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GAMA AVIATION V MWWMMWM: THE PROBLEM OF CONTRACTUAL FORMALITIES AND INFORMAL NOVATION

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SUMMARY

The problem of what happens when parties do not act in accordance with contractual formalities is a hardy perennial in commercial disputes. Certain instances of the problem are peculiar to the construction industry, notably absent or inadequate notices of events giving rise to time and money, or absent or inadequate payment or pay less notices. Each of these has given rise to complex caselaw. Other instances are common to all commercial contexts. One is the practice of including a "no oral modification" clause in a contract, but then informally agreeing an amendment. This situation has proved sufficiently difficult to require a thorough review and restatement of the law by the Supreme Court in MWB Business Exchange Centres Ltd v Rock Advertising Ltd.

The recent case of Gama Aviation v MWWMMWM shows the issues thrown up by an informal novation of an agreement that one side said prohibited such informal variation, and the other side said made no provision for it.

The facts

In 2008, International Jetclub (IJC) and MWWMMWM (M) entered into an Aircraft Support Services Agreement (ASSA) under which IJC would provide maintenance and repair services to an aircraft owned by M. Clause 1 of the ASSA defined the duration of the agreement:

> *"This agreement shall commence from the date of this agreement and shall … continue until such time as either party gives the other not less than three months' notice in writing of termination …"*

Clause 13.9 was a standard clause saying any variation had to be in writing.

In 2014, IJC was part of a company reorganisation and became a subsidiary of GAMA Aviation (GAMA). The group rationalised so that all regulatory permissions needed to be held by GAMA. In 2017, the aircraft was moved to Bermuda, where the regulatory authority to service aircraft was held

by GAMA. As a result, and at M's request, from March 2017 GAMA rather than IJC was providing the services and invoicing M. M corresponded with GAMA about the services, including agreeing an increase in the fees, and paid its invoices. The parties negotiated with a view to entering into a revised agreement, but that was not finalised. So the parties continued to operate the ASSA until January 2019, when M stopped paying.

The issues

GAMA applied for summary judgment for its unpaid fees of around $1.35 million. It contended that by the parties' conduct, the ASSA had been novated from IJC to it in 2017.

M's principal defence was that the novation was ineffective in light of clauses 1 (which, it said, created an exclusive code for terminating the agreement and that required three months' notice) and 13.9 (which, it said, prevented any changes to the original agreement other than in writing).

The judgment

On the facts, the court was satisfied there was a novation. The law is clear that a novation can be inferred from conduct (Seakom Ltd v Knowledgepool Group Ltd), if that inference is necessary to give business efficacy to what happened, and that evidence of subsequent conduct is relevant (Capita ATL Pension Trustees Ltd v Sedgewick Financial Services Ltd). The fact that the parties were in negotiations in relation to a revised written agreement was not inconsistent with a finding that the original agreement was novated (following Evans v SMG Television Ltd).

The court was content that the "no oral modification" clause did not apply, because a novation is a wholesale replacement of the original agreement, rather than an amendment to it.

The duration clause was more problematic. In his initial judgment, Kramer J thought that the clause prevented novation, because:

> *"… on its face the contract requires three months' notice of termination so if you are proposing to terminate by what is in effect an agreed rescission, this term should prevent that from happening."*

But he decided that in light of the facts – notably GAMA providing services and incurring expenses on the understanding that it would be paid in accordance with the ASSA – M was estopped from denying the efficacy of the novation. The approach based on estoppel found support in both Rock Advertising and the Court of Appeal decision in Kabab-Ji SAL v Kout Food Group. The judge granted summary judgment.

Between his initial judgment and the drawing of the order, however, the judge reflected further on the duration clause and issued an addendum to his judgment. Here, he applied the standard principles, and concluded that:

"… the construction consistent with commercial common sense is that clause 1 merely identifies when the contract starts and provides for unilateral termination and has no bearing upon whether or not mutual termination is available. As the latter is not provided for in the contract at all, that is to say there is no provision setting up formalities as to how the contract is to be terminated by agreement, there is no bar within the contract for termination by novation."

Analysis

With the usual caveats concerning judgments on summary judgment applications, the reasoning in GAMA Aviation is helpful. The primary ground for decision shifted from estoppel (in the main judgment) to the construction of the contract (in the addendum). But the two parts of the judgment reflect a common thread of principle, namely that the parties are free to unmake their agreement and remake an agreement involving different parties, unless they have chosen expressly to fetter their ability to do so.

The judge's decision on the construction of the two clauses in dispute recognised the specific purpose and intent of each and accorded it meaningful but proportionate effect. He restricted the "no oral modification" clause to its intended scope of amendments to the contract, and restricted the "notice for termination" clause to its proper domain of terminations prompted by one party. In doing so, he dismissed the defendant's approach, which would have conflated amendment, unilateral termination, and agreed rescission, and given the clauses unusually wide application.

The practical lesson is the usual one: novation is a matter which merits specific provision in your agreement. Many construction contracts do contain express rules on when and how it can occur. This recent case is a reminder that in the absence of such rules, the law will follow the facts and if the parties have in practice novated, that new contract will be enforced.

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