"No Oral Modification" clause legally effective, Supreme Court holds

Introduction

On Wednesday (16 May), the Supreme Court handed down its Judgment in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, unanimously holding that the Respondent (Rock Advertising Limited) had not, by oral agreement, varied a contractual term which stated that an agreement may not be amended save in writing signed on behalf of the parties (a "**No Oral Modification**" clause).

This is a departure from the trend of recent case law on this issue, which indicated that parties had more latitude to vary existing contractual arrangements orally or by conduct, even where No Oral Modification clauses were in place.

In reaching its decision, the Supreme Court was asked to consider two fundamental issues in contract law: (i) whether a No Oral Modification clause is legally effective; and (ii) whether an agreement whose sole effect is to vary a contract to pay money substituting an obligation to pay less money or the same money later, is supported by consideration.

Background

On 12 August 2011, Rock Advertising Limited ("**Rock**") entered into a licence agreement with MWB Business Exchange Centres Limited ("**MWB**"), a serviced offices operator in London, to occupy office space in London for a term of 12 months. Clause 7.6 of the agreement provided:

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

In early 2012, following an accumulation of licence fees arrears (exceeding £12,000), Rock's sole director proposed a revised schedule of payments to a credit controller at MWB, to defer certain payments and spread the accumulated arrears over the remainder of the licence term. The revised schedule was worth slightly less to MWB than the original terms due to the interest cost of deferral. Following a discussion via telephone, Rock's director contended that the credit controller at MWB had agreed to vary the agreement in accordance with the revised schedule. A dispute arose as to whether the credit controller at MWB had accepted Rock's director's proposal orally.

At first instance (in the Central London County Court), it was held that the parties had agreed orally to the revised schedule and that the agreement was supported by consideration. However, the oral variation was ineffective because it was not recorded in writing signed on behalf of the parties (as per the requirement in Clause 7.6), so MWB could claim the arrears without regard to that oral variation.

On appeal,[1] the Court of Appeal overturned the first instance decision. While agreeing that the variation was supported by consideration, it held that the concept of "*party autonomy*" meant that the oral variation had also amounted to an agreement to dispense with Clause 7.6.

Judgment

Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) stated on behalf of the Supreme Court that "*the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation*". He explained that No Oral Modification clauses are common for three main reasons: (i) they prevent

1 [2017] QB 604.

attempts to undermine written agreements by informal means; (ii) they avoid disputes not just about whether a variation was intended but also about its exact terms; and (iii) they allow corporations to restrict the authority to agree variations. No Oral Modification clauses do not frustrate or contravene public policy, so there is no reason to obstruct the legitimate intention of commercial parties.

After analysing the common law, Lord Sumption concluded that 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 a variation to be in writing. Lord Sumption stated that the "*natural inference*" from the failure to adhere to the requirements of a No Oral Modification clause is that the parties overlooked the clause, not that they intended to dispense with it.

There is a risk with such clauses that a party may act on the contract as varied, only to find itself unable to enforce it, because the formalities were not followed. However, Lord Sumption explained that the "*safeguard*" to the risk lies in the various doctrines of estoppel. While Lord Sumption declined to go further by exploring the circumstances in which a party can be estopped from relying on a No Oral Modification clause, he thought that "*[a]t the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself*". In this case, Rock's "*minimal steps*" were not enough to support any estoppel defences.

Given the findings in relation to the first issue it was asked to consider, the Supreme Court found it unnecessary to deal with the second issue relating to consideration. While the case law in this area is "*probably ripe for re-examination*", Lord Sumption thought it would be more appropriate for an enlarged panel of the Supreme Court to consider the matter in a case where the decision would be more than *obiter dictum*.

Lord Briggs gave a concurring Judgment but gave different reasons for reaching his conclusion. In his view, a No Oral Modification clause binds the parties until they expressly or by necessary implication agree to do away with it. In this case, the oral variation made no mention of the No Oral Modification clause so the clause remained in effect.

Comments

This decision confirms that the Courts are willing to give effect to No Oral Modification clauses. Such clauses can be used as an effective means to support internal rules restricting the authority to agree variations or any relaxation of contractual terms. The decision may, however, require commercial entities to re-think the way they conduct business in circumstances where it is not always realistic or viable to document in writing each and every minor departure from the express contractual terms.

This case is also a useful reminder that it is always prudent for any party that seeks to amend an agreement to revisit the underlying contractual documentation to check whether or not it contains a No Oral Modification clause, or indeed whether there are other requirements for variations to be valid. Courts will now be much less willing than previously to allow variations, in the absence of strict compliance with contractual requirements. Although this represents a change in direction on this particular issue, it is consistent with the more rigorous approach to strict contractual compliance adopted over recent years by the Courts, for instance with respect to compliance with notice provisions.

This case paves the way for future cases to explore the circumstances in which a party can be estopped from relying on a contractual provision that prescribes conditions for the formal validity of a variation. In the meantime, parties should be wary that the point at which an estoppel defence arises is by no means set in stone and will turn on the facts.

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