

Contractual Law



Understanding Contractual Law and the implications for you when selling real estate as a real estate salesperson

What is a Contract ?

Contracts come in all shapes and sizes. Some are verbal, some written. Some are formal, some informal.

They all have 3 features in common:

- **one party makes an offer to another party**
- **The offer is accepted**
- **one party promises to give something in return for what they're getting - usually, but not always - money. The legal term for this promise is 'consideration'.**

Generally, contracts don't have to be in writing. A verbal agreement is binding, but you can save yourself a lot of hassle by writing it down: if things go wrong, how do you prove the terms of a verbal contract?

Putting the contract in writing also makes sure you both understand exactly what's being promised before you agree.

Watch out for marketing people who phone you. We know of cases where people have had their power supply or phone switched over to a new company, and they didn't realise they'd agreed. If the company can't provide a recording proving you did agree to switch, you can demand to be switched back.

What is a Contract ?

A contract is a binding agreement between two or more parties which the law will enforce.

There are some contracts that must be in writing,

- credit contracts,
- insurance contracts,
- agreements to buy and sell real estate (Property Law Act 2007 Section 24(1)),
- agreements to buy cars from registered dealers.

Property Law Act 2007 Section 24

24 Contracts for the disposition of land is not enforceable unless in writing

(1) A Contract for the disposition of land is not enforceable by action unless-

- (a) the contract is in writing or its terms are recorded in writing; and
- (b) the contract or written record is signed by the party against whom the contract is sought to be enforced.

What does my contract mean?

When you enter a contract, you're legally bound by everything you've specifically agreed with the other person or company.

- You might also be covered by terms and conditions that weren't specifically mentioned but are, nevertheless, assumed under the law to be part of the contract.
- For example, if you go to an appliance store and buy a new TV that turns out to be faulty, you're entitled to take it back. You don't need to have a specific agreement from the store that it will work. The [Consumer Guarantees Act](#) requires that goods and services should be fit for the purpose they're sold for, and that promise is assumed to be part of the contract you made when you bought the TV.
- Another example is where you buy a phone card. The card directs you to a website for the full terms and conditions. If the supplier can show that the terms and conditions were available before you bought the phone card, then you are bound by them. However, if you couldn't read the terms and conditions until after you bought the card, then in our opinion they may not be valid.

Standard form contracts

Standard form contracts are commonly used by businesses that provide services to large numbers of customers. Your dealings with your electricity company, your insurer, your bank and so on are governed by this type of contract. They are offered on a "take it or leave it" basis - you won't be given the opportunity to quibble over details you're not happy with.

Commonly, these contracts include a clause giving the company the right to alter the terms and conditions as they see fit. Your electricity company can put up its prices even though you haven't "agreed" to it.

A contract has a life. It is created, then eventually it is discharged - in other words, it comes to an end. The usual course of a contract is that firstly the parties enter in to it, and secondly they do whatever they contracted to do.

Getting out of a contract

Once you've entered into a contract, you're generally stuck with it. You can only back out or change the terms if the person or company you're dealing with agrees.

So if you went shopping and, on impulse, bought yourself a new jacket but then decide that you don't like the colour, or can't really afford it, you can't just take it back. You've entered a binding contract with the shop. Despite what many people think, you don't have 7 days to change your mind and return it.

There are a few exceptions. Here are some of the common ones:

- If you borrowed money on a credit contract, you can cancel the contract any time during the first 3 days. If the contract was a hire purchase agreement for your new DVD player, and you've already taken possession of it, you can get out of the credit agreement but you've got to keep the DVD - and pay cash for it. If you haven't taken possession, you can cancel outright and pay nothing.
- If you're buying a new dress or anything else on [layby](#), you can cancel the layby arrangement at any time. Usually, you'll get most of your money back.
- Under the Contract and Commercial Law Act, minors can sometimes avoid their responsibilities under a contract. A contract that is not "fair and reasonable" can't be enforced against someone younger than 18.

The Law of Contract

Six elements of a contract

- Intent
- Offer and acceptance
- Consideration
- Capacity
- Legal purpose
- Genuine consent

The three most common areas that you must follow for a contract to be enforced are:

- Capacity
- Genuine consent
- Legality of purpose

The Law of Contract in relation to real estate

Conveying Acceptance

In real estate the purchaser usually makes the initial offer. The vendor accepts or alters it. Then the purchaser could do the same.

