Verbal alteration

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Shy Jackson considers the validity of verbal agreements

It is sometimes said that a verbal agreement is not worth the paper it is written on, as a way of highlighting the risks of arrangements that are not recorded in writing and the uncertainty that can result from them. A common means of limiting this risk is to include a clause stating that any agreement to vary the contract must be made in writing and signed by both parties. Whether such clauses are effective was the subject of the recent decision in MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553 .

The case concerned a claim by MWB, a company operating managed offices in central London, against an occupier, Rock Advertising, for the arrears of licence fees as well as other charges and damages.

In its defence, Rock claimed that an oral agreement had been reached with MWB?s credit controller to reschedule the licence fee payments. Rock said it paid the first instalment that was due in accordance with the revised payment schedule, and also argued that MWB should not be able to deny the variation that it had orally agreed. The oral agreement was the subject of various discussions and email exchanges on 27 February 2012, as well as an email sent on 29 February proposing new terms.

This meant that contract clause prevented the oral agreement from being effective, and the claim for payment was thus successful.

Court of Appeal

When Rock sought to appeal the decision, the Court of Appeal relied on an earlier appeal decision from April 2016, in the case of Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 . In that case, the three Lord Justices concluded that a clause prohibiting verbal agreements cannot stop parties from subsequently entering into such an agreement.

When considering Rock?s appeal, the court noted that there has for some time been a considerable degree of uncertainty as to whether an agreement in writing that contains an anti-oral variation clause can itself be varied, other than in accordance with the terms of that clause. The Court of Appeal, however, agreed with the reasoning in Globe Motors and concluded that the existence of such a clause did not prevent a subsequent agreement.

This was largely due to the principle of contract autonomy and the right of parties to enter into contracts as they wish. In that context, the clause that limited change could be changed like any other, and the prohibition of an oral waiver could itself be waived. The appeal was therefore successful, and MWB could not pursue its claim for payment due to the verbal agreement.

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While clauses prohibiting oral variations are common, the decisions in MWB and Globe Motors have now clarified the law, confirming that such a clause will not prevent an oral agreement from binding the parties. It is still necessary to show how and when such an agreement was reached, and MWB highlights the uncertainty that can arise when seeking to rely on evidence of verbal discussions and email exchanges. It is also a reminder that once an agreement is reached, it cannot be undone by a later email, as was attempted in this case.

To avoid such issues, it remains best practice to make it clear in writing when negotiating that such discussions are on a 'subject to contract' basis and, where possible, to avoid informal discussions and agreements. That should go some way to limit the risk of ending up in court arguing about what may have been agreed verbally.

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Further information

- Related competencies include Contract practice
- This feature is taken from the RICS *Construction journal* (November/December 2016)

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