The validity of "No Oral Modification" clauses and the UKSC decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24

I. Introduction

1. The recent UK Supreme Court's ("**UKSC**") decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited* was highly anticipated. Modern litigation rarely raises new fundamental issues in the law of contract; this case, however, dealt with two.[1] Moreover, the preceding Court of Appeal ("**COA**") judgement had left the law relating to the effect of non-oral modification clauses in a mangled state.[2]

2. The first issue was whether a contractual term providing that an agreement can only be modified in writing and must be signed by both parties was effective. Such terms are commonly referred to as "No Oral Modification" clauses, and will be abbreviated hereafter as a "**NOM clause**". The second issue was whether an agreement to vary a payment obligation was supported by consideration.[3]

3. This article will focus on discussing the first issue, which is the more important one since it determined the outcome of the case.[4]

II. Material Facts

4. MWB Business Exchange Centres Ltd ("**MWB**") operates offices in central London.[5] On 12 August 2011, Rock Advertising Ltd ("**Rock Advertising**") entered into a contractual licence with MWB to occupy certain office space for a fixed term of 12 months.[6]

5. The central issue concerned clause 7.6 of the contract, which stated:

> This Licence sets out all the terms as agreed between MWB and Licensee. 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.[7]

6. On 27 February 2012, Rock Advertising had accumulated arrears of licence fees.[8] Rock Advertising's sole director thus proposed a revised schedule of payments to a credit controller employed by MWB.[9] The revised schedule would essentially allow Rock

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[1] *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 ("*Rock v MWB (UKSC)"*) at [1].

[2] *Ibid*.

[3] *Ibid.*

[4] The author also agrees with Lord Sumption who stated that it would be undesirable to make any pronouncement on the issue of consideration since it would merely be *obiter dictum*. *Rock v MWB (UKSC), supra* n 1, at [18].

[5] *Rock v MWB (UKSC), supra* n 1, at [2].

[6] *Ibid.*

[7] *Ibid.*

[8] *Rock v MWB (UKSC), supra* n 1, at [3].

[9] *Ibid.*

Advertising to defer part of the payments and spread the accumulated arrears over the remainder of the licence term.[10]

7. An oral agreement was allegedly reached between Rock Advertising's director and MWB's credit controller to vary the licence agreement according to the revised schedule (the "**Oral Agreement**").[11] However, the proposal was later rejected by the director of MWB.[12]

8. MWB subsequently evicted Rock Advertising from the premises and sued for the arrears.[13] The crux of the parties' dispute laid in whether the alleged Oral Agreement was effective despite the presence of a NOM clause in the contract.[14]

III. Case History

9. In the Central London County Court, Judge Moloney QC ruled in favour of MWB. He held that the Oral Agreement was ineffective because it was not recorded in writing and not signed by both parties, as required by clause 7.6.[15] However, the COA overturned the County Court's decision, and held that the Oral Agreement payments amounted to an implied agreement to dispense with clause 7.6.[16]

10. Lord Justice Kitchin began his analysis by briefly canvassing past English authorities which dealt with such clauses.[17] In the case of *United Bank Ltd v Masood Asif*, it was held that an oral variation of the contract in question could have legal effect, due to the inclusion of a NOM clause.[18] However, this brief judgement did not elaborate on why the NOM clause itself was effective. In contrast, in the case of *World Online Telecom v I-Way Ltd*, it was held that an oral variation of the contract in question was effective despite the presence of a NOM clause.[19] Lord Justice Sedley reasoned that "the parties have made their own law by contracting, and can in principle unmake or remake it".[20] In other words, the *World Online Telecom* court held that consensual oral variation is an exercise of freedom of contract, and to give effect to NOM clauses would restrict that freedom.[21]

11. The apparent contradictions between *United Bank Ltd v Asif* and *World Online Telecom v I-Way Ltd* were resolved in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*. There, Beatson LJ concluded that the COA was not bound by previous decisions at the appellate level where there were inconsistent judgements, and was entitled to

