

# NO ORAL MODIFICATION CLAUSES: AN AUSTRALIAN RESPONSE TO *MWB BUSINESS EXCHANGE CENTRES V ROCK ADVERTISING* [2018] 2 WLR 1603

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*The strict enforcement of No Oral Modification clauses offers considerable commercial benefit. It also simultaneously conflicts with the fundamental common law principle of party autonomy. In 2018, the UK Supreme Court appeared to resolve that conflict, and heralded a new era wherein such clauses are given their proper effect. This note contends that that decision misapplies principles of contract law and reverses developments made in equity. It should not be followed by Australian courts.*

## I INTRODUCTION

Consider the case where two parties make an agreement containing a stipulation that any modification or variation to it must be recorded in writing (a ‘NOM clause’: no oral modification).<sup>1</sup> Such clauses are, of course, common place in the commercial and construction worlds. Some months later, without having removed the requirement for writing, those tasked with administering the contract orally agree to vary it. A dispute arises, and one party considers, with the benefit of hindsight, that their position would be legally or commercially superior if the variation was of no effect. In those circumstances, should a court enforce the parties’ clearly expressed *former intention* that any variation is ineffective unless recorded in writing, or should a court instead favour the parties’ *latter intention* to vary the contract?

At this point, a divide emerges between Australian law and English law. The Australian approach favours the latter intention,<sup>2</sup> considering that an agreement to vary a contract in non-compliance with a NOM clause also contains an implied agreement to dispense with that NOM clause. Consequently, although NOM

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<sup>1</sup> In truth, the phrase ‘NOM clause’ is misleading as such clauses purport to deny efficacy to any variation not in writing, not simply those which take place orally. One common example is a variation by conduct. Nevertheless, for consistency with the literature and the case law, this note will retain the language of NOM clauses.

<sup>2</sup> The authorities here are many. To pick one from most jurisdictions, we have: *Ryder v Aphrodite Gold* [2017] WASC 377 at [228] per Banks-Smith J; *Harrop Engineering Australia v Beauville* [2016] VSC 17 at [60] per Elliot J; *Alstom v Yokogawa Australia* [2012] SASC 49 at [1519] per Bleby J; *Mathews Capital Partners v Coal of Queensland Holdings* [2012] NSWSC 462 at [39] per Black J; *Australian Medic-Care Company v Hamilton Pharmaceutical* (2009) 261 ALR 501 at 561-2 [257] per Finn J. The rationale for this position is clearly explained in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 61 [213] - 63 [223] per Finn J.

clauses play an evidentiary role in determining whether a variation was actually agreed,<sup>3</sup> they have no capacity to ultimately exclude that variation. In direct contrast, since May 2018, the English approach favours the former intention, considering that an oral variation made in non-compliance with a subsisting NOM clause is legally ineffective: *MWB Business Exchange Centres v Rock Advertising*.<sup>4</sup>

Given the respect traditionally paid to pronouncements of England's highest court,<sup>5</sup> as well as the commercial importance of the issue, it is worth considering whether *Rock Advertising* should be followed in this country. That consideration is made more pertinent because there is an existing Australian proceeding which raises the point, and which could provide the opportunity for modifying domestic law.<sup>6</sup> Unfortunately, despite the considerable allure of the new English rule from both a commercial and a public policy perspective, the steps taken to reach it misapply and undermine fundamental principles of contract law. Consequently, this note suggests that neither the plurality judgment delivered by Lord Sumption nor the concurring judgment of Lord Briggs should be followed by Australian domestic courts.

## II BACKGROUND TO THE SUPREME COURT DECISION

Before diving into the legal treatment of NOM clauses, it is helpful to first set the stage by discussing their purpose: why might contracting parties impose formality requirements that seek to restrict their ability to modify their contract?<sup>7</sup>

### A *The Benefits of Enforcing No Oral Modification Clauses*

The most obvious reason is to address the inherent uncertainty associated with oral agreements and variations.<sup>8</sup> When an agreement is in writing, the parties can disagree on its legal meaning, but cannot reasonably disagree on its actual terms. In contrast, when an agreement is oral, any dispute between the parties (whether

<sup>3</sup> *Matthews Capital Partners v Coal of Queensland Holdings* [2012] NSWSC 462 at [39] per Black J; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 62 [221] per Finn J.

<sup>4</sup> [2018] 2 WLR 1603; [2018] UKSC 24 (*Rock Advertising*).

