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Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24

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Synopsis

The Supreme Court has held that a contractual term prohibiting parties from varying a contract unless in writing and signed by the parties (a 'No Oral Modification' or NOM clause) is legally effective. Despite the fact that NOM clauses are common "boilerplate" in commercial contracts, until now there has been little caselaw directly on the efficacy of such clauses. The Supreme Court has provided reassurance that NOM clauses will be upheld by courts; however, the differing reasoning applied under the two judgments may leave some questions as to whether there are limited circumstances in which NOM clauses are less effective.

The case centred on a purported oral variation of a licence agreement containing a NOM clause. The Supreme Court's decision overturned the decision of the Court of Appeal which held that such a clause was not effective and that, therefore, the licence was capable of being modified verbally.

The leading judgment was given by Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) with Lord Briggs providing a concurring judgment reaching the same result on the facts, but disagreeing with some of Lord Sumption's conclusions. The leading judgment focussed largely on what Lord Sumption called the 'conceptual' arguments advanced in previous caselaw holding NOM clauses invalid.

The case also raised a second question on whether varying payment obligations and accepting a lower amount of money with more certainty of being paid constitutes effective consideration. The court declined to address this issue as it ceased to be relevant on the facts with the decision that the NOM clause was effective.

Factual background

The case involved a licence agreement (the 'Licence') between MWB Business Exchange Centres Limited ('MWB'), a property management company acting as the licensor, and Rock Advertising Limited ('Rock'), the licensee. Rock had accrued arrears of more than £12,000 in licence fees. Rock's sole director called a credit controller at MWB and offered a deferred repayment schedule for the arrears. Rock argued that this payment schedule had been accepted as a variation of the Licence. MWB did not accept the revised payment schedule, locked Rock out of the premises, terminated the Licence and sued for the full arrears. Rock counterclaimed, seeking damages for wrongful exclusion, relying on the oral variation of the Licence.

In the first instance, Judge Moloney QC (in the Central London County Court) found an oral agreement to vary the Licence had been reached, but found that such a variation was rendered ineffective by the NOM clause contained in the Licence.

The NOM clause provided:

> 'This Licence sets out all of 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.'

The Court of Appeal overturned the first instance decision, finding that the NOM clause did not prevent the parties from agreeing, independently, to orally vary the contract. The Court of Appeal decision was based on the common law principle that there are no formal requirements for the validity of a simple contract and that parties are entitled to agree whatever terms they choose, including to later agree to vary earlier contractual terms. The Court of Appeal relied largely on *obiter dicta* in the recent decision in *Globe Motors Inc and ors. V TRW Lucas Varity Electric Steering Ltd and anor* [2016] 1 C.L.C. 712 to reach the view that the NOM clause was ineffective.

The Supreme Court judgment

The five Justice panel gave two judgments. The leading judgment was given by Lord Sumption (with which all but Lord Briggs agreed). A concurrent judgment, given by Lord Briggs, reached the same outcome as to the appeal, but arrived at its decision through different reasoning.

Lord Sumption's judgment

The usual reasons given for denying the efficacy of NOM clauses are as follows:

- a variation of a contract is in itself a contract;
- common law imposes no requirements of form on the making of a contract so parties are free to agree informally to dispense with contracted formalities; and
- agreeing a variation informally infers that parties intended to dispense with a NOM clause.

Lord Sumption dispensed with these reasons, holding that the correct position is that 'the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation'.

The Court of Appeal had reached its decision with reference to the concept of 'party autonomy': by which parties cannot to restrict themselves to written variations only, because to do so would restrict their autonomy to freely contract going forwards. Lord Sumption disagreed. In his view, preventing parties from being bound by terms agreed between them in the name of party autonomy is a fallacy. It is common, and expected, that a contract will bind parties to certain causes of action, and therefore restrict the autonomy of the parties. Party autonomy operates to allow parties to contract on whatever terms they choose, but only does so to the point of contracting, after which the parties are bound by the terms they have agreed.

Lord Sumption noted that there are several commercially legitimate reasons for using NOM clauses:

- they prevent attempts to undermine written agreements by informal means;
- they avoid disputes about the terms of a variation and whether it was intended; and
- they provide formality in recording variations, allowing corporations to more easily police who they authorise to deal with variations.

Lord Sumption emphasised that contract law does not normally operate to frustrate the legitimate intentions of contracting parties and that there are no policy reasons to do so in the case of NOM clauses.

In reviewing the authorities, it was noted that prior to legislation giving effect to NOM clauses, United States case law had a long-standing tradition of treating such clauses as ineffective. The English authorities, on the other hand, are less clear. While the most recent (and the case mostly relied on by the Court of Appeal), *Globe Motors*, stated, *obiter*, that NOM clauses were ineffective, there are cases, and a substantial body of academic writing, in support of their efficacy.

