Railway Co (1912)). Here, the defendant may attempt to argue that a reasonable person, faced with the issues at the Royal Hotel, would have at least explored the possibility of alternative accommodation, as we know that at least one nearby hotel had "plenty" of rooms available. However, it would be difficult to characterise Katrina's behaviour as unreasonable, especially as the Royal Hotel could have used this availability to house the guests from the storm-hit hotel.

Question 2

A misrepresentation is a false statement of fact (or law) which induces a party to enter into a contract, as a result of which that party suffers loss. Two statements have been made to Xavier, one by Derek and one by Wendy, which may potentially represent actionable misrepresentations.

Derek's statement

Derek was asked by Xavier about the weight limit for the shelving unit, to which he replied "I can't think of much that it couldn't hold." However, it is not clear that this will be an actionable misrepresentation.

Firstly, the statement must be false. This has been interpreted by the courts to mean that it is not "substantially true", as discussed in Avon Insurance v Swire Fraser (2000). It is questionable whether what Derek has said is not substantially true – it may well be the case that he cannot think of much that the shelving unit could not safely hold. However, it could be argued that in the context of Xavier's question, Derek is suggesting by his words that the unit has a high weight limit, which is not the case.

As such, the next question to consider is if Derek has made a statement of fact. Looking carefully at Derek's words, it would appear that he has instead made a statement of opinion, as he is discussing what he himself thinks, rather than any factual claim as to a specific weight limit. An opinion is not usually an actionable misrepresentation, Bissett v Wilkinson (1927). There is an exception to this rule, which can be seen in Esso Petroleum v Mardon (1976), where the opinion of an expert will be treated as a statement of fact. Is then Derek an expert? It would appear to be unlikely that the court would consider him such – while he is employed by the store and thus may be presumed to have some knowledge of the products, he is merely a part-time employee who has only recently started working at Brilliant Bookcases.

Finally, even if the statement could be said to be a false statement of fact, it is questionable whether it induced Xavier to enter into the contract. Xavier does not contract on that day, and indeed does not purchase the unit until the following week. Following authority such as Attwood v Small (1838) a misrepresentation does not induce the contract if the representee did not allow it to affect his judgement. While Edgington v Fitzmaurice (1885) makes it clear that the representation need only be a factor, not the sole factor, in the decision to contract, the fact that Xavier asks Wendy about the weight limit of the

bookcase during their telephone call would suggest that he is not relying on the earlier statement made by Derek.

Wendy's statement

As such it may be preferable for any claim brought by Derek to be based on Wendy's statement. This statement is clearly false, as the shelving was only certified to carry 50kg of weight, not the 200kg stated. Furthermore, this is *prima facie* a statement of fact. Wendy may attempt to argue that she was merely repeating the statement from the website, rather than making the representation herself. However, it has long been settled law (see e.g. Smith v Land and House Property (1884)) that where a claim is repeated by one presumed to have expertise in the area, that person may be making an actionable misrepresentation. Wendy could well be presumed to be such an expert, considering that she owns the business. The issue has been the subject of a number of recent cases and the Court of Appeal decision in Webster v Liddington (2014) is of particular relevance. That case upheld the test first proposed by Toulson J in IFE Fund SA v Goldman Sachs International (2007), namely that the court has "to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context." It is certainly arguable that by passing on the information she found, without any qualifications as to its accuracy, and perhaps even embellishing it by suggesting this was an official claim by the manufacturer, Wendy has committed an actionable misrepresentation.

If this is the case, it must also be decided as to what type of misrepresentation has occurred: fraudulent, negligent or innocent. This will dictate what remedies are available and is of particular relevance here, as Xavier will be wishing to claim damages rather than the remedy of rescission, and damages are only available as of right for negligent or fraudulent misrepresentation.

In order for Wendy to demonstrate that this was an innocent misrepresentation under S2(1) of the Misrepresentation Act 1967, she would have to demonstrate she believed the statement was true, and reasonable grounds for that belief. If the figure of 200kg was from the manufacturer's official specifications, then Wendy would likely pass that test. However, from the facts as stated it is extremely unclear where she found the 200kg figure. Assuming it was from an unofficial source, then it is hard to imagine the website being found to constitute "reasonable grounds".

There is no requirement for Xavier to claim that the misrepresentation was fraudulent, as under the Misrepresentation Act 1967 the same remedies are available for negligent and fraudulent misrepresentation. If Wendy is unable to demonstrate the misrepresentation was innocent, Xavier may claim damages as his remedy (as rescission is impossible due to the damage to the programmes). Importantly, because fraudulent misrepresentation comes from the tort of deceit, damages will be assessed on the tortious basis (i.e. to put the claimant back in the position they were in before the misrepresentation) and the more generous tortious rules of remoteness will apply to the damages awarded. This is important as under contract law it is extremely arguable as to whether the valuable programmes would have been in the contemplation of Wendy at the time of sale.

