GILES DIXON SOLICITORS

Be Sure to Read the Small Print when you want to Vary a Contract.

The Supreme Court Upholds a Clause requiring a Variation in Writing.

The Supreme Court recently had to decide whether an oral agreement to vary a contract was valid when a clause in the contract stated that any variation must be in writing and signed by the parties before it could take effect.

Until that decision in May 2018, it has often been said that, under the common law, there is no particular form of making a contract and, therefore, it follows that a clause which prohibits or restricts a change can itself be changed by agreement of the two parties, orally or in writing.

There has, therefore, been some doubt as to whether such a clause, sometimes known as a No Oral Modification (NOM) clause is fully effective.

The Supreme Court has now decided this issue in Rock Advertising v MWB Business Exchange Centres. Rock Advertising had a licence to occupy premises owned by MWB. The licence payments fell into arrears and there was said to be a telephone agreement to vary the agreement by rescheduling the payments. A few days later MWB locked Rock Advertising out of the premises and sued for the arrears. The Supreme Court had to decide whether the variation agreement was effective in law.

Lord Sumption, in his leading judgement, said that in his opinion "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation."

Many contracts contain a clause stating that any variation to the terms of the contract must be in writing and signed by authorised signatories of the parties. Yet there are numerous instances when variations are agreed informally without being confirmed in writing in this manner. Quite often, these agreements will be reached at an operational level between employees of the parties, probably individuals who have not in fact studied the small print in the contract.

So, given this decision, whenever such a situation arises, parties to a contract should first check what it says about making a variation and, if there is a NOM clause, they should follow the procedure laid down before implementing the variation.

As Lord Sumption said, there are at least three good reasons for including such a clause:

(i) it prevents attempts to undermine written agreements by informal means,

(ii) it avoids disputes, especially in circumstances where oral discussions can give rise to misunderstandings, and

(iii) a measure of formality in recording variations allows a company to police internal rules for restricting the authority to agree them.

It is worth noting that the court did not entirely rule out the possibility of a situation where an oral variation might be said to have some validity. There was reference to international law including the Vienna Convention on Contracts for Sale of international Goods which contains a NOM clause, but which also contains this qualification: “However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.”

The UK has not ratified this Convention but a similar principle of English law might be argued in some circumstances: the doctrine of estoppel. If MWB had accepted the rescheduled payments over a period of several months and then locked Rock Advertising out of the building on the grounds it was in arrears with the original schedule of payments, a court might hold that MWB should be estopped – i.e. prevented - from relying on the NOM clause in those circumstances.

But the basic law is now clear: a NOM clause may be among the boiler plate clauses at the back of a contract but it still has to be complied with like any other.

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