

No Oral Modification Clauses: Solid as a Rock¹

“Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional. It raises two of them.”² Thus spoke Lord Sumption in the lead judgment of the English case of *Rock Advertising v MWB Business Exchange Centres*. The two questions raised were, first, whether a No Oral Modification (NOM) clause could be given effect and, second, whether an agreement is supported by consideration when its only function is to vary an existing contract to pay a certain sum of money by either reducing the sum payable or by deferring payment until a later date. In the event, the court decided only the former of these questions and it is that decision which is addressed in this note.

A. The Facts

On 12 August 2011 Rock Advertising Ltd entered a contractual licence agreement to occupy an office space managed by MWB in the now-demolished Marble Arch Tower, London W1, for a period of twelve months beginning on 1 November 2011 at a fee of £3,500 per month for the first three months and £4,333.34 per month thereafter. Clause 7.6 of the licence agreement included a NOM provision which read: “This Licence sets out all of the terms as agreed between MWB and Licensee. 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.”

By the end of February, Rock Advertising had fallen into arrears of rent and licence fees amounting to over £12,000. On 27 February, during a telephone call between a credit controller employed by MWB and the sole director of Rock, it was allegedly agreed that a revised payment schedule would be put in place under which certain payments were to be deferred while payment of the arrears was to be spread out over the remainder of the licence term, rendering the licence less financially rewarding to MWB. It was Rock’s position that the revised schedule had been agreed orally by MWB’s representative, but MWB contended that the revised schedule was merely a proposal in an ongoing negotiation. On 30 March 2012, MWB locked Rock Advertising out of the premises and terminated the licence with effect from 4 May 2012. They then sued for the arrears. Rock counterclaimed damages for wrongful exclusion from the premises. Both claim and counterclaim turned on the same issue: whether an oral variation of the licence had been agreed and whether, in view of the NOM, any such variation was effective.

The case was heard at first instance at Central London County Court by HHJ Moloney QC who accepted that an oral variation had been agreed, that the credit controller was empowered to make such an agreement on behalf of MWB and (since English law requires consideration for a contract to be considered valid) that the revised payment schedule provided sufficient benefit to MWB to constitute valuable consideration. However it was also held that clause 7.6 of the licence explicitly precluded any oral variation of the core terms, meaning that the agreement had and could have no legal effect. The Court of Appeal (Arden, Kitchin and McCombe LJJ) subsequently overturned this decision and held, citing the principle of party autonomy, that an

¹ The author is grateful to Prof. Hector MacQueen and Mr. James McDougall for their valuable comments on this case and the law surrounding it.

² *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2019] AC 119 at 125.

oral agreement to vary payments also amounted to an agreement to dispense with clause 7.6 in its entirety.³ MWB had therefore not been entitled to claim the arrears at the time they had. More importantly, this ruling rendered NOM clauses largely ineffective as any oral variation, once agreed, amounted to an implied repudiation of the clause.

The case came to the Supreme Court where two fundamental points of law arose: could a NOM clause itself be orally varied and can a revised payment schedule constitute consideration?

B. The Decision

The lead judgment was given by Lord Sumption (with whom Lady Hale and Lords Wilson and Lloyd-Jones agreed) upholding the decision at first instance and therefore upholding the essential validity of NOM clauses. Lord Briggs concurred but for different reasons.

Lord Sumption's starting point was to note that, absent a few statutory exceptions, the common law imposes no formal requirements for contractual validity. On that basis, three common reasons are given for treating NOM clauses as ineffective: (i) that a variation of an existing contract is itself a contract; (ii) that, because no formal requirements on the making of contracts are imposed by the common law, parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) that, by agreeing to an informal variation when the principal agreement clearly required writing, the parties must have intended to dispense with such a NOM clause.⁴ This approach, giving pre-eminence to party autonomy, was illustrated by the American case of *Beatty v Guggenheim Exploration* and, in particular the celebrated remark of Cardozo J that, "[t]hose 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."⁵ While NOM clauses had been endorsed in the United States by the Uniform Commercial Code,⁶ the earlier case law had been strongly in support of Judge Cardozo's ruling in *Beatty* and similar principles applied in Australia and Germany.⁷

English case law was both "more recent and more equivocal."⁸ In *United Bank Ltd v Asif*,⁹ Sedley LJ had held that it was "incontestably right" that a NOM clause should be given legal effect. Yet two years later, in *World Online Telecom Ltd v I-Way Ltd*, the same judge declined summary judgment on the ground that "the law on the topic is not settled."¹⁰ In several other recent cases, judges, while declining to settle the issue definitively, had articulated sympathy for the contention that NOM clauses were ineffective and represented, in some sense, an

³ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604.

