WHAT IS A CONTRACT?

A contract is a legally binding agreement creating rights and obligations between the parties involved. Making a contract can be very simple and can happen in many ways, including verbally. Whilst some contracts are complicated and heavy on detail and paperwork, equally a contract can be entered quite easily - for example; when buying a chocolate bar or getting an Uber.

HOW CAN A CONTRACT BE FORMED?

- A signed written agreement
- Verbally
- An exchange of emails
- An exchange of letters
- An exchange of texts
- An electronic signature
- Ticking a box online
- A telephone call
- Conduct (for example driving past a sign and into a car park)

THE DIFFERENCES BETWEEN CONTRACTS FORMED IN DIFFERENT WAYS

Technically, a contract is a contract regardless of how it is formed. What is important is whether or not the parties involved have sufficient evidence that a contract has been agreed or not, and on what terms.

For example:

- A verbal contract can more easily be denied, or queried, than one which is evidenced in writing.
- An online supplier who can not demonstrate that the user has seen and accepted the Terms & Conditions (T+Cs) may struggle to enforce these. This is why tick boxes are used.
- A car park with inadequate signs, or ones which are too small, may struggle to demonstrate that a user has seen and agreed to the T+Cs.

As such, the more evidence there is, ideally in writing, the easier it will be to establish both the existence of the contract and the nature of what has been agreed.

Some contracts do need to be in writing, no matter the circumstances. These include but are not limited to:

- Land contracts - which need to be in writing
- Guarantees - which need to be in writing

WHEN IS A CONTRACT FORMED?

A contract will be made when the four basic elements are satisfied; offer, acceptance, consideration and intention. If any one of these is not present, a contract has not been formed.

- **Offer**

  An offer is made by one party to another to enter into a contract on set terms. It must be specific, unambiguous, capable of acceptance and made with the intention of being accepted. An offer may be spoken, written or implied by conduct.

  An offer must be distinguished from an ‘invitation to treat’, which merely invites the other party to make an offer. An example of an invitation to treat is displaying goods in a shop and it's up to the customer to accept the offer and buy the goods..

- **Acceptance**

  A binding contract is only formed when an offer is accepted. Acceptance must correspond with the terms, and must be communicated to the other party. Acceptance can generally be made by any means as long as it is clear and is communicated to the other party making the offer.

  If the offer is not accepted on precisely the same terms, technically this constitutes a counter-offer. This amounts to a rejection of the original offer so no contract is formed, instead a new offer is made and the person who made the original offer can then choose whether to accept it or not. The general rule is that an acceptance is not effective until it is communicated to the other party who made the offer.

- **Consideration**

  A contract must have a benefit and a detriment. If a contract lacks consideration, then it can only be enforced if it is made by a signed deed. To have ‘good consideration’ there must be some value. An agreement that someone will do something for nothing, for example, is not legally binding.

- **Intention**

  It must be shown that parties had the intention to create a contract. In commercial transactions there is a rebuttable presumption that the parties intend their agreement to be legally binding.

  The phrase ‘subject to contract’ can be used to rebut the presumption of contractual intent. It means an agreement has not been reached and parties are still negotiating.

  Clearly what the parties intended can be argued about and will depend on the circumstances, facts, and evidence of the case.

THE BATTLE OF THE FORMS

'The Battle Of The Forms' is a phrase used when different offers and counter-offers have been made, yet the arrangement is still progressing. It will sometimes be difficult to know whose T+Cs, if any, apply. Courts have tended to adopt the 'final shot' approach and apply the T+Cs of the party who communicated theirs last, provided the other side didn't object. However, this will not always be the case, and the facts of the case and the conduct of the parties will be paramount.

TERMS OF THE CONTRACT

The parties are free to agree to the terms of the contract. However, there are certain exemptions, for example:

- Statutory rights; generally anything set down in an Act of Parliament will take precedence to the contract, although these can be excluded or limited in certain circumstances when the contract is between 2 businesses.
- Consumers must be treated fairly, and have statutory rights regarding the quality of the goods and services being offered as well as a right to cancel in certain circumstances.
- Clauses that try to exclude or limit liability for personal injury or death are often invalid under the Unfair Contract Terms Act 1977.

PRIVITY OF CONTRACT

Generally, only the parties who agreed to enter into the contract are bound by it and can be sued about it.

An example would be where you buy a game from a store and give it to your son as a present. If your son notices a fault with the game only you have a claim against the store because the contract was between you and the store.

However, the Contracts (Rights of Third Parties) Act 1999 has altered the above position, and now someone who was not a party to the contract may now be able to enforce that contract in certain circumstances, usually where this has been agreed.

In the above example if the store owner agreed that the son could bring the item back, he is contractually entitled to do so.

COOLING-OFF PERIODS

It is a popular misconception that most if not all contracts have an automatic cooling-off period, ie: a period of grace whereby either party can withdraw without penalty. This is not the case. In business to business contracts there is no cooling off period unless the contract says so.

In certain circumstances, a consumer will have a legal right to cancel within a certain period (normally 14 days).

A consumer can, in addition, under the Consumer Credit Act (as amended) withdraw from most regulated finance agreements within 14 days.

GENERAL TIPS

- There is no such thing as a 'gentleman's agreement', it is either an agreement or not.
- Be particularly careful when you are dealing with a consumer. You must be aware of and protect their legal rights. Such contracts are heavily regulated and protected by various pieces of legislation. T+Cs need to be fair and written in plain English.
- Always be transparent with your terms and conditions, and make sure that you can demonstrate that your client has been made aware of and accepted these.
- Make sure you have evidence as to what exactly was agreed. The more easily your evidence can be challenged or contradicted, the more difficult it will be to enforce the contract.

USEFUL LINKS

- How To Write Fair Contracts: Information For Businesses: https://www.gov.uk/guidance/how-to-write-fair-contracts