

THE ENFORCEABILITY OF NO ORAL MODIFICATION CLAUSES - THE DANGERS OF FAILING TO PUT PEN TO PAPER

- ▶ The Supreme Court upheld a 'No Oral Modification' (**NOM**) clause, deciding that an oral variation made to a contract containing a NOM clause was invalid.
- ▶ NOM clauses are not uncommon, particularly in framework and bespoke contracts. In light of this decision, the importance of reviewing contracts to ensure variation provisions are followed is now more important than ever.
- ▶ Failure to follow NOM provisions means that a party seeking to rely on an oral variation is left in a difficult position. However, the party relying on the oral agreement may be able to argue estoppel (but this is hard to establish).

What's it about?

In the case of *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, the Supreme Court considered the enforceability of a NOM clause and, consequently, whether an attempt to vary an agreement orally had been successful.

The defendant, Rock Advertising Limited (**Rock**), had fallen behind on payments due under a licence. The (sole) director of Rock proposed a revised payment schedule to an employee of the claimant via a telephone call. Although Rock contended that this was a variation, it was not agreed in writing as required under the NOM clause. When Rock fell in to rent arrears the claimant locked Rock out of the property.

The Court of Appeal - reaching a contrary decision to the Supreme Court – explored the principle of "Party Autonomy". The Court of Appeal held that English law imposes no formal requirements to bring a contract into being and that subsequently parties can just as easily change its terms, concluding that the oral variation in the current situation amounted to an agreement to dispense with the formal requirements under the NOM clause¹. It was held possible to orally agree variations to contracts with NOM clauses; effectively agreeing to dispense with the formal requirements noted in such clauses.

In the Supreme Court, the Court of Appeal decision was reversed. The Supreme Court decided that where parties had provided for NOM clauses, that could not be ignored. Any variation must comply with the formal requirements that were agreed when the contract was created. The Supreme Court found that enforceability of a NOM clause does not restrict autonomy but records autonomy at that point in time and does not prevent a change by the parties at a later date. It considered that there would be few situations where the parties would not have time to put pen to paper and observe the formalities under a NOM clause.

The Supreme Court noted that NOM clauses reflect a clearly expressed intention by the parties at the time of contracting to impose variation formalities. Additionally, the Supreme Court noted how such clauses give effect to legitimate commercial interests, including:

- ▶ Preventing contracts being undermined;
- ▶ Avoiding disputes through the clarity they provide; and
- ▶ Policing internal rules to ensure only those with the relevant authority can vary contracts.

To dispense with a NOM clause, the parties needed to demonstrate that they have unequivocally confirmed, by words or conduct, that the variation was valid notwithstanding the lack of formality, and this must be more than an informal promise.

¹ [2018] UKSC 24 [5]

Why does it matter?

The case affirms the need to ensure that contractual terms are reflective of the intentions of the parties over the long term. Should the terms not reflect intentions over the long term, parties need to take care when making contractual variations to ensure that the amendment is valid and enforceable.

Practical Implications

- ▶ NOM clauses provide greater certainty than before; but only if the provisions are followed by the parties.
- ▶ Where NOM clauses are not followed, the variation may be invalid but arguments can remain.
- ▶ Be familiar with the provisions of the contract and follow them. As noted by the Supreme Court, those with day to day running of contracts may be "blissfully unaware" of their contract containing a NOM clause.
- ▶ The Supreme Court was careful to remind that estoppel was available to ensure that injustice is prevented where there has been reliance on the variation. However, it must be remembered that estoppel is not always applicable and can be difficult to demonstrate.

Now what?

Read the contract and determine whether there is a NOM clause present. Contracts and subsequent variations ought to be reviewed to ensure that variations have been made correctly and are, therefore, enforceable. If they have not been made correctly, the risk of a challenge needs to be considered as well as whether the position under the contract should now be recorded in a compliant way.

If the parties want to agree variations more informally, despite the presence of a NOM clause, this decision needs to be documented. It would be wise to go as far as acknowledging the NOM clause and detailing the decision to vary it.

Be aware that if there is a NOM clause it will be upheld by the Court. If you are not complying with a NOM clause there is considerable risk that an oral variation will not be enforceable.

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