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Oral variation of contracts: a gentleman's word really is his bond.

By Susie Dryden

The standard, boiler plate clauses contained in contracts are often given much less thought than the main terms by lawyers and contracting parties alike. Clauses which mandate that only written variations are acceptable aim to promote certainty as to the terms of the relationship; and to prevent a party to a contract unintentionally amending contractual terms whilst discussing the terms with the other party.

However following the case of *Globe Motors Inc. and others v TRW Lucas Verity Electric Steering Limited and another [2016] EWCA Civ 396* parties will need to take care to avoid unintentionally agreeing an amendment to their contract and should not assume a "no variation" clause will protect them.

The law prior to Globe Motors was found in two distinct cases, which had two very different outcomes. In *United Bank v Asif (unreported, 11 February 2000, CA)*, the Court of Appeal endorsed the decision of the Court at first instance in finding that a contract containing an anti-oral variation clause could only be amended by a written document and therefore any oral agreement the parties had made following the entry into the contract had no legal effect. Conversely, two years later in *World Online Telecom v I Way [2002] EWCA Civ 413*, Sedley LJ found that the question of whether parties could amend or override a clause in an agreement (which required any variations to be made in writing) by agreeing orally was unsettled and remarked "in a case like the present, the parties have made their own law by contracting, and can in principle un-make or re-make it". The law was left in this unsatisfactory position until the Court of Appeal judgment in the Globe Motors case was handed down on 20 April 2016.

The Court of Appeal decision in Globe Motors inc v TRW Lucas Verity Electric Steering Ltd and another [2016] EWCA civ 396

The contract the subject matter of the dispute in the Globe Motors case included the following clause:

"[this agreement] can only be amended by a written document which (i) specifically refers to the provisions of this Agreement to be amended and (ii) is signed by both parties"

The Court of Appeal concluded that such clauses cannot have the effect of restraining the parties' freedom to agree an amendment by for example oral agreement. Instead, the existence of a no variation clause will be a factor the Court takes into account when assessing whether the parties intended to vary the contract. Such no variation or anti oral variation clauses are standard "boiler plate" clauses in many English contracts.

The facts in the case were as follows. TRW produced electric power assisted steering systems for a number of car manufacturers which were assembled from components bought from manufacturers. TRW entered into an exclusive supply agreement with Globe Motors, under which TRW had to purchase all its electric motors from Globe Motors and Globe Motors could not sell the same parts to anyone else. Under the agreement TRW reserved the right to propose engineering changes, namely changes in the specifications or other requirements relating to "the products". The agreement was to continue for the lifetime of each of the relevant car building

> *"A party wishing to argue that a contract has been varied orally or by conduct will still need to prove that both parties intended to alter legal relations."*

platforms. Between 2005 and 2015 TRW purchased over 3 million improved second generation motors, known as "Gen 2" motors, from another manufacturer. Globe Motors argued that it could and would have manufactured the new motors by making engineering changes to its first generation motors, and that the Gen 2 motors were within the class of "products" in the agreement so their purchase from the other manufacturer was in breach causing it loss and damage. TRW maintained that the Gen 2 motors were different from the earlier motors and Globe Motors could not have produced them within a reasonable time by making engineering changes. The Court at first instance held that the term "engineering changes" was not a technical term and did not have a single universal meaning in the motor industry, but it was a concept of relatively clear general meaning. The Court concluded that the changes that Globe Motors claimed it could have made to the Gen 1 motor in order to manufacture its own Gen 2 motor were "engineering changes" for the purposes of the agreement and that Globe Motors would have made the changes within a timescale acceptable to TRW.

TRW's appeal was formed of two grounds: the first being that the judge had erred in construing the agreement to include the Gen 2 motors within the definition of "products"; and the second that it had been open to the parties to vary the agreement orally or by conduct.

TRW succeeded in the appeal, the Court of Appeal overturning the High Court's judgment on the grounds that the new motors were a different product, and therefore not covered by the exclusivity clauses in the agreement. Although there were "undoubted attractions in achieving a result which prevents the buyer from walking away from the agreement", there was no basis in the contract for extending the definition of 'products' beyond those mutually agreed by the parties, according to Lord Justice Beatson.

In view of the conclusion on ground one, it was not necessary to decide whether TRW also succeeded on its other grounds. However, the Court of Appeal addressed the second ground on an obiter basis. Whilst therefore not a binding precedent, three senior judges heard full arguments and reached agreement and hence the decision is likely to be followed in future when applying English law. In doing so it resolved the tension between the terms the contracted parties had executed and the freedom of those parties to change the terms thereafter. It concluded that even if the contract contained a clause requiring any amendment to be in writing and be signed by both parties. That did not prevent them from later making a new contract varying the contract by an oral agreement, or by conduct. The governing principle was freedom of contract. The decisions in United Bank and World Online were inconsistent and, following the rules in *Young v Bristol Aeroplane Co Ltd [1944] K.B. 718*, the court was not bound by either. Unlike the situation in United Bank, the point had been fully considered in the World Online case and that decision was preferred.

The commercial reality

During the Globe Motors judgment, Underhill LJ in particular was keen to state that such variation clauses were not worthless in contracts, but that the decision was designed to reflect the commercial reality of contracting in a modern age, where parties will often need to modify their agreements. However, the presence of a no variation clause will remain relevant to the question of whether the contract has been validly amended. A party wishing to argue that a contract has been varied orally or by conduct will still need to prove that both parties intended to alter legal relations. Instead, Underhill LJ reflected, in cases where oral or conduct based variations are contended, the Court will require strong evidence or "evidence on the balance of probabilities which establishes that such a variation was indeed concluded" before a finding that a clause had been varied through oral agreement or conduct.

In considering an anti-variation clause, it would seem, therefore, that a prudent draftsman would still seek to include such a clause in commercial contracts, with the aim of encouraging the parties to document variations to the contract formally, however be alive to the prospect and advise his clients that the conduct and conversations parties have subsequently may indeed operate to vary the agreement.

The decision in Globe Motors was approved in the latter case of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553.*

Susie Dryden is an experience commercial litigator who heads up a three-partner team in Blake Morgan's Southampton office. Over a number of years she has advised on a broad range of matters, often in relation to high-value contractual disputes, including a successful defence for NHS England against allegations of breach of statutory duties. Susie has also acted for many years as an Intervention Agent for the Solicitors Regulation Authority into interventions into solicitors' firms. Chambers UK recognises Susie as "...a very personable and knowledgeable litigation lawyer" . She is also an accredited mediator.