<sup>5</sup> In *Miller v The Queen* (2016) 259 CLR 380, five members of the High Court said that it was 'appropriate' (at [3]) to reconsider the doctrine of extended joint criminal enterprise after UK Supreme Court's decision in *R v Jogee* [2017] AC 387. It is likely that *Rock Advertising* will provide a similar stimulus.

<sup>6</sup> *Cenric v TWT Group* [2018] NSWSC 1570. That decision is presently on its journey to the NSW Court of Appeal and could well be a contender for special leave. Indeed, during the course of submissions in the Supreme Court (at T371.23), Mr Newlinds SC alluded to this prospect when he noted that he did '*like a special leave point in every case*'.

<sup>7</sup> For a more detailed answer to this question, see Florian Wagner-von Papp, 'European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They Are Written On' [2010] *Current Legal Problems* 511 at 544-53; Lon Fuller, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799 at 800-6.

<sup>8</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1609 [12].

litigated or not), alongside any consequential uncertainty, now operates at both of those levels. This is necessarily productive of greater commercial inefficiency.

Similarly, it is simpler for a corporation to be aware of its legal rights and obligations when all of those rights and obligations are contained within a written agreement, rather than depending upon the spoken words of an agent or employee who may not even work for the corporation anymore.

Those commercial benefits become even clearer when it is realised that NOM clauses can provide a safe-guard against illegitimate conduct.<sup>9</sup> The introductory question posed by this note was premised on a variation having been agreed, and the issue was whether the NOM clause should deny efficacy to that variation. But what if, in truth, there was no actual variation? Or what if the scope of the variation did not encompass what a party now says it does? Strictly enforcing NOM clauses avoids each of those issues.

Interestingly, there is also a public interest served by the strict enforcement of NOM clauses. In one recent case, *Cenric v TWT Group*,<sup>10</sup> McDougall J was confronted with a high-value commercial dispute involving various construction and royalty contracts. A number of the issues in that case turned upon a meeting which took place on 19 February 2018. Although everyone accepted that some variation was agreed to in that meeting, they all furiously disagreed as to what that variation was. The parties led extensive affidavit and oral evidence dealing with that issue. Its resolution took multiple days of court time. Considerable legal expense was doubtless expended on the matter. Each of those points would have been avoided if the NOM clauses contained in the contracts were strictly enforced.<sup>11</sup> At least from a normative perspective, where parties have agreed to simplify the judicial task by denying the efficacy of oral variations, courts should not be required to go behind that agreement.

#### B *The Australian Treatment of 'No Oral Modification' Clauses*

With that context, it can appear surprising that current Australian law holds that if an oral variation is demonstrated to exist,<sup>12</sup> a NOM clause will not stand in

<sup>9</sup> See the discussion in HH Nordlinger, 'Oral Modification of a Written Contract' (1926) 26 *Columbia Law Review* 432.

<sup>10</sup> [2018] NSWSC 1570.

<sup>11</sup> The same point can be made regarding applications for summary judgment: *Rock Advertising* [2018] 2 WLR 1603 at 1609 [12]; *Axis Fleet Management Ltd v Rygor Group Services Ltd* [2018] EWHC 2276 (QB).

<sup>12</sup> Of course, this variation must be legally effective: requiring not only consideration but an *actual agreement to vary* the contract. Simply acting a way that falls short of evidencing such agreement is insufficient: see *OzEcom v Hudson Investment Group* [2007] NSWSC 719 at [173]-[180] (McDougall J).

its way.<sup>13</sup> Thus, a NOM clause does not have the conclusive effect that it purports, according to its terms, to have.

What is less often discussed, but equally important, is that this Australian ‘rule’ applies to any attempt by contracting parties to procedurally limit their ability to vary their contract: *Commonwealth of Australia v Crothall Hospital Services (Aust)*.<sup>14</sup> In that case, Crothall agreed to provide services to the Commonwealth, and the parties’ agreement provided a mechanism by which the rate at which Crothall was to be paid could be varied. Over a number of years, Crothall submitted claims for payment calculated at a higher rate, explaining the basis for that varied rate but without going through the contractually required mechanism for variations. The Commonwealth deliberated each time as to whether to make the payment before doing so in each case. The Full Federal Court held that an agreement to vary the contract could be inferred.<sup>15</sup>

Given that commercial law does not ordinarily thwart the agreements of contracting parties, why has Australian law adopted this approach? It is important to briefly discuss the difficulties Australian law has with such clauses, so as to later determine whether the reasoning of their Lordships in *Rock Advertising* satisfactorily meets those difficulties.

