The Legal Effect of NOM clauses

When deciding on Rock, Supreme Court chooses a hard place

21 MAY 2018
By: James Carter | Jamie Curle

Introduction

"No Oral Modification" clauses (or NOM clauses) are commonly used in commercial contracts in order to prevent parties from modifying, varying or terminating an existing contract by means other than the prescribed form (usually in writing and signed by both parties). The status of these clauses under English law has, until now, been subject to some uncertainty.

In *Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited (Appellant)* [2018] UKSC 24, the Supreme Court has given its judgment in an area described as a "fundamental issue in the law of contract". Lord Sumption, giving the lead judgment, has comprehensively resolved any uncertainty by finding that "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation".

Speedread/ Summary

The key points arising out of this judgment are:

- There has been some uncertainty in the past regarding the effectiveness of NOM clauses, based on conceptual difficulties concerning party autonomy and a perceived tension between a party's freedom to enter into contractual arrangements which fetter their own future conduct and an equivalent freedom to vary those
The Supreme Court has held that NOM clauses are effective. In general terms this means that if a contract contains a NOM clause, parties must now abide by the procedural requirements set out in that clause if they later seek to vary the agreement.

There may be some limited level of protection for parties who rely to their detriment and act upon the contract as varied and are subsequently unable to enforce it, based upon the defence of estoppel.

What has happened?

Rock Advertising Limited (Rock) entered into a contractual licence with MWB Business Exchange Centres Ltd (MWB) to occupy serviced office space operated by MWB in central London for a fixed term of 12 months. Clause 7.6 of the licence agreement provided:

"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."

In effect, the clause combined an entire agreement provision (the first two sentences) and a NOM clause (the last sentence).

Rock went on to accumulate licence fee arrears, and the company's sole director, Mr Idehen, proposed a revised schedule of payments to Ms Evans, a credit controller employed by MWB. The effect of the revised schedule was to defer part of the overdue payments, and to spread the accumulated arrears over the remainder of the licence term. The proposal under the revised schedule was less profitable to MWB than the original terms of the licence because of the interest cost of deferral. A dispute arose as to whether Ms Evans had accepted the proposed revisions orally, with Rock maintaining that this was the case. MWB locked Rock out of the premises, terminated the licence and sued for the arrears. Rock counterclaimed damages for wrongful exclusion from the premises.

In the County Court, the judge found in favour of MWB, holding that the variation agreement contended for by Rock was supported by consideration (specifically, the enhanced prospect of receiving payment), but that the variation was ineffective because it was not recorded in writing signed on behalf of both parties as required by clause 7.6. The Court of Appeal overturned the first instance decision on the basis that the oral agreement to revise the schedule of payments also amounted to an agreement to dispense with clause 7.6.

Supreme Court decision

Lord Sumption's judgment grapples with the fundamental question of whether parties who are free to enter into a contractual arrangement in any form they may choose (whether written or oral) are also free to change a clause which purports to restrain the means by which they may vary their existing contractual relationship in a way which is not in accordance with that clause.

NOM clauses have in the past been held to be ineffective on the basis that a variation of an existing contract is itself a contract (provided that the basic principles of offer, acceptance and consideration are also fulfilled) and that the parties must have intended to dispense with any requirements of form by the mere act of agreeing a variation informally when the principal agreement required writing. However, Lord Sumption disagreed with the premise of this assumption, stating that "what the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies".

In concluding that there was no inconsistency between a general rule allowing contracts to be made informally and a specific rule requiring variations to an existing contract to be made in writing, Lord Sumption referred to legal systems, such as the Vienna Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts, 4th ed (2016) which also impose no formal requirements for the validity of a commercial contract, and yet give effect to NOM clauses. These legal systems also provide protection to parties who act upon the contract as varied and are subsequently unable to enforce it by providing that a party may be precluded by his conduct from relying on a NOM provision to the extent that the other party has relied (or reasonably relied) on that conduct. Under English law, a party may be able to place some
limited reliance upon the concept of estoppel, but “at the very least” there would need to have been some words or conduct unequivocally representing that the variation was valid notwithstanding its informality, and the informal promise itself would not be sufficient for these purposes.

It is interesting to note that Lord Briggs, whilst giving a concurring judgment, had different reasons for allowing the appeal. In Lord Briggs’ view, refusing to recognise the effect of a NOM clause would not necessarily override the parties’ intentions if both or all parties had agreed to do away with it.

Conclusion

Following this Supreme Court case, parties should pay close attention to clauses such as NOM clauses and entire agreement clauses, which can sometimes be perceived as being ‘boilerplate’ and therefore less critical than those clauses recording the substantive agreement.

This judgment demonstrates that these types of clauses, which are designed to promote and preserve legal certainty, can have a substantial effect on the parties’ ability to bind themselves as to their future conduct. In contracts which provide for ongoing collaboration between parties and a close working relationship, minor matters can sometimes arise which are resolved or dealt with quickly and informally by those on the ground. This may result in a variation or modification to the contract which may later be found to be ineffective if the procedural requirements for agreeing that change have not been observed. Clients and their employees should take care to be clear about the circumstances in which such modifications are permitted and any formal requirements for ensuring that any changes are legally effective.

AUTHORS

James Carter
Partner
London | T: +44 (0)20 7349 0296
james.carter@dlapiper.com

Jamie Curle
Partner
London | T: +44 (0)20 7349 0296
jamie.curle@dlapiper.com