Monday, 21 May 2018

Bell Gully summary of Supreme Court's reasoning: Rock Advertising Ltd v MWB Business Exchange Centres Ltd[1]

The majority's reasoning

The reasoning underpinning the majority's decision is essentially pragmatic and emphasises the "legitimate commercial reasons" why parties agree NOM clauses. In the majority's opinion, contract law "does not normally obstruct legitimate intentions of businessmen, except for overriding reasons of public policy." NOM clauses do not cause any mischief or frustrate or contravene any policy of the law. Thus, for good reasons, contract law gives effect to terms requiring specified formalities to be observed for a contract's variation.

In explaining why the Court of Appeal had erred in deciding not to give effect to NOM clauses, the majority held that the lower Court's reasoning about party autonomy was a "fallacy". The correct view is instead 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 parties to some course of action, and to that extent restrict their autonomy. The 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.

Additionally, the majority held that the other reasons relied on by the Court of Appeal were "entirely conceptual", i.e. that it was impossible for parties to agree not to vary their contract orally because any such agreement is automatically destroyed upon their doing so. In the majority's view, the position reached in other legal systems which have confronted the same issue shows that there is no conceptual inconsistency between the general common law (or other rule) allowing contracts to be made informally and a specific provision that effect will be given to a contract requiring writing for variation. It is therefore wrong to conclude that parties who agree an oral variation despite a NOM clause's existence intended to dispense with the NOM clause rather than that they simply overlooked it. If, however, the parties had the NOM clause in mind when they made a particular oral agreement, then they were simply "courting invalidity with their eyes open". That is because a NOM clause does not forbid oral variations. It simply makes any such variation invalid.

The majority recognised that its conclusions created a risk that a contractual party may act on a contract which has been varied orally despite the existence of a NOM clause and then find itself unable to enforce the oral agreement. In its opinion, the various doctrines of estoppel function as a sufficient safeguard against injustices. But because it was clear on the particular facts of the case that no estoppel could operate, the majority considered it inappropriate to explore the various estoppel boundaries in detail. It did, however, observe 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 [NOM] clause".

Lord Briggs' reasoning

Whilst turning on narrower grounds than the majority, Lord Briggs' decision acknowledges that the reasoning differences between him and the majority are unlikely to have "any significant consequences for the application of the common law, save perhaps on very unlikely facts."

Regarding the specific differences between Lord Briggs' and the majority's decisions, the core difference is essentially Lord Briggs' disagreement with the proposition that a NOM clause's effect is to invalidate any attempt to vary a contract orally (including the NOM clause itself). In Lord Briggs' opinion, NOM clauses simply make oral variations invalid unless the NOM clause is itself removed (temporarily or permanently) by

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1 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

agreement. That can occur through either a compliant express/written variation or by “strictly necessary implication”, i.e. not necessarily in writing. The law which applies to arrangements made “subject to contract” is a good analogy. In this sense, Lord Briggs’ approach is less radical than that articulated in the majority’s decision and can be seen as a more incremental development or modernisation of the common law, as opposed to a clean break from it.