## 1 *Party Autonomy*

The first rationale for this non-conclusive approach to NOM clauses can be found in the fundamental common law principle of party autonomy. That principle, also known as freedom of contract, provides that contracting parties have the autonomy to strike whatever bargain they desire (subject to presently irrelevant exceptions, such as illegality).

This might appear to be a surprising justification for the non-enforcement of NOM clauses. After all, if contracting parties have freedom of contract, surely they can deploy that freedom to agree to a procedural limitation on any variations. The difficulty, however, lies in the fact that party autonomy not only allows parties to enter whatever contract they agree, but also to modify or terminate it as they (mutually) agree.<sup>16</sup> As was eloquently explained by Cardozo J:<sup>17</sup>

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,

<sup>13</sup> See the cases cited at footnote [2].

<sup>14</sup> (1981) 36 ALR 567.

<sup>15</sup> *Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567 at 581 (Ellicott J, Blackburn and Deane JJ agreeing).

<sup>16</sup> Jurgen Basedow, ‘Freedom of Contract in the European Union’ (2008) 16(6) *European Review of Private Law* 901 at 906-7.

<sup>17</sup> *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 387-388.

may itself be waived. 'Every such agreement is ended by the new one which contradicts it'. 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.

From that expression of party autonomy, the non-enforcement of NOM clauses follows: those clauses purport to limit the capacity of contracting parties to re-agree, and that limitation is immediately destroyed the moment they do, in fact, re-agree (even if done in contravention of the clause).<sup>18</sup> There is therefore a logical or conceptual conundrum in the enforcement of such clauses which can supposedly only be overcome by overriding the common law notion of freedom of contract which has existed for hundreds of years. Unsurprisingly, that has not proved to be an acceptable course.

## 2 *Equitable Enforceability*

Another rationale for the non-conclusive approach to NOM clauses is to recognise that an agreed variation supported by valuable consideration would be effective in equity, even if it did not comply with the procedural limitations agreed by the parties.<sup>19</sup> This is because, as Leeming JA recently pointed out in *Hawcroft General Trading Co Pty Ltd v Hawcroft*,<sup>20</sup> "[t]he position in equity now prevails".

Further, absent the existence of discretionary factors, in a case where it was claimed that a variation was ineffective for want of writing, a party can seek orders for specific performance directing that the variation be reduced to writing.<sup>21</sup> That general principle is well established: in *Masters v Cameron*, for example, the High Court considered a category of cases where the parties have agreed on the terms of their bargain, but have made performance "conditional upon the execution of a formal document".<sup>22</sup> As the High Court explained, in those instances there is "a necessary implication that each party would sign a contract in accordance with the terms of the agreement", and it is therefore appropriate to make orders for specific performance to compel this.<sup>23</sup> After all, this is the "proper sense" in which the term specific performance is used.<sup>24</sup>

<sup>18</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1607-8 [7].

<sup>19</sup> [2017] NSWCA 91 at [35] (Leeming JA) and the authorities contained therein.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 750-1 (Santow J).

<sup>22</sup> *Masters v Cameron* (1954) 91 CLR 353 at 360 (Dixon CJ, McTiernan and Kitto JJ).

<sup>23</sup> *Ibid.*; *Niesmann v Collingridge* (1921) 29 CLR 177.

<sup>24</sup> *J C Williamson Ltd v Lukey* (1931) 45 CLR 282 at 297 (Dixon J). See also JD Heydon, MJ Leeming and PG Turner, *Equity: Doctrines and Remedies* (LexisNexis, 5th edition, 2015) at [20-005]-[20-010].

Again, it follows that the court cannot, consistent with established principles of equity, circumvent the inquiry into whether a variation was agreed between the parties by summary reference to the existence of a NOM clause.

### 3 *The Evidentiary Impact of NOM Clauses*

With that said, however, it must be understood that simply because NOM clauses do not have conclusive effect under Australian law does not mean that they have no effect. This is because a variation to a contract is itself a contract,<sup>25</sup> and thus before a variation is effective, it is necessary to find that the parties actually agreed to the variation. Whilst that variation can be written, oral, or implied (as in *Crothall*), the existence of a NOM clause:<sup>26</sup>

... is to be taken into account in interpreting the subsequent conduct of the parties, and it makes it more difficult to draw an inference that the parties did intend, by an oral agreement or by emails between their advisers, to vary the terms of [their agreement].

Thus, although not formally affecting the burden of proof,<sup>27</sup> a NOM clause elevates the evidentiary hurdle which must be surpassed before finding that a variation was agreed in a form that is not writing. It can also operate to limit the ostensible authority of an agent.<sup>28</sup> The strength of those evidentiary impacts is one of fact and degree; the most obvious matter affecting the weight given to such clauses is whether they were freely negotiated, or whether they were simply buried in the standardised clause (boilerplate) of a standard form contract.

