Commercial Litigation Evening – seminar

Chair: Philip Moser QC

Speakers:

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MONCKTON CHAMBERS

CONTRACTUAL VARIATION

BETWEEN A ROCK AND A HARD PLACE

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ROCK ADVERTISING LTD V MWB BUSINESS EXCHANGE LIMITED [2018] UKSC 24

"This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

THE PRINCIPLE

- In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation. [10]
- Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.[11]

IS THIS CASE LIMITED TO ORAL MODIFICATIONS?

Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional. It raises two of them. The first is 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. [1]

ESTOPPEL EXCEPTION

This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation….I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself [16]

UK Learning Academy Ltd v The Secretary of State for Education [2018] EWHC 2915 (Comm)

Lord Briggs, in that case, whilst reaching the same conclusion about the outcome of the appeal as the other Supreme Court Justices, but for different reasons, expressed the view (particularly at [31]), *effectively*, that the court ought only to find that a contracting party is estopped from relying on a No Oral Modification clause if that party must necessarily have had the clause in mind when it indicated (or purportedly indicated) that it intended not to rely on it. [261]

UK Learning Academy Ltd v The Secretary of State for Education [2018] EWHC 2915 (Comm)

I have carefully considered all the evidence to which I was referred. There is nothing, in my view, which amounts to an unequivocal statement or other representation by LSC that it would not rely on the 2008 Yorkshire Contract formalities in this case (that is, that it would not rely on the No Oral Modification clauses). All that UKLA can point to are, on its case, repeated promises, not satisfying those formalities, by LSC that it would not rely on the MCV in relation to learners who started before 1 April 2009. The fact that any such promises were repeated does not establish the "something more" than those promises themselves that Lord Sumption made clear would be required for an estoppel. [262]

FURTHER EXAMPLE

Axis Fleet Management Ltd v Rygor Group Services Ltd [2018] EWHC 2276 (QB)

Battle of the Forms

IMPLICATIONS

A new contract but on what terms?

IMPLICATIONS

Restitution? – And no terms…….

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Russia and CIS law: Abuse of rights – a new law of equity?

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Abuse of rights – Article 10 of the Civil Code

Article 10. Limits on the exercise of civil rights.

1. *The exercise of civil rights exclusively with the intent of causing harm to another person, actions in circumvention of the law with an unlawful aim and other [forms of] knowingly bad faith exercise of civil rights (abuse of right) are not permitted.*
   It is not permitted to use civil rights for the purpose of restricting competition, as well as abuse of a dominant position in the market.
2. *In the event that the requirements envisaged by paragraph 1 of this article are not observed, the court, arbitrazh court or arbitral tribunal, taking into account the nature and consequences of the abuse committed shall refuse to protect the person's right in part or in full, as well as take other measures prescribed by law.*
3. *In the event that the abuse of right is manifested in actions in circumvention of the law with an unlawful aim, then the consequences prescribed by paragraph 2 of this article shall apply unless other consequences for such action are prescribed by this Code.*
4. *If an abuse of right has resulted in the breach of another person's rights, that person shall be entitled to claim compensation for losses caused thereby.*
5. *The good faith of participants in civil legal relations and the reasonableness of their actions is presumed."*

Origins

Former USSR states – Romano-Germanic system

- CIS Model Civil Code
- Abuse of rights adopted from the *Schikaneverbot* rule in the German Civil Code
- Different levels of protection in CIS countries

<u>Model Code in full (w/cause of action)</u>

- Belarus, Kyrgyzstan

<u>Shield only</u>

- Armenia, Kazakhstan, Russia (now w/cause of action), Tajikistan, Uzbekistan, Turkmenistan, Ukraine

<u>Principle only - no shield, no sword</u>

- Azerbaijan, Moldova

<u>Non-Model Code systems</u>

- Estonia, Georgia, Latvia, Lithuania

1st decade – 1995-2005

- Seldom used - limited primarily to malicious acts in spirit of origins
- Appearance in tax cases

Ministry of Taxes and Duties Ref, Constitutional Court, 25 Jul 2001, 138-O

Constitutional Court disallowed defence based on a strict interpretation of the law where this was being invoked in bad faith – taxpayer had issued bank instruction knowing bank was insolvent and that funds would not reach the tax authority

- Applied liberally (and controversially) in Yukos case
- *Rosneft v. Yukos Oil Company* – set aside guarantees imposed on Yuganskeneftegaz by parent as 'not in its interests' (Federal Arbitrazh Court Moscow Circuit, 7 September 2006 N KG-A40/7419-06)

2nd decade – 2005-2013/2015

- **Used to defeat limitation defense**

OJSC Russian Railways v. LLC Bataysk Youth Housing Complex

CJSC Ineks Financial Industrial Company v. OJSC Svetlograd Elevator

- **Guidance to lower courts**

Information Letter of Supreme Arbitrazh Court no. 127 dated 25 Nov 2008

- **Creation of cause of action to invalidate transaction as a fraudulent transfer (actio pauliana) (similar to s. 423 Insolvency Act)**

Resolution of Plenary Supreme Arbitrazh Court dated 30 April 2009 N 32

- **Used to defeat defence of formal invalidity of contract**

Sberbank v. Artur T LLC and CJSC Neftekamsk Autofactory

- **Abuse of rights used to mount claim in tort**

Bakaleya-Torg-08 v. Lapidevskaya, Supreme Court

Post-reform – 2013 to present

Introduction of general duty of good faith – Article 1(3) of the Civil Code

Introduction of cause of action – Article 10(4) of the Civil Code

- **Formation of contracts**

  Article 432(3) of the Civil Code

  A party who accepts performance under a contract in full or in part or who otherwise confirms the operation of the contract is not entitled to seek a declaration that no contract has been formed if such a claim, taking into account the specific circumstances, would be contrary to the principle of good faith (Article 1(3)).

