communication by practitioners and trusting in capable adults to make their own decisions are important aspects of the law's view of communication in healthcare. In *Meadows*, the latter seemingly constrained the former and patients may now, in retrospect, wish themselves more proactive upon initial presentation instead.

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NO ORAL MODIFICATION CLAUSES: AUTONOMY, CERTAINTY OR PRESUMPTION?

BY a judgment of Lord Sumption with which a majority of the court agreed, the Supreme Court in *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* [2018] UKSC 24, [2019] A.C. 119 ruled that a contractual term which prescribed that the contract was not amendable save in writing signed by or on behalf of the parties (a No Oral Modification or "NOM" clause) was effective to invalidate subsequent oral variations to the contract. Lord Burrows later suggested extrajudicially (in P.S. Davies and M. Raczynska (eds.), *Contents of Commercial Contracts* (London 2020), 49) that *Rock Advertising* might not find traction in other common law jurisdictions. The decision has now been considered for the first time by a Commonwealth apex court. Indications are that it will endure a mixed reception around the common law world.

The Singapore Court of Appeal case of *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("*Lim v Hong*") stemmed from an agreement executed in September 2014 for the sale and purchase of certain shares by the sellers (one Mr. Lim and his mother) and the buyers (Messrs. Hong and Tan). Completion of the transaction was slated for mid-October 2014 but that never occurred, leading the sellers to sue the buyers for breach of contract in 2018. In their defence the buyers pointed to a telephone call between Mr. Lim and Mr. Hong on 31 October 2014 in which both sides had purportedly agreed to rescind the sale and purchase agreement.

Delivering judgment in a five-judge Court of Appeal, Steven Chong J.C.A. found that the parties had indeed orally concluded an agreement to rescind. That was the only satisfactory explanation for the delay of over three years between the stated completion date and the time the sellers served upon the buyers a notice to complete (and subsequently the writ of action). Similarly, although text exchanges between Mr. Lim and Mr. Hong up to 31 October 2014 showed the former trying "desperately" to complete the transaction (at [67]), no further text messages existed after that date. Mr. Lim also did not assist the claimants' case with his inconsistent evidence at trial.

The remaining issue was one of law. Clause 8.1 of the sale and purchase agreement read: "No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party". Leading counsel contended that this clause rendered ineffective the oral rescission agreed over the telephone call of 31 October 2014, because the purported agreement to rescind should have been, but was not, made in writing, its either being a "replacement" of the sale and purchase agreement or having resulted in the "deletion" of terms in that agreement which required performance of the sale and purchase transaction. Chong J.C.A. rejected this as incongruous and for ignoring the plain and ordinary meaning of the words in clause 8.1. The rescission agreed here was no "replacement" as there was nothing left to perform thereafter. Nor was it a "deletion" as the effect of rescinding the agreement was its unravelling and not mere removal of its terms; it was "somewhat contrived" to speak of a contract to be performed that had had all its terms "deleted" (at [33]).

Clause 8.1 not being engaged, the rescission was adjudged valid. Because the court had heard full argument on the clause's legal effect, it took the opportunity to consider the issue and the reasoning in *Rock Advertising*. This is the point of broader interest to lawyers in other jurisdictions. Chong J.C.A. observed that there were at least three schools of thought. Lord Sumption's approach, which commanded the majority's assent in *Rock Advertising*, was to give full effect to a NOM clause: any subsequent modification to the contract was invalid unless it complied with the stipulated formalities. Next, there was Lord Briggs's minority approach in *Rock Advertising*, which was similar to that of Lord Sumption but relaxed to the extent that an oral agreement to depart from an NOM clause was treated as valid. Finally, a NOM clause might be seen as merely raising a rebuttable presumption that, in the absence of a written agreement, there would be no variation. In each of these approaches the doctrine of estoppel formed an exception that might preclude strict enforcement of an NOM clause.

A doubtful Chong J.C.A. viewed Lord Sumption's approach as having conflated the parties' individual autonomy with their collective autonomy. Recall that, in *Rock Advertising*, Lord Sumption justified giving full effect to an NOM clause with reference to the aphorism that "Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows" (at [11]). But Chong J.C.A. thought that elided a crucial distinction: while the autonomy of an individual party might be bound by the contract terms, the parties *as a collective* retained power and autonomy to vary any aspect of their agreement where they jointly agreed to do so (*Lim v Hong* at [42]). In a key passage, he said:

> Thus far, the courts have only circumscribed the parties' autonomy to contract in limited situations, such as where the contract is tainted by illegality, or where it is contrary to public policy. It seems to us that there is no legitimate reason to suggest that NOM clauses are *sui generis* and are somehow insulated from the parties' power and capacity to vary the terms of their bargain. This would constitute an unprincipled limitation on the parties' collective autonomy (at [46]).

