# ‘Man is Born Free
## *(and can therefore agree to live in chains)’*



*The Supreme Court decision in MWB v Rock Advertising goes against two Court of Appeal authorities and makes clear that NOM clauses are effective. In this article,* ***Charlie Thompson*** *sets out a brief survey of the cases and seeks to highlight some practical implications of the Supreme Court’s decision.*

**Introduction**

The recent case of *MWB v Rock Advertising* [1] raises the question of what freedom of contract actually means in a commercial context. If commercial parties are free (subject to arguments over duress and undue influence etc) to bind themselves as they see fit, including agreeing specific formality requirements for any change to their contractual relationship, does freedom of contract permit the parties to subsequently ignore such a formality requirement in amending their contractual relationship? In other words, is freedom of contract served better by: (a) allowing parties to agree enforceable restrictions on the effect of their future conduct, or (b) allowing parties to ignore a previously agreed restriction on the effect of their future conduct?

The contention that freedom of contract is undermined if the parties are able to agree limits on their future conduct is redolent of recent debates over parliamentary sovereignty. As the conundrum goes, Parliament cannot be sovereign if it is subject to the laws of the EU, although, if Parliament chose to be bound by the laws of the EU does it not remain sovereign despite being bound by the laws of the EU?

Non-oral modification (“NOM”) clauses are found in many construction contracts; they provide that a variation to the contract shall be of no effect unless it is made in writing.[2] Such clauses are clearly designed to provide commercial certainty: setting out a clear process to be followed for any variation and thereby permitting parties to accurately track what changes have been agreed during the life of the contract. In the modern world, such certainty is all the more important given the possibility that a change to a contract might be agreed by an ever-increasing number of informal methods of instantaneous communication.

Nevertheless, and despite the clear commercial purpose of such clauses, until very recently, it had been thought that they did not operate to prevent a subsequent oral modification of a contract (although the legal analysis behind their ineffectiveness and therefore precisely what was required to circumvent the clause was not entirely clear). That position has now changed following the Supreme Court decision in *MWB v Rock Advertising* which goes against two Court of Appeal authorities and makes clear that NOM clauses are effective. This article sets out a brief survey of the cases and seeks to highlight some practical implications of the Supreme Court’s decision.

1 [2016] EWCA Civ 553

2 See, for example, NEC4 Core Clause 12.3, JCT SBC/Q 2016 clause 3.12 and FIDIC Red Book 2017 GC1.2(c)



**Globe Motors**

The first in the run of NOM clause cases is *Globe Motors v TRW LucasVarity Electric Steering Ltd.*[3] This was an appeal from a decision of the Commercial Court that TRW had acted in breach of an exclusive supply agreement with Globe. Globe was a designer and manufacturer of electric motors: important components in electric power-assisted steering systems, which TRW produced. TRW entered into an agreement with Globe that it would exclusively purchase electric motors from Globe. Despite this, in about 2005 TRW began purchasing “second-generation” motors from Emerson. Globe argued that this was a breach of the exclusive supply agreement.

At first instance, HHJ Mackie QC held that the purchase of second generation motors from Emerson was a breach of the exclusive supply agreement. Furthermore, the judge found that there had been an implied novation or variation of the agreement so that a Portuguese subsidiary of Globe, Porto, was a party to the exclusive supply agreement and therefore also had a cause of action. This variation was said to take effect notwithstanding the fact that that agreement had a NOM clause, in the following terms:

> *“6.3 Entire Agreement; Amendment: 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.”*

The Court of Appeal overturned HHJ Mackie QC’s decision, finding that he had been wrong to conclude that the exclusive supply agreement did not apply to second-generation motors, such that there had been no breach. This finding was sufficient to dispose of the appeal. However, the Court of Appeal went on to express its view on the NOM issue in *obiter* comments. In this context, the Court of Appeal agreed with the first instance judge’s decision that the agreement could be varied orally. Beatson LJ, giving the lead judgment of the Court, held that freedom of contract meant that the parties were free to agree a later contract which had the effect of varying the original agreement:

> *“Absent statutory or common law restrictions, the general principle of the English law of contract is [freedom of contract]. The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties’ contract contains a clause such as Article 6.3 does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct.”*

Moore-Bick LJ concurred, suggesting that an analogy might be drawn with parliamentary sovereignty and the principle that Parliament cannot bind its successor. Underhill LJ was more cautious. He had considerable doubts about refusing to enforce the intentions of the parties but could not find a conceptually satisfactory way to give effect to a NOM clause. The appeal was therefore allowed.

