Mind what you say

John de Waal QC advises on the enforceability of anti-oral variation clauses following decisions in *Globe* and *MWB*

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Property lawyers of all people will be aware of the tension between the need for commercial certainty, and hence the emphasis on the necessity for agreements for the disposition of interests in land to be in writing, and the occasional need to mitigate the harshness that such certainty can produce by allowing for oral agreements to take effect as actionable representations or estoppels when circumstances dictate that an unjust result should be avoided.

The jurisprudence in relation to entire agreement clauses is well established, but until recently the law in relation to anti-oral variation clauses has not been clear. Two decisions of the Court of Appeal have now considered such clauses: *Globe Motors Inc v TRW Lucas Varity Electric Steering* [2016] EWCA Civ 396, which concerned the supply of electric motors within the automobile industry, but in which the decision on this issue was strictly *obiter*, and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, which concerned managed office space let to an advertising company on licence, where the court's decision on such a clause led to the appeal being allowed.

Victory for certainty

In *MWB*, the relevant facts were that MWB terminated Rock's licence agreement for arrears of licence fees and other charges and locked the company out. Rock claimed that there had been an oral agreement between the Rock managing director, Mr Idehen, and MWB's credit controller, Miss Evans, which allowed Rock to reschedule the fees payable so it was not in arrears at the date it was evicted. Rock counterclaimed for loss and damage.

MWB's original written agreement contained the following provision at clause 7.6: 'This licence sets out all the terms as agreed between MWB and the 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 intended effect of such a clause is to prevent one or other of the parties asserting that the written agreement has been varied by subsequent oral agreement. But can it work? Before *Globe*, there had been conflicting decisions – both, interestingly, involving applications for summary judgments based on such anti-oral variation clauses, one successful and the other not as you might anticipate.

At the trial of MWB's claim for arrears of licence fee, the judge found that there had been an 'agreement' between the parties as Rock alleged, but held that clause 7.6 precluded an oral renegotiation of the licence fees payable and thus found for the claimant, and against Rock on its counterclaim. Victory for certainty, but perhaps a result which might have seemed unfair to Idehen.

Party autonomy

However, by the time *MWB* came on for hearing in the Court of Appeal, the decision in *Globe* had been handed down. In that case, the court acknowledged that anti-oral variation clauses promoted certainty and avoided false or frivolous claims. But, as Lord Justice Beatson, who gave the lead judgment, observed, as a matter of principle parties have freedom to agree whatever terms they choose to undertake and can do so by document, word of mouth, or conduct. Thus the parties can make a new contract by varying the existing contract by oral agreement. The most powerful consideration, he said, is party autonomy.

Or, to put it another way, while it is trite to say that two parties cannot make an agreement to agree, it is also now the case that they cannot make an agreement not to agree.

Following the reasoning in *Globe*, the court in *MWB* thus allowed the appeal.

Will this give rise to frivolous claims? The argument for certainty is of course, as always, a 'floodgates' argument. It is undoubtedly true that the reason that parties include such clauses is to promote such certainty. But as Lord Justice Underhill observed in *Globe*: 'Nor do I think this [result] need 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.'

In *MWB*, allowing the appeal gave effect to an agreement that had been entered into by two people who had authority to contract on behalf of their principals. Certainty here would have been certain injustice, and I suspect most readers will concur with the view that the decision reflects the flexibility of the common law and is to be applauded. As to unmeritorious claims, as well we know, they will be tested at trial, and if they lack merit, will fail.