This recasting of Lord Sumption's analysis as one "overly concerned with contractual certainty" at the expense of party autonomy (*Lim v Hong* at [50]) seems slightly unfair. In *Rock Advertising*, Lord Sumption had alluded (at [11]) to the reality that an NOM clause would have been accepted *by the parties* at the point of contracting, for reasons similar perhaps to those motivating the existence of parallel formalities in statute. Approving, however, of the commentary in Carter et al. (2020) 36 Journal of Contract Law 107, Chong J.C.A. disdained any equivalence between common law and legislation in this regard, stating that there was no justification to characterise NOM clauses as mandatory rules in the manner that one would with statutes. Absent any statutory provisions mandating formalities for contracts, he said, a court should give effect to party autonomy as the paramount consideration and uphold the parties' oral agreement to depart from such a clause if that were proved (at [49]).

Lord Briggs's approach fared only slightly better before the Singapore court. His limited concession – to find valid an oral agreement of the parties to do away with an NOM clause – was viewed as not going far enough, because the clause would remain binding until parties expressly (or by strict necessary implication) agreed to do away with it. In Chong J.C.A.'s opinion these would be very rare situations, resulting in an NOM clause practically never being dispensed with (at [52]). The accusation against Lord Briggs's approach appears, again, to be that it would effectively render party autonomy a dead letter.

This left the Court of Appeal with the last option, which was to treat an NOM clause as raising a presumption that there would be no effective variation absent a written agreement. Rebutting that would necessitate cogent evidence of an oral variation having been concluded by the parties. Unlike Lord Briggs, Chong J.C.A. would *not* require parties to have specifically addressed their minds to dispensing with the NOM clause when agreeing to the oral variation (at [56] and [61]). Perhaps anticipating a charge of uncertainty, Chong J.C.A. declared that difficulties relating to the informal nature of oral variations could and should be dealt with through the proper application of evidential principles (at [58]).

That optimism is unlikely to be fully rewarded by litigants. There has been a marked reluctance generally on the part of common law courts to consider that, in this corner of commercial law, the foremost aims of doctrinal purity and of forestalling unmeritorious litigation make for

highly uncomfortable bedfellows. The approach preferred in Singapore may encourage the airing of spurious claims in a way Lord Sumption's approach (or even Lord Briggs's approach) would not, as parties increasingly see their way to court to assert their rights in alleged oral accords. That was why some had welcomed the *Rock Advertising*-type of reasoning: see, for example, Morgan [2017] C.L.J. 589, 608–09; O'Sullivan (2019) 135 L.Q.R. 1, 6. Nevertheless, one cannot immediately conclude that the English approach is comparatively advantageous, for that now promotes greater forensic battles over estoppel (as commentators had predicted): see, for example, *K Learning Academy Ltd. v Secretary of State for Education* [2020] EWCA Civ 370; *In re High Street Rooftop Holdings Ltd.* [2020] EWHC 2572 (Ch), [2020] Bus. L.R. 2127; Davies [2018] C.L.J. 464, 466; D. Foxton, "The Boilerplate and the Bespoke" in C. Mitchell and S. Watterson (eds.), *The World of Maritime and Commercial Law* (London 2020), 275. So, returning to our opening prophecy, and unlike other controversies originating from decisions such as *Transfield Shipping Inc. v Mercator Shipping Inc.* [2008] UKHL 48, [2009] A.C. 61 and *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, the present issue is less a matter of philosophical divergence among common law jurisdictions than one of courts proceeding from different directions towards a unitary goal: to strike an appropriate balance between doctrinal integrity, commercial expectation and the expedient resolution of disputes.

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MISTAKE OF LAW AND LIMITATION PERIODS

Test Claimants in the Franked Investment Income Group Litigation v HMRC [2020] UKSC 47, arose in the course of the long running Franked Investment saga. The test claimants argued that the differences between their tax treatment and that of wholly UK-resident groups of companies breached EU Treaty provisions, guaranteeing freedom of establishment and free movement of capital. They sought repayment by HMRC of the tax wrongly paid, together with interest, dating back to the UK's entry to the EU in 1973. Large elements of these claims were therefore time-barred and this gave rise to argument over the application of section 32(1)(c) Limitation Act 1980 to claims for restitution of money paid under a mistake of law and in particular over the question of discoverability of the mistake. Section 32(1)(c) provides that where the action is for relief