⁴ *Rock Advertising v MWB* [2019] at [7].

⁵ *Beatty v Guggenheim Exploration Co.* [1919] 225 NY 380 at 387.

⁶ US UCC § 2-209: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded."

⁷ *Rock Advertising v MWB* [2019] at [8].

⁸ *Rock Advertising v MWB* [2019] at [9].

⁹ CA, unreported, 11 February 2000

¹⁰ *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413 at [12]. A similar point was made by Kitchin LJ when this case came before the Court of Appeal: "There has for some time been a considerable degree of uncertainty in this country as to whether an agreement in writing which contains an anti-oral variation clause...can be varied other than in accordance with the terms of that clause. That uncertainty may be attributed at least in part to two inconsistent decisions of the Court of Appeal." *MWB v Rock Advertising* [2017] at [19]. The two cases to which Lord Kitchin refers are *United Bank v Asif* and *World Online Telecom v I-Way*.

unwarranted restriction on the autonomy of the parties to vary a contract.¹¹ The argument for the effectiveness of NOM clauses comes primarily from a “substantial body of recent academic writing”, from which Lord Sumption singled out three articles all of which appeared in 2017.¹²

Having set out the background, Lord Sumption stated his belief that the law did, in fact, give effect to NOM clauses and proceeded to explain why this was so. The Court of Appeal’s contention that party autonomy would be overridden were a NOM clause to be given effect is dismissed as “a fallacy.”¹³ Party autonomy is restricted once the contract has been agreed between the parties and, as Lord Sumption sees it, “[t]he real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed.” There exist “legitimate commercial reasons” for giving effect to NOM clauses, primarily that they protect the integrity of the written agreement against attempts to undermine it and they are a mechanism for avoiding disputes.¹⁴

Arguments against the effectiveness of NOMs, by contrast, are “entirely conceptual” in nature and rest on the idea that one cannot agree not to vary a contract orally because that agreement would itself be destroyed once variation has been agreed orally.¹⁵ Yet, Lord Sumption notes, there are other legal systems which have dealt with this supposed conceptual paradox. The Vienna Convention on Contracts for the International Sale of Goods (1980) provides by Art. 11 that no written formalities are required while rendering NOM clauses valid under Art. 29(2), subject to personal bar. The same is true of UNIDROIT’s Principles of International Commercial Contracts (4th ed., 2016) where art. 1.2 removes any need for contractual formalities but art. 2.1.18 gives effect to clauses that require particular formalities for modification or termination and renders invalid any agreed modification or termination not in the required form.¹⁶

An analogy was made between NOM clauses and entire agreement clauses (that is, clauses stating that the document containing it is the entirety of the agreement between the parties) because both “give rise to very similar issues.”¹⁷ There follows a reasonably detailed survey of key litigation on the topic which ends with the remark of Longmore LJ in *North Eastern Properties v Coleman* that, “if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said.”¹⁸

¹¹ Gloster LJ in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) at [273]; and Beatson LJ obiter in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712 at [101-107], with the support of Moore-Bick and Underhill LJ.

¹² J Morgan, “Contracting for self-denial: on enforcing ‘No oral modification’ clauses” [2017] 76 CLJ 589-615; E McKendrick, “The legal effect of an Anti-oral Variation Clause”, [2017] 32 *Journal of International Banking Law and Regulation*, 439-445; Janet O’Sullivan, “Unconsidered Modifications” [2017] 133 LQR 191-197.

¹³ *Rock Advertising v MWB* [2019] at [11] responding to Kitchin LJ, *MWB v Rock Advertising* [2017] at [34].

