Beware the "No Oral Modification" Clause

The UK Supreme Court has held that a clause in a contract which required modifications to that contract to be in writing and signed by the parties invalidated a subsequent oral agreement to vary the contract: *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24.

Our Comments

The UK Supreme Court has, in a decision addressing what it refers to as a "fundamental [issue] in the law of contract", upheld the effectiveness of a clause which prescribes that a contract may not be amended save in writing signed on behalf of the parties (a "**"No Oral Modification" clause**") and ruled that a purported oral variation of the contract was invalidated by it.

The Singapore courts have taken a different position. In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("***Comfort Management***") and *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61, for example, our courts accepted that a "No Oral Modification" clause would not necessarily preclude oral variation. The Court of Appeal in *Comfort Management* observed (at [90]) that the effect of a "No Oral Modification" clause is "*at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation*".

While UK cases are not binding in Singapore, they have persuasive value. It remains to be seen whether, and to what extent, the position taken by the UK Supreme Court in this case will develop Singapore jurisprudence on this issue.

That said, this decision is a valuable and timely reminder to contracting parties everywhere that form can make a difference. Care should be taken to comply with all formalities that contracting parties sign up to — even formalities prescribed in "boilerplate" provisions such as "No Oral Modification" clauses — lest unintended consequences follow.

This update takes a look at the UK Supreme Court's decision.

Background

MWB Business Exchange Centres Limited ("**MWB**") operated serviced offices in London. Rock Advertising Limited ("**Rock Advertising**") agreed with MWB to occupy office space for a fixed term of 12 months under the terms of a contractual licence.

The licence agreement contained a "No Oral Modification" clause in these terms:

> … 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, Rock Advertising accumulated arrears of licence fees totalling over £12,000.

Rock Advertising claimed that, in the course of a telephone discussion, MWB and Rock Advertising reached an oral agreement to vary the schedule of payments under the licence agreement ("**Oral Agreement**"). MWB denied this.

About a month later, MWB locked Rock Advertising out of the premises on account of its failure to pay the arrears, and terminated the licence. MWB then commenced an action against Rock Advertising for the arrears. Rock Advertising

counterclaimed damages for wrongful exclusion from the premises.

Both the claim and the counterclaim turned on the question whether the Oral Agreement was effective.

The English High Court's Decision

The High Court decided the case in favour of MWB, holding that the Oral Agreement was ineffective because it was not recorded in writing signed on behalf of both parties, as required by the "No Oral Modification" clause.

MWB was therefore entitled to recover the arrears of licence fees without regard to the Oral Agreement.

The English Court of Appeal's Decision

The Court of Appeal overturned the decision of the High Court. It took the view that the Oral Agreement amounted to an agreement to dispense with "No Oral Modification" clause. As a result, MWB was bound by the variation and was not entitled to claim the arrears at the time when it did.

MWB appealed to the Supreme Court against the Court of Appeal's decision.

The UK Supreme Court's Decision

Allowing the appeal, the UK Supreme Court held the Oral Agreement was invalid because it was not in writing and signed in accordance with the requirements of the "No Oral Modification" clause.

In reaching this conclusion, Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) observed that the law should and does give effect to contractual provisions which require specified formalities to be observed for a variation.

Parties are free to agree to set boundaries on their future conduct. His Lordship highlighted 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.
- Party autonomy suggests that parties can agree and bind themselves as to the form of any variation.
- There is no conceptual inconsistency between the general rule at common law of allowing contracts to be made informally, on the one hand, and a specific requirement that effect will be given only to a contract requiring writing for a variation, on the other.
- There are many cases in which a particular form of agreement is prescribed by statute. These include contracts for the sale of land, certain regulated consumer contracts, and others. There is no principled reason why contracting parties should not adopt the same principle by agreement.

The UK Supreme Court noted that there were at least three legitimate commercial reasons that businessmen include "No Oral Modification" clause in contracts, and in respect of which there were no overriding reasons of public policy:

- First, they prevent attempts to undermine written agreements by informal means, a possibility which is open to abuse.
- Second, they help parties avoid pitfalls associated with oral discussions (such as misunderstandings and crossed purposes) and disputes about whether a variation was intended but also about its precise terms.

- Third, the formality in recording a variation makes it easier for corporations to police internal rules restricting the authority to agree them.

In addition, Lord Sumption took the view that parties who agree an oral variation despite a "No Oral Modification" clause do not inevitably intend to dispense with the clause. The more natural inference is that they overlooked it. But if, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.

Significantly, His Lordship recognised that strict enforcement of "No Oral Modification" clauses could give rise to injustice, e.g., if a party performs the contract as (purportedly) orally varied and then is caught out when he cannot enforce it. In such an event, His Lordship pointed out that the safeguard against injustice lies in the various doctrines of estoppel. On the facts of the case, however, the minimal steps taken by Rock Advertising were insufficient to support any estoppel defences.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or any of the following partners:

CHAN Hock Keng
Head - Commercial &
Corporate Disputes Practice
d +65 6416 8139
e hockkeng.chan
@wongpartnership.com
Click here to view Hock Keng's CV.

Joy TAN
Deputy Head - Commercial &
Corporate Disputes Practice
d +65 6416 8138
e joy.tan
@wongpartnership.com
Click here to view Joy's CV.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-
WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-
WongPartnership LLP
Beijing Representative Office
Unit 3111 China World Office 2
1 Jianguomenwai Avenue, Chaoyang District
Beijing 100004, PRC
t +86 10 6505 6900
f +86 10 6505 2562
-
WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-
WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-
Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

wongpartnership.com

MALAYSIA

-
Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-
Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com
-
Al Aidarous Advocates and Legal Consultants
Zalfa Building, Suite 101 - 102
Sh. Rashid Road
Garhoud
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-
ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw