**The legal effect of no-oral modification clauses:**
***Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] SGCA 43**

## I. Executive summary

This case concerns an agreement for the sale and purchase of shares which had been orally rescinded (*ie* set aside and treated as if it had never existed) by mutual agreement between the signing parties. The question was whether this rescission could actually be given effect, given that the contract contained a no-oral modification ("**NOM**") clause,[1] which expressly prohibited any "variation, supplement, deletion or replace of or from" the agreement unless made in writing and signed by or on behalf of each party.

The Court of Appeal ("**CA**") answered in the negative. It held that the NOM clause did not apply to a rescission of the contract, and that on the facts, the contract had in fact been orally rescinded.

As the case was decided on this point, it was not necessary to determine the legal effect of NOM clauses in general. However, as a five-judge panel had been specially convened to hear this issue, and both parties had made submissions on this point, the CA also made several provisional observations on NOM clauses in *obiter*.[2] After exploring three differing schools of thought, it showed preference for the approach endorsed in the earlier case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979: a NOM clause merely raises a *rebuttable presumption* that in the absence of an agreement in writing, there would be no variation of the contract. However, compelling and cogent evidence proving the oral variation must be provided to rebut the presumption that there was no variation of the contract. While the CA's observations were not binding precedent, they would be of significant value to future courts in deciding similar situations.

## II. Material facts

Charles Lim Teng Siang ("**Lim**") and his mother entered into a sale and purchase agreement ("**SPA**") to sell shares to Hong Choon Hau ("**Hong**") and Tan Kim Hee ("**Tan**"). The transaction was never completed, with Lim bringing a suit against Hong and Tan more than three and a half years after the "**Completion Date**" of the SPA.

Before the High Court ("**HC**"), Hong and Tan claimed that the SPA had been orally rescinded (*ie* set aside) by mutual agreement over a telephone call on 31 October 2014, and that in any case, Lim was estopped (*ie* prevented)[3] from enforcing the SPA. Lim denied that such a rescission occurred, or that he was estopped from enforcing the SPA. The HC held in favour of Hong and Tan on the grounds that the SPA had been rescinded. As the case was decided on this point, the issue of estoppel was not dealt with.

On appeal to the CA, Lim raised a new argument that even if there had been an oral rescission, it was invalid pursuant to clause 8.1 of the SPA, which stated that "No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless

[1] Generally, NOM clauses seek to invalidate contractual modifications except when these modifications are made in writing.
[2] *Obiter dicta* refers to statements made in a judgement which are incidental to or go beyond the main points necessary for deciding the case at hand. They have persuasive effect, but are not binding on subsequent courts.
[3] Generally, estoppel is a legal doctrine which prevents a person from arguing something that contradicts what he or she previously said or promised, as it would be unfair to allow him or her to do so.

made in writing and signed by or on behalf of each Party." Lim argued in the alternative that in any case, there had been no mutual agreement to rescind the SPA.

## III. Issues

The CA considered four main issues:

*A.* First, whether clause 8.1 of the SPA applies to an oral rescission;
*B.* Second, if it does, what is the legal effect of clause 8.1 on an oral rescission;
*C.* Third, whether the HC had erred in finding that there was an oral agreement between Lim, and Hong and Tan, to mutually rescind the SPA; and
*D.* Fourth, whether Lim was estopped from enforcing the SPA.

### *A. Whether clause 8.1 of the SPA applied to an oral rescission*

The CA held that clause 8.1 did not apply to a rescission of the contract. This was self-evident from the plain language of the clause itself, which referred to any oral "variation", "supplement", "deletion" or "replacement" of the contract. Instead, where parties intend for a NOM clause to exclude rescission, this can be explicitly provided for. The CA raised the example of section 2-209 of the Uniform Commercial Code,[4] which expressly refers to "rescission".

### *B. The legal effect of clause 8.1 on an oral rescission*

Though it concluded that clause 8.1 was not engaged in the present case, the CA nonetheless decided to express a number of provisional observations on the legal effect of NOM clauses such as clause 8.1.