In *Crothall*, the hurdle was overcome because the evidence showed that the Commonwealth had expressly turned its mind to, and accepted, the varied bases of payment. In other words, there was "nothing to support a claim that the payments were made by mistake".<sup>29</sup> In many other cases, and particularly where the evidence is otherwise equivocal, the NOM clause will have decisive effect.<sup>30</sup> It may be that there is scope for Australian courts to give greater weight than they presently do to the existence of a NOM clause in determining whether a variation has been agreed,<sup>31</sup> but beyond commenting on the desirability of treating such clauses as

<sup>25</sup> *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 533 [22] (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

<sup>26</sup> *Mathews Capital Partners v Coal of Queensland Holdings* [2012] NSWSC 462 at [39] (Black J).

<sup>27</sup> *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) at [60].

<sup>28</sup> *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712 at 748; [2016] EWCA Civ 396 at [117] (Underhill LJ).

<sup>29</sup> *Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567 at 579 (Ellicott J, Blackburn and Deane JJ agreeing).

<sup>30</sup> *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 62 [221] (Finn J).

<sup>31</sup> See, eg, Janet Sullivan, 'Unconsidered modifications' (2017) 133 *Law Quarterly Review* 191 at 197.

strong evidence in most cases (and particularly where the clause is not boilerplate), this note shall not consider the point.

In this way, Australian law attempts to give effect to the NOM clause agreed to by the parties in a manner consistent with the common law autonomy of those parties; it does not prioritise one to the complete exclusion of the other. When phrased that way, this approach is resonant of a general rule of contractual construction: where a contract appears to contain two statements at odds with each other, they should be interpreted harmoniously such that both have work to do.<sup>32</sup> It is also consistent with the approach taken in other areas of contract law, such as where there is a framework agreement which is expressed to prevail over other smaller agreements, and it is alleged that the smaller agreement has varied the framework agreement.

### III ROCK ADVERTISING: GIVING STRICT EFFECT TO NOM CLAUSES

With that explanation of Australian law, it comes time to consider the approaches taken by their Lordships and Ladyship in *Rock Advertising*. The judgments delivered by both Lord Sumption and Lord Briggs have the virtue of granting the commercial and public interest benefits earlier discussed. Unfortunately, close attention to the reasoning of their Lordships demonstrates that they grant these virtues through a channel which is apt to introduce incoherence into the common law of contract. Nor do they not satisfactorily address the issues currently found determinative by Australian law. Further, neither judgment engages, either in terms or in substance, with the fact that any variation supported by consideration would be effective in equity, as well as the availability of specific performance to compel compliance with the writing requirement.

It is respectfully suggested that their Lordships' reasoning should not be followed in this country.

#### A *Introduction to the Supreme Court's Decision*

The facts of the case can be shortly stated.<sup>33</sup> Rock Advertising agreed to license office space in Marble Arch Tower in London from MWB. Within four months, Rock Advertising was more than £12,000 in arrears. One of its agents orally proposed a revised schedule of payments to MWB. There was a factual dispute regarding whether MWB's agent actually agreed to vary the contract in this way. That dispute was resolved by the trial judge in favour of Rock Advertising. At this

<sup>32</sup> *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411 (Lockhart and Hill JJ); *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 (Gibbs J).

<sup>33</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1606 [2] - 1607 [5].

point, however, Rock Advertising's case was confronted by the obstacle lurking in clause 7.6 of the agreement:

... All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.

The variation to the schedule of payments was not recorded in writing.

Did that fact render their alleged oral variation ineffective? Judge Maloney at first instance held that it did. The Court of Appeal unanimously disagreed, reasoning (as Australian courts do) that the subsequent oral agreement of the parties to vary the schedule of payments also amounted to an agreement to dispense with the requirements of clause 7.6.<sup>34</sup> Both positions had some support in recent English case law.<sup>35</sup> The Supreme Court overturned the Court of Appeal, and held that clause 7.6 should be given its plain meaning to render the oral variation invalid.

### B *The Approach of the Plurality*

Lord Sumption (with whom Lady Hale and Lords Wilson and Lloyd-Jones agreed) gave the plurality judgment. His Lordship expressed the general principle as being that "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation".<sup>36</sup> Subsequent case law has clarified such a formality provision, and the effect of non-compliance with it, must be clearly drafted.<sup>37</sup> On the assumption that that requirement is met, the formality provision then procedurally limits the capacity of parties to agree to any change (including to the formalities clause itself). In effect, therefore, the plurality judgment treats a NOM clause as the common law equivalent of the Statute of Frauds.

