

## Clauses preventing oral modification of contracts are enforceable – UK Supreme Court

Parties to commercial contracts should review their contracts to check whether they contain “no oral modification” (**NOM**) clauses, and if they do, ensure they are complied with, following the UK Supreme Court’s decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, in which the Supreme Court held that a NOM clause was enforceable.

*Partner, Stuart Dalzell and Solicitor, Michael Riordan discuss the decision and its implications below.*

### No Oral Modification clauses

NOM clauses seek to provide the parties with certainty that they can rely on the words recorded in the contract. A typical NOM clause provides:

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

NOM clauses present a conflict for the law of contract and its essential principle: the freedom of contract. On one hand, that freedom supports an argument that the parties can agree to be bound to a particular method of varying their contract. On the other hand, that same freedom supports an argument that the parties should be able to make changes to their contract.

Both sides of that argument have had judicial support, and recently the English courts have considered that NOM clauses are generally ineffective.

### Facts

Rock Advertising Ltd (**Rock**) sought to rely on an oral variation to their lease agreement with MWB Business Exchange Centres Ltd (**MWB**) to avoid a claim for rent arrears.

Judge Moloney, in the first instance, found that the NOM clause was enforceable. MWB was entitled to claim the arrears. The Court of Appeal found that the oral variation to the contract also amounted to an implied agreement to negate the NOM clause. Rock was entitled to avoid the arrears.

### The decision

Lord Sumption, delivering the Court’s majority judgment, tracked the English courts’ recent discussion of the enforceability of NOM clauses:

- (a) From “definitely enforceable” in 2000, when Sedley LJ stated that it was “incontestably right” that “no oral variation of the written terms could have any legal effect”;
- (b) To “maybe enforceable” in 2002, when Sedley LJ’s view had softened, stating that “the law on this topic is not settled”;
- (c) To “probably not enforceable” in 2013, when Gloster LJ “inclined to the view” that NOM clauses were ineffective.

His Lordship identified three typical reasons to not enforce a NOM clause:

- (a) A variation of an existing contract is itself a contract;
- (b) The parties can agree informally to dispense with an existing clause which imposes requirements of form because the common law imposes no requirements on form; and
- (c) The parties must have intended to override the NOM clause by the simple act of agreeing an oral variation.

Simply put, the argument for refusing to enforce (allowing oral variations in the face of) a NOM clause is that the parties are free to conduct the contract

however they want, and if they agree to oral variations when a NOM clause is in place, they must have considered that clause and deliberately negated it.

After considering the above, Lord Sumption held that “the law should and does give effect to” NOM clauses.

In support of that position, his Lordship discussed the commercial reasons for including NOM clauses and noted that the law of contract will not obstruct the legitimate intention of business people.

Lord Sumption went on to discuss two international agreements (the Vienna Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts) that both provide protection to NOM clauses. Those agreements, Lord Sumption held, show that there is “no conceptual inconsistency” in enforcing a NOM clause.

The Court was unanimous that a NOM clause cannot be negated by implication. Accordingly, the appeal was allowed and MWB was entitled to claim the arrears.

Lord Sumption’s analysis was limited to the particular facts of the case and accordingly focussed on the application of the law when the parties, in agreeing the oral variation, do not address the NOM clause.

Lord Briggs, in the minority judgment, went further and considered the application of the law when the parties expressly (although orally) negate the NOM clause. His Lordship considered that the parties could expressly negate a NOM clause by way of an oral agreement. Lord Briggs considered that the majority’s position led to the conceptual impossibility:

...for the parties to a contract to impose upon themselves such a scheme, but not to be free, by unanimous further agreement, to vary or abandon it by any method, whether writing, spoken words or conduct, permitted by the general law.

His Lordship characterised his own approach as “incremental” and the majority’s as “radical”.

#### Comment

The “incremental” approach of Lord Briggs respects the parties’ intention to avoid oral variations to the contract, while imposing the least possible restriction on the contractual freedom of the parties, by enforcing their original intention only to the extent that it is not varied later.

The majority’s approach places greater weight on the parties’ original intention, to the exclusion of their later intention.

We will follow with interest the approach of our courts. The most recent High Court authority on this issue is *Conqueror International Ltd v Mach’s Gladiator Ltd* [2018] NZHC 265, where Gendall J cited with approval the approach taken by Osborne AJ in *Beneficial Finance Ltd v Brown* [2017] NZHC 964. In *Beneficial Finance*, a summary judgment application, Osborne AJ considered the English authorities and landed on a position more reflecting Lord Briggs’ minority judgment in *Rock Advertising*. Although the Court did not delve into the conceptual intricacies of the issue, it focussed on the intention of the parties, however that intention was expressed. Osborne AJ held:

...whether an oral variation becomes operative turns on the intention of the parties.

That approach recognises that NOM clauses can restrict the parties’ ability to vary their contract orally, but only to the

extent that they do not express a different intention later, written or not.

Our higher courts have not considered the issue since the development of the English law.

Future consideration of this issue by a New Zealand court will depend on the facts. If the NOM clause has not been expressly negated by the parties, then an argument that it should be negated by implication will gain little traction in light of *Rock Advertising* and the High Court’s focus on intention. There will be scope to argue that the parties expressly addressed the NOM clause orally, relying on *Beneficial Finance* and the minority judgment in *Rock Advertising*. It will be vital to point to evidence proving the intention of the parties to remove the NOM clause, and even if that is present a Court may prefer the approach of the majority in *Rock Advertising*.

For the avoidance of doubt a prudent business person will err on the side of caution by being aware of NOM clauses and complying with them.

*\*The foregoing has been prepared for the general information of clients and friends of the firm. It is not meant to provide legal advice with respect to any specific matter and should not be acted upon without specific legal advice.*