

# Supreme Court confirms effectiveness of ‘no oral variation’ clauses

May 2018

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## Summary

Against a backdrop of inconsistent authorities, in *Rock Advertising Limited v MWB Business Exchange Centres Limited*<sup>1</sup>, the United Kingdom Supreme Court considered the effectiveness of so-called ‘no oral modification’ clauses, which purport to preclude contractual variations other than in writing. The Supreme Court, in allowing the appeal, confirmed that ‘no oral modification’ clauses should be given effect according to their terms. The decision will be welcomed by parties who include such clauses in their contracts for legal certainty.

## The Facts

MWB operates serviced offices in London. Rock entered into a licence agreement with MWB to occupy office space for a year at one of MWB’s properties near Marble Arch. That agreement contained a ‘no oral modification’ (“**NOM**”) clause. During the term, Rock’s rent payments fell into arrears and its sole director negotiated with a credit controller at MWB an oral agreement to reschedule the rent payments. When Rock began to pay at the revised rates, MWB demanded the full amount. When it was not forthcoming, MWB locked Rock out of the premises, terminated its licence and sued for the rent arrears in accordance with the original terms of the licence. Rock counterclaimed, seeking damages for wrongful exclusion from the offices. Both parties’ claims turned on the effectiveness of their oral agreement to vary the licence agreement.

## The Decision

The judge at first instance held that, although Rock had made an oral agreement with MWB’s credit controller to reschedule its rent payments, and that the credit controller had ostensible authority to make such an agreement, the NOM clause in the parties’ licence agreement was effective. He held that the parties’ oral amendment was therefore ineffective because it was not in writing and signed by the parties, as stipulated by the clause. Accordingly, MWB was entitled to demand payments under the original payment schedule, and evict Rock when those payments were not made.

The Court of Appeal disagreed. It held that the clause was ineffective and that MWB was bound by the oral amendment (and therefore not entitled to evict Rock and claim the arrears). The Court of Appeal reasoned that: first, in English law there are no formal requirements for the validity of a contract and, with few statutory exceptions, contracts can be made orally or in writing, with or without a signature. Second, a variation of a contract is itself a contract. Finally, when Rock and MWB agreed orally to vary the payment schedule in their contract, it was implied that they were also agreeing to dispense with the NOM clause.

The Court of Appeal’s decision emphasised the importance of parties’ freedom of contract and party autonomy. So, a contract containing a clause which purported to prohibit variation of the contract by oral

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<sup>1</sup> [2018] UKSC 24.

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agreement could nonetheless be varied by the parties without the formality stipulated in the original agreement (i.e., by oral agreement or by conduct). *MWB* appealed the decision.

The majority of the Supreme Court, in allowing the appeal, held that NOM clauses should be given effect according to their terms. In doing so, the Supreme Court flatly rejected the notion that an informal variation automatically or impliedly destroys an agreement precluding informal variations. Lord Briggs (dissenting as to reasoning but not as to result) took the view that a NOM clause should continue to bind the parties, but only until the parties expressly (or by strictly necessary implication) agreed to dispense with it (which they were free to do even without complying with the formality of the NOM clause). But the majority took a stricter approach, holding that parties could not effectively agree to remove a NOM clause orally.

As to concerns raised in previous judgments over party autonomy and conceptual inconsistencies between (i) a general rule allowing contracts to be made informally (e.g., orally), and (ii) a specific rule that effect would be given to contracts requiring variations to be in writing, the majority took the view that there is no inconsistency: what parties agree in a NOM clause is not that they are forbidden to subsequently agree to vary the contract informally (a notion offensive to party autonomy), but that any informal agreement that does not comply with the formal requirements they have stipulated will be ineffective (although of course the practical effect is the same).

The Supreme Court's decision favours legal certainty over the flexibility of many of the old authorities on NOM clauses, which allowed for the possibility that the parties may have intended to be bound by an agreement that did not respect the formality requirements of their historic agreement. But, recognising the potential for injustice in cases where a party acts on a contract purportedly varied in this way, the Court noted that other safeguards exist in the law of estoppel. So, where a party has acted to its detriment in reliance on the effectiveness of an oral variation, the other party may in some cases be estopped from relying on the NOM clause. The Court did not explore the circumstances in which an estoppel may apply (there being no grounds for an estoppel on the facts in this case), but did note that there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality, for which more would be required than just the informal agreement itself. The Court emphasised that the scope of estoppel cannot be so broad as to undermine the certainty the parties sought in agreeing the NOM clause.

## Comment

Prior to the *Rock Advertising* judgment, the authorities on NOM clauses had been inconsistent and so the effect of such clauses unclear. Accordingly, it has been difficult for parties to have certainty as to their rights in situations where the effectiveness of a NOM clause – a very common term of commercial and other contracts – is engaged. To this extent at least, the Supreme Court's decision provides welcome clarity on the effectiveness of such clauses.

A party that has acted in reliance on an oral variation that is ineffective in the face of a NOM clause may be able take some comfort in the continued availability of equitable remedies, but such remedies are an unattractive – and limited – alternative.

The best practical advice to parties has always been to comply with the requirements of NOM clauses. The Supreme Court's decision will mean that, in most cases, parties will be left with limited prospects of recourse if they have failed to do so when amending a contract that contains such a clause.

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