Preliminarily, the CA recognised that there were legitimate commercial reasons as to why parties may choose to include a NOM clause in their contract: (a) to prevent parties from informally undermining written agreements, such as by raising an alleged defence of oral modification in order to prevent summary judgment;[5] (b) to ensure the certainty of the terms and existence of any modification, since oral discussions are difficult to prove and may easily cause misunderstandings; and (c) such formality makes it easier for corporations to police internal rules which restrict their employees' authority to agree to any variation.

The CA noted three schools of thought regarding the legal effect of a NOM clause:

> 1. Under the approach taken by the majority in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21 ("***Rock Advertising UKSC***"), with the grounds delivered by Lord Sumption, a NOM clause will be given full effect such that any subsequent modification to the contract is deemed invalid unless it complies with the formalities stipulated in the NOM clause.
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> 2. Under the approach taken by the minority Lord Briggs in *Rock Advertising UKSC*, a NOM clause will be given full effect unless the parties had orally agreed to depart from a NOM clause – such an agreement will be treated as valid. An oral agreement to depart from a NOM clause can be express or by necessary implication, but should not be lightly inferred where parties merely agree to an oral variation without express reference to the NOM clause. A strict test should be applied before the court finds that parties had, by necessary implication, agreed to depart from the NOM clause.

[4] A set of laws governing commercial transactions in the United States.
[5] Generally, summary judgment refers to a judgment entered by a court without need to proceed to a full trial, on the basis that the defendant has no real defence to the claims being brought.

3. A separate approach was endorsed by the Singapore Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("***Comfort Management***"), also in *obiter*: a NOM clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation. This was also the approach rejected in *Rock Advertising UKSC*.

The CA expressed its preference for the third approach under *Comfort Management*.

*1. Problems with Lord Sumption's approach*

The CA noted several issues with Lord Sumption's approach. *First*, Lord Sumption had wrongly treated the approach in *Comfort Management* as effectively overriding parties' intentions.[6] Parties' intentions are not invariably fixed to the time when the contract was entered into. As parties are ultimately the masters of their own contract, should they orally agree to do away with or depart from a NOM clause, the court should uphold their autonomy to do so.

Accordingly, Lord Sumption's approach conflated the autonomy of an *individual* party with the parties' *collective* autonomy. While the autonomy of an individual may be bound by the terms of a contract, the parties as a collective retain the power and autonomy to vary their agreement so long as they *jointly* agree to do so. In conflating the two, Lord Sumption erroneously suggested that once parties had agreed to a certain set of rules, they could not together agree to change those rules. This failed to recognise that even if parties had initially agreed to certain rules, they could subsequently agree to jointly amend those rules. Instead, the CA held that an initial limitation imposed by a NOM clause could be unwound by the same parties at a later date. The courts could recognise the more recent intention of the parties to (orally) vary a contract, despite their earlier agreement to the contrary.

*Second*, Lord Sumption's approach had potentially far reaching consequences. Taken to its logical conclusion, it would result in the courts enforcing a clause which stipulated that a contract can never be varied at all, thus invalidating all future amendments to the contract. This would be an unjustifiable restriction on the parties' collective autonomy to amend their contract.

*Finally*, Lord Sumption's approach was overly concerned with contractual certainty. It sought to redress the difficulty in proving the existence and terms of an alleged oral variation by excluding the oral variation altogether, even when it has been mutually agreed and proven. However, this was an evidential difficulty which could be addressed by evidential principles instead of contractual ones. Where an oral variation was already proven, there was simply no evidential burden to speak of.

*2. Problems with Lord Brigg's approach*

Lord Briggs' approach accorded with the CA's view insofar as it respected and upheld the parties' collective autonomy to depart from NOM clauses, if they did so by: (a) express agreement; or (b) necessary implication.[7]

[6] Generally, in contract law the parties' intent with regard to the contract is a crucial component of contractual interpretation.

[7] Generally, a court will only imply a term into a contract if such term is so necessary (in the business or commercial sense, to give the contract efficacy) that both parties must have intended its inclusion in the contract.

However, the CA recognised that this approach was too narrowly formulated: a court will not imply that parties had intended to depart from the NOM clause unless it is proven that the parties had expressly intended to do so, or unless such implication is necessary. Such situations are rare, with the result that a NOM clause will practically never be done away with. Parties are unlikely to enter into an oral agreement despite knowing of the NOM clause, because they would be aware that such oral agreement is or could potentially be invalid. Instead, if the parties were cognisant of the formality requirements, they would have simply complied with them.

