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BITING OFF MORE THAN YOU CAN CHEW: NO ORAL MODIFICATION AND ENTIRE AGREEMENT CLAUSES

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SUMMARY

The Court of Appeal recently considered the application of, and relationship between, no oral modification (NOM) and *entire agreement clauses*. While this was not a construction case (the appeal in question concerned a contract for the provision of dental services), both types of clause are commonly included in construction contracts.

The judgment also restates a number of rules of contractual interpretation, which serve as a useful reminder, and perhaps a warning, of the potential pitfalls when seeking to administer and vary contracts.

Handle with care: NOM clauses

NOM clauses provide that parties to a contract can only *vary its terms* in writing, so oral amendments will be invalid. Contracting parties like and use them them because they provide certainty as to what has been agreed and are a useful dispute avoidance tool.

However, issues still arise. For example, what if it is not clear whether the NOM clause is even part of the contract that the parties have purported to vary? This was the issue that the Court of Appeal had to consider in the case of *NHS Commissioning Board v Vasant (t/a MK Vasant and Associates)*.

What happened?

The case concerned two contracts entered into between NHS Commissioning Board (NHS England) and Vasant (Dentists). The issue was whether one of the contracts had been validly varied.

The first contract (made in 2006) was an agreement for the provision of general dental services (GDS Contract). It contained:

- A NOM clause whereby no variation could be made unless it was in writing and signed by the parties.
- An entire agreement clause, stating that the contract superseded all prior agreements and represented the entire agreement between the parties.

In 2007, the parties then entered into a separate fixed term contract for the provision of intermediate minor oral surgery services (IMOS Contract). On expiry of the fixed period it continued to operate under its provisions. However, in 2009, both parties signed a contract variation agreement form (VAF), purporting to bring the IMOS services within the scope of the GDS Contract.

The issue

In 2016, NHS England wrote to the Dentists purporting to terminate the IMOS Contract. The question was: had it validly terminated the arrangement between the parties? It was common ground that there was a contract in place, but the question was which one – the GDS Contract (as varied) or the IMOS Contract?

Under the GDS Contract, NHS England had no general right to terminate the contract without default by the Dentists, whereas under the IMOS Contract, it was entitled to terminate on one month's notice.

In NHS England's view, the IMOS Contract continued in operation and was therefore capable of being terminated. It argued that the VAF failed for uncertainty because it did not spell out in sufficient detail the contractual arrangements that applied from the date of the VAF. The VAF consisted of a single page that essentially stated that "an intermediate minor oral surgery service" was to be carried out as "Further Services" under the GDS Contract. It referred to the IMOS Contract but did not include any details of the particular IMOS services or payment terms.

The Dentists disagreed, arguing that the VAF had effectively varied the GDS Contract. Further, NHS England had no right to terminate because there had been no default by the Dentists.

Decision

The Court of Appeal agreed with the first instance decision (although not the reasoning) that the VAF was valid with the effect that the IMOS services were to be carried out as further services under the GDS Contract. NHS England could not bring this arrangement to an end by terminating the IMOS Contract.

"NOM" and entire agreement clauses

Over the years, the enforceability of NOM clauses has been debated by the courts. In *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, the Supreme Court finally answered the question, holding that oral variations of a contract containing a NOM clause are invalid. It explained

that the purpose of a NOM clause is to prevent a misunderstanding arising from oral discussions and avoid disputes not only as to whether a variation was intended but also its exact terms.

Parties may seek to *vary the contract terms* or the *scope of the works or services to be carried out under the contract*. NOM clauses can apply to both types and are standard in many construction contracts. An issue that commonly arises in practice on many construction projects is that contractors are given oral instructions to vary the scope of works. Indeed, most standard form contracts acknowledge this and include provisions requiring oral instructions to vary the works to be confirmed in writing as part of a detailed "change" procedure.

However, what if one party acts on an oral instruction which is not subsequently confirmed in writing, and finds itself unable to obtain payment? It might find itself trying to rely on the existence of a collateral contract, or arguing that there was an implied promise to pay. That is where the entire agreement clause kicks in. This has the effect of limiting the parties' agreement to those terms written in the contract. In common with NOM clauses, the intention is to achieve contractual certainty about the agreed terms. It prevents parties from relying on matters (including pre-contractual negotiations) that are not included in the written agreement. Therefore, the party that is seeking payment has to argue that the parties waived their rights to rely on the NOM clause and the entire agreement clause.

Construing the contract, the Court of Appeal found that the entire agreement clause was "subject to" any variations validly made in accordance with the relevant provisions of the GDS Contract. The Court accepted that where a clause in a contract is said to be "subject to" another clause in the same contract, the second clause takes precedence over the first (*Scottish Power Plc v Britoil (Exploration) Ltd* (1997)).

The VAF satisfied the contractual requirement for variations to be in writing and signed by the parties and then, once the variation had been made, the GDS Contract (as varied) was governed by the entire agreement clause.

Post-variation conduct

In considering NHS England's argument that the VAF failed for uncertainty, the judge at first instance concluded that the amended contractual arrangements following the VAF were clear and that it was "business as usual" in terms of the practical operation of the services provided by the Dentists. In doing so, the judge relied on:

- Contemporaneous correspondence;
- Oral evidence of the contracting parties; and
- The conduct of the parties after the variation.

In rejecting each of these three strands of the judge's reasoning, the Court of Appeal:

- Reiterated the general principle that documents forming part of pre-contractual negotiations are irrelevant, and therefore inadmissible, for the purposes of *interpreting a concluded agreement*. The court referred to *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* as authority that documents explaining the "genesis" and "aim" of a contractual provision are no exception to this principle.
- Commented that oral evidence of the contracting parties is no more than an expression of subjective intention which again is irrelevant and therefore inadmissible in interpreting a written contract.
- Re-stated the "long-standing principle of contractual interpretation" that, in the case of a written contract, post-contract conduct is irrelevant, and again inadmissible.

Further, the Court of Appeal considered whether an entire agreement clause affects the principle that extrinsic evidence is admissible to explain the meaning of unconventional terms in a contract, particularly those used in certain sectors.

The court agreed with NHS England that it was not possible to interpret the words of the VAF, standing alone, as incorporating any particular terms of the IMOS Contract. The key issue was what the relevant words – "an intermediate minor oral surgery service" – meant. The service was defined in the IMOS Contract, but not in any of the terms that had been validly incorporated into the GDS Contract by way of the VAF. However, the court found that those particular terms of the IMOS Contract were admissible to give meaning to the phrase as they did not alter the terms of the GDS Contract (as varied) but simply explained what the words in the VAF meant. The existence of the entire agreement clause and NOM clause did not preclude the implication of terms that were intrinsic to the agreement or necessary to give business efficacy to the contract.

Take away points

Although it concerns a dental services contract and not a construction contract, the case contains lessons for those who need to amend complex contracts. Amendments should be made clearly, in line with the requirements of the contract and perhaps in a case such as this one, the parties should consider whether to draft a new contract rather than incorporate elements of one existing contract into another.

In the construction industry, where oral instructions to vary the scope of the contract works are common, parties should ensure that that any such oral variations are subsequently confirmed in writing. Don't assume that just because both parties agree something orally and then perform the contract in accordance with that agreement, they have waived the right to rely on the formalities of the written agreement.

This post first apeared on the Practicle Law website.

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