Devonshires

Rock Advertising Limited V MWB Business Exchange Centres Limited

Caught between a Rock and a hard place?

The fact that the Supreme Court has upheld no oral modification clauses as meaning there cannot be an oral variation, shouldn't come as a surprise. It is what it says on the tin! However, this is not necessarily the end of the story…

The Case

In this case, Rock had entered into a contractual licence with MWB for office space in Central London. Rock eventually accumulated rent arrears but argued that the terms of the licence had been varied via a telephone call with MWB and that such amendment was effective notwithstanding the no oral variation provision contained in the licence. MWB disputed this alleged oral modification and treated the conversation as being part of continuing negotiations. It then terminated the licence, locked Rock out of the premises and sued for the outstanding rent arrears. Rock counterclaimed for wrongful exclusion and ultimately left the courts to decide the fundamental question at hand here:

"whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a "No Oral Modification" clause) is legally effective."

The Supreme Court found that the oral variation was invalid for want of the writing and signatures prescribed by the licence. It found that "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation".

Consequences for PFI/PPP Contracts

No oral modification clauses are commonly found in PFI/PPP contracts. Although such clauses are not a requirement under the Treasury's Standardisation guidance, they were required in other standard documents such as the Department for Health's Standard Form Project Agreement.

- Advice to all PFI operators and employers is therefore always to ensure that where service changes are required, the necessary variations should be agreed in accordance with the variation procedures in the contract.

- Where contract procedures are not followed, then the contract is not varied.

- However, that doesn't necessarily mean an Authority which has agreed to a service change can then claim damages for non-performance under the original specification of works. The law of equitable estoppel prevents a party from seeking to benefit in such circumstances. Note that the Supreme Court stated that where there is a No Oral Modification clause, something more that the informal variation itself would be required: "there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality".

- Further, where work is instructed without a written variation and undertaken then in addition to a claim under the contract, which then is not available, a quantum meruit claim can in certain circumstances be made for work done. This may be in the same amount.

So all is not doom and gloom and in our view nothing has materially changed in consequence of this case.

For more information on compliance with PFI contracts, variations and DRP please contact: Paul Buckland (paul.buckland@devonshires.co.uk) (020 7880 4346), Robert Turner (robert.turner@devonshires.co.uk) (020 7880 4238) Or Philip Barden (philip.barden@devonshires.co.uk) (020 7880 4280)

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