

Does a Contract Exist

The following five key elements must be proven before you can demonstrate a legally binding contract.

Offer

There must be an expression of readiness to contract which, if accepted, will give rise to a binding contract.

Where there is a request for varied terms, this will not be seen in the immediate as an acceptance because the offeree will have made a counter-offer.

Acceptance

A contract is formed when one party has made an offer that another party has accepted.

Acceptance must be unqualified and absolute on the offer terms.

Generally, acceptance must be communicated to the offeror to be effective although sometimes conduct will be considered as acceptance.

Consideration

Consideration must have been provided by both parties.

The consideration is the motive inducing the offeree to enter into the contractual agreement. Something must be given in return which the parties agree to be adequate consideration for the thing to be done.

In other words, some sort of payment or value must be provided by both parties.

Intention to be bound

There must be a mutual intention between the parties to create legal arrangement. Without this, there can be no contract.

It is important to note that in commercial situations it is presumed that an intention to create legal relations exists. A burden then exists to rebut this presumption.

If there is any document in existence which demonstrates a reluctance from one party to be bound, for example if any documents are marked subject to contract etc., there will be no binding contract.

Certainty of terms

For a contract to be binding, the parties do not need to prove that every term of the contract was agreed. Instead, provided that the core terms are agreed and those terms are not uncertain or ambiguous the contract will be binding.

Where any terms are missing, they must be capable of being implied by the court.

In establishing that the parties have reached agreement on all core terms the court can infer a standard of reasonableness, either on the basis of common law, or statute from the parties' communications and conduct.

It is important to agree and set out the essential terms by written means at the beginning, if at all possible, to reduce the chance of a dispute arising in future.

Do the parties have capacity?

Neither party to the contract must lack capacity.

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

Does a contract exist?

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Does the contract have to be in writing?

A contract can be in writing, be inferred by conduct, be made orally, or a combination of the above.

There must always be offer, acceptance, consideration, an intention to create legal intentions and certainty of terms. Ideally, any oral agreement to contract with another party should always be recorded in writing.

However, provided the essential elements are proven (as above) a binding agreement will have been formed.

It is important to note that, despite the above, some contracts must be in writing by virtue of Statute, particularly land contracts, deeds and guarantees.

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