Further, under Lord Briggs' approach, an intention to depart from a NOM clause is only inferred where the parties had to perform their modified obligations "urgently" and did not have the time to formalise the oral variation. However, if performance were indeed urgent, the parties would have performed the contract as varied, and would in turn have relied, to their detriment, on the oral variation. This gives rise to a claim in estoppel. Therefore, in practical terms, the Briggs approach may not meaningfully add to the requirements under the doctrine of estoppel.

*3. Preference for the approach in* Comfort Management

The CA instead preferred the wider test, as explained in *Comfort Management*, as to when it can be necessarily implied that the parties intended to depart from a NOM clause. The test is whether at the point when the parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.

Under this approach, the party alleging oral variation must rebut the presumption that there is no oral variation. This requires him to adduce compelling and cogent evidence proving an oral variation. This does not operate as a third standard of proof, but reflects the inherent difficulty in proving such an oral variation in the face of their express agreement to the contrary as prescribed in the NOM clause. Once the burden of proof is discharged, the NOM clause ceases to have legal effect because it is a *collective* decision of both parties to the contract.

### *C. Whether there was in fact an oral rescission of the SPA*

The CA affirmed that there was an oral rescission for several reasons.

Firstly, the Completion Date had passed without the SPA being completed, and for more than 3.5 years thereafter, Lim had not served any notice to complete on Hong and Tan. No satisfactory explanation was offered for his complete inaction. Although Lim claimed to have continually attempted to persuade Hong and Tan to complete the transaction, there was not a single shred of evidence supporting this. In an age where communications are often through digital devices, the absence of any document evidence was a glaring omission, suggesting that Lim had not attempted to persuade Hong and Tan to complete. Further, Lim's testimony were fraught with inconsistencies and internal contradictions.

Secondly, Lim's contemporaneous conduct in or around 31 October 2014, the alleged date of the oral rescission, supported the claim of oral rescission. Lim was "desperately trying to make" Hong and Tan complete the SPA prior to and up until 31 October 2014, but had gone radio silent after 31 October 2014. In the absence of contrary explanations, this suggested that it was due to the mutual rescission of the SPA on 31 October 2014.

Thirdly, Hong had confronted Lim on 31 October 2014 concerning certain announcements which made Hong and Tan doubtful about the ownership of the shares. This made it unlikely for them to have agreed to pay a premium for the shares.

Finally, although the alleged oral rescission was never mentioned in any written correspondence, this must be weighed against the complete and inexplicable silence/inaction on the part of Lim over a period of 3.5 years in failing to seek the completion of the SPA. Hong and Tan may have saw the need to document the rescission precisely because Lim had never sought to complete the SPA. The CA held that Lim's inaction was far more damaging and more consistent with the agreed rescission of the SPA.

Accordingly, the CA held that the parties had orally agreed to a mutual rescission of the SPA via the telephone call on 31 October 2014.

### *D. Whether Lim would have been estopped from enforcing the SPA*

For completeness, the CA made brief observations on the issue of estoppel. All three schools of thought on the legal effect of a NOM clause recognise estoppel as an exception to the enforcement of NOM clauses.[8]

The CA held that even if the oral rescission was invalid due to the NOM clause, Lim would have been estopped from enforcing the SPA. The oral agreement to rescind the SPA was a clear and unequivocal representation by Lim that he would not enforce the SPA. Hong and Tan relied on this representation and decided not to complete the SPA. This caused them detriment as the publicly listed share price had substantially plummeted from the Completion Date price.

## IV. Lessons learnt

This case highlights the importance of ensuring that NOM clauses are properly drafted in scope, in order for intended contractual modifications to be caught by the plain wording of a NOM clause. As a further implication, given that compelling and cogent evidence is required to prove an oral variation, it would be advisable for any variations in the contract to be concretised in writing, thus avoiding the difficulties of discharging this seemingly high evidential burden.

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[8] In this regard: a party (*X*) cannot enforce a NOM clause if the other party (*Y*) had acted in reliance on the oral modification to his (*Y*) detriment. This is because it would be unjust or inequitable to permit a party (*X*) to abandon a position which he previously represented to the other party (*Y*).