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*Dispatch* highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

# Dispatch

## Case update: "no-oral variation" clauses

### Rock Advertising Ltd v MWB Business Exchange Centres Ltd

[2018] UKSC 24

In Issues 192 and 193 of *Dispatch* we discussed the cases of *Globe Motors v TRW Lucas* and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* both of which dealt with the question as to whether a clause requiring that amendments to the contract be in writing, can be over-ridden by conduct. In the MWB case, the dispute related to a claim against Rock for arrears of licence fees and other charges. Rock had issued a counterclaim relying upon an oral agreement. The Judge at first instance agreed that there was an oral agreement and that the individual who made that agreement had at least ostensible authority to commit MWB to such an agreement of this kind. However, MWB relied upon the express terms of the original written agreement. Clause 7.6 provided:

*"This licence sets out all of the terms as agreed … 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."*

The question for the Court was whether or not clause 7.6 precluded any variation of the contract other than one in writing in accordance with its terms. Rock said that it was open to the parties to vary the contract as a whole, including clause 7.6, orally or in any other way they chose. The CA agreed with Rock and LJ Kitchen went on to refer to the words of Cardozo J nearly 100 years ago in the New York Court of Appeals in *Alfred C Beatty v Guggenheim Exploration Company* (1919) 225 NY 380 where he said that:

*"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived … What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again…"*

MWB appealed. Lord Sumption had to decide whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a "No Oral Variation" clause, although the Supreme Court used the alternative expression: the "No Oral Modification" (NOM) clause) was legally effective. He noted that at common law there were no formal requirements for the validity of a simple contract. The reasons that are usually given for treating No Oral Modification clauses as ineffective are (i) that a variation of an existing contract is itself a contract; (ii) that precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing.

However, Lord Sumption disagreed with the CA and Cardozo J, saying that:

*"In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation."*

Lord Sumption said that party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. To Lord Sumption, the real offence against party autonomy was the suggestion that the parties cannot bind themselves as to the form of any variation, even if that is what they have agreed.

There are at least three reasons for including No Oral Modification clauses. The first is that it prevents attempts to undermine written agreements by informal means. Second, in circumstances where oral discussions can easily give rise to disagreement, it avoids disputes not just about whether a variation was intended but also about its exact terms. Third, a measure of formality in recording variations makes it easier for companies to police internal rules restricting the authority to agree them. To Lord Sumption, these were all legitimate commercial reasons for agreeing such a clause as clause 7.6. There was "no mischief" in No Oral Modification clauses and they did not frustrate or contravene any policy of the law. Oral variations and agreements are common in construction contracts. Regard should therefore be had to these words of Lord Sumption:

*"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. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open."*

Lord Hope agreed with Lord Sumption's conclusion but not with all of his reasoning. For Lord Hope, as long as either (or any) party to a contract containing a NOM clause wishes the NOM clause to remain in force, that party may so insist, and nothing less than a written variation of the substance will suffice to vary the rest of the contract. The NOM clause will remain in force until they both (or all) agree to do away with it. In particular it will deprive any oral terms for a variation of the substance of their obligations of any immediately binding force, unless and until they are reduced to writing, or the NOM clause itself is removed or suspended by agreement. To Lord Hope, that fully reflected "*the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition*".

## Case update: adjudication enforcement and winding-up petitions

### Victory House General Partner Ltd v RGB P&C Ltd

[2018] EWHC 1143 (Ch)

This was an application to restrain notice being given of, a winding up petition, which sought payment of some £820k following an adjudicator's decision in respect of goods supplied and services rendered for the development and conversion at Victory House, Leicester Square, London.

The building contract was in the form of a JCT Design and Build Contract 2011 and related to the development and conversion of an office building at Victory House. RGB served an interim payment application, number 30, on 11 July 2017 which led to the adjudication. The decision rejected an argument put forward by Victory House that it was not liable to pay the sum identified in the interim application because the parties had entered into a memorandum of understanding which provided for other payments to be made which were not as large as the figure claimed in application number 30. Victory House also said that it had served a valid pay-less notice. Again the adjudicator rejected this argument which meant that the adjudicator did not go into the question as to what would have been the value of the work, the subject of interim application number 30, if that work had fallen to be valued by him.