**MWB v Rock Advertising**

The same question came before the Court of Appeal in *MWB v Rock Advertising.* The case concerned a licence agreement under which Rock Advertising was to occupy premises in central London. Rock Advertising was unable to keep up payments of the licence fees and fell into arrears. Subsequently, a new payment plan was orally agreed with the credit controller of MWB, Miss Evans, to help Rock Advertising to clear the licence fee arears; in fact, this agreement had been made over the phone while Miss Evans was on a bus on Oxford Street. When Miss Evans told her manager about the agreement, he refused to ratify it and instead excluded Rock Advertising from the building.

MWB therefore issued proceedings for the arrears in licence fees and Rock Advertising counterclaimed for wrongful exclusion. At trial, MWB relied on clause 7.6 of the licence agreement which stated that:

> *“This licence sets out all of 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.”*

At first instance, the judge held that there had been an oral agreement but that it was ineffective because of clause 7.6. MWB successfully appealed to the Court of Appeal who followed *Globe Motors* and allowed the appeal. Even though the discussion of NOM clauses in *Globe Motors* had been *obiter*, the Court of Appeal in *MWB* felt bound to follow it given the detailed consideration the issue had been given in *Globe Motors*.

**Supreme Court**

MWB then appealed to the Supreme Court.[4] Lord Sumption gave the leading judgment and, overturning the Court of Appeal, determined that NOM clauses should be enforced in accordance with their terms.

> ***“The presence of a NOM clause does not prevent the parties from agreeing a subsequent variation to their agreement: it merely requires certain formalities to be met.”***

In Lord Sumption’s view, the only reasons advanced for disregarding NOM clauses were entirely conceptual but these conceptual reasons did not withstand scrutiny. For example, whilst entire agreement clauses regulated the position in the past, and NOM clauses regulated future conduct, the purpose behind both was the same, namely, to avoid uncertainty over the terms of an agreement or the existence of collateral agreements. Given their shared purpose, in Lord Sumption’s view it was inconsistent for English Law to uphold entire agreement clauses but refuse to enforce NOM clauses in accordance with their terms. Ultimately, there was no conceptual inconsistency between a 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. Further, Lord Sumption identified that there appeared to be no principled reason for why statute could demand formality requirements to be observed but the courts would refuse to uphold any such formality requirement agreed by the parties.

3 [2016] EWCA Civ 396.

4 [2018] UKSC 24

Ultimately, Lord Sumption's view of what freedom of contract required was to uphold the parties' intentions as at the date of contract:

> "*The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties' intentions. They cannot validly bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they express their intention to do so…Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows…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.*"

It is respectfully suggested that this view is right. The presence of a NOM clause does not prevent the parties from agreeing a subsequent variation to their agreement: it merely requires certain formalities to be met. The advantage of Lord Sumption's view is that it does not encroach on the parties' freedom of contract, in that it enforces what the parties have agreed, whilst upholding the commercial purpose of NOM clauses (see paragraph 12 of his judgment) and still permits those parties to vary their agreement in accordance with the limitations they have agreed to be subject to.

Further, at paragraph 15, Lord Sumption dealt with the argument that, in agreeing an informal oral variation, it was clear that the parties intended to dispense with the NOM clause:

> "*What the parties to [a NOM] clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause…The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with eyes open.*"

However, in his dissenting opinion Lord Briggs approached the matter differently. Lord Briggs' view was that freedom of contract and party autonomy was protected best by having a position in which:

> "*The NOM clause will remain in force until they both (or all) agree to do away with it. In particular it will deprive any oral terms for a variation of the substance of their obligations of any immediately binding force, unless and until they are reduced to writing, or the NOM clause is itself removed or suspended by agreement.*" *(paragraph 25)(emphasis added)*

