



Contract Formation

Am I in a Contract?

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When is a contract formed?



Four key elements are required to form a contract

- Offer
- Acceptance
- Consideration
- An intention to create legal relations



There must also be certainty of terms – not a legal requirement but fundamental to the existence of a contract

Other factors can affect whether or not a contract is formed such as:

- Conditions precedent
- Public policy

Offers



An offer is a promise by one party to enter into a contract on certain terms. There are four requirements for an effective offer. The offer must be:

- specific
- complete
- capable of acceptance
- made with the intention of being bound by the acceptance.

An offer is different to an invitation to treat.



Incorporation of Terms



- Terms can be incorporated into a contract
- The terms have to be provided before the contract is made
- Has the person receiving the offer had the ability to review the terms?
- What about contracts made over the internet?



Acceptance



- A contract is formed by acceptance of the offer
- An acceptance is a final and unqualified assent to the offer
- If the acceptance does not match the offer, this could comprise a counter offer
- Acceptance must be communicated:
 - Reception rule – instantaneous communication
 - The postal rule – delayed communication
- Tenders may specify how acceptances (or tender returns) are to be issued



Electronic Acceptance



- No legal rule as such
- Emails can be instantaneous or they can be delayed
- Thomas v BPE Solicitors – Mr Justice Blair:

'No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practices and in some cases by a judgment of where the risks should lie'.

- Acceptance affects where the contract is formed and this can affect the governing jurisdiction – Entores v Miles

The Battle of the Forms



- Used to describe the situation where an acceptance does not quite match the offer or where the two parties seek to impose their own standard terms and conditions
- Who fires the last shot?
- Clauses regarding '*prevailing terms*' will often not work – they are likely to be a counter offer or an offer open to acceptance which is unlikely to be accepted
- What are the terms of the contract?
- What are the surrounding communications?
- How have the parties conducted themselves?



Considering Consideration



- What is consideration – something given in exchange for the promise
- There are four main rules to consideration:-
- The consideration does not need to be adequate
- Consideration must move from the promisee
- Consideration is not needed if a contract is executed as a deed
- Past consideration is no consideration. *Stilk v Myrick*

Intention to create legal relations



- There must be an intention to create a legally binding agreement
- There is a general presumption of this intention in commercial situations
- This presumption can be rebutted
- The intention to create legal relations can overlap with other issues such as a lack of certainty at a particular point in time



Drawing the Threads Together – Carlill v The Carbolic Smoke Ball Company [1892]



- The advertisement was the offer
- Mrs Carlill's use of the smoke ball was the acceptance
- The purchase of the product was the consideration
- The deposit of the money showed the intention to create legal relations



Certainty of Terms



- The agreement must be complete
- Not otherwise lacking – ie not vague or ambiguous
- Where the courts have to make a decision they will try to fill in the gaps
- MRI Trading v Edernet
- The courts will try to give effect to the bargain made by the parties



Early Performance



- Early performance causes issues – have all the terms of the contract been agreed?
- Is there the intent to create legal relations at that time?
- The labels that are used in documents are not all important
- The courts will look to the true meaning of the document
- New Media Holding Company v Ivan Kuznetsov [2016]



Letters of Intent



- How can the contractor start work in the absence of a contract?
- Agreements to agree are generally void for uncertainty
- Letters of intent are a necessary evil in the construction industry
- Illiffe v Feltham Construction [2014]
- *'It is well established that the issuing of an instruction by a letter of intent is itself capable of giving rise to a contract which is separate from the projected contract'*
- A letter of intent can create its own 'mini-contract'

Drafting of Letters of Intent



- As letters of intent could comprise their own individual contract they should deal with the following:
- The works the contractor is to do under the instruction – these should be narrowly drawn so as to ensure the contract is not open ended
- The employer's intention to enter into the main contract in due course once the final points have been resolved
- The price to be paid for the works comprising the instruction - there should be no obligation to pay more than the stated price
- The letter should contain a mechanism allowing for it to be terminated either at will, or automatically when the maximum amount has been paid or when the stated works have been completed
- The letter should contain requirements in respect of the maintenance of insurance
- The letter should contain some usual contractual clauses, albeit cut down – such as a duty of care, a copyright licence and an obligation to provide a collateral warranty

RTS v Molkerei Muller [2010]



- The High Court found that, after the letter of intent had expired, a new contract had been concluded between the parties. However, the contract did not incorporate the amended standard conditions because the counterparts clause prevented their incorporation into the contract unless and until it was executed by each party.
- The Court of Appeal held there was no contract, holding that the counterparts clause constituted a continuing stipulation that a contract would only come into existence if a written agreement was entered into.
- The Supreme Court held that there was a binding contract between the parties incorporating the standard legal terms. The judges took into account the fact that the price had been agreed and the parties subsequently behaved on the basis that a contract and a price had been agreed, even if other matters remained outstanding. E.g Muller had paid percentages of the price after carrying out extensive works. Variations to what the parties regarded as the contract had been agreed. The counterparts clause did operate as a contractual provision but the parties had waived this requirement.

RTS v Molkerei Muller [2010]



Lord Clarke:

'The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms, depends on what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.'



Questions?



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