- Making an offer
- Counter offering back and forth
- Finally acceptance of the offer (by either party)
- To make a binding contract we must then convey acceptance to the other party.....

Property Law Act- Section 24

Contracts for disposition of land not enforceable unless in writing

- (1) A contract for the disposition of land is not enforceable by action unless—
- (a) the contract is in writing or its terms are recorded in writing; and
 - (b) the contract or written record is signed by the party against whom the contract is sought to be enforced.
- (2) In this section, **disposition** does not include—
- (a) a short-term lease; or
 - (b) a sale of land by order of a court or through the Registrar.

Parties to a Contract of Agency

There are always two parties to a contract no matter what the purpose of the agency is:

Examples would include real estate, travel, shipping, import, insurance, plumbers etc). The parties to a contract of agency are always the same:

- **The Agent**, who provides a service
 - *and*
- **The Vendor or Client**, who pays for the service.

Discharging Contracts

Once a contract exists it will eventually be **discharged**, which means it will come to an end. A contract may end in various ways, they can be discharged by:

- performance,
- agreement,
- frustration and
- breach

By performance - The most common, and preferred method of discharge is that the contract is discharged by **performance** - all parties have completed their obligations

By Agreement - Discharge by agreement of the parties' means that both parties agree to discharge the contract. Both parties might actually want to end the contract. It may be that both parties are happy to agree without any compensation from one to the other, or it may be that one party has to persuade or induce the other by offering **new consideration** - this is known as **accord and satisfaction** (the parties reach accord as to the intended new course of action and once the action has taken place there is satisfaction).

In real estate, an agreement for sale and purchase of real estate contains conditions (clause 10.0) which, if not satisfied, provide for the discharge of the contract.

Discharging Contracts

By Frustration - On rare occasions an outside event can frustrate the contract, leading to **discharge by frustration**. This can also be called **impossibility**, meaning that it is impossible for the contract to proceed. The event which causes the frustration is not the fault of either party, it is beyond their control. Had it not occurred, the parties would have completed their obligations.

If war broke out for example, a party to the contract may be prevented from performing his obligations. The Contract and Commercial Law Act 2017 provides for some remedies - **Section 60-64**

By Breach - If one of the parties has walked away from their obligations, that party has breached the contract - **discharge by breach**. The other party may still want the contract to proceed, and as it is a legal contract, the defaulting party can be held accountable to it. However, in many cases the easiest and cheapest solution for the other party is to cancel the contract. The breach by one party has discharged the other's obligations. The Contract and Commercial Law Act 2017 provides for some remedies in **Section 37**.

Discharging Contracts

NOTE: Operation of law - contracts can also be discharged by **operation of law**, or a court order. In situations where both parties to a contract have partially performed their obligations and the contract is voided, the court has the ability to create a new contract based on what performance has taken place, and set fair and reasonable terms to accommodate the rights of both parties.

Creation of Agency

Agents are not just related to real estate, they could be anything from travel agents to insurance agents. These agents have something in common when they enter into a contract with their client – by way of an Agency Agreement.

The Four ways an Agency can be created: *In Brief*

- **Express Authority** – *you enter into an Agency Agreement before you start work*
- **Implied and Usual Authority** – *it is not written or specified in any way but is expected work by the client*
- **Agency by Estoppel** – *no agency has been signed but by conduct and words represented to a third party the agents has their authority to act for them*
- **Subsequent ratification** – *after the work was started the client enters into a contract*

NOTE: REAA 2008 Section 126 requires real estate agencies to have a signed Agency Agreement in place before they start any real estate work.

An Agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out with out a signed written agency agreement.

NEW LEGISLATION AFFECTING CONTRACTS

The Contract and Commercial Law 2017 replaced several small acts in 2017:

- **The Contractual Remedies Act 1979**
- **The Contractual Mistakes Act 1997**
- **The Frustrated Contracts Act 1944**
- **Electronic Transactions Act 2002**
- **Contracts (Privity) Act 1982**
- **Carriage of Goods Act 1979**
- **The Illegal Contracts Act 1970**
- **The Minors Contract Act 1969**
- **The Sale of Goods Act 1908**

The Contract and Commercial Law 2017 updates a suite of legislation that dates back over 100 years and underpins transactions in commercial contexts as well as dealings between individuals who are not in trade.

