"NO ORAL VARIATION" CLAUSES: ARE THEY WORTH THE PAPER THEY'RE WRITTEN ON?

On 20 April 2016 the Court of Appeal handed down judgment in the case of ***Globe Motors Inc & Ors v TRW Lucas Varity Electric Sterring Ltd & Anr*** [2016] EWCA Civ 396. The case is of interest not for its ratio, but for the obiter discussions of other matters along the way - particularly the detailed (albeit ultimately obiter) consideration given by all three judges to the question of whether a clause in a contract prohibiting variations other than in signed writing did in fact do what it said on the tin.

In brief, the dispute revolved around a long-running exclusive supply agreement between TRW Lucas, a manufacturer power steering systems, and Globe Motors, which supplied TRW Lucas with electric motors and other parts needed for its products. In 2014, a High Court judge found that TRW Lucas had breached this agreement by instead purchasing 'next generation' motors from DEAS Emerson, a firm that it bought in 2006. The Court of Appeal overturned the High Court's judgment on the grounds that the new motors were a different product, and therefore not covered by the exclusivity agreement.

TRW Lucas argued that Globe's Portuguese subsidiary, which actually supplied it with the motors, was not a party to the agreement and therefore was not entitled to sue it for breach of contract. Globe's position was that by dealing directly with the subsidiary, TRW Lucas had effectively varied the agreement regardless of a provision in the contract which stated that any variation had to be made in writing and signed by both parties

As the Court of Appeal recognized, there were substantially inconsistent decisions at Court of Appeal level on this issue. In ***United Bank Ltd v Asif***[1] , Thorpe and Mantell LLJ upheld the summary judgment granted initially by a Master (and upheld by Wright J) on the basis (inter alia) that where a deed of guarantee contained an 'anti- oral variation clause' no oral variation of the written terms could have any legal effect. However, in ***World Online Telecom Ltd v 1-Way*** **Ltd**[2]. Sedley LJ held (albeit without reference to *United Bank*) that the question whether parties could orally override such a clause was sufficiently unsettled to be unsuitable for summary determination and that *"in a case like the present the parties have made their own law by contracting, and can in principle un-make or remake it".* Indeed, in the trial of that matter in the Commercial Court, Steel J held that, notwithstanding the clause, the conditions in the contract in the case had been varied by oral agreement[3]. Gloucester LJ also tended to the view that there could be an oral variation notwithstanding such a clause (obiter) in *Energy Venture Partners Ltd v Malabou Oil & Gas Ltd*[4] and there are a number of other decisions in support at first instance and in other jurisdictions.

Which approach. then, is to be preferred?

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[1] unreported
[2] [2002] EWCA Civ 413
[3] see [2004] EWHC 244.
[4] [2013] EWHC 2118 at [271]-[274],

It was argued on behalf of TRW Lucas that anti oral variation clauses promote certainty and avoid false or frivolous claims of an oral agreement, setting a useful evidential threshold. Further, if Parliament can stipulate for formality (eg for guarantees, dispositions of an interest in land etc), despite the potential injustices and hard cases that can result, how much more should the parties themselves, by consent, be able to adopt such a regime (particularly where the doctrine of estoppel provides a safety net where detriment is shown to result from a failed oral variation). In the leading judgment, Beatson LJ gave this argument short shrift - he considered that while there are common law and statutory restrictions on contracting parties, these are the exception to the general principle in English law that the contractual parties have freedom to agree whatever terms they chose to undertake and can do so in a document, by word of mouth or by conduct. In principle therefore the fact that a written contract contains an anti oral variation clause should not prevent the parties to it from later making a new contract varying the written one by an oral agreement or by conduct.

But what of concerns about manufactured allegation of oral agreements? Beatson LJ recognized that difficulties of proof may arise whenever it is claimed that a contract has been made orally or by conduct, but considered that evaluating evidence on this sort of issue is the day to day lot of the trial judge. It is only where the evidence on the balance of probabilities establishes that an oral variation was indeed concluded .that such a finding will be made,. In reality therefore the only danger is of unmeritorious claims slipping through at summary judgment stage.

Having decided as a matter of precedent he was not constrained by precedent to follow either previous decision of the Court of Appeal, but could essentially chose which he preferred, he preferred the approach in *World Online Telecom*.

The judge at first instance had ruled that the conduct of the parties was sufficient to vary the agreement; and Lord Justice Beatson said that there was "ample evidence" to justify that conclusion, since there had been "*open, obvious and consistent" dealings between TRW Lucas and the subsidiary over a considerable period, to the extent that "there was no other explanation but that the parties had intended to add [the subsidiary] as a party to the agreement*".

Underhill LJ agreed, although more hesitantly[5], it seeming to him to be entirely legitimate that the parties to a formal written agreement might wish to be able to effectively insist that subsequent variations be agreed in writing not least as a protection against the subsequent raising of ill founded allegations of variation, which might make the obligations under the contract more difficult to enforce (most obviously by making it more difficult to obtain summary judgment). However, he concluded that, even if it were desirable to treat provisions of that kind as entrenched, the could not see a doctrinally satisfactory way of achieving that result.

[5] see para [116]

Moore-Bick LJ was less hesitant. In his view the governing principle was one of party autonomy such that the parties are "*free to include terms regulating the manner in which the contract can be varied,*

but just as they can create obligations at will, so they can discharge or vary them, at any rate where to do so would not affect the rights of third parties. If there is an analogy with the position of Parliament, it is that Parliament cannot bind its successors".[6] While he could see the force of the suggestion that there could be practical benefits in being able to restrict the manner in which an agreement is varied, the fact that as a matter of principle the parties cannot effectively tie their hands and remove from themselves the power to vary the contract informally need not be a matter of concern given that nothing can be done without the agreement of both parties, "*and if the parties are in agreement, there is no reason why that agreement should not be effective*". [120].

Although obiter dicta, this decision was very recently followed by the Court of Appeal in ***MWB Buisiness Exchange Centres Ltd v Rock Advertising Ltd***[7] with Kitchen LJ (with whom LLJ McCombe agreed) stating at paragraph 34 that , given that the relevant principles, the material policy considerations, the earlier authorities and the issue of precedent were considered in depth and with the benefit of very full argument in *Globe*, it would require a powerful reason for this Court now to come to a conclusion or adopt and approach which is different from that of all members of the Court in that case, and no such reason had been put forward. To his mind the most powerful consideration was that of party autonomy. While this case adds very little to *Globe* in terms of substantive reasoning on the issue of oral variations (rather adopting wholesale the reasoning of Beatson LJ), it does contain some interesting observations on consideration and the doctrine of practical benefit which are well worth a read.

So what of the anti oral variation clause? Does it add any value to an agreement? Well, perhaps - in the words of Underhill LJ in Globe[8] :"*In many cases parties intending to rely on informal communications and/or a course of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing both parties intended what was said or done should alter their legal relations; and there may also be problems about authority. Those difficulties may be significantly greater if they have agreed to a provision requiring formal variation*".

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[6] see para [119].
[7] [2016] EWCA Civ 553 (21 June 2016)
[8] at para [117]