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[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Rock v MWB (UKSC), supra n 1,* at [4].
[16] *Rock v MWB (UKSC), supra n 1,* at [5].
[17] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 ("*MWB v Rock (EWCA)*") at [19].
[18] *United Bank Limited v Masood Asif* [2000] EWCA Civ 465 at [18].
[19] *World Online Telecom v I-Way Ltd* [2002] EWCA Civ 413 at [15].
[20] *Id*, at [10].
[21] *Ibid.*

decide which judgment to follow.[22] Ultimately, the decision in *World Online Telecom*, which did not recognise NOM clauses, was preferred by the court in *Globe Motors*: there was "both textbook and judicial support for the approach", whereas *United Bank v Asif* failed to consider "any authority on the effectiveness" of NOM clauses.[23]

12. Therefore, the English COA's position prior to *Rock v MWB* was that NOM clauses are ineffective in preventing an oral variation of contract, and *Globe Motors* was the authority for this principle.

13. Consequently, the COA in *Rock v MWB* considered that it was bound by the decision in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*. In fact, Lord Justice Kitchin remarked that he would require a very powerful reason to come to a different conclusion.[24] In addition, the COA emphasized that party autonomy is paramount in contracts.[25] While contracting parties may impose formal contract variation requirements upon themselves, they may also impliedly remove them.[26]

14. With regards to Rock Advertising's claim that MWB should be estopped from enforcing their rights under the original license agreement, the claim was rejected by the COA.[27] The COA found that although Rock Advertising had made one payment of £3,500 to MWB in accordance with the revised schedule of payment, there was no detriment suffered by Rock Advertising since this was a sum which they were "in any event bound to pay", given that there were arrears of license fees in excess of £12,000.[28] As such, a crucial element of promissory estoppel was not established since there was no detriment suffered, and MWB is not precluded from enforcing the original license agreement.[29]

IV. The Supreme Court Decision

A. Lord Sumption's Judgement (majority)

15. Rather unpredictably, the UKSC overruled the COA's decision, and held that NOM clauses should be given effect.[30]

16. Lord Sumption noted that the main reasons advanced in case law for disregarding NOM clauses were entirely conceptual: the argument was that it is impossible for the parties to agree not to vary the contract by word of mouth, because any such agreement would automatically be destroyed upon them doing so.[31] However, Lord Sumption asserted that the presence of widely used codes (such as the Vienna Convention on Contracts

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[22] *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [111].
[23] *Id,* at [113].
[24] *MWB v Rock (EWCA)*, *supra* n 13, at [34].
[25] *Ibid.*
[26] *Ibid.* Lord Justice Kitchin quoting Cardozo J in *Alfred C Beatty v Guggenheim Exploration Company* (1919) 225 NY 380: "Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived."
[27] *MWB v Rock (EWCA)*, *supra* n 13, at [63].
[28] *Ibid.*
[29] *Ibid.*
[30] *Rock v MWB (UKSC), supra n 1,* at [10].
[31] *Ibid.*

for the International Sale of Goods), which do allow parties to agree not to vary their contract orally, suggests that it is not conceptually impossible to do so, and that the 89 other legal systems which ratified such codes have "squared this particular circle".[32]

17. Lord Sumption drew an analogy between the use of NOM clauses and entire agreement clauses (**"EAC**"), the latter of which are often upheld.[33] He noted that both EAC and NOM clauses serve the same function of achieving contractual certainty of terms, the only difference being that one nullifies a prior informal pre-contractual agreement, whereas the other nullifies an informal post-contractual agreement.[34] Thus, both types of clauses should be treated similarly.[35]