Consumer Guarantees Act 1993

The Consumer Guarantees Act 1993 (CGA) is a piece of consumer protection legislation. It applies statutory guarantees to the consumer who is a person who 'acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption' (section 2(1)).

These statutory rights for the supply of goods and services to the consumer are independent of any other rights, including any contractual rights there may be between the parties.

Our consumer, in real estate, is the person who buys the service - usually the client. Part IV of this Act (**Sections 28-40**) deals with the **Supply of Services**. In real estate, the service we offer is to sell the client's property.

As the agent licensee is a supplier of a service to a consumer, the statutory guarantees of the Act apply to real estate agency work.

The Consumer Guarantees Act 1993 provides guarantees to consumers about the services supplied. There are four guarantees in relation to the supply of Services contained in Part IV are:

- Section 28
- Section 29
- Section 30
- Section 31

Consumer Guarantees Act 1993

Guarantee as to reasonable care and skill: if services are supplied to a consumer, there is a guarantee that they will be carried out with reasonable care and skill - if you list a property for sale you must exercise 'reasonable' care and skill in endeavouring to sell the property. (**Section 28**)

Guarantee as to fitness for a particular purpose: the service that you offer must be fit for the intended purpose. From a real estate point of view, this does not mean that the property must sell, but that the actions you take could reasonably be expected to achieve a sale. (**Section 29**)

Guarantee as to time of completion: if you do not give a time for completion of the service there is a guarantee that it will be completed in a reasonable time. (**Section 30**)

Guarantee as to price: if you do not agree a fee, or the basis of calculating a fee, before starting the service, there is a guarantee that the fee will be reasonable. (**Section 31**)

Suppliers cannot contract out of the guarantees for consumers who acquire goods or services for domestic purposes (Section 43).

The Consumer Guarantees Act 1993

In relation to timing, the client seller/lessor should be guided as to the most appropriate marketing method and time frame in which to achieve optimal outcomes for successfully completing a transaction.

A breach of a guarantee under the Consumer Guarantees Act 1993 gives consumers several different remedies, including:

- giving the supplier an opportunity to remedy the failure to comply with the statutory guarantee
- getting the matter rectified elsewhere at the original supplier's expense
- cancelling the contract for services
- seeking damages for any substantial losses suffered in order to comply with a statutory guarantee.

However, the most likely remedy under the Consumer Guarantees Act, in the context of duties performed by a licensee, would be a consumer's entitlement to damages for any loss caused as a result of the breach of the guarantee. For example, if it was found that the licensee's breach of a guarantee resulted in the property selling for considerably less than it should have, the damages awarded would be the difference between the market value of the property and the price actually obtained.

The Consumer Guarantees Act 1993

Section 28 is very important for licensees to bear in mind; the guarantee that the services supplied will be carried out with reasonable care and skill. Essentially this guarantee codifies the common law tort of negligence. This requirement is also confirmed in the Code of Conduct under rule 5.1.

Reasonable care and skill is measured against the standard of competent practitioners. Therefore, licensees must be aware of their level of competence and seek advice when and where necessary from their supervising agent or branch manager. The agent must ensure that sufficient direction and control is provided in their supervision of salesperson licensees.

As the licensee is the professional 'care taker' of the transaction, the customer relies on the licensee to demonstrate skill and care in all matters, and to provide information that can be relied upon by the customer in their decision-making.

In relation to Section 30 and 31, issues of reasonable pricing and timeframes may impact on:

- marketing costs (where appropriate) and period, and
- the requirement for timely management when action is required, and appropriate costs for the client. In relation to costs, a client seller/lessor is entitled to be sure the costs of any marketing passed to the client, accurately reflect any economies of scale enjoyed by the agency.

The Fair Trading Act and its relevance to Real Estate

The Fair Trading Act prohibits misleading and deceptive conduct, false representations and unfair practices by people in trade. Real Estate Licensees are “in trade”

- Section 9
 - misleading and deceptive conduct
- Section 14
 - misrepresentation in relation to land
- Section 17
 - Offering prizes with no intention of giving them

Breaches of Section 9, Section 14 (1) and Section 14 (2) and further explained under Section 40 which limits the fines for the -

- individual
- company

Fair Trading Act – Section 12A Unsubstantiated representations

- (1) A person must not, in trade, make an unsubstantiated representation.
- (2) A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.
- (3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.
- (4) In this section and [sections 12B to 12D](#), **representation** means a representation that is made
 - (a) in respect of goods, services, or an interest in land; and
 - (b) (1) in connection with the supply or possible supply of the goods or services;
(11) the sale or grant or possible sale or grant of the interest in land
(111) the promotion by any means of the supply or use of the goods services or the sale or grant of the interest in land.