¹⁴ *Rock Advertising v MWB* [2019] at [12].

¹⁵ *Rock Advertising v MWB* [2019] at [13].

¹⁶ The European Draft Common Frame of Reference (DCFR) was not mentioned by the court, but II.-4:105 “establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form” while also applying a personal bar-type mechanism based upon statements and conduct. This appears to uphold the validity of NOM clauses unless the presumption of intent to be bound can be rebutted. It has, however, been argued that the very act of oral modification or termination constitutes sufficient rebuttal: F Wagner-von Papp “European Contract Law: Are No Oral Modification Clauses not worth the paper they are written on?”, (2010) 63(1) *Current Legal Problems* 511 at 580-582.

¹⁷ *Rock Advertising v MWB* [2019] at [14]. On entire agreement clauses generally, see M Combe, “The whole deal”, [2010] 55(11) *Journal of the Law Society of Scotland*, 24-25.

¹⁸ *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715 at [82].

Lord Sumption's point, which is perhaps not uncontroversial, appears to be that if one can define a single document as constituting the entirety of a contract, thereby precluding the inclusion of any materials outwith that document, it must equally be possible to preclude any verbal alterations to an agreed contract.

Having dispensed with the supposed conceptual inconsistency, Lord Sumption went on to explain that an agreed oral variation, of the kind alleged to have occurred in the instant case, is not itself a contravention of the NOM clause but merely the situation in which the clause was intended to apply.¹⁹ It was the very possibility foreseen by the parties and against which they wished to guard. Where oral variation has been agreed but (as appears to have happened in this case) the parties were unaware of the clause's existence, then there was, in any case, no intent to dispense with the clause and therefore it must stand. Conversely, if the parties agreed upon an oral variation despite knowing that the contract contained a NOM clause, it followed that they "were courting invalidity with their eyes open." Waters might conceivably become muddier when a party acts upon the contract as varied and then finds the contract as performed unenforceable, but, in English law, estoppel acts as a legal safeguard in such circumstances, although not in the instant case.²⁰ The decision at first instance was upheld and the oral variation held ineffective.²¹

Lord Briggs reaches the same conclusion – that clause 7.6 of the licence agreement deprived the alleged oral variation of force – but for different and narrower reasons, thereby neatly sidestepping any supposed paradox. Like Lord Sumption, Lord Briggs sees the main objection to NOM clauses as being conceptual in nature. The parties to a contract are entitled to bind themselves to a particular course of action and any such agreement will be legally enforceable. But equally if the parties agree that they should no longer be bound or that the agreement should be varied, there is no reason for the law to stand in the way.²² NOM clauses themselves can be varied in this way and, thereafter, further oral modifications will be valid. For Lord Briggs, the key issues are whether a NOM clause can be removed by the oral agreement of the parties; and, if so, whether such a removal can be implied by an oral variation which makes no explicit mention of the NOM clause.²³

Lord Sumption solved the issue by answering the first question in the negative thereby removing any need to consider the second. Lord Briggs, however, answers the first question in the affirmative and the second in the negative. So, as Lord Briggs sees it, a NOM clause can be dispensed with by oral agreement of the parties, but this cannot be done impliedly.²⁴ Any oral agreement to that effect must make specific reference to the NOM clause and to the parties' desire to dispense with it. In the present case, this would make no difference because the oral agreement between the director of Rock and the credit controller employed by MWB made no mention of the NOM clause and it is likely that neither individual was aware that the clause

¹⁹ *Rock Advertising v MWB* [2019] at [15].

²⁰ *Rock Advertising v MWB* [2019] at [16]. In Scots law, personal bar serves broadly the same function as estoppel in this context, notwithstanding that the English law makes different demands. Cf. Lord Keith in *Armia Ltd v Daejan Developments Ltd* 1979 SC (HL) 56 at 72: "I would not accept today that no important juridical differences exist between personal bar in Scotland and estoppel in England."

²¹ *Rock Advertising v MWB* [2019] at [17] and [19].

²² *Rock Advertising v MWB* [2019] at [22] and [23].

²³ *Rock Advertising v MWB* [2019] at [24].