Lord Briggs' position reflects the celebrated dictum of Cardozo J in *Beatty v Guggenheim*[5] that was cited in the Court of Appeal by Kitchin LJ and Lord Sumption in the Supreme Court at paragraph 7:

> "*Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived…What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again…*"

What Lord Briggs made clear, however, was that in his view, in order for such an oral variation to the parties' contract to be effective where there is a NOM clause, the parties must have turned their minds to removing or suspending the NOM clause itself. Whilst the idea of 'suspending' a NOM clause may seem uncertain, the advantage of Lord Briggs' view is that it provides some doctrinal clarity on the position adopted in the Court of Appeal in *Globe* and *MWB v Rock Advertising*, which left open the question of precisely how it was that a NOM clause could be disapplied (i.e. whether it was always ineffective or whether it was effective but could be waived).

In Lord Briggs' view: (a) the NOM clause is effective and so cannot be ignored by the parties to the contract, but (b) it can be waived or removed/suspended by agreement. Nevertheless, it is respectfully suggested that there are still some problems with Lord Briggs approach.

First, his position was that, whilst statute did require formality requirements for some contracts, it should only be statute that imposes such requirements. However, Lord Briggs did not identify a principled reason why this should be the case. Moreover, this approach would actually lead to the conclusion that NOM clauses should be wholly ineffective, contrary to his position that they are effective but can be done away with by direct agreement.

Second, it has a tendency to undermine the certainty for which the parties had originally contracted in agreeing the NOM clause. To that extent, it arguably does undermine freedom of contract in that whilst parties are free to change their contract by turning their minds to the specific clause in question according to Lord Briggs, the parties will have considerably less ability to police internal rules restricting authority to agree variations to the contract and will not, in practice, be able to trust the effect of a NOM clause.

Third, Lord Briggs' analogy with negotiations declared to be 'subject to contract' (see paragraph 29) may not be entirely direct. Whilst parties can agree to dispense with the 'subject to contract' label, or an agreement reached during such negotiations may by necessary implication indicate that the label has been dispensed with, the question of whether parties have reached an enforceable agreement that does away with the subject to contract label in the first place is surely different from one of whether the parties have agreed to dispense with a formality requirement in their pre-existing contract. The subject to contract scenario is not so much a question of whether the parties have agreed to dispense with a formality requirement (as it would be for NOM clauses on Lord Briggs' view) as a question of whether, as a matter of construction of the putative agreement, there is a binding contract despite the subject to contract label (i.e. an agreement for which a formal contract is not a condition precedent).

## What Room for Estoppel?

The majority view in the Supreme Court does leave some questions open, however. For example, in what circumstances would the law permit the parties to circumvent the effect of a NOM clause?

> *"…it is arguable that estoppel by convention offends against the very purpose of certainty at which NOM clauses aim."*

Even if it is consistent with principle to uphold the certainty of the parties' bargain, there must still be some means for the law to protect a party against the potential injustice of acting to its detriment on the understanding that the NOM clause was no longer effective. Whilst Lord Sumption stated that *MWB v Rock* was not the place to explore the circumstances in which an estoppel could operate to defeat a NOM clause, he did say that:

> "*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…*" *(paragraph 16)*

The position therefore appears to be as follows:

a. An estoppel by representation may well be capable of defeating a NOM clause, in circumstances where:

   i. the parties have reached an informal agreement (including a variation) that would be enforceable but for the NOM clause;

   ii. one party has represented to the other that the agreement or variation will be valid despite the terms of the NOM clause; and

   iii. the other party has acted in reliance on that representation in some way that is external to the informal agreement or variation itself (i.e. additional to the promises made in the informal agreement).

