

CONSTRUCTION : BULLETIN

Can A “Variations Must Be In Writing” Clause Be Overcome By An Oral Agreement?

It is very common for contracts to contain a clause which provides that any variation to the terms of the contract must be agreed by the parties in writing. It is also very common for contracting parties to overlook these “variations must be in writing” clauses and agree contract variations informally without following the correct procedure. This can often lead to a dispute about whether or not the variation to the contract is binding.

The law on this issue has been unclear for a long time due to conflicting Court of Appeal decisions. However, the point was clarified in the recent Court of Appeal case of *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*.

Background

Globe Motors Inc (‘Globe’) and TRW Lucas Varity Electric Steering Ltd (‘TRW’) entered into an agreement dated 1 June 2001 under which Globe was to supply TRW with electric motors forming part of the electric power steering systems in cars. After a number of years, TRW began purchasing a different type of electric motor from a rival supplier. Globe alleged that TRW was in breach of the agreement for failing to purchase the motors from Globe.

A dispute arose about whether the different type of electric motor fell within the scope of the exclusive agreement between the parties and should have been purchased from Globe.

One of the many issues forming part of the dispute was whether the agreement had been informally varied by the parties so as to introduce a subsidiary of Globe (known as ‘Globe

Porto’) as a further party to the agreement.

TRW argued that Globe Porto could not have been informally added as a party to the agreement because clause 6 provided:

“This Agreement, which includes the Appendices hereto, is the only agreement between the Parties relating to the subject matter hereof. It can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties.”

TRW and Globe had not complied with clause 6 in order to introduce Globe Porto as a party to the agreement.

In the High Court, the judge decided that TRW was in breach of the agreement for purchasing the new type of electric motors from a third party. The judge also found that Globe Porto had become a party to the agreement by oral/informal variation.

TRW obtained permission to refer the dispute to the Court of Appeal on a number of grounds.

The Court of Appeal decision

The Court of Appeal found that the High Court judge had wrongly interpreted the agreement and TRW was not in breach for purchasing a new type of electric motor from a third party.

However, the key aspect of the Court of Appeal’s decision is the clarification of the law on whether a “variations must be in writing” clause can prevent informal variations from taking effect.



Hawkswell Kilvington

Solicitors to the
Construction and
Engineering Industries

Hawkswell Kilvington

17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

28 Queen Street
London
EC4R 1BB

T: 01924 258719
E: enquiries@hklegal.co.uk
W: www.hklegal.co.uk

Previous case law

There have previously been two conflicting Court of Appeal decisions on this issue.

In the case of *United Bank v Asif* (2000), the Court found that a “variations must be in writing” clause in a deed of guarantee prevented an oral agreement to vary the terms of the guarantee from taking effect. It was alleged that a bank employee had agreed to vary the guarantee by extending the time limit for payment. The Court refused to accept that a bank employee could simply disregard the express contractual requirement for variations to the guarantee to be recorded in writing.

In *World Online Telecom Ltd v I-Way Ltd* (2002), the Court of Appeal took the opposite view. This case was an appeal against the lower court’s refusal to grant summary judgment on the basis of the argument that a “variations must be in writing” clause prevented an oral variation. Summary judgment will only be awarded in an “open and shut case” where a claim or defence has no real prospect of success. The Court of Appeal also declined to give summary judgment on the basis that the “variations must be in writing” issue was not a settled point of law and required detailed consideration. The dispute then went to a full trial in the Commercial Court, where it was held that the contract had been varied orally notwithstanding the “variations must be in writing” clause.

There have subsequently been other cases in the lower courts (such as *Energy Venture Partners Ltd v Malabour Oil and Gas Ltd* (2013)) where judges have acknowledged the principle that an oral variation can be effective notwithstanding a “variations must be in writing” clause. However, the decisions of the Court of Appeal take precedence over these cases.

Clarification of the law

The general principle of English law is that contracting parties are free to agree whatever terms they wish, and can do so in writing, orally or by conduct/course of dealing.

Whilst the Court of Appeal judges acknowledged that there would be some practical benefits if contracting parties could restrict the manner in which their contract can be varied, they were unable to reconcile these potential benefits with the fundamental principle of freedom of contract. Consequently, the Court of Appeal found that the fact that the agreement contained a “variations must be in writing” clause did not prevent the parties from later varying the contract by an oral agreement and/or by conduct. Essentially, if the parties have reached an agreement about something, there is no reason why that agreement should not be effective just because an earlier agreement requires subsequent agreements to be in writing.

Whilst the Court recognised that if “variations must be in writing” clauses are not binding, this could potentially encourage parties to manufacture allegations of an oral variation in order to support their position, the Court did not consider this was likely to cause serious issues. Where an oral variation is alleged to have occurred, the facts will have to be determined by the judge based on the evidence. Arguments about oral variations which do not stand up to scrutiny will not succeed.

The Court commented that “variations must be in writing” clauses do still have a value because they make it harder for the contracting parties to prove that an oral variation has been agreed. This is because the inclusion of a “variations must be in writing” clause creates a stronger presumption that the parties did not intend to vary the contract orally. Compelling evidence will be needed to overcome this presumption.

Strictly speaking, the Court of Appeal did not need to decide the question about the “variations must be in writing” clause because TRW had already won their appeal on the breach of contract point. However, the Court considered that it was important to express a view on this issue because of the previous conflicting cases. Whilst the Court’s views on this issue are therefore non-binding, they will

almost certainly be taken into account if the issue comes before the courts again in the future. It is very difficult to see another court coming to a different conclusion on this issue.

Analysis

This case provides important clarification on an issue which has long given rise to confusion. It is now quite clear that the inclusion of a “variations must be in writing” clause does not prevent contracting parties from informally agreeing variations to the terms of their contract.

Nevertheless, oral agreements should always be avoided because of the difficulty in proving their terms. Contracting parties should certainly not be encouraged to start varying their contracts informally to avoid paperwork, as this can cause real evidential difficulties if a dispute arises. A party may find that the terms they thought had been informally agreed cannot be proven and are not binding.

With this in mind, it is still worth including a “variations must be in writing” clause in contracts to help remind the parties to document variations properly and to act as a barrier against spurious claims about oral variations.

CONTACT DETAILS

Hawkswell Kilvington Limited

17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

28 Queen Street
London
EC4R 1BB

T: 01924 258719

W: www.hklegal.co.uk

E: enquiries@hklegal.co.uk

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