²⁴ *Rock Advertising v MWB* [2019] at [29]-[32].

existed.²⁵ Provided there is no statutory requirement for written formalities and the parties are in explicit agreement about variation or termination, Lord Briggs believes that the NOM clause itself should not be an obstacle. The clause subsists, in other words, only so long as at least one of the parties wishes it and ceases to be enforceable once there is consensus that it should be removed. The fact that this consensus has been expressed orally rather than in writing (as required by the NOM clause) is neither here nor there.

The majority decision, that a NOM clause does not override the intent of the parties but is, in fact, reflective of their intent, does not persuade Lord Briggs. For him, the autonomy of the parties is upheld by the fact that, so long as at least one party to the agreement wishes it, the contract will remain binding. But it is “conceptually impossible...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.”²⁶

C. Conclusion

The fundamental issue facing the court in this case was that of party autonomy: could the parties bind themselves in such a way as to forbid variation of the contract other than in accordance with specific formalities? This is as much a question of legal theory as of legal practice. The argument in favour of NOM clauses has always been, simply, that they represent the will of the parties to the contract and must be given effect on that basis; the contrary view is that NOM clauses unreasonably hinder the parties’ freedom to contract by preventing oral modification even where consensus exists and that, in any case, the oral variation of such a contract amounts to the implied repudiation of any clause requiring writing. Given that an agreement to vary a contract is itself a contract subject to the usual rules of offer and acceptance, it can be argued that the court, in giving effect to NOM clauses, is interfering with contractual freedom by imposing requirements for written formalities which cannot be waived by the parties.

However, any form of enforceable obligation may restrict party autonomy, most obviously that of the debtor in the obligation, because the obligation binds them to do or to refrain from doing certain things. Contracts generally place limits on the future actings of at least one of the parties and give rise to legal remedies in the event of breach. The court was thus required to consider what party autonomy actually means, how far it extends and the extent to which it can be restricted by agreement between the parties themselves. The decision at first instance upheld the validity of the NOM clause while the Court of Appeal subsequently decided that, in view of the general validity of oral contracts, it was a step too far to impose written formalities, notwithstanding that the parties had agreed to such an imposition. At every point during this case’s journey through the judicial system, all judgments, whether upholding or dismissing NOM clauses, articulated the belief that party autonomy was key and that the function of the courts was to defend that autonomy.

The Supreme Court found itself having to consider whether the autonomy of the parties was undermined or protected by interpreting an oral variation as constituting an implied repudiation

²⁵ Cf. Lord Sumption at [15]: “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.”

²⁶ *Rock Advertising v MWB* [2019] at [26].

of any NOM clause. The unanimous decision was that, in this context, any such term agreed between the parties to a contract must be given force.²⁷ Objections to this approach were dismissed by Lord Sumption as being “entirely conceptual”, but party autonomy is itself an abstract concept and sharp criticism has already been levelled at the court for what has been construed as an unwarranted infringement of the wider legal principles of contractual freedom.²⁸ This objection was anticipated by Lord Briggs when he stated that, where the parties are aware of the NOM clause’s existence and nevertheless reach explicit consensus that the contract should be modified regardless of the clause, party autonomy demands that their oral agreement be given effect and that the clause be set aside.

Yet party autonomy extends only so far and, notwithstanding its central place in the ideology or, rather, ideality of contract law, it has not always been treated as the final word. Lord Sumption stated in his judgment that “the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy.”²⁹ This is an uncontroversial comment and the same view was expressed more than fifty years earlier by Lord Guthrie who observed in the Inner House that, “the object of our law of contract is to facilitate the transactions of commercial men, and not to create obstacles in the way of solving practical problems arising out of the circumstances confronting them, or to expose them to unnecessary pitfalls.”³⁰ NOM clauses, indeed, emerge from the demands of commerce, not from the courts themselves and certainly not from legislation. There is therefore no question that commercial actors have seen NOM clauses as a useful prophylactic measure against pointless litigation and a means of creating contractual certainty. On that basis, the legal effectiveness of NOM clauses might be assumed. The courts have, however, demonstrated a willingness in the past to set aside contractual clauses agreed freely between the parties. Lord Sumption singled out the treatment of entire agreement clauses as an example of this;³¹ but the same thing can be seen in the way that the law on penalty clauses was so drastically altered by the Supreme Court in *Cavendish Square Holding v Talal El Makdessi*,³² a judgment subsequently applied in Scotland by the Inner House in *Gray v Braid Group (Holdings) Ltd*.³³ In *Cavendish*, the fact that the parties had exercised their contractual autonomy to establish a penalty clause did not persuade the Supreme Court which, through this case, “substantially rewrote the law of England and Wales on penalty clauses.”³⁴ There is, thus, an established record of courts setting aside party autonomy in certain circumstances and dispensing with, or at least radically altering, a clause which has been agreed between the parties.