18. Addressing the concept of "party autonomy", Lord Sumption clarified that party autonomy only operates up to the point when the contract is made, but thereafter only to the extent that the contract allows.[36] Thus, once the parties agree to be bound by a NOM clause, once the contract is signed, they no longer have party autonomy – that is complete freedom – to vary the contract at will and without regard to the NOM clause. Secondly, the purpose of a contract is to restrict party autonomy and impose obligations, which the contracting parties are free to dictate.[37] Refusal to recognise the effect of an NOM clause is to override the parties' intentions, and makes it impossible for them to bind themselves as to the manner in which a change in legal relations is to be achieved in future.[38]

19. Additionally, Lord Sumption reasoned that giving effect to NOM clauses promotes legitimate business purposes.[39] Such clauses prevent attempts to undermine written agreements informally, serve to avoid frivolous disputes, and make it easier for corporations to restrict authority to vary such agreements.[40]

20. However, Lord Sumption noted that a NOM clause is not always valid under all circumstances. The court qualified its position by referring to article 29(2) of the Vienna Convention on Contracts for the International Sale of Goods, which provides that:

> A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. *However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct*.[41] [emphasis added]

21. Therefore, while the general rule is that NOM clauses should be given effect, an exception would apply if the other party had reasonably relied on the oral variation of the contract.[42] This line of reasoning is similar to that of the various doctrines of

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[32] *Ibid.*
[33] *Rock v MWB (UKSC), supra n 1,* at [14].
[34] *Ibid.*
[35] *Ibid.*
[36] *Rock v MWB (UKSC), supra n 1,* at [11].
[37] *Ibid.*
[38] *Ibid.*
[39] *Rock v MWB (UKSC), supra n 1,* at [12].
[40] *Ibid.*
[41] *Rock v MWB (UKSC), supra n 1,* at [13].
[42] *Rock v MWB (UKSC), supra n 1,* at [16].

estoppel and has the effect of allowing the court to retain some discretion in arriving at a calibrated solution.[43]

22. Applying the aforementioned principle, Lord Sumption agreed with the COA that the minimal steps taken by Rock Advertising were insufficient to raise any estoppel defence.[44] Lastly, Lord Sumption warned that the scope of estoppel cannot be so broad as to undermine the certainty provided by NOM clauses.[45]

B. Lord Briggs' Judgement (minority)

23. Whilst agreeing with the majority that the appeal should be allowed, Lord Briggs took a slightly different approach. He noted that NOM clauses are recognised as effective in many legal codes, and for that reason the common law should give effect to them as well.[46]

24. In his judgement, Lord Briggs addressed two legal issues: firstly, whether the parties could agree to remove a NOM clause orally; and secondly, whether such an agreement can be implied if the NOM clause was not expressly referred to.[47]

25. On the first issue, Lord Briggs answered in the affirmative. He asserted that parties should be allowed to dispense with NOM clauses orally if there is unanimous consent.[48] However, so long as either party wishes for the NOM clause to remain in force, nothing less than a written variation would suffice.[49] Taking this position will give effect to the autonomy of the parties to bind themselves as to their future conduct, while preserving their freedom to agree to release themselves from that inhibition.[50] On the second issue, Lord Briggs answered in the negative.[51] Where both parties were unaware of the NOM clause and made no express reference to it, there would be no room to imply that they had intended to remove such a clause.[52]

26. However, parties could impliedly agree to dispense with the NOM clause if the orally agreed variation called for *immediate* performance of the contract before any written record could be made and signed.[53] In such a situation, the agreement to depart from the NOM clause could be implied out of necessity, with necessity being a strict test.[54]

V. Analysis of the New Legal Test

A. The Law After Rock v MWB

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[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] *Rock v MWB (UKSC), supra n 1,* at [21].
[47] *Rock v MWB (UKSC), supra n 1,* at [24].
[48] *Rock v MWB (UKSC), supra n 1,* at [26].
[49] *Rock v MWB (UKSC), supra n 1,* at [25].
[50] *Ibid.*
[51] *Rock v MWB (UKSC), supra n 1,* at [24].
[52] *Rock v MWB (UKSC), supra n 1,* at [29].
[53] *Rock v MWB (UKSC), supra n 1*, at [30].
[54] *Ibid.*