Real Estate Agents Act 2008

Section 3 Purpose of Act

(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

(2) The Act achieves its purpose by-

- (a) regulating agents, branch managers, and salespersons:
- (b) raising industry standards:
- (c) providing accountability through a disciplinary process that is independent, transparent, and effective. The practice Rules are required under Section 14 of the Real Estate Agents Act 2008
- They work in conjunction with the Act to promote the overall integrity of the relationships with Agencies, clients and the customers.

NOTE

The Purpose of the Rules is different from the purpose of the Act and are outlined in Rules Scope and Objectives see Rules 3.2 and 3.3

Real Estate Contracts - Problems that can arise

- Buyers Agent
- Agency Agreement
 - Signatories
 - Appraisals
 - Rules 5.1, 9.9, 6.4, 9.6 and 9.7
 - Cooling off periods

CASE STUDY - Uninvited Direct Sales

https://decisions.dotnous.com/reaa/pdfs/C17051_Determination.pdf

- Sale and Purchase Agreement
 - Signatories
 - Supervision
 - Clauses
 - Timeframes

Fiduciary Relationship

When an agent licensee and vendor enter in to an agency agreement, they are entering into a **fiduciary relationship**; one of confidence and trust; requiring full disclosure between both parties.

This unique term in the agency relationship comes from Latin. The term is *Uberrimae fidei* which means '**a relationship of the utmost good faith**'. The word 'fiduciary' itself comes originally from the Latin words - *fides*, meaning faith, and *fiducia*, meaning trust. This fiduciary duty is considered the highest standard of care when considered either in terms of equity (legal principals) or law.

The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 sets out rules that a real estate practitioner is required to abide by, and **Rule 6** covers Standards of Professional Conduct, beginning with a requirement:

Rule 6.1 'A licensee must comply with fiduciary obligations to the licensee's client.'

The clients is paying you for a Service so their needs come first.

Fiduciary relationship

Vendor
(Principal)

AGENT
Duty of care

Purchaser

Full disclosure of all things material to either party
(except privileged information of the vendor)

Common Breaches

- **Fiduciary Responsibility**
- **Conflict of Interest**
- **REAA Professional Conduct and Client Care Rules 2012 – Section 5 and Section 6**
- **Disclosure of Defects**
- **Unsatisfactory/Misconduct – Section 72 and Section 73 or Rules 7.1 and 7.2**
- **Fair Trading Act**
- **Supervision Rules 8.3 and 8.4 and Section 50**

What do you think the outcome would be?

Mistakes

Ever found an absolute bargain, only to be told when you get to the shop counter the price was a mistake?

Unfortunately for you, the shop can't be forced to sell at the display price. The price tag is an invitation for you and the shop to talk; it isn't an "offer" under contract law. The shop can raise the price or introduce other new conditions at any time until you reach agreement.

But if the shop discovers the mistake after you've made the purchase, it generally can't then ask you to pay more. By then, you have a contract.

The only exception is if you knew the price was a mistake, but took advantage of it anyway. Under the Contract and Commercial Law Act, a court could require you to pay the correct price. For example, you go to buy a jacket for \$300, but the shop assistant only types \$30 into the eftpos machine. You notice this but continue with the purchase, hoping to get away with it. If the shop contacts you later once they realise the mistake you have to pay them the difference.

Shops can't deliberately display the wrong price in order to entice customers in. That would breach the [Fair Trading Act](#), which bans misleading advertising.

Resources Acknowledgment

Statement

The material contained in these power points has been collated from various sources acknowledged below:

- REINZ Best Practice Guides
- The REA public website
- The REA Verifiable Training material from 2012 through to 2019
- The Skills.org Real Estate Salespersons Level 4 – Learner Guides
- Real Estate Industry information from various Agencies.

The information included in these Power Points is based on best practice and industry experience and should not be considered as legal advice.

If employed by an Agency students must adhere to Agency policy and procedures unless contrary to law.