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UK Supreme Court Confirms ‘No Oral Modification’ Clauses Prevail Over Oral Amendments

Decision confirms that oral modifications to a contract will not be effective if the contract contains a no oral modification clause.

In a recent decision,¹ the UK Supreme Court confirmed that an oral modification to a contract would not be effective due to a ‘no oral modification’ (“NOM”) clause in the contract. Although NOM clauses are included as a customary provision in many contracts, it is not uncommon for parties to seek to agree oral modifications rather than to agree a modification in writing. The UK Supreme Court’s decision represents a departure from recent case law and may have a significant impact on commercial parties that regularly seek to agree oral amendments to contracts which may then later be documented in writing.

Background

MWB Business Exchange Centres Limited (the licensor) granted Rock Advertising Limited (the licensee) a contractual licence to occupy office space in London. The licence contained the following clause, comprising an entire agreement clause and NOM clause (shown in bold):

*“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.**”*

Rock fell significantly into arrears under the licence and proposed a revised payment schedule to MWB. Under the proposal, MWB would receive less overall, but its prospect of receiving payment would increase. Rock alleged that MWB orally accepted the proposal to alter the payment schedule. MWB proceeded on the basis that the proposal had not been accepted, locking Rock out of the premises and terminating the licence, before issuing a claim for the arrears. Rock counterclaimed for wrongful exclusion from the premises. The claim and counterclaim centred on whether the oral agreement could effectively vary the underlying licence.

In the UK Supreme Court’s decision, Lord Sumption’s leading judgment concluded that “party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows.” The NOM clause therefore prevented Rock and MWB from varying the contract unless such variation was in writing.

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¹ Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24

Implications

Although it is not uncommon for parties to agree oral modifications of a contract (whether later evidenced in writing or not), there are valid public policy objectives which are promoted by NOM clauses. Further to this, Lord Sumption noted that NOM clauses are commonly used in commercial agreements for the following reasons: (1) to prevent undermining written agreements via informal means; (2) where oral discussions can easily give rise to misunderstandings; and (3) through the requirement of formalities to allow corporations to maintain internal rules restricting the authority to agree to such variations. The UK Supreme Court did not identify a persuasive public policy rationale for not giving effect to NOM clauses.

Nevertheless, there are many instances in which commercial parties to a contract have agreed an oral variation to a contract which contains a NOM clause, only to put the variation in writing at a later time. Prior to the oral variation being memorialised, the parties often desire to act as if the variation was a valid modification to the underlying contract. The UK Supreme Court has made it clear that parties which adopt this approach in respect of an English law governed contract will have to face the risk that such an oral variation will not be an effective amendment to such a contract. In such a circumstance, a party may be able to rely upon estoppel; however, it may be difficult to establish an adequate basis for an estoppel which would, in any event, be subject to the limitations which apply to equitable remedies, including the requirement that anyone seeking to rely on estoppel to have ‘clean hands’ and not have acted unconscionably.

Contractual parties should take heed of the UK Supreme Court’s decision and be mindful of the risks of proceeding to perform under a contract on the basis of an oral modification if the relevant contract has a NOM clause. Parties seeking to amend their contracts should be sure to review the terms of their contracts to determine whether they contain NOM provisions or other specific conditions relating to the effectiveness of amendments and take appropriate action. If a party sought to proceed on the basis of an oral modification, the counterparty may decide to reject this approach before the oral modification was reduced to writing which would put the party seeking to rely on an oral modification in a challenging position due to the risk that the oral variation would not be an effective amendment to the contract.

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