Victory House brought TCC proceedings by way of a Part 8 claim (see *Dispatch* 212). In the TCC Deputy Judge Smith held that RGB was entitled to summary judgment in relation to the adjudication decision. The TCC case did not determine two matters, one relating to the memorandum of understanding and the second relating to the question as to the notices which had been served by Victory House and the effect of those notices. Deputy Judge Smith made case management directions as to what was to happen in relation to these outstanding points. As Mr Justice Morgan noted in the winding- up proceedings, it was important to recognise that the fact that matters were still being pursued did not in any way detract from the final and binding character of the TCC judgment, which was to be complied with by 2 February 2018.

The petition debt here was based on the judgment debt. Mr Justice Morgan made clear that the judgment debt was no longer a disputed debt. There was no question of a set-off being asserted. However, Victory House did not pay and RGB issued a further interim application notice, number 31. Application 31 rolled up all of the work, which had been the subject of the previous interim application including the sums awarded by the first adjudicator. Prior to the second adjudication, Victory House had paid on account some £8.5 million. RGB claimed £11.7million.

The second adjudicator reached the conclusion that the gross value of the work done, up to the valuation date, was just over £7million. Allowing for retention, the net payment due to RGB was £6.9million. The adjudicator decided that the sum due on interim application number 31 was nil. He did not make an order that the contractor pay back any part of the £8.5 million already received and it was agreed the adjudicator did not have power to make that order. However, the logic of the order was that RGB had received a substantial sum, something of the order of £1.5 million, in excess of the sum due on a true valuation in accordance with the contractual provisions. The figure of £8.5 million paid by Victory House to RGB did not include the judgment sum because the judgment sum had not been paid by Victory House.

RGB issued the winding-up petition in relation to the judgment debt. Victory House raised two reasons as to why they should not have to pay.

First, the result of Adjudication No.2 was that if Victory House did pay the judgment debt, it would immediately become entitled to be repaid that sum so there is a cross-claim.

Second, there was said to be a cross-claim for unliquidated damages (the cost of remedial works) for alleged breaches by the contractor of the building contract. The Judge noted that those issues had been considered in a third adjudication and "rightly or wrongly" had effectively been rejected. He therefore concentrated only on the first cross-claim item.

Mr Justice Morgan referred to the decision of Mr Justice Coulson in *Grove Developments v S&T* (Dispatch 213). One of the issues there was whether, following a smash and grab adjudication, the employer could ask for a second adjudication in which he asked the second adjudicator to carry out a valuation of the work which had been done in accordance with the contractual provisions. Mr Justice Coulson suggested that the employer could, provided they had honoured the first adjudication decision.

Mr Justice Turner noted that Mr Justice Coulson had also said that if the figure determined in the second adjudication by way of interim payment was a smaller figure than had earlier been paid, in particular in accordance with the first adjudication, the employer would be entitled to ask for repayment of the figure appropriately calculated. The Grove case was one where there were two adjudications in relation to a single interim payment application, with one adjudication turning on the formal documents that had been exchanged, and the other involving what was described as a "true" valuation of the same matter.

Here Victory House said that their case was stronger because there had not been a second adjudication on the same certificate but a subsequent adjudication in relation to a later certificate in which the earlier one was subsumed. The second adjudicator had carried out a "true" valuation in accordance with the contractual provisions, in relation to an application for an interim payment, and it had emerged that no sum was payable.

Mr Justice Turner agreed that Victory House could say that it was "bad enough" for the employer that it has paid some £8.5 million when Adjudication No.2 has determined that the correct interim payment would be of the order of £7 million. It would be worse if the employer, to avoid winding up, then had to pay the further sum by way of the judgment debt.

The Judge then decided, following the 1999 case of *Re Bayoil SA*, that he had no doubt that Victory House had a bona fide cross-claim on substantial grounds and he dismissed the petition.

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