- **Validity of contracts**

  Article 166(5) of the Civil Code

  5. An claim that a transaction is invalid is of no legal significance if the person relying upon the invalidity of the transaction is acting in bad faith, in particular if his conduct after the transaction was entered into gave other persons grounds to rely upon the validity of the transaction.

The standard of good faith

Plenary Supreme Court Resolution No. 25 dated 23 June 2015:

When evaluating the actions of the parties as taken in good or bad faith, one must proceed from the conduct expected of any participant in civil relations that is taking account of the rights and legal interests of another party and assisting it, including in the receipt of necessary information."

Notwithstanding presumption of good faith, Supreme Court had held that the burden of proof can be reversed with an uncooperative defendant.

Elements of an abuse of rights

Elements –

- Exercise of substantive law rights
- Abusive purpose
- Malicious purpose
- Circumvention of the law with an unlawful aim
- Contrary to legitimate purpose
- Anti-competitive behaviour
- Other bad faith Minimum standard of conduct expected of others in business relations
- Includes deceit, concealment
- Presumption of good faith

Remedies

- Court refuses to protect right, cause of action in damages where harm caused

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Confining Compensation

The Supreme Court and recoverable loss

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A (Broadly) uncontroversial principle

'The rule of common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

Baron Parke, *Robinson v Harman* (1848) 1 Exch 850, 855

Has the claimant suffered any loss?

Swynson v Lowick Rose [2017] UKSC32

- *The claimant lending company made three loans to the borrower on account of negligent advice provided by the defendant accountants*

- *The borrower defaulted on the loans*

- *The claimant's principal acquired the majority beneficial ownership of the borrower, and advanced personal loans to the borrower to enable it to repay Swynson which it did.*

- *The borrower was unable to repay the claimant's principal*

Has the claimant suffered any loss?

Swynson v Lowick Rose [2017] UKSC32

Had Swynson suffered any recoverable loss?

Has the claimant suffered any loss?

Tiuta International Ltd v De Villiers Surveyors Ltd [2017] UKSC 77

- *Claimant lender brought claims against the defendant surveyors for negligently valuing a partially completed residential development over which the claimant proposed to take charge of a loan*

- *Two loan facilities were advanced by the lender on account of two different valuations*

Has the claimant suffered any loss?

- *There was no claim in respect of advances made under the first facility because (i) there was no negligence in making the valuation on which the first facility was advanced; and (ii) even if there had been, the advances made under that facility were in fact discharged out of the advances under the second facility, so there was no recoverable loss.*

- *The claim was limited to the advances under the second facility*

Has the claimant suffered any loss?

'*The basic measure of damages is that which is required to restore the claimant as nearly as possible to the position that he would have been in if he had not sustained the wrong. This principle is qualified by a number of others which serve to limit the recoverable losses to those which bear a sufficiently close causal relationship to the wrong, could not have been avoided by reasonable steps in mitigation, were reasonably foreseeable by the wrongdoer and are within the scope of the latter's duty*.'

- Lord Sumption at [6]

Credit for benefit?

"Two questions can arise. First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sum must be deducted from the former in assessing the damages."

- Lord Reid, *Parry v Cleaver* [1970 AC 1, 13

Credit for benefit?

'Leaving aside purely benevolent benefits, the paradigm cases are benefit under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant, for example insurance receipts or disability benefits under contributory pension schemes. These are not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral, for there may be analogous cases which do not exactly it into the traditional categories. But they are a valuable guide to the kind of benefits that may be properly left out of account on this basis'

- Lord Sumption, *Tiuta* at [12]

Credit for benefit?

The New Flamenco [2017] UKSC 43

- Repudiatory breach for early redelivery under charterparty by charterers in 2007
- No available substitute market
- Owners sold the vessel
- Financial crisis in 2008
- Had the vessel been sold in 2009 (the end of the charter period) it would have been worth USD 17m less than what it was in 2007

Credit for benefit?

The New Flamenco [2017] UKSC 43

- Owners claimed loss of earnings over the two year period; did credit need to be given for an avoided fall in the capital value of the vessel?

Credit for benefit?

- The fall in value was irrelevant [29]
- There needs to be a '*sufficiently close link between*' breach and benefit [30]
- There was no causative link between the breach and the avoidance of fall in the capital value of the vessel. The decision to sell was an independent commercial decision [32]

Credit for benefit?

- There is a difference between an occasion for the action which gives rise to a benefit and its legal cause [33]

- The sale was not an act of mitigation because it was incapable of mitigating the loss of the income stream [34]

Conclusions

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