Wilberforce CHAMBERS

No oral modification clauses after *Rock Advertising*: Some property law difficulties

COMMENTARY BY JONATHAN CHEW, 5 DECEMBER 2019

1. "No Oral Modification" clauses ("**NOMs**") are regularly found in the boilerplate clauses towards the back of contracts. They are designed, and included, to try to impose some formality on future changes to the contractual arrangement between the parties. But does this work, and, if so, how? The conceptual difficulty with such clauses has been around for centuries:

> *"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. 'Every such agreement is ended by the new one which contradicts it'. 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 …"*[1]

2. In *MWB Business Exchange v Rock Advertising* [2019] AC 119, however, the Supreme Court held that NOMs were valid and, generally, a subsequent "informal" (i.e. not compliant with the procedural mechanism set out in the relevant clause) "variation" was invalid to alter the contract. The entire Court held that NOMs were effective. The conceptual question is therefore resolved for all practical purposes.

3. Lord Sumption's majority decision[2] was that the law *"should and does give effect to a contractual provision requiring specified formalities to be observed for a variation"* (at [10]). He gave three reasons for this:

   3.1. "Party autonomy" is best preserved by giving effect to the parties' agreement and intentions. "Party autonomy" is not preserved by refusing to give effect to NOMs, but by doing so: all contracts, once made, bind the parties to a particular course and so reduce their autonomy. There is no reasons NOMs should not be such an example of binding the parties to a course (at [11]).

   3.2. There are good practical reasons: (i) preventing informality and so e.g. avoiding liability at summary judgment stage; (ii) avoids the risk of disputes about what the oral variation was, given *"oral discussions can easily give rise to misunderstandings and crossed purposes"*; and

[1] Cardozo J in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380, 387–388

[2] Lord Briggs dissented on the reasoning but not the outcome; he reasoned that the parties *could* orally agree to dispense with the NOM but only if they specifically turned their discussions to it. This may be thought analytically preferable to Lord Sumption's approach, but, since it was a sole dissent, it is not the law.

(iii) formality in variations allow corporations to police their internal rules on authority to agree variations (at [12]). These *"legitimate commercial reasons"* contrasted with the *"entirely conceptual"* (at [13]) arguments against NOMs.

3.3. If a party acts on the contract as varied but then, in principle, cannot enforce the variation because of the NOM, the *"safeguard against injustice"* in England is estoppel. But, since there was no possible estoppel in *Rock*, the detail of this position was not worked out (at [16]).

4. This paper focuses on two practical questions arising out of the decision: estoppel and authority to vary. The estoppel issue, particularly, raises some difficult questions that the principle in *Rock* does not answer and remain to be worked out.

Practical Issues I: Estoppel

5. Despite not wanting to "*explore the circumstances in which a person can be stopped from relying on a contractual provision laying down conditions for the formal validity of a variation*", Lord Sumption went on to make one observation and lay down two criteria (at [16]):

> *"I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself"*

6. So, it is clear that the Supreme Court is firmly against using estoppel to circumvent the NOM, not to be used as the "window" to get back in, despite the NOM having barred the "door" of contractual variation. Considering each of the criteria, it may well be that the threshold is so high as to be illusory:

6.1. Criterion (i) gives rise to a practical and principled difficulty in founding an estoppel.

(a) Practically, in the ordinary run of such cases, the parties will not have identified the issue around the informality of the variation. A representation that the variation was valid "*notwithstanding its informality*" is likely to require a recognition of the informality. To do so, that would require the representing party to have spotted the problem created either by the NOM specifically, or, more generally, the fact that they were making a change without reference to the contractual documentation. If the specific informality of the NOM were identified, surely most parties would just comply with the NOM. Even the broader analysis requires the parties to identify that they are changing their contractual requirements. Again, it seems unlikely that the parties would recognise they were doing that and not look to see what those requirements were. The situation that "*we know there's a NOM/contract but let's just do X anyway*" is unlikely to arise.