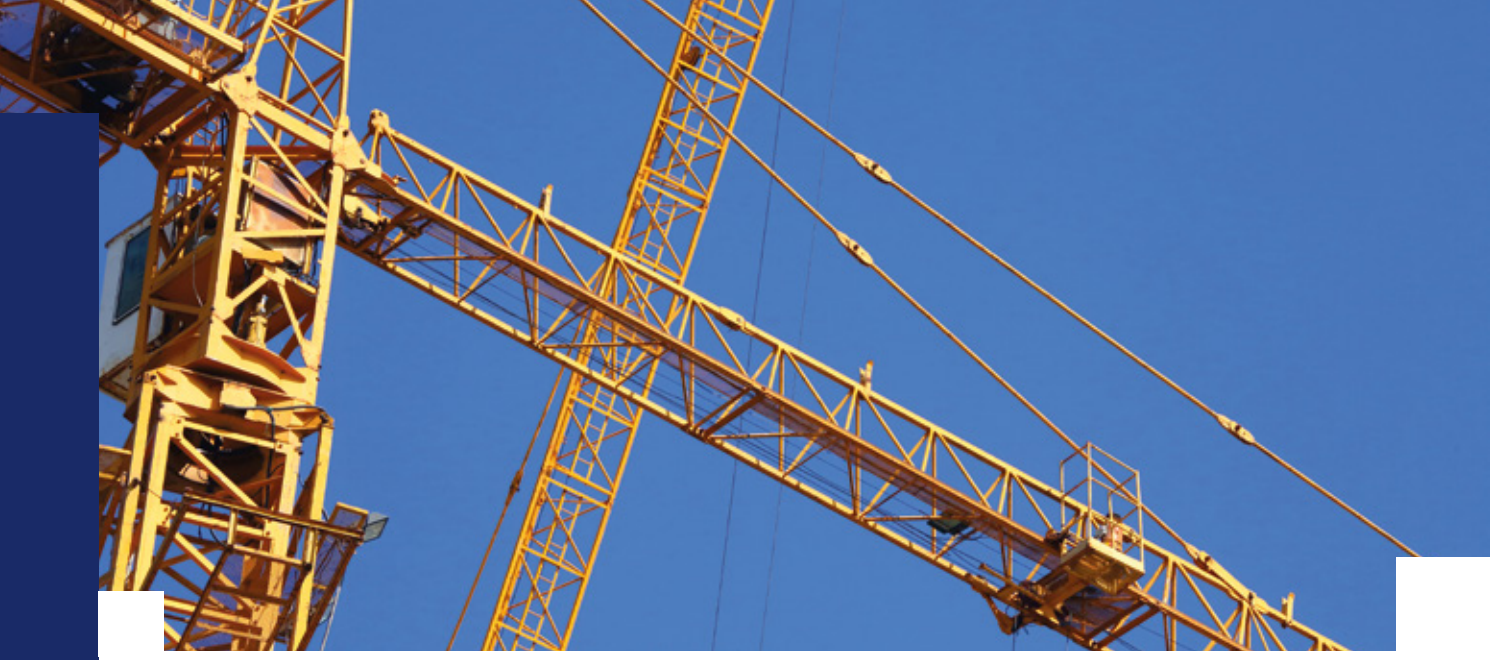
b. There is no room for an estoppel by convention to circumvent the effect of a NOM clause as, if the parties could simply act in contravention of the NOM clause and still enforce their informal agreements, this would undermine the very purpose of the NOM clause and, if the parties were aware, be an instance of the parties "*courting invalidity with their eyes open*" (see paragraph 15 of Lord Sumption's judgment).

Though Lord Sumption did not expressly deal with estoppel by convention, in the section of his speech that did deal with estoppel, his only reference was to estoppel by representation. Further, as set out above, it is arguable that estoppel by convention offends against the very purpose of certainty at which NOM clauses aim: which purpose the Supreme Court upheld in *MWB v Rock Advertising*.

However, if or to the extent that Lord Sumption was not saying that it was impossible for an estoppel by convention to defeat a NOM clause (which he did not, of course, expressly state), it seems clear that he did intend for there to be limits on the application of such an estoppel. On this basis, what would such restrictions look like? It may well be that (a) the parties would have to operate on the shared assumption that (i) the NOM clause was no longer effective, and (ii) that their subsequent agreement was valid, and; (b) it would have to be unconscionable to go back on the shared assumption due to some detriment suffered by one party that was additional or external to any action taken on the basis of the agreement itself. In other words, the limit is provided by the parties essentially turning their minds to the effect of the NOM clause and by a detriment being suffered that is more than merely performing the terms of the otherwise invalid agreement.

