CASE COMMENT

Concerning the Enforceability of No Oral Modification Clauses: Rock Advertising Ltd v MWB Business Exchange Centres Ltd

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Introduction

The boilerplate 'no oral modification' clause (the 'NOM clause') has found its way into various contracts. It is no surprise that its enforceability has been the subject of much litigation. Courts in Australia, Canada and many states in the United States had held that NOM clauses were unenforceable.[1] In *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[2] the UK Supreme Court unanimously rejected this view.

In a concurring opinion, Lord Briggs described the Australian/Canadian/American view as the 'international common law consensus' but rejected it nonetheless.[3] Lord Briggs characterised the majority opinion – authored by Lord Sumption – as a 'radical solution' that was 'unsupported by any societal or other considerations peculiar to England and Wales'.[4] Lord Briggs' opinion should be welcomed to the extent it recognised that Lord Sumption's

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1 [2018] UKSC 24, 2 WLR 1603 [8].

2 [2018] UKSC 24, 2 WLR 1603.

3 *Ibid* [32].

4 *Ibid.*

reasoning was unpersuasive,[5] but it stopped short of full recognition that enforcement of NOM clauses does not conform to basic principles of contract law and cannot be justified by public policy concerns.

A second issue, relating to the doctrine of consideration (whether an agreement to substitute a contract to pay money for an obligation to pay less money is supported by consideration), which has been examined by English courts for centuries,[6] was described as 'ripe for re-examination'[7] in a later case.

Facts

MWB Business Exchange Centres Ltd (MWB) operated offices in London. Rock Advertising Ltd ('Rock') entered into a licence agreement (the 'Agreement') with MWB to occupy office space for a one-year term.

Rock fell into arrears; it proposed a revised schedule of payments to a credit controller employed by MWB whereby certain payments would be deferred and the accumulated arrears would be spread over the remainder of the licence term. Rock contended that MWB's credit controller had orally accepted this proposal but MWB disputed this claim. MWB subsequently locked Rock out of the premises, terminated the Agreement, and sued for the arrears.

Procedural history

The County Court found that the parties had agreed to the revised schedule but held that MWB could claim the arrears nonetheless because the oral variation was rendered invalid by the NOM clause in the Agreement. Rock appealed successfully to the Court of Appeal, which held that the oral variation amounted to an implicit agreement to dispense with the NOM clause. The Supreme Court unanimously allowed the appeal and restored the order of the County Court.

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5 *Ibid* [25].

6 See *Pinnel's Case* (1602) 5 Co Rep 117a, 77 Eng Rep 237; *Foakes v Beer* [1884] UKHL 1, LR 9 App Cas 605; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5, [1991] 1 QB 1; *Re Selectmove Ltd* [1993] EWCA Civ 8, [1995] 1 WLR 474.

7 [2018] UKSC 24, 2 WLR 1603 [18].

Conceptual analysis

Lord Sumption's majority opinion

Lord Sumption held that NOM clauses should generally be enforceable because 'the parties to such a clause have agreed… that oral variations… will be invalid'.[8] But haven't parties to a subsequent oral variation also agreed that their oral contract should be valid and binding? Why should the validity of the first agreement trump the validity of the second?

Lord Sumption has asserted that refusing enforcement of a NOM clause would override the parties' intentions. It is suggested instead that refusing enforcement of an oral variation of the original contract overrides the parties' intentions. Leaving aside the issue of sufficiency of consideration, what should a court determine is the true intention of contracting parties where someone contracts to buy goods for £100, and subsequently contracts to buy the same goods from the same vendor for £50 while the original contract remains executory? If a court were to hold (as the Supreme Court apparently has) that the second agreement does not reflect the true intention of the parties, then what is the commercial reason that ought to be ascribed to the second transaction? Lord Sumption held that the second agreement is invalid owing to the parties' supposed oversight of the NOM clause. He then went on to say that, 'If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open'.[9] These propositions are not indicative of a genuine concern for supporting the actual intention of the parties. Lord Sumption has acknowledged here that he would not enforce a subsequent oral agreement even if the parties, at the time of formation of that subsequent oral agreement, were cognisant of the existence of a NOM clause in the original contract and had mutually intended to rescind same.