(b) As a matter of principle, even if there is such a representation, it is hard to see how the recipient can *reasonably* rely on an informal representation in circumstances where there is a NOM. If the recipient is not aware of the NOM, then it has not read its own contractual documentation and is being "blind eye" reckless (in the sense of not caring whether the representation is effective), which is not what one would ordinarily consider reasonable conduct. On the other hand, if the recipient is aware of the NOM, but proceeded anyway, how can reliance on a representation that it knows is invalid be reasonable; it is reckless risk-running.

6.2. Criterion (ii), requiring "something more than the promise" is similarly practically difficult to fulfil, and is analytically unusual:

(a) Once the parties have agreed their informal variation, it would be odd (and practically unusual) for them to repeat it or set it out in some other way. More likely is that they will act in accordance with the agreed variation. This conduct could, in principle, found an estoppel. But, if one is assessing that conduct alone, it is difficult for it to be sufficient to amount to an unequivocal representation or convention. Having disregarded what was in fact agreed, what remains is simply the performance, and from such performance it is difficult to discern an intention to vary rather than, say, simply a breach by not performing in accordance with the un-varied terms.

(b) It is also analytically unsatisfactory to found an estoppel by looking at the "something more" than the variation. This will usually postdate the agreed variation. Ordinarily, one assesses this conduct to see if there was reliance (and if it was reasonable) or detriment, and whether it would be unconscionable to resile. The way in which the parties performed after the agreement is the focus of this enquiry, which is subsequent to the finding of the representation or convention. It is analytically strange to be looking at conduct post-dating the variation to find the representation or convention itself.

7. So, on any view, establishing an estoppel post *Rock* will be very difficult, and may be practically impossible. Translating this into the property-specific sphere is also not straightforward:

7.1. Proprietary estoppels have historically been treated somewhat differently to "mere" estoppels by representation or convention. *Rock* was a "pure" contract case, and the different types of estoppels were not considered. It remains to be seen if there is scope for arguing that proprietary estoppel is relevantly different.

7.2. Similarly, property lawyers are well familiar with these kinds of issues. The NOM/estoppel debate is conceptually similar to the problems created by section 2 formalities. Constructive trusts can arise notwithstanding section 2(1); could they still arise notwithstanding a NOM?

Practical Issues II: Authority

8. Ensuring that entities can monitor authority to contract was one of Lord Sumption's practical reasons upholding NOMs. Often NOMs require a variation to be "agreed in writing by a director of the company" or similar. Part of Lord Briggs' reasoning for upholding the NOMs was to avoid arguments over validity in circumstances where *"the persons charged with the day to day performance of a business contract will, with full authority to do so, agree 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"* (at [30]).

9. That assertion that such a person does in fact have such authority may be doubted. The distinction between authority to agree/vary a contract and authority to execute/manage performance of a contract are easily distinguishable in principle. If so, the person charged with execution (e.g. the account manager or similar) has no actual authority so to act. Apparent/ostensible authority would be similarly difficult to show; such authority must arise from a statement to the counterparty from someone other than the ostensible agent, who cannot create their own authority. It may be thought factually unlikely that someone other than the designated point of contact would be in communication with the counterparty, making it difficult to identify a source of authority.

10. This is just one example of the importance of proper analysis in working out which people, and for which purposes, have the authority to bind a corporation; it is something which is easily overlooked.

Final Thought

11. Viewed from a property law perspective, there is a certain irony in Lord Sumption's view in *Rock* of the importance of stopping a party raising assertions of fact to avoid liability on summary judgment and so litigate abusively. The same judge's approach in *S Franses* [2019] AC 249 to questions of fact about a landlord's motives were exactly the opposite; he was happy to proceed on the basis that dishonest landlords would be "found out" by judges at trial. The approach in *S Franses* necessarily requires more, not less, factual investigation and risks an increase in litigation, and for litigation to go further. Both decisions raise questions that will need to be worked through.

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