Spring 2018 Number 5

Commercial Briefing

Consideration, Anti-Oral Variation Clauses and 'Collateral Unilateral Contracts'

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2017] Q.B. 604

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Introduction:

An anti-oral variation clause, requiring any variations to the terms of a written contract to be in writing, is a standard feature of commercial contracts. In English law two inconsistent Court of Appeal decisions, *United Bank Ltd v Asif* (unreported, 11/2/2000) and *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413, produced uncertainty as to whether contracts containing an anti-oral variation clause could be varied other than in accordance with the terms of the clause. The Court of Appeal in MWB resolved this issue and dealt with the question of whether an agreement to reschedule payment obligations was unsupported by consideration. MWB also saw Arden LJ express a 'provisional view' that a variation agreement gave rise to a 'collateral unilateral contract'.

Facts:

On 1 November 2011 the claimant entered into a 12 month written licence agreement for office space with the defendant. Clause 7.6 contained an anti-oral variation clause as follows: 'This licence sets out all of the terms as agreed between [the claimant] and the licensee [defendant]. 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'. The defendant fell into arrears and the claimant gave notice terminating the licence; it then exercised its right under the licence to lock the defendant out of the premises. Shortly before the notice was served the claimant's credit controller and the defendant's managing director negotiated the rescheduling of the licence fee payments (the period over which the payments were rescheduled was in fact longer than the contractual term) and the defendant made a payment of the first instalment due under the revised payment schedule. When the claimant sued for arrears of licence payments, the defendant argued that an oral agreement had been made to reschedule the payments so that the claimant had wrongfully terminated the licence and excluded it from the premises, and that it was estopped from relying on the original payment terms because it had received the first instalment payment. In response, and at first instance, the claimant argued (inter alia) that the oral agreement relied on by the defendant was precluded by the anti-oral variation clause and that in any event it was unenforceable because it was not supported by consideration.

At first instance the judge agreed with the claimant that clause 7.6 precluded an oral re-negotiation of a core term of the agreement, namely payment of the licence fees on prescribed dates. He also dismissed the estoppel argument. However, he found that there was adequate consideration in the rescheduled payments; even though the defendant was doing no more than paying what it was contractually bound to pay, there was a practical benefit to the claimant of recovering its arrears rather than terminating the licence, failing to recover those arrears and allowing the property to stand empty for some time. The defendant appealed, arguing that it was open to the parties to vary the licence as a whole, including clause 7.6, orally or in any other way they chose so that the judge had been wrong to hold that the claimant was not bound by the oral agreement. The claimant in turn argued that the judge had been wrong to find that the defendant's agreement to the revised payment schedule was good consideration for the oral agreement and that he should have found that a promise to pay an existing debt by instalments did not amount to consideration.

The Law:

United Bank concerned a bank guarantee which provided that 'no variation…shall be valid or effective unless made by one or more instruments in writing signed by the parties'. The Court of Appeal had held that no oral variation of the written terms could have any legal effect'. In *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ. 413 the contract had provided that 'no addition, amendment or modification of this agreement shall be effective unless it is in writing and signed by or on behalf of both parties'; the Court of Appeal had held that the parties had made their own law by contracting and could in principle unmake or remake it.

In *Globe Motors Inc v TRW Lucas Varity Electric Steering Limited* [2017] 1 All E.R. (Comm) 601, the relevant clause had provided that the agreement could only be amended by a written document which specifically referred to its provisions and was signed by both parties'. Although it was not necessary to decide whether the clause prevented the parties amending the agreement orally and by conduct, the Court of Appeal expressed a 'considered view'. Beatson LJ said that as a matter of principle the clause did not prevent the parties from later making a new contract varying the original contract by oral agreement or conduct. As a matter of precedent he said that the Court was not bound by either of the decisions in United Bank and World Online Telecom because they were inconsistent but in his view the latter decision accorded better with principle. Underhill LJ agreed with Beatson LJ; while he thought it entirely legitimate that parties to a formal written contract should wish to insist that any subsequent variation be agreed in writing as a protection against ill-founded allegations, he said that the presence of an anti-oral variation clause would raise the threshold for a party trying to rely on an oral variation. In the view of Moore-Bick LJ the governing principle was party autonomy; the principle of freedom of contract entitled parties to agree whatever terms they chose, subject to public policy limits, and to vary them in any way they agreed.

In English law an oral promise is not, as a general rule, binding as a contract unless it is supported by some consideration. The traditional definition focuses on the requirement that something of value must be given: consideration is either some detriment to the promisee or benefit to the promisor. The law looks for consideration for a promise rather than a contract which is why the benefit and detriment are usually the same thing seen from different points of view. The House of Lords held in *Foakes v Beer* (1884) 9 App Cas 605 that payment of part of a sum which was owed could not amount to valuable consideration.
Promissory estoppel…

Decision:

Kitchin LJ at [34] agreed with Beatson LJ in *Globe Motors that World Online Telecom* was correct. In his view the most 'powerful consideration is that of party autonomy' and he cited Cardozo J in the New York Court of Appeals in *Alfred C Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 that those 'who make a contract may unmake it. The prohibition of oral waiver may itself be waived. What is excluded by one act is restored by another'. He held at [36] that clause 7.6 did not preclude any variation of the original agreement other than one in writing and in accordance with its terms.

On the issue of consideration the claimant argued that the practical benefits it gained from the rescheduled payments via an agreement to pay the debt by instalments to accommodate the defendant could not amount to good consideration (*Foakes v Beer*). At [48] Kitchen LJ said that the claimant had received a practical benefit which went beyond the advantage of receiving the prompt payment of a part of the arrears and a promise that it would be paid the balance of the arrears in accordance with the new schedule: the fact that the defendant would remain in occupation of the property was a practical benefit which did amount to good consideration.

On the assumption that, contrary to his findings, the oral agreement was not enforceable, Kitchin LJ said at [61] that the broad principle of promissory estoppel was that if one party to a contract made a promise to the other that his legal rights under the contract would not be enforced or would be suspended and the other party in some way relies on that promise, such as by altering his position, then the party which might otherwise have enforced those rights for promissory estoppel was whether it was inequitable for the claimant to assert its legal rights under the original contract against the defendant.

Arden LJ

Conclusion:

The clear issue for Scots commercial lawyers is the position under Scots law. McBryde on Contract (3rd Ed) sits on the fence; at 25-06 the author asks whether an oral variation will override a non-variation clause but in answer simply states that for Scots law the arguments will be (i) the non-variation clause should apply unless there is clear indication to the contrary; (ii) the parties can innovate on their original contract, their original consent is not immutable. In the absence of any Scottish authority, it is likely that the Scots courts will follow the English lead.