Reports from the courts

Our regular round up of the court decisions of most interest to construction comes from Andrew Croft and Ben Spannuth of Beale & Company Solicitors LLP, including one highlighting the need for clear and broad termination provisions; and one confirming that oral agreements to vary contracts containing NOM clauses may not be effective.

Redbourn Group Ltd v Fairgate Developments Ltd
[2018] EWHC 658 (TCC); TCC; Mr Andrew Bartlett QC

Fairgate Developments Ltd (FDL) engaged Redbourn Group Ltd (RGL) to act as development manager and project manager in respect of a proposed development in Wembley (the Project) by way of a contract dated 26 February 2015 (the Contract) (despite RGL having commenced work in 2013 without a firm agreement on fees).

The Contract provided that RGL's fee was payable in stages (cl 4 and Sch 4). For Stages 3/4 (Development Management and Design for Tender and Build), £400,000 was payable in two instalments of £200,000, the first of which was 'to be paid monthly over the planning and initial design for tender period', the second of which was 'payable upon the granting of full planning consent, the planning application having first been approved by FDL'. RGL was also entitled to '[a] fee equal to 2% of the estimated build cost for the project' for Stage 5 (Project Management Fee) and to 'a fixed fee of £250,000' if the construction of the development completed on time and on budget.

FDL terminated the Contract during Stages 3/4. FDL alleged breach of contract by RGL because of failure to obtain planning permission. RGL sought to accept this as a wrongful repudiation of the Contract.

RGL subsequently commenced proceedings in respect of outstanding fees. RGL claimed: (i) £21,615 in respect of the remaining unpaid balance of the first instalment for Stages 3/4; (ii) £200,000 as the second instalment for Stages 3/4 on the basis that ‘if its engagement had been continued, the grant of planning consent was inevitable’; (iii) £1,032,414, representing 2% of the build cost; and (iv) the £250,000 fixed fee.

FDL failed to serve a defence within time so RGL obtained judgment in default. The court dismissed FDL’s application to set aside the judgment on the basis that FDL had ‘no realistic prospect of defending this claim’.

Whilst FDL admitted that the remaining unpaid balance of the fixed fee was due, it argued that the other sums were not payable as planning permission would not have been obtained and no building contract would therefore have ever been awarded. RGL argued that FDL was contractually obliged to continue employing RGL for all stages contemplated and was not entitled to terminate the Contract.

Decision
The court acknowledged that the Project was unrealistic and that FDL was unable to obtain the required planning permission.

The court therefore held that FDL was entitled to terminate RGL's appointment before RGL earned any further remuneration. RGL was not therefore entitled to damages for the termination of its appointment and could only claim those fees which would have been payable up to the point that the appointment could have been lawfully terminated.

FDL had no obligation to continue with the Project solely to grant RGL the chance of earning its full fees. RGL was therefore only entitled to the outstanding fees in the sum of £21,615 and not the other sums claimed by RGL.

Significance
This case is a reminder that developers should ensure that contracts contain sufficiently clear and broad termination provisions in favour of the developer and in respect of the sums for which the developer may be liable in the event of termination.

It also underlines the importance of clearly stating the consequences of termination in circumstances other than for breach of contract and, in particular, whether any loss of profit or
other additional compensation is payable on termination.

**Rock Advertising Ltd v MWB Business Exchange Centres Ltd**

[2018] UKSC 24; SC; Lord Sumption

On 12 August 2011, Rock Advertising Ltd (Rock) entered into a contractual licence with MWB Business Exchange Centres Ltd (MWB), a company operating serviced offices in London, to occupy office space for a fixed term of 12 months commencing on 1 November 2011 (the Licence). The licence fee was £3,500 per month for the first three months and £4,333.34 per month thereafter.

Clause 7.6 of the Licence, which could be described as a 'No Oral Modification' (NOM) clause, provided:

‘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.’

As at February 2012, licence fees in excess of £12,000 were outstanding from Rock. Rock proposed a revised schedule of payments in a telephone conversation with MWB’s credit controller.

On 30 March 2012, MWB locked Rock out of the premises due to the outstanding licence fees and terminated the Licence with effect from 4 May 2012. MWB then commenced proceedings to recover the outstanding licence fees. Rock counterclaimed for damages for wrongful exclusion from the premises.

Rock argued that the revised schedule of payments had been agreed by MWB during the telephone conversation in February 2012 and that this varied the Licence. MWB relied upon cl 7.6 to argue that any agreed oral variation was ineffective.

The Central London County Court found that an oral agreement had been made to vary the Licence in accordance with the revised schedule and held that it was supported by consideration, namely the practical advantages to MWB in that there was an enhanced prospect of it eventually being paid. However, the variation was held to be ineffective because it was not recorded in writing and signed by both parties as required by cl 7.6.

The Court of Appeal overturned this decision. It considered that the oral agreement to revise the schedule of payments also amounted to an agreement to dispense with cl 7.6. It therefore followed that MWB were not entitled to claim the arrears. MWB appealed to the Supreme Court.

**Decision**

The Supreme Court reversed the Court of Appeal’s decision. Lord Sumption, in the leading judgment, held that the oral variation was invalid for ‘want of the writing and signatures prescribed by clause 7.6’ of the Licence.

NOM clauses are commonly treated as ineffective on the basis that: (i) a variation of an existing contract is itself a contract; (ii) parties may agree informally to dispense with an existing clause which imposes requirements of the form of any variation; and (iii) parties must be taken to have intended to do so by agreeing a variation informally when the contract required the variation to be in writing.

Lord Sumption referred to three legitimate commercial reasons for including NOM clauses: (i) they prevent attempts to undermine written agreements by informal means; (ii) they avoid disputes about whether a variation was intended and its exact terms; and (iii) they make it easier for corporations to police internal rules restricting the authority to agree them.

There was not considered to be any conceptual inconsistency between the general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation.

The NOM clause was therefore enforceable.

**Significance**

The decision confirms that oral agreements to vary contracts containing NOM clauses may not be effective. It is common for construction contracts to include pre-conditions for variations to be effective, whether in relation to scope, the contract price, or the contract as a whole.

The decision therefore provides welcome clarification to the industry that NOM clauses are enforceable and is a reminder that parties must follow the formal procedures in their contracts to vary the terms. However, this will also be a concern to many. Construction contracts are typically ‘varied’ during a project by course of dealing or verbally in order to manage risks arising. Parties may no longer be able to rely on such variations. CL