The majority decision in the instant case was, in the end, a simple and objective one: if a NOM clause has been included in the contract, it must and will be enforced. In agreeing to such a contract and such a clause, the parties articulated their will and it is not the place of the courts

²⁷ Lord Briggs envisions situations where a NOM clause might validly be modified or extinguished by oral agreement of the parties, but accepts that the instant case is not one of them.

²⁸ J C Fisher, “Contract variation in the common law: a critical response to *Rock Advertising v MWB Business Exchange*”, [2018] 47(3) *Common Law World Review* 196-207.

²⁹ *Rock Advertising v MWB* [2019] at [12].

³⁰ *R & J Dempster v Motherwell Bridge & Engineering Ltd* [1964] SC 308, at 308-309

³¹ *Rock Advertising v MWB* [2019] at [14].

³² [2015] UKSC 67

³³ [2016] CSIH 68. This case was treated by the court as having superseded completely the previous authority on penalty clauses, *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

³⁴ Scottish Law Commission, [March 2018] *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (SLC 252) at [2.2].

to tell them that they did not really intend to be bound by their agreement. Lord Briggs' contention is that the majority decision goes beyond what is necessary for the preservation of contractual certainty and that it now serves to prevent the oral modification of a NOM clause even if the parties are explicit about their wish to do so. Yet this seems a weak argument. Where a NOM clause has been included and the parties are aware of it, they are equally aware that they have undertaken to make any modifications in an agreed form and that oral modifications will not have effect. Had they wished to retain the potential for explicit oral modification, the solution would have been to dispense with the NOM clause in the first place and, of course, they retain the power to vary the contract and remove the clause by setting down their intentions in writing. The fact that the NOM clause exists at all tells us that the parties envisioned and wished to remove the possibility of oral modification, whether implicit or explicit. The inclusion of a NOM clause is not accidental. It is the result of an active decision to apply specific formalities to the process of contractual variation and, where this has been done, the reason is uniformly because it serves as a means of preventing the kinds of misunderstandings which can, and in this case did, arise during oral negotiations.

From a Scottish perspective, this was an English case heard exclusively by English judges and therefore possessing no binding authority. Nevertheless, given the unanimity of the Supreme Court in upholding NOM clauses and further given that the decision was congruent with international approaches in the form of UNIDROIT's Principles of International Commercial Contracts, the Vienna Convention and perhaps DCFR, it was never likely that the Court of Session would depart from Lord Sumption's opinion. So it was not surprising that Lord Bannatyne, in the Outer House, should have relied upon this judgment in the recent case of *Agilisys Ltd v CGI IT UK Ltd*.³⁵ This case dealt, amongst other things, with a clause requiring the implementation of certain formalities prior to any variation of the contract. Though not concerned specifically with a NOM clause, Lord Bannatyne chose to construe Lord Sumption's judgment as a generalised principle of law "applicable not only to NOM clauses but to all clauses which lay down a specified procedure for making changes to a contract."³⁶ It is not clear that this is what Lord Sumption actually intended, but nor was it ruled out by him. Lord Bannatyne's interpretation now stands as authority, albeit only from a court of first instance, for the application of *Rock Advertising* in Scotland and for its extension to any manner of formality agreed between the parties. Both north and south of the border, it seems that NOM clauses are, in fact, as solid as a rock.

³⁵ [2018] CSOH 112 at [46].

³⁶ *Agilisys Ltd v CGI IT* [2018] at [49].