Lord Briggs' concurring opinion

Lord Briggs parsed the central issue into two parts: whether the parties can orally agree to waive a NOM clause, and, if so, whether such an agreement will be implied where they orally agree to vary their contractual obligations without expressly waiving the NOM clause itself. Lord Sumption answered the former question in the negative, thereby negating the premise of the latter question. Lord Briggs endorsed a 'more cautious recognition of the effect of a NOM clause', answering the former question in the affirmative, but the latter question in the negative, holding that in respect of the latter, the

8 *Ibid* [15].
9 *Ibid.*

NOM clause 'continues to bind until the parties have expressly (or by strictly necessary implication) agreed to do away with it'.[10] Lord Briggs observed that it would 'commonly be the case that the persons charged with the day to day performance of a business contract will, with full authority to do so, agree [to] some variation in the manner in which it is to be performed, blissfully unaware that the governing contract has, buried away in the small print of standard terms, a NOM clause'.[11]

Two objections are made in response to this observation. First, the case involved sophisticated, commercial parties – such parties should be treated as knowing at the time of the variation what their rights and obligations were under the original contract. Secondly, Lord Briggs' reference to one party being 'blissfully unaware' of the NOM clause embodies the extinct subjective theory of contract. Lord Briggs' proposal of a rigid test requiring express waiver or at least 'strictly necessary implication' in order to determine that a NOM clause has been waived does not comport with the prevailing objective theory of contract. The effect of the conduct of contracting parties who orally agree to a contractual variation is impliedly to waive the NOM clause. In the seminal case of *Smith v Hughes*,[12] Blackburn J famously said:

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'[13]

Hannen J added: 'It is essential to the creation of a contract that both parties should agree to the same thing in the same sense… But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party.'[14]

The inadequacy of the court's policy rationale

The Supreme Court asserted that its decision enhances legal and commercial certainty, thus preventing abusive litigation concerning alleged oral variation of contracts. The possibility that abusive litigation concerning alleged oral agreements could arise is a legitimate concern, but it is not limited to cases involving NOM clauses. Rather, it is a more pervasive problem, pertaining to

10 *Ibid* [31].
11 *Ibid* [30].
12 (1871) LR 6 QB 597.
13 *Ibid* 607.
14 *Ibid* 609.

the evidentiary difficulties encountered in proving the existence of an oral contract. Courts have grappled with this problem for centuries, because in many cases collateral oral agreements reflect the true intention of contracting parties and therefore it would be unjust simply to disregard them. Countless exceptions have been made to the parole evidence rule for these reasons. The Supreme Court observed that its own precedent could lead to grave injustices; it claimed that 'the safeguard against injustice lies in the various doctrines of estoppel'.[15] The court adopted a two-part test for estoppel with reference to *Actionstrength Ltd v International Glass Engineering In Gl En SpA and others*:[16]

- there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and
- something more would be required for this purpose than the informal promise itself.[17]

It is not self-evident that the application of this test to a particular set of facts is predictable. More importantly, the test does not preclude the possibility of abusive litigation concerning alleged oral variation of contracts.

The Supreme Court expressed its concern that if NOM clauses were held to be unenforceable, parties could not validly bind themselves as to the manner in which future changes in their legal relations are to be achieved. But such a capability is not necessarily desirable. The tenor of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* conveys that special significance was given to the commercial interests of contracting parties. But if parties enter into a contract that is later found to be detrimental to their commercial interests, the freedom to waive that contract would better serve their interests. Lord Briggs recognised this point as being a 'basic concept' in contract law.[18] The common law has never mandated that mutual rescission is permissible only by way of a written agreement. The freedom mutually to rescind a contract could include renunciation of any prior contractual constraints on how the parties may vary their respective obligations. Placing undue restraints on mutual rescission in this context would imperil the reasonable expectations of commercial parties, *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* being a case in point: Rock had a reasonable expectation that it would

15 [2018] UKSC 24, 2 WLR 1603 [16]. The court recognised that a disadvantaged party may reasonably rely on the oral agreement to its detriment, but assumed that the doctrines of estoppel would guard against injustice. The court simultaneously limited 'the scope of estoppel [so that it] cannot be so broad as to destroy the whole advantage of certainty', indicating that justice was not its primary concern.

16 [2003] UKHL 17, 2 AC 541.

17 *Ibid* [9] (Lord Bingham), [51] (Lord Walker).

18 [2018] UKSC 24, 2 WLR 1603 [23].

not be evicted from the licensed premises, provided that it pay down arrears and make certain deferred payments in accordance with the terms of the oral variation. Ironically, the court took great pains to avoid the prospect of imperilling the reasonable expectations of commercial parties, but unfortunately for Rock the court failed in this regard.

Conclusion

Supporters of the decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* have pointed out that it gives force to NOM clauses, but it does so at the expense of oral contracts perfectly valid according to well-established principles of contract law. Cardozo J said in *Beatty v Guggenheim Exploration Co*:[19] '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.'[20]

The decision also cannot be seen as a well-informed policy choice since it has not been demonstrated that strict enforcement of NOM clauses promotes freedom of contract, assures legal and commercial certainty, prevents abusive litigation and achieves justice as between the contracting parties. The Supreme Court thus erred by rejecting the 'international common law consensus' on the enforceability of NOM clauses.

19 (1919) 225 NY 380.
20 *Ibid* 387.