When the ingredients of any such estoppel by convention are considered, it seems very much like the sort of agreement that Lord Briggs considered to be capable of varying the NOM clause itself (see paragraph 31). Assuming that Lord Sumption did not intend to deny the possible impact of estoppel by convention altogether (which is not at all clear), the major difference between his approach and that

5 [225 NY 380, 387-388]



of Lord Briggs is essentially one of legal classification: whether it is better to deal with such scenarios by way of estoppel or as an enforceable agreement (see Lord Briggs' comments at paragraph 31 *"...where estoppel and release of the NOM clause by necessary implications are likely to go hand in hand"*).

A further difference may well be that an estoppel by convention requires a longer-term course of conduct but, in theory, such an estoppel could operate in relation to one variation alone in respect of which the parties had acted in accordance with the shared assumption for a sufficient period of time.

*"Whilst the idea that parties should essentially be free to make or unmake their contracts is appealing, it is also the case that a bilateral contract necessarily entails the agreement of some limits to one's freedom to act in the future."*

What is difficult to envisage, though, is how often estoppel by representation or estoppel by convention will actually operate to ground a contractor's claim for unpaid sums pursuant to an orally agreed variation where there is a NOM clause. On one view, this would be an attempt to use such an estoppel as a sword and not a shield. Accordingly, claimants will need to be careful how they frame such a claim therefore (see, for example *Mears Ltd v Shoreline Housing Partnership Ltd*).[6]

## Practical Implications

It is clear that parties to construction contracts will now have to be careful to record variations in writing. This will have a significant impact on the often informal and site-based agreement of variations that is commonplace on construction projects. However, there may still be some room for manoeuvre.

At paragraph 15 of his speech, Lord Sumption explained that the natural inference of parties agreeing an oral variation was not that they had agreed to dispense with a NOM clause; this was on the basis that NOM clauses merely made oral variations invalid but did not forbid them. Accordingly, the position may be different where a NOM clause forbids oral variations and the parties subsequently reach an oral agreement as, in that case, the agreement is a direct contravention of the NOM clause and it is arguable, therefore, that by necessary implication the parties should be taken to have dispensed with or suspended it.[7] Parties should therefore be astute to check the wording of any NOM clauses in their contracts: although agreeing a variation in writing is always the safest bet.

Further, Lord Sumption's speech indicates that collateral contracts may well still be able to operate despite the presence of a NOM clause and depending on its wording (see paragraph 14). In framing claims for informal or orally agreed variations, parties may choose to advance them on the basis that these agreements constitute collateral agreements not varying the contract itself but being additional thereto.

Finally, as set out above, parties may still rely on estoppel to protect them albeit the ambit of this protection is not quite clear. What is obvious however, is that in seeking to demonstrate detriment, the relevant party will have to show some reliance additional to the informal or oral agreement itself.

## Conclusion

Whilst the idea that parties should essentially be free to make or unmake their contracts is appealing, it is also the case that a bilateral contract necessarily entails the agreement of some limits to one's freedom to act in the future. If such limits are in the nature of a contract, then it seems that giving effect to NOM clauses would tend to promote freedom of contract.

Further, that parties are free, in principle, to agree whatever limitations on their future conduct they might wish, also serves freedom of contract. It seems wrong (and somewhat contradictory) that the concept of freedom of contract could be invoked to render ineffective a clause that has been agreed between two commercial parties with the sensible aim of promoting certainty. Of course, even if such a clause is effective, the parties remain free to alter their bargain in accordance with the terms of that bargain. In that sense, it is difficult to see what threat to freedom of contract NOM clauses pose.

The Supreme Court has now spoken (almost decisively) about the effect of NOM clauses: which take effect according to their terms. However, in doing so the court has left open the related and important issue of the extent to which the various doctrines of estoppel will be able to protect a party relying on an oral agreement made in spite of a NOM clause. No doubt this is the next battle-ground for the TCC in dealing with orally agreed variations.

6 [2015] EWHC 1396 (TCC)

7 Such an approach would, however, come very close to Lord Briggs' approach to matters.