The reasoning in previous case law for rendering NOM clauses ineffectual is based on purely conceptual reasons. It has previously been argued that as contracts are permitted to be made informally, it is conceptually impossible to agree not to vary a contract orally, because such an agreement would be immediately nullified by the parties subsequently coming to an informal oral agreement. Lord Sumption argued that it cannot be conceptually impossible to permit NOM clauses if there are clear examples of them working. He referred to the Vienna Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts, 4th edn (2016) as two examples of widely adopted codes which permit NOM clauses, and demonstrate that there is no conceptual inconsistency between a general rule in English law that contracts can be made informally, and a specific prohibition on oral amendments to contracts.

Lord Sumption turned to the question of whether it should be inferred that parties who agree an oral variation regardless of a NOM clause in their contract must have intended to dispense with the clause. To this point, he found that by including a NOM clause, parties have agreed that oral variations will be invalid. The natural inference is not that parties intend to dispense with the clause, but that they have overlooked it.

Lord Briggs' judgment

Lord Briggs agreed with Lord Sumption's characterisation of the debate, the commercial advantages of NOM clauses and on the conclusion reached on the facts of the case.

He did however differ in his reasoning and suggests that there is a broader range of circumstances in which a NOM clause could be removed by oral agreement.

Lord Briggs' position appears to be that a NOM clause will prevent parties from orally agreeing to variations to the substance of a contract while the clause remains in place, but that parties are equally free expressly (or by strictly necessary implication) to orally agree to remove or vary a NOM clause. He believed that this 'fully reflects the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition'.

Lord Briggs suggested that his approach represented a more cautious development of the common law more in line with other jurisdictions. He noted that Lord Sumption's 'more radical' solution represented a clean break with the consensus in other common law jurisdictions.

Estoppel

Lord Sumption touched upon the possible tension between the doctrines of estoppel and NOM clauses. The lower courts had found on the facts that Rock had not

taken sufficient steps to invoke estoppel defences. Lord Sumption agreed with this finding and did not examine estoppel in detail. He did consider, obiter, that the scope of estoppel cannot be so broad as to destroy the whole advantage of the certainty of a NOM clause. The judgment does not close off the possibility of estoppel completely in circumstances where parties have agreed a NOM clause , but Lord Sumption's judgment suggests that there would need to be good evidence of unequivocal words or conduct for a party to be estopped from enforcing a NOM clause.

The consideration issue

Both at first instance, and in the Court of Appeal, consideration, in the form of accepting a varied payment schedule for the prospect of being more likely to be paid, was held to be sufficient, based on the expectation of practical value, following the test in *Williams v Roffey Bros & Nichols (Contractors) Ltd* [1991] 1 QB 1. Lord Sumption highlighted the tension between *Williams* and the *Foakes v Beer* (1884) 9 App Cas 605, noting that this had been raised in *In re Selectmove* Ltd [1995] 1 WLR 474 where the Court of Appeal declined to follow *Williams*. However, he felt ultimately that revisiting such a long established decision should be a task for 'an enlarged panel of the court in a case where the decision would be more than obiter dictum' so ultimately declined to comment further on the issue.

Comment

This case provides certainty to contracting parties that NOM clauses will take effect as drafted and emphasises the need to consider formalities in 'boilerplate' contractual language. In practice, the judgment will make it extremely difficult (if not all but impossible) for a party to establish an oral variation of a contract containing a NOM clause. Although Lord Briggs' alternative interpretation of the law is of interest, it is a minority judgment and addresses the unlikely circumstance of parties considering and then making an express oral amendment of a NOM clause rather than simply complying the relevant clause . The 'clean break' proposed by Lord Sumption will likely be the prevailing interpretation of the law on NOM clauses.

In practice this means that parties will need to be more aware of the exact terms of the contract as any instances of parties agreeing (orally) to deviate from contractual terms in the day-to-day, commercial implementation unaware of the intricacies of underlying contractual terms are unlikely to now be effective.

Other than the brief remarks on estoppel, Lord Sumption did not consider in any detail the possibility of varying a contract containing a NOM clause through a course of dealing as distinct from oral variations. This point did not appear relevant on the facts of the case but will of course be of considerable importance in practice. Where a contract contains a NOM clause it would seem likely that a court would follow the logic of the leading judgment and hold such variation by conduct (without an express written modification) to be ineffective, too. In some regards it is a shame that the judgment does not address this issue as in practice it is just as common as the issue of oral modification.

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