United Kingdom Supreme Court confirms the validity of 'no oral modification' clauses

The UK has clarified its stance on the enforceability of 'no oral modification' clauses in commercial contracts. Will New Zealand follow suit?

The recent case of *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 gave the United Kingdom Supreme Court the rare opportunity to consider one of the "truly fundamental issues in the law of contract": whether an oral variation of a contract can be enforced where the agreement contains a 'no oral modification' (**NOM**) clause.[1]

On the face of it, it would seem clear that where a NOM clause exists, an oral variation of that agreement cannot be valid. However, previous case law in both the United Kingdom and New Zealand has illustrated the Court's divided stance on the issue. Given that the common law does not impose specific requirements of form on making contracts, historically this has been considered sufficient to allow parties to dispense with a clause which does impose requirements of form. Oral variation is valid for standard contract terms; the same principle has been applied to varying a NOM clause itself.

The facts of the case

MWB Business Exchange Centres Limited (**MWB**) operated serviced offices in central London. Rock Advertising Limited (**RAL**) entered into a written contract providing a licence to occupy office space for 12 months at a fixed monthly fee. The contract contained a NOM clause which provided the following:

> 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.

Within six months of the license to occupy commencing, RAL had accumulated arrears of licence fees of more than £12,000. RAL's sole director proposed a payment plan to MWB's credit controller, which deferred payments and spread out the accumulated arrears over the remainder of the licence term. The proposal was discussed over the phone, at which point RAL contended MWB agreed to the revised payment plan. MWB denied that any agreement was reached.

MWB locked RAL out of the premises on account of its failure to pay the arrears, and terminated the licence. MWB then sued RAL for the arrears. RAL counterclaimed seeking damages for wrongful exclusion from the premises. The case ultimately turned on whether the oral variation was legally enforceable.

Disagreement at the County Court and Court of Appeal

At the County Court it was found that an oral agreement had been made to vary the licence, however the variation was ineffective because it was not recorded in writing and signed by both parties, as required by the NOM clause.

RAL appealed to the Court of Appeal, which overturned the County Court's decision. The Court of Appeal ruled that the oral variation was effective, relying on notions of party autonomy and the overriding ability of parties to amend their contracts, notwithstanding the parties earlier agreement only to vary the agreement through specific means.

MWB appealed the Court of Appeal's decision, on the question of whether it was possible to vary a written contract that contains a NOM clause in any way other than what is specified in the NOM clause.

Supreme Court decision

Ultimately the Supreme Court allowed the appeal and determined that the oral variation was invalid and the NOM clause must be enforced.

[1] At [1].

United Kingdom Supreme Court confirms the validity of 'no oral modification' clauses
(Continued)

Majority decision

Lord Sumption, in delivering the majority decision, could see no principled reason why NOM clauses should not be enforced. Commercial certainty supports the enforcement of NOM clauses, as do the existence of various international instruments that similarly provide for NOM clauses.[2]

While the Court of Appeal focused predominantly on party autonomy, Lord Sumption determined this was a fallacy. Parties exercise their autonomy up until the point that the contract is made. From then the extent of party autonomy allowed is that which is dictated by the contract. Lord Sumption considered that the real offence against party autonomy was the suggestion that parties cannot bind themselves as to specific forms of variations.

If a party did act in the mistaken belief that the contract had been varied orally, it was noted that the doctrine of estoppel should act as a sufficient safeguard in those circumstances.

Minority decision

In his minority judgment Lord Briggs also allowed the appeal, however he reached his conclusion on much narrower grounds.

Lord Briggs considered that a NOM clause could be varied orally, however this could only be done with express reference to the NOM clause itself. Any oral variation would be invalid unless (or until) the NOM clause is removed, either temporarily or permanently, by the parties. Such an agreed departure would not be lightly inferred, however Lord Briggs considered that parties should be free to vary or abandon a NOM clause in any form, by express unanimous agreement.

Lord Brigg's analogised NOM clauses with arrangements that are made 'subject to contract'. No binding obligation follows negotiations that are made 'subject to contract' until an agreement is executed; the same applies when orally agreeing to vary a NOM clause. Only once the parties expressly refer to the NOM clause and agree it should be varied, will any subsequent oral contract variation be valid.

Will the New Zealand Courts follow suit?

Interestingly, Lord Briggs ended his judgment with a comment on Lord Sumption's majority decision, describing it as "radical" and a "clean break" from common practice that other common law jurisdictions would be unlikely to follow.[3]

The Supreme Court in New Zealand has not yet had the opportunity to rule on the validity or enforceability of NOM clauses. There are examples of Aotearoa cases where NOM clauses have been enforced,[4] and also where a NOM clause was overruled.[5] Therefore it is unclear whether the Courts will follow the precedent set in this case.

Given that the case relates to the licence of land, it is prudent to note that New Zealand law requires contracts relating to the disposition of land, which includes leases (with some exceptions, including short-term leases of 1 year or less and equitable interests) to be in writing and signed by the relevant parties, otherwise the agreement will not be enforceable.[6]

In light of this case, we recommend inserting a NOM clause into commercial contracts, and following up any desired variations to the agreement in writing, signed by all relevant parties. It is worth the extra time it takes to record variations in writing, and should the New Zealand Courts find this case persuasive, it will also protect a commercially astute party from the precedent set in this decision.

Want to know more?

If you have any questions about drafting contracts (including contracts for land) or enforcing them, please contact our specialist commercial contract and litigation teams.

[2] Vienna Convention Contracts for the International Sale of Goods (1980), article 29(2); UNIDRIOT Principles of International Commercial Contracts, 4th ed, (2016), article 2.1.18.

[3] At [32].

[4] *Air New Zealand Limited v Nippon Credit Bank Limited* [1997] 1 NZLR 218 (CA); *Stevens v ASB Bank Limited* [2012] NZCA 611.

[5] *Beneficial Finance Limited v Brown* [2017] NZHC 964.

[P] Property Law Act 2007, s 24.