Question 3(a)

It should be noted that due to the provision of a new benefit, namely a specific delivery 'slot' on the day of delivery, the amending contract will not fail for a lack of consideration. As per Williams v Roffey Brothers (1990) a "practical benefit" will have been provided, but this doctrine will not assist in cases of duress (see Stilk v Myrick (1809)). Therefore Olivia will need to use economic duress in order to attempt to set this contract aside.

The doctrine of economic duress is difficult to define exactly, but can be said to be a vitiating factor which arises where one party uses superior economic power to force another into a contract. The courts are careful to only allow a claim of duress where there has been some illegitimate pressure, going beyond the usual pressures of commercial bargaining (The Sibeon and The Sibotre (1976)). This had led to the development of a two-limbed test for duress, "compulsion of the will of the victim and...the illegitimacy of the pressure" *per* Lord Hoffman, R v Attorney General (2003).

Coercion of the will has been difficult to define, particularly as Professor Atiyah among others has pointed out that a person under duress is in many ways exercising their own will in choosing to consent, as they wish to avoid the threat made against them. As such, the modern formulation of the test looks more at whether the party seeking to claim duress had any realistic alternative than to agree to the terms offered. In this scenario, it is somewhat unclear as to whether Olivia could have sourced the items from an alternative provider. However, the fact that there was little time to either contest the charge or find an alternative (see e.g. B&S Contracts & Design v Victor Green Publications (1984)) and Olivia's contracts with her purchasers would also be affected (see e.g. Atlas Express v Kafco (1989)) it can be argued that Olivia had no realistic alternative to accepting the new terms.

Due to the lack of clarity around the concept of coercion of the will, most decisions on economic duress focus instead on the latter part of the test, namely whether the pressure was illegitimate or mere hard bargaining. In order for pressure to be illegitimate, the threat made must be to do something unlawful. Thus a threat to refuse to make a future contract in CTN Cash and Carry v Gallaher (1994) was not economic duress, as the party was legally entitled to choose whether or not to enter into a new contract. Here, the threat being made by KMS is to not deliver the goods. If KMS did not have an existing contract with Olivia, this would be legitimate, however it is clear that there is an existing contract. This means that KMS is not merely threatening to refuse to contract, but instead threatening to breach the existing contract, which would be unlawful. It would also appear that KMS are acting in "bad faith", as discussed in e.g. DSDN Subsea Ltd v Petroleum Geo-Services ASA (2000), by making the demand so close to Olivia's delivery date.

Finally, there is also a requirement that the party suffering the duress protested at the time or soon afterwards. It would appear that Olivia has done so.

Therefore, a claim for economic duress certainly has a chance of success. Were this to be the view of the courts, the amending contract under which Olivia paid the £250 charge would be set aside, and she could recover the fee paid. Her original delivery contract would remain unchanged.

(b)

In addition to the need for agreement and consideration, a vital part of any enforceable contract is the intention to create legal relations. Due to the difficulty of discovering the subjective thoughts and beliefs of the parties at the time of contracting, the courts have created two (rebuttable) presumptions which govern this area. In contracts made in a commercial or business context, it is presumed that the parties do have the intention to create legal relations. Conversely, in contracts made in a family or social situation the presumption is that there is no such intention.

Prima facie the latter presumption may appear to apply to Olivia and Alice's contract, due to their sibling relationship. If this were the case, the burden would be on Alice to demonstrate an intention to create relations. However, as the contract is made by Olivia in her capacity as owner of her own business, for the purposes of that business, it is more likely that the commercial presumption will apply. Therefore the burden is on Olivia to provide evidence to rebut the presumption that there was an intention to create legal relations.

The commercial presumption is a heavy one (see e.g. Eso Petroleum v Commissioners of Customs and Excise (1976)) and unlikely to be rebutted outside of certain situations. There is nothing within the facts as stated to assist Olivia, such as e.g. an honour clause as in Rose and Frank Co v J R Compton and Bros (1925). It is therefore likely that there is an intention to create legal relations and as there also appears to be agreement and consideration provided by both parties, this will be a binding contract that imposes the obligation on Olivia to pay Alice as agreed.

Question 4

It is clear that Fallon, Gergana and Harry have all agreed contracts with Safety Driving School. In each case there is agreement, the intention to create legal relations and good consideration. However, if any of the parties wish to succeed in a claim for breach of contract, they must first demonstrate that Safety Driving School is in breach of a term of their respective agreement. As Safety Driving School has contracted for a purpose relating to their business, and Fallon, Gergana and Harry have contracted for purposes wholly or mainly outside their own trade or profession, they fall within the definitions of "trader" and "consumer" respectively under S2 of the Consumer Rights Act 2015 (CRA).

