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NO ORAL MODIFICATION CLAUSE UPHELD – FORMALITIES IN CONTRACTS MUST BE ADHERED TO

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As Lord Sumption stated in the first paragraph of his leading Supreme Court judgment, the case of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24* was one of those exceptional cases in which fundamental issues of the law of contract are considered.

The main issue considered by the Supreme Court was whether the following clause in a contractual licence made between the parties was legally valid:

> "*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*. (Clause 7.6)"

On 27th February 2012, Rock had accumulated over £12,000 in licence fee arrears. Rock's director proposed a revised schedule of payments in order to spread the arrears over the remainder of the licence term. Rock claimed that MWB agreed this schedule over the telephone, though this was denied by MWB. On 30th February 2012, MWB locked Rock out of the premises for its failure to pay the arrears, and terminated the licence with effect from 4th May 2012.

In a unanimous judgment, the Supreme Court determined that the clause was legally valid, and therefore that there had been no variation of the contractual licence. The appeal was therefore allowed, overturning the decision of the Court of Appeal. The leading judgment was given by Lord Sumption, with whom Lay Hale, Lord Wilson and Lord Lloyd-Jones agreed. Lord Briggs also agreed that the appeal ought to be allowed, though for different reasons.

Lord Sumption also referred, briefly, to another ground of appeal before the Court; the question of whether provision of a less advantageous schedule of payments would have been adequate consideration for the purposes of varying the contract. However, Lord Sumption's view was that, given the Court's decision on clause 7.6 of the contract and, it would have been undesirable to determine the issue. This is because it would likely require a re-examination of *Foakes v Beer (1884) 9 App Cas 605* which, given the long-standing principles set out in that case, ought to be reserved for an enlarged panel of the Court and a case whether the decision would be more than obiter dictum.

Discussion

Contractual provisions such as clause 7.6 are often referred to as No Oral Modification clauses ("NOM clauses"). As Lord Sumption set out in paragraph 12 of his judgment, there are three reasons why parties may choose to include NOM clauses in their agreements:

1. Prevention of attempts to undermine written agreements by informal means.

2. Avoiding disputes about (a) whether a variation was intended and/or (b) the terms of any such variation.

3. Enabling corporations to police internal rules restricting who has authority to agree variations.

Underlying each of these reasons is the need for commercial certainty in contractual dealings. Parties make contracts to formalise a relationship and to allocate risk over the course of the relationship. When an issue arises during the course of a contractual relationship, the parties (and third parties who are relying on the contract) need to know how that issue is going to be resolved. If the contract is ambiguous, or if one of the parties believe that the contract has been varied, then the result is a dispute which may only be solved through long, and expensive, litigation. This is in nobody's interest.

Weighing against commercial certainty is party autonomy. Contracts are, ultimately, consensual arrangements which are agreed between the parties. Save in certain circumstances prescribed by contract, English law is largely *laissez-faire* about the formal requirements for creating a contract and the substance of any contracts. The Court has traditionally been very reluctant to delve too deeply into the contractual relationships agreed between parties. If the parties agree something, then why shouldn't they be bound by that agreement?

It is the desire to ensure that the Court does not impinge on party autonomy which resulted in equivocal decisions relating to NOM clauses. However, as Lord Sumption made clear in paragraph 11 of his judgment:

> "*party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows.*"

It should not, of course, be forgotten that the inclusion of a NOM clause is, itself, an exercise of party autonomy. The parties were not forced to include the clause; they decided to do so consensually. Having done so, the enforcement of the NOM clause fulfils the intentions of the parties (though those intentions may subsequently alter).

Further, when negotiating a contract the parties are in a position to assess what formality requirements (if any) are appropriate for their circumstances. If those circumstances change, or if the parties decide that more informal formality requirements would be preferable, they could, presumably, vary or suspend the NOM clause (as long as they comply with the formality requirements of that clause to do so). If the parties fail to exercise their autonomy in what would appear to be a fairly straightforward manner, it is easy to see why Lord Sumption considered an appeal to autonomy in order to avoid a NOM clause a fallacy.

That is not to say, of course, that it is not possible to "get around" a NOM clause. As Lord Sumption makes clear in paragraph 16:

> "*the safeguard against injustice lies in the various doctrines of estoppel*."

It is clear why estoppel couldn't avail Rock in this case; it would always be a difficult task to claim that the elements of estoppel have been satisfied over a period of three days. However, had MWB orally agreed to the schedule and the schedule been adhered to for a period of months, an estoppel argument may have been stronger. The promissory estoppel in *High Trees* arose, after all, as a result of the landlord orally agreeing/promising to accept lower rent for the duration of the war, which was relied upon by the tenant.

The doctrine of promissory estoppel is a recognition that there are certain circumstances in which it would be unconscionable for a party to assert their legal rights. It is not a variation of the contract, as if it was a variation there would be no legal rights for the "unconscionable" party to assert. It may therefore be possible for an estoppel to arise in circumstances where an oral agreement is relied upon, notwithstanding a NOM clause.

In any event, parties must ensure that they understand the implications of a NOM clause before they agree to it. Such clauses may be inappropriate, or require broader wording, for example, in fast moving industries where contracts need to be capable of quick adaptation to changing circumstances. In that regard, parties should be made aware of the need to tailor precedents to their particular requirements. Whilst an estoppel argument may avail them in the end, the time and cost of litigation may be avoided by more thoughtful wording of a NOM clause at the start.

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