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U.K. Supreme Court Moves English Common Law Towards International Consensus On 'No Oral Variation' Clauses

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In the recent case *Rock Advertising Limited v MWB Business Exchange Centres Limited*,[1] the Supreme Court of the United Kingdom considered whether a contractual term, which purported to preclude oral variations to a contract, was of legal effect. In holding that it was, the Court has significantly shifted English contract law. Previously, such terms were typically found to be ineffective; that is no longer the case.

The Supreme Court's ruling does not impose any formal requirements for entering into a contract. But this change should certainly give some comfort to commercial parties who want to ensure that a degree of formality is required in order subsequently to amend the terms of that contract.

Factual Background

The contract in question was a licence to occupy office space in London. It contained a fairly standard clause providing that oral modifications would not be effective:

> "This Licence sets out all of the terms as agreed between MWB [the Licensor] and Licensee [Rock Advertising]. 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 Supreme Court described this as a "No Oral Modification" (NOM) clause.

Rock Advertising fell into arrears with its licence payments, so one of its representatives called MWB and spoke to a credit controller about restructuring payment terms under the licence. The Parties took different views about the nature of that discussion: Rock Advertising considered an agreement had been reached, which allowed the overdue license fees to be repaid over the remainder of the licence term. For its part, MWB thought the restructuring idea was a proposal only. Subsequently, MWB terminated the licence and sued for the outstanding payments. Rock Advertising relied upon the oral agreement and counterclaimed for wrongful exclusion from the premises.

The Question Before the Court

On the gateway question of whether the Parties' restructuring discussion amounted to an agreement, the Court agreed with Rock Advertising and found the Parties had agreed to vary the terms of the licence.

The question before the Court, therefore, was whether the oral variation bound MWB.

Lord Sumption, speaking for the majority, held that MWB was not bound by the agreement made during the telephone call on the basis that "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation."[2]

Lord Sumption noted[3] that in the past, three reasons had typically been given for treating NOM clauses as ineffective:

1. Variations of existing contracts are themselves contracts.
2. Because the common law imposes no requirements of form on the making of contracts, parties may agree informally to dispense with an existing clause which imposes requirements of form.
3. Parties must be taken to have intended to override such a clause by the mere act of agreeing to a variation informally when the principal agreement required writing.

His Lordship rejected this third reason in particular, noting that "[t]he natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it."[4] He also observed that, by failing to give effect to these provisions – thereby disregarding express provisions that certain formalities must be met to vary agreements – the Court will have actually overridden parties' intentions in the past.

The Court of Appeal, in finding that the oral agreement in this case was effective, had invoked the principle of party autonomy. Lord Sumption rejected that notion unequivocally too. Indeed, he thought it supported his view:

> "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 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."[5]

He further noted that the flexibility of English common law on contracts regarding formal validity was advantageous: "it enables agreements to be made quickly, informally and without the intervention of lawyers or legally drafted documents."[6] But this flexibility, he explained, which generally allows contracts to be made informally, is not inconsistent with a "specific rule that effect will be given to a contract requiring writing for a variation."[7]

His Lordship compared the English common law position with international consensus on this issue, found in the Vienna Convention on Contracts for the International Sale of Goods (1980) (CISG) and the UNIDROIT Principles of International Commercial Contracts, 4th ed (2016) (UNIDROIT Principles).

Lord Sumption acknowledged that one of the dangers of enforcing a clause that made oral variations invalid was that a party might act on the contract as varied, but then find itself unable to enforce the varied contract. He was not troubled by this, however, on the basis that a "safeguard against injustice lies in the various doctrines of estoppel."[8]

While, here, Rock Advertising had not taken sufficient steps to support an estoppel argument, Lord Sumption's point stands. It is perfectly possible that a clause requiring parties to make any modifications to their contracts in writing will be found legally effective, and yet disregarded by the Court in circumstances where it would be unjust to allow one of the parties to rely upon it.

Comment

Lord Sumption also noted that clauses of this kind were very commonly found in commercial agreements, which he thought indicated "the common law's flexibility has been found a mixed blessing by businessmen and is not always welcome."[9] He suggested three reasons why commercial parties might wish to include such clauses in their agreements:

1. They are an obstacle to any attempt to undermine written agreements by informal means.
2. They avoid disputes where oral discussions might otherwise lead to misunderstandings.
3. Requiring a degree of formality in recording variations makes it easier for organisations to police internal rules restricting authority to agree to such variations.

It is noteworthy that, in reaching this decision, the Supreme Court appears to have taken some comfort – even guidance – from the approaches taken in the CISG and the UNIDROIT Principles. Particularly given England & Wales is not a party to the CISG, and English law contracts are not interpreted under its aegis (and therefore Lord Sumption's desire to bring the English common law in line with these internationally-established principles is necessary to achieve his aims even in the context of the international sale of goods).

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[1] [2018] UKSC 24.

[2] Paragraph 10.

[3] Paragraph 7.

[4] Paragraph 15.

[5] Paragraph 11.

[6] Paragraph 12.

[7] Paragraph 13.

[8] Paragraph 16.

[9] Paragraph 12.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Gordon McAllister
Counsel – London
Phone: +44.20.7413.1311
Email: gmcallister@crowell.com

Edward Norman
Counsel – London
Phone: +44.20.7413.1323
Email: enorman@crowell.com

John Laird
Associate – London
Phone: +44.20.7413.1324
Email: jlaird@crowell.com