27. The UKSC has provided clarity to the validity of NOM clauses, and the exceptions to that validity. The general rule following *Rock v MWB* is that parties who have inserted a NOM clause into their contract may only vary the contract by putting the variation in writing and also fulfilling the other formal requirements set out by the clause. Additionally, if the *obiter* by Lord Briggs is to be preferred, in the absence of written variation, the contracting parties may remove the NOM clause by mutual agreement instead.[55] However, if the parties have varied their contract orally without expressing their intention to remove the NOM clause, the clause remains enforceable.

28. However, there is an exception to this general rule. Lord Sumption recognised that the Vienna Convention on Contracts for the International Sale of Goods and UNIDROT model provide that notwithstanding the presence of a NOM clause, an oral variation may be enforceable if the counterparty has reasonably acted in reliance on that oral variation.[56] Although the UK did not ratify such codes, nonetheless under UK law, the various doctrines of estoppel serve to fulfil the same function as a safeguard against injustice.[57]

B. Why NOM Clauses should be given effect

29. The author agrees with the conclusion reached by the UKSC, and, with respect, offers additional reasons which may bolster the UKSC's reasoning.

30. First, it is submitted that upholding NOM clauses not only respects party autonomy but also, and more importantly, promotes commercial certainty. The flexibility of common law has often been found as a mixed blessing in the commercial sphere.[58] Upholding such clauses would therefore protect business agreements from inadvertent variations of contract. In fact, parties should be required to abide by the forms of variation which they have stipulated for themselves. If the variation is of such crucial importance to both parties, then it would surely not be onerous for them to take the necessary steps, such as putting the variation in writing and signing it.

31. Secondly, the principal function of including NOM clauses is to prevent the very dispute that arose.[59] From an economic perspective, it makes little sense for parties to engage in prolonged disputes over whether an oral variation of their contract is valid, when both have previously agreed that such oral variations will simply have no effect at all. Giving effect to NOM clauses would save considerable time and expenses for both the parties as well as the courts. By upholding such clauses, frivolous claims may be avoided and the court need not "thresh into the undergrowth" and make tedious inquiries into the conflicting evidence presented by the parties.[60]

32. Thirdly, as a matter of practicality, large organisations may have a legitimate interest in maintaining a proper written record of their agreements and all of the contractual variations. The requirements of formalities would therefore prevent the unfortunate

[55] *Rock v MWB (UKSC), supra n 1,* at [29].
[56] *Rock v MWB (UKSC), supra n 1,* at [16].
[57] *Ibid.*
[58] *Rock v MWB (UKSC), supra n 1,* at [12].
[59] *Ibid.*
[60] *Rock v MWB (UKSC), supra n 1,* at [14].

scenario of an employee orally agreeing to a proposal to vary the contract when he did not actually have such authority.[61]

33. However, it should be noted that the above-mentioned reasons are most cogent where both parties are of equal bargaining power. A different situation, *e.g.* a business-consumer relationship or standard form contract where the NOM clause might be a standard term in small print, might call for a different treatment of NOM clauses. Notwithstanding the disparity in bargaining power, it is submitted that the above-mentioned reasons still hold water, unless the inclusion of NOM clause amounts to unconscionable conduct on the part of the commercial entity.

VI. Conclusion

34. Parties are free to impose obligations between themselves by way of contract. Thus, once a NOM clause finds its way into a contract, both parties are bound by the formal requirements set out by the clause. Parties who prefer a greater degree of flexibility in modifying their contracts should have negotiated to not include the NOM clause in the first place.

35. The UKSC's position on enforcing NOM clauses ought to be welcomed. The *Rock v MWB* decision will encourage contracting parties to make better decisions as to whether the inclusion of such a clause best serves their commercial interests while upholding party autonomy.

[61] *Rock v MWB (UKSC), supra n 1,* at [12].