Varying a written contract: how effective is a "no oral modification" clause?

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The Supreme Court has upheld the effectiveness of a clause in an agreement providing that changes to the agreement must be in writing. Although the case arose in the context of a licence for serviced offices, the principle established by the Supreme Court is of general relevance to corporate and other transactions.

Background

The aim of a "no oral modification" (NOM) clause is to provide a minimum procedure for the parties to follow to vary the contract to exclude the possibility of informal oral variations.

However, there has been some doubt about how a NOM clause fits with the principle of party autonomy. This is the principle that, just as parties are free (generally) to agree whatever they choose, so they are free to "unmake" specific aspects of that agreement later, including by oral agreement or conduct.

Facts

Under the licence, Rock was due to pay a set licence fee every month. The licence provided that:

"All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

Rock had accumulated arrears with its licence fee payments and it proposed a schedule of revised payments to MWB. It alleged that, over a telephone conversation, the parties had agreed that they would vary the licence in accordance with the revised schedule.

The question arose as to whether the alleged oral variation was effective. Did any variation to the licence have to be in writing or could the parties orally agree to do away with that requirement?

Decision

Overruling the Court of Appeal, the Supreme Court held that the NOM clause in the licence was effective and that, therefore, the oral variation was ineffective.

The Court held that party autonomy operates up to the point when the parties make the contract but, after that, only to the extent that the contract allows. There is, therefore, no inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to contracts requiring writing for a variation.

The Court did recognise that enforcing NOM clauses carries the risk that a party could act on the contract as varied

and then find itself unable to enforce it. However, it pointed out that under English law the safeguard against injustice lies in the various doctrines of estoppel. These prevent (estop) a party from departing from statements or promises that they have previously made to another party. However, for estoppel to arise at the very least:

- there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and
- something more would be necessary than the informal promise itself.

On the facts, an estoppel did not arise.

Comment

The decision favours certainty over flexibility. It represents a break from decisions of the lower courts which had held that NOM clauses were not legally effective, as those who make a contract can unmake it.

The practical effect of this judgment is to make it more important for the parties to a contract to follow the procedure in the contract for varying it. If an agreement contains a NOM clause, an oral agreement to vary the contract may not be effective, even where the other party is agreeable to it. If the parties in the Rock case had agreed to remove the NOM clause and followed the prescribed procedure, the outcome would probably have been different.

Rock Advertising Ltd v. MWB Business Exchange Centres Ltd [2018] UKSC 24

Your Key Contacts

Richard Barham
Partner, London
D +44 20 7246 7109
richard.barham@dentons.com

Candice Chapman
Partner, London
D +44 20 7246 7141
M +44 7525 174223
candice.chapman@dentons.com