Fallon's claim

Fallon has contracted with Safety Driving School for a course of eight driving lessons. These are to be provided by Safety Driving School and are a service, thus the contract is a contract to supply a service as defined by S48 of the CRA. In all such contracts, a term is implied by S49 of the Act "that the trader must perform the service with reasonable care and skill." The explanatory notes to the CRA 2015 make clear that the standard of "reasonable care and skill" remains the same as in the old section 13 of the Supply of Goods Act Services Act 1982 and further state that the standard is one to be set by the court in each case. Relevant factors include how the service has been carried out, industry standards and the price of the service. It is clear from the facts that Ralph is not using reasonable care and skill when teaching Fallon. He is not 'teaching' Fallon how to drive, or even paying attention to her driving during lessons.

As Fallon has a claim for breach of contract, she is entitled to a remedy. As well as her usual common law remedies such as damages, Fallon also has the option of claiming one of the rights set out in S54-56 of the CRA (although she cannot recover twice for the same loss and so must select one remedy). Considering that Fallon feels she has not learned what she wished from her lessons, she may wish to use the S55 right to require repeat performance. Under this remedy, Safety Driving School would have to deliver the course of lessons again, this time ensuring reasonable care and skill is used. This must be done within a reasonable time and Safety Driving School must bear any necessary costs to do so. If Safety Driving School fail to do this, Fallon can apply for a price reduction (up to the full cost) under S56.

Gergana's claim

Gergana has also contracted for driving lessons, but has selected the "intensive course". As such she also has a contract for the supply of a service under S48. It would appear that no price was agreed between Gergana and Safety Driving School for this service. This situation is specifically provided for in S51(1) of the 2015 Act, which applies when the contract does not expressly fix a price nor state how it is to be fixed. When this is the case, S51(2) states that the contract is to be treated as including a term that the consumer must pay a reasonable price for the service. What is a reasonable price is a question of fact (S51(3)). Considering equivalent courses at other driving schools in the same area cost between £300 and £400 it would seem clear that £1000 is not a reasonable price.

Alternatively, Gergana could argue that S50 of the Act may apply. Under this section, anything said or written to the consumer, by or behalf of the trader, about the trader or the service may be treated as a term of the contract if it is "taken into account" by the consumer when deciding to enter into the contract. Depending on where the £20 per hour rate was mentioned, it may be that this could be argued to have been written about the service. If this was the case, the £20 an hour rate would be a term of the contract and Gergana would be liable to pay 20 x the number of hours of teaching. Assuming an eight hour day, this would equate to £320.

Harry's claim

Harry has a slightly different claim to Fallon and Gergana. Under the old law as found in the Sale of Goods Act 1979 and Supply of Goods and Services Act 1982 it is likely that Harry would have a contract for the sale of goods regarding the physical handbook, and services regarding the website. However, today his claim would fall entirely under the provisions of the CRA 2015. His contract is a contract to supply goods under S3 of the Act. As such, certain terms are implied into the contract by S9-18 of the Act.

Considering first the Safety Driving School Theory Handbook, this is clearly outdated having not been revised in fifteen years. As such, it is most likely in breach of section 9 (goods to be of satisfactory quality), specifically S9(3)(a) as it is not fit for the purpose for which goods of this kind are commonly supplied. Such goods are supplied to assist learner drivers taking the driving test, and an outdated book will not be fit for this purpose. There is also a potential argument that there is a breach of the implied term in section 11, namely that the goods are not as described – this is clearly not the "Brand New" Handbook promised by the website. Finally, it should be noted here that under section 16 if the digital content provided does not conform to the contract to supply that content, the

goods will be held to also not confirm to the contract (this will be discussed below).

Harry can rely on the statutory remedies set out in S19-24 of the 2015 Act. Harry has three particular rights under the Act: the short-term right to reject, the right to repair or replacement and the right to a price reduction or final right to reject. Under section 22 Harry has 30 days from receiving the Handbook to exercise his right to reject. Alternatively, he has a right for the Handbook to be replaced within a reasonable time and at the cost of Safety Driving School (S24). If there is an updated version of the Handbook, this may be a valuable right, however if not section 23(3) will apply to prevent Harry from claiming this remedy, as it would be impossible. In that case, if more than 30 days has passed Harry will need to rely on section 24(5) which would give him a right to a price reduction and refund, up to the full value of the product.

Harry may also wish to make a claim regarding the website access. The CRA 2015 contains a Chapter dedicated to digital content and Harry will be covered by this Part due to S33. This also means that even if the access was supplied "free" with the handbook, it will still be a contract to supply digital content (S33(2)). Under S34 there is an implied term of satisfactory quality, which again appears to have been breached as the website is clearly not of the standard a reasonable person would consider satisfactory. Furthermore, the section 36 term that the content will match any description given by the trader is also breached. Harry may claim under section 16 as discussed above, but also has specific rights to repair or replacement or a price reduction under S42-44. Realistically it is unlikely that Safety Driving School can now provide the "hundreds" of questions within the reasonable time required under S43, and so Harry is best advised to seek a price reduction (which again may be up to the full cost) in relation to the digital content.