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Oral variations

NICOLA HUXTABLE - OPERATIONAL DIRECTOR, DRIVER TRETT UK EXPLAINS THE APPLICATION OF ORAL VARIATIONS, THEIR ENFORCEABILITY AND THEIR FUTURE.

Most of us working within the construction industry are familiar with oral instructions and variations and will accept that although 'not worth the paper they are not written on' they are widely used, and on occasion, unavoidable. The validity of these instructions has been contemplated by the courts since the invention of the wheel and continues to be debated today.

The debate over the issue of oral instructions leads to the question; "can a written contract be varied by an oral agreement where there is a clause within the contract itself prohibiting oral variations"?

So, we have two conflicting positions.

Firstly, in English law, clauses preventing oral variation lead to uncertainty as two parties are always free to agree or vary a written contract orally. Secondly, standard form construction contracts often state that a variation will not be valid unless it is issued in writing. If the variation/ instruction is not valid, the contractor will ultimately not be paid for associated work.

This is where it gets more complicated. The courts have recently had to look at whether a variation, issued orally, actually constitutes an agreement between the parties to both vary the scope of works and vary the terms of the written contract, in that the clause preventing oral variations is not applicable.

It is always good practice to follow up any oral variation or instruction with a confirmation of verbal instruction (CVI), but although a CVI is a written record of what was said, it is not an instruction and therefore does not overcome a condition precedent to payment.

So, what are the courts telling us?

The recent case of ZVI Construction Co LLC v The University of Notre Dame (USA) in England [2016] EWHC 924 (TCC) is concerned mainly with expert determination. However, it does comment upon the issue of whether a clause within a written contract, expressly preventing variations from being effective unless they are in writing and signed by the appropriate person, is enforceable.

In this case, the question was whether the parties could orally agree a provision for expert determination. The court held that the parties had entered into an oral agreement which was effective and did not have to be recorded in writing.

Within the judgment, the court cited two 2016 decisions handed down from the Court of Appeal. Although neither of these cases are construction related, they provide guidance on the relevant issue.

The first case cited is Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396. A dispute had arisen in this case as to whether the parties could vary the contract to introduce another

party to the agreement, that being a subsidiary of Globe, when a written clause in the original agreement stated that it could only be amended by a written document which was signed by both parties.

The Court of Appeal decided that the parties were within their rights to vary the agreement orally or by conduct, and that if the parties made an agreement, there is no legal reason why it should not be effective solely on the basis that a previous agreement required changes to be in writing.

This decision appears to uphold the English Law principle that parties should be free to contract based upon an assumption of freedom of contract.

The case of MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EXCA Civ 553 applied the same principles, confirming that parties have autonomy to contract on their own terms and as such, an oral variation can be binding regardless of a provision within a written agreement preventing them.

So, what does this mean in practice?

The age old legal principle that parties should be free to agree whatever terms they wish, be it in a formal written contract, an oral agreement, or by conduct, or in the course of dealing, seems to be the approach favoured by the courts today. It would seem to apply, even in the face of attempts to prevent parties from making subsequent agreements in a different form, i.e. orally, when the original agreement was in writing.

Both the courts and the learned people drafting standard form contracts accept that it would be both beneficial and sensible to restrict the parties to a contract, when it comes to varying the terms of that contract. It would certainly provide clarity to the agreement and make the resolution of disputes easier. However, the courts have declared that the fundamental principle of freedom of contract must prevail.

Parties should be free to contract based upon an assumption of freedom of contract.

The difficulty will always be proving what was agreed, when and by whom. As such, it must be the case that clauses within construction contracts, stating that variations and instructions must be in writing to be effective, do have a place in the contract. Having a term such as this in a contract will make it more difficult for the parties to a contract to prove that an oral variation was agreed between them. The question will always be asked as to why the oral instruction was not followed up with a written record? It must be that where a dispute arises, which is referred to an adjudicator, there will be a presumption that there was no intention to vary the contract orally.

So where are we now?

Simply inserting a clause into a contract, which states that a variation will not be effective unless issued in writing, will not prevent an oral variation becoming effective. However, it will always be the case that proving that an agreement was made between the parties orally will be difficult. With the amendments to the Construction Act allowing oral contracts to be adjudicated upon, we may be provided with more construction specific guidance on this issue in the foreseeable future. ■

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