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INSIGHTS

Paper Beats Rock! The UK Supreme Court rules on the efficacy of 'No Oral Modification' clauses

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The UK Supreme Court opinion in ***Rock Advertising Limited v MWB Business Exchange Centres Limited*** [2018] UKSC 24 marks a step change in English law's treatment of 'No Oral Modification' ("*NOM*") clauses. The Court opined that English law gives effect to contractual NOM provisions that require specific formalities to be observed for contractual variations to be valid. This overturns a rich corpus of previously held views, including those of the Court of Appeal in ***Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*** [2016] EWCA Civ 396 that parties may orally vary contractual terms notwithstanding a NOM clause whose formalities had not been strictly observed.

Some significant points emerge from the Supreme Court's judgment:

1. Post-contractual oral variations are invalid if the contract includes a NOM clause;

2. A party seeking in bad faith to rely on a NOM clause to avoid oral variations which both parties relied upon *may* be precluded from doing so by estoppel doctrines. However, such protection is set at a high bar; and

3. Incorporation of NOM clauses into commercial contracts reduces the risk of litigation and the accompanying delay and expense.

CASE SUMMARY

Who were the parties?
Rock Advertising Limited ("*Rock*") is a London based company offering advertising, marketing, research and polling services to commercial clients. MWB Business Exchange Centres Limited ("*MWB*") operates serviced offices in London.

What did the contractual variations clause provide?
In November 2011, Rock entered into a licence with MWB to occupy office space in central London for a fixed term of 12 months. The licence agreement contained a NOM clause stipulating that:

'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.'[1]

What was the dispute about?

Three months after the licence was signed, Rock had accumulated arrears of licence fees exceeding £12,000. Rock proposed a revised licence fee payment schedule, which was discussed between Rock and MWB on a telephone call. Rock contended that MWB had agreed to vary the licence agreement in accordance with the revised payment schedule. In denial, MWB argued that the payment schedule was merely a proposal and was therefore ultimately rejected.

One month later, MWB locked Rock out of the premises on account of its failure to pay the arrears, and terminated the licence. MWB then sued for the licence fee arrears. Rock counterclaimed damages for wrongful exclusion from the premises. The case turned on whether the terms of the licence could be varied by oral agreement alone, despite the NOM clause requiring variations to be recorded in writing and signed.

What were the key issues for the Court to decide?

The UK Supreme Court was tasked with two central considerations for its adjudication:

1. Whether a contractual term prescribing that an agreement may be amended *only* in writing and signed on behalf of the parties – not orally – is legally effective; and

2. Whether an agreement with the sole effect of varying a contract to pay money by substituting an obligation to pay less money or the same money later, constitutes good consideration in the formation of a contract.

What was the result?

Unanimously (though Lord Briggs proffered a separate, albeit concurring, opinion), the UK Supreme Court upheld MWB's appeal, opining that the oral variation was invalid for *'want of the writing and signatures prescribed by [the NOM clause] of the licence agreement*.'[2]

Their Lordships opined there is no conceptual inconsistency between a general rule allowing contracts to be made informally, and a specific rule that effect will be given to a contract requiring writing for a variation. Therefore, if a contract contains a NOM clause, any variations not adhering to the stipulations of form required by the NOM clause will be invalid.

In lead judgment, Lord Sumption construed as "*a fallacy*"[3] the Court of Appeal's view that party autonomy was the most powerful consideration. In His Lordship's estimation '*party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows*.'[4] There is '*no mischief in No Oral Modifications clauses*' which would obstruct the legitimate intentions of businessmen, Lord Sumption opined, '*nor do they frustrate or contravene any policy of the law*.'[5]

Rather, restricting contractual variations to a prescribed form has several legitimate commercial justifications:

1. It prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment;

2. In circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms; and

3. A measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them.[6]

Lord Sumption recognised that the enforcement of NOM clauses carries the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. His Lordship emphasised that the safeguard against this injustice lies in the various doctrines of estoppel. However, it is a high bar to prove a defence of estoppel. In the present case, the courts held that the minimal steps taken by Rock were not enough to support any estoppel defences.

The Court declined to render judgment on the issue of consideration, but noted that the time is ripe for an investigation into whether an expectation of commercial advantage is good consideration, and thus a re-examination of the ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** [1989] EWCA Civ 5] decision.

What significant points of interest emerge from this case?
This judgment highlights the importance of including NOM clauses in commercial contracts struck under English law to help protect against informal, unrecorded discussions inadvertently constituting modifications to an agreement.

Parties should also consider the importance of matching the mechanisms for varying a contract with the practical requirements of the business or project. The inclusion of NOM clauses may be preferable to large businesses which have numerous employees with authority to bind the company. Conversely, for small, fast paced projects, parties may wish to allow for oral variations, in certain circumstances.

Many will welcome the UK Supreme Court's judgment because it will allow parties to achieve greater certainty through the inclusion of NOM and entire agreement clauses in their contracts. At the horizon where business and law conflate, such certainty invariably paves the way for more harmonious relations and healthier balance sheets. This may reduce the scope for disputes over oral amendments in future.

How does this case impact upon the international major projects sector?
As participants in the international energy, infrastructure and construction sectors will be all too familiar, the fast-paced, high-stakes, changeable nature of major projects mandates the constant instruction of variations. Very seldom, therefore, will all such variations be issued to the strict contractual letter – often, performance of the varied work will promptly follow an on-site oral instruction before the validating paperwork has been raised.

It is quite commonplace for those international major projects to involve contracts struck under English law. Many also will adopt standard forms of contract that expressly provide for NOM or similar type provisions, which operate to require conformance with strict formalities (of varying

kinds) in the discharge of contractual variations. For instance, the widely used FIDIC 'Red Book' 2017 form at clause GC1.2(c), the NEC4 form at clause 12.3, and the JCT SBC/Q 2016 form at clause 3.12 each prohibit the issue of 'informal' variations.

For international major projects with the above features, the consequence of the UK Supreme Court's judgment will be quite profound. From this landmark moment, major projects participants should anticipate increased English court (or applicable tribunal) scrutiny over whether expressly contemplated formalities have been strictly met, in the valid variance of their contractual promises.

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1 Clause 7.6 of the licence agreement concluded between the parties on 12 August 2011.

2 Per Lord Sumption, para 17.

3 *Ibid.*

4 *Ibid,* para 11.

5 *Ibid*, para 12.

6 *Ibid*.