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"The basic contract elements are often not called into question. But they're still there nagging at you"

Contracts are the foundation of business, but some recent examples show that the black and white of an agreement can quickly fade to grey

One of the first things I was taught at law school was how a contract is formed. Someone needs to make an offer to another party; for example, Person A says to Person B, "I will provide you with services for £200". Person B needs to accept that offer; for example, by saying, "Yes please". There needs to be some form of consideration from each party to the other party. In Person A's case, it is promising to provide services; in Person B's case, it is promising to pay £200.

The terms of the contract need to be sufficiently certain and complete. In our example, there are many different types of services, and many different ways in which they can be provided. The parties would need to be clear that the services in question are, say, preparing a specific meal next Tuesday.

Each party must intend to be legally bound to the other party. If Person A is a caterer and the arrangements were made in a usual business context, this intention may be clear. But arrangements may have been discussed in more informal or social settings. If Person A is married to Person B, it's likely it was just a hilarious joke, and Person B did not actually intend to pay their spouse £200 for cooking lasagne one night.

For terms to be incorporated effectively into the contract, both parties need to be aware of them before the contract is formed. For instance, if new terms are written on the back of an invoice sent once the lasagne has been served and eaten, this is too late for their inclusion in the contract under which the lasagne was provided.

Only the actual parties to a contract have rights and obligations under it (with some exceptions). So each party will want to be clear on who they are contracting with. If our catering provider uses the trading name Lasagne4U, is the contract clear on who the company is behind this?

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Each of these contract elements sounds straightforward, but as you drill into different scenarios and case law, you discover there are quite a lot of *ifs* and *buts* and *ohs* and *oh dears*. One of the joys of the English common law system is that the rules don't stay the same for long. The intricacies I learnt at law school are now wildly out of date, as case law continued to develop over the past *[mumbles number of years]* since I was there.

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Once one starts working in legal practice, one's head gets filled with the finer details of drafting and negotiating: attempting to decode a 12-line sentence discussing exclusions of liability, or deciding whether to squeeze another iteration of the word "reasonable" into paragraph 26. The basic contract elements are often not called into question. But they're still there nagging at you, and every now and then something happens that causes them to pop to the forefront. And, in line with waiting for buses, I seem to have had a few instances of this recently.

Contracts don't need to be signed...

While signed written agreements may provide less room for dispute, signatures are not necessary to indicate acceptance of terms.

My client (the customer) had prepared an agreement and sent it to the other party (a supplier of software development services). No comments were received back, nor alternative terms sent. The supplier started to provide the services, and the customer started paying for them, in line with the terms. The following year, there was a question over an intellectual property warranty, and it was discovered that the supplier had never signed the agreement. But, by acting in line with the agreement, there is a strong argument that the terms were agreed by the conduct of the parties.

A word of caution, however. While contracts often don't need to be signed (or in writing), an assignment of copyright (in this case, copyright in software) needs to be in writing and signed by the assignor. So additional steps were still needed to perfect the intended assignment.

...but are the basics in place?

A potential supplier sent the director of a company a proposal for services relating to development of a new product, including a brief overview of the work involved and a fee quote. The director requested the supplier to proceed to the next step. The supplier then sent a written agreement to be signed. But the director decided not to go ahead, so didn't sign the agreement. A couple of weeks later, he was sent some deliverables of the services together with a bill.

The question posed to me was: did he need to pay the bill? Now, silence

RIGHT Contracts often don't need to be signed, or even to be put in writing

ABOVE Make sure the terms are correct if you don't want the other party reneging

cannot generally constitute acceptance of an offer. So, as he had done nothing after the written agreement was sent, it is unlikely that a contract was formed at that stage. The timing of sending the agreement would also make it difficult to claim that its terms applied to any contract formed earlier. It was possible that the director had accepted an offer to provide services in line with the quote, by requesting to proceed to the next step. But there were two potential problems: had he intended to be legally bound, and did the vague scope of work constitute sufficiently certain and complete terms?

A recent decision of the High Court (Gray vs Smith & Anor [2022] EWHC 1153 (Ch)) considered similar problems with these key contract elements, and in this case the judge decided that no contract had been formed.

In my case the matter was resolved informally. But it demonstrates two important points: first, it's generally preferable to put in place a signed written agreement before commencing services. Second, try to make it clear if you don't intend to be bound. The phrase "subject to contract" is often used on draft agreements for this reason.

Party problems

I have been involved with two interesting matters involving group companies, where there have been problems over who the parties to a contract were.

In the first case, I was advising a supplier that had been providing tech services to one of its customers. The customer was restructuring its group, and the project had evolved, so my client and its contact within the customer group were discussing entering into a new agreement with a new group entity, which reflected the current project.

If my client and its new customer entered into a new agreement, they would want to end the old one. The new customer couldn't agree to end it, as it wasn't a party to it. But, for administrative reasons, there were difficulties in the original customer entity entering into a termination agreement.

While the group companies may not have worried about the consequences as between them, there were risks for my client. It had outstanding obligations under the old contract, which could be enforced by the old customer. And there were some tricky issues relating to ownership of intellectual property.

The second matter involved a supplier wanting to provide services to a company in the same group as one of its customers. It had a contract with its customer, under which it provided services directly to that entity, though the terms did not envisage group entities benefiting. My client was in touch with the other group company, which had agreed to pay for services in line with the general arrangements under that contract. But this other company had not seen the full terms, so it would be difficult to argue that a new contract had been formed with it on those same terms.

The risks for my client were that either there was no contract at all (as the discussed general arrangements were incomplete or uncertain), or there was a contract that lacked important terms (such as those relating to limitations of liability and protection of intellectual property).

So it is important that the contract elements are in place with the right party, not just at the start of a project, but also when significant changes are made to how they are provided.

Signatories are different to parties

The signatory to a contract is not necessarily a party to it. For example, if a company is entering into a contract, a director of that company may sign on its behalf.

My client provided services to individuals and companies. Contracts were formed by the parties completing and signing an order form, which cross-referred to separate standard terms. The standard terms stated that the contract was entered into between the supplier and the "Customer", defined as the person completing the order form. For corporate customers, the order form did not clearly distinguish between the individual filling in the form and the company itself. So there was an ambiguity here – was the contract being entered into with the individual, or with the company?

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A recent decision of the Court of Appeal (O G Thomas Amaethyddiaeth CYF & Anor vs Turner & Ors [2022] EWCA Civ 1446) demonstrates the importance of this distinction. A contractual notice was held to be ineffective as it was addressed to an individual, rather than the company (which was the party to the contract).

BELOW A contract can be signed by a director on behalf of a company

What if there is no payment?

This article would feel incomplete if I didn't comment on the key contract element of consideration. I am frequently asked whether it matters if there is no payment under an agreement, such as a trial period for providing services, or a confidentiality agreement. Consideration does not need to be monetary, and mutual obligations under a contract can be sufficient consideration. For example, Person C provides access to software and Person D has obligations not to misuse it, or Person C promises to keep Person D's information confidential and vice versa. If there is a concern over consideration, there is the option for an agreement to be executed as a deed (rather than a simple contract), which does not require consideration.

I started off this article comparing these issues on contract basics to buses. But in going through it, I kept thinking of more and more examples that have happened over the *[mumbles number of years]* since I started in legal practice. So I've changed my mind: a reasonable number of clients (acting reasonably) have had reasonable queries at reasonable intervals.

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