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Construction Law Update

Are 'No Oral Modifications' Clauses Enforceable?

The issues surrounding the enforcement of 'No Oral Modifications' ("**NOM**") clauses has arisen yet again. It would appear however that it has now been finally determined. In our article in June 2016, we considered the effect of *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd.* In *Globe*, the Court of Appeal held that NOM clauses were ineffective and the parties to a contract were at liberty to agree variations orally should they so choose. Not surprisingly, further case law followed with parties in dispute over whether their contract was validly and effectively varied, despite not following the prescribed contractual procedure.

The Supreme Court has now settled this issue in the recent case of *Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24.*

Background

In August 2011, Rock Advertising Limited ("**Rock**") entered into a licence (the "**Licence**") with MWB Business Exchange Centres Limited ("**MWB**") to occupy office space in Marble Arch Tower in London for a fixed term of 12 months. The Licence fee was £3,500 per month for the first 3 months and £4,333.34 per month thereafter. Clause 7.6 of the Licence stated as follows:

"This Licence sets out all the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

By February 2012, Rock was in arrears of more than £12,000 in licence fees. Rock proposed a revised payment schedule to MWB's credit controller. It was Rock's case that MWB's credit controller agreed to vary the Licence in accordance with the proposed payment schedule during a phone call. MWB denied that it agreed to the revised payment schedule.

On 30 March 2012, MWB locked Rock out of the premises due to its failure to pay the outstanding arrears. MWB terminated the Licence and sued Rock for the outstanding monies. Rock, on the basis the Licence had been validly varied by the revised payment schedule, counterclaimed for damages for wrongful exclusion from the premises.

The High Court judge held that an oral agreement had been made by MWB to vary the Licence and that the variation was supported by consideration because it had the practical benefit of enhancing MWB's prospect of being paid eventually. However, it was held that the variation was ineffective because it was not recorded in writing and signed by both parties as required by clause 7.6 of the Licence. Therefore, MWB was entitled to claim the arrears.

The Court of Appeal overturned the High Court judge's decision. The Court of Appeal agreed the variation was supported by consideration, but accepted that the oral agreement to revise the schedule of payments amounted to an agreement to dispense with clause 7.6 on the basis that the principle of party autonomy allows parties to bind themselves as they see fit. As a result, MWB was bound by the variation and therefore not entitled to its claim for arrears.

Supreme Court

The Supreme Court overturned the Court of Appeal decision and in doing so, considered a long line of authority including *Globe*. In his well-reasoned judgment, Lord Sumption stated that the effect of the rule applied by the Court of Appeal was to override the intentions of the contracting parties. He considered Kitchin LJ's reasoning in the Court of Appeal to be a fallacy and at paragraph 11 of his Judgment stated:

"Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the

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parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed."

Lord Sumption held that there was no conceptual inconsistency between the general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring variations to be made in writing. He concluded by stating that parties who agree an oral variation in spite of a NOM clause do not intend to dispense with the NOM clause. The correct inference to be drawn from parties' failure to observe the formal requirements of a NOM clause is not that they intended to dispense with it but that they overlooked it. The Supreme Court was therefore in agreement with the High Court judge, the oral variation was ineffective and MWB was entitled to claim for the payment arrears.

As the oral variation was held to be ineffective, it was not necessary for the Court to decide whether a practical benefit, such as an increased chance of payment, could constitute good consideration. The Court did note however, that this issue was "*ripe for re-examination*" and therefore we will hopefully get a judgment on this point soon.

Lord Briggs agreed with Lord Sumption's judgment save that he considered a NOM clause could be varied orally provided specific reference was made to it. At paragraph 26, Lord Briggs commented as follows:

"What is to my mind conceptually impossible is for the parties to a contract to impose upon themselves such a scheme, but not to be free, by unanimous further agreement, to vary or abandon it by any method, whether writing, spoken words or conduct, permitted by the generally law".

It appears therefore that variations agreed orally could be valid provided the parties have first expressly removed the NOM clause, orally or otherwise.

Analysis

This decision provides important clarification on an issue which has long plagued contracting parties. It is now clear that the inclusion of NOM clauses prevents parties from informally varying the terms of their contracts. However, it appears that parties to a contract may be able to orally dispense with a NOM clause provided all parties to the contract expressly agree. Thereafter, the parties would be able to orally vary the contract as they see fit.

What is clear from this judgment is that, NOM clauses will prevent parties from orally varying the contract. Before seeking to agree a variation, parties should check their contracts for NOM clauses and follow any formal procedures to ensure the variation is effective and its terms are clear.