With respect to the usual brilliance of Lord Sumption, that conclusion is unsustainable. The reasoning leading to it should be rejected by Australian courts.

His Lordship's exposition starts from the premise that not enforcing NOM clauses would:<sup>38</sup>

<sup>34</sup> *MWB Business Exchange Centres v Rock Advertising* [2017] QB 604 611 [19] - 616 [36] (Kitchin LJ, Arden and McCombe LJJ agreeing). As an interesting aside, the former two have since been appointed to the Supreme Court.

<sup>35</sup> *United Bank Ltd v Asif* (CA, unreported, 11 Feb 2000); *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413; *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm); *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712.

<sup>36</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1608 [10].

<sup>37</sup> *Rotam Agrochemical Company Limited v Gat Microencapsulation GMBH* [2018] EWHC 2765 (Comm) at [137] (Butcher J).

<sup>38</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1608 [11].

... override the parties' intentions... [as 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.

Whilst that proposition sounds unobjectionable, it is, unfortunately, misdirected. Because a variation to a contract is itself a contract,<sup>39</sup> there is not merely one set of party intentions to be considered, but rather their intentions at the time of the first contract and their intentions at the time of the variation. As those intentions are necessarily inconsistent, at least one must be overridden. Consequently, the real question is not whether we should honour the parties' intention to limit any variations to writing, but rather whether that intention should be prioritised over their latter intention to orally vary the agreement.<sup>40</sup>

By focusing, however, only on the parties' initial intention, and ignoring their latter intention, Lord Sumption is led into error regarding the conceptual difficulty posed by party autonomy. In this regard, his Lordship continues in a central part of his reasoning:<sup>41</sup>

Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. 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.

Of course, as Lord Sumption correctly notes, the contract of the parties demarcates the legitimate bounds of their future autonomy. But, properly understood, that is not the territory occupied by party autonomy or freedom of contract; those principles do not provide, and never have provided, that parties are free to unilaterally adopt whatever course of action they desire. Instead, they provide that contracting parties are free to mutually agree to whatever they desire, even if that agreement is inconsistent with their earlier agreement.<sup>42</sup> Unfortunately, his Lordship does not engage with this issue of mutuality, nor with the fact that any variation only exists because both parties have consented to its existence.

This difficulty is starkly exposed when it is realised that his Lordship's approach, being premised on the clear intentions of the parties at some initial point, must allow, by parity of reasoning, two parties to permanently abdicate their freedom of contract by agreeing to an 'eternity clause'.<sup>43</sup> Such a clause would be

<sup>39</sup> *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 533 [22] (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

<sup>40</sup> David Snyder, 'The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver and Estoppel' (1999) *Wisconsin Law Review* 607 at 640.

<sup>41</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1608-9 [11].

<sup>42</sup> Papp, above, n 7, at 542.

<sup>43</sup> *Contra. Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 387-388.

void as against public policy, and thus Lord Sumption retreats from that conclusion by framing the general rule as being limited to procedural matters.<sup>44</sup>

... the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.

(emphasis added)

The basis for this limitation, however, is not apparent from his Lordship's reasoning; this, in turn, suggests that the reasoning itself is flawed. Further, and in any event, the distinction implicitly drawn between a substantive limitation and a procedural limitation is questionable.<sup>45</sup> Consider, for example, a clause which states that no variation is effective unless signed by all employees of both contracting parties. Despite being a procedural limitation, it would no doubt have the practical effect of substantively entrenching the parties' agreement.<sup>46</sup>

Perhaps in recognition of these difficulties, Lord Sumption attempts to draw comfort from supposedly analogous areas of law to support his conclusion.<sup>47</sup> His first point was to note that various other legal regimes, such as the CISG and UNIDROIT, enforce NOM clauses, apparently demonstrating that it is conceptually possible to do so whilst also retaining party autonomy.<sup>48</sup> Subsequently, an analogy was drawn to the treatment of entire agreement clauses under English law. The analogy goes something like this: just as the parties can agree under entire agreement clauses to nullify what would otherwise be valid collateral agreements (and thus curtail their contractual autonomy), they should also be able to agree under NOM clauses to nullify what would otherwise be valid oral variations.

However, and again with respect, both of those analogies are misplaced.<sup>49</sup>

First, the main mechanism by which other legal regimes that enforce NOM clauses do so is through legislative force. Contrary to Lord Sumption's view, there is an obvious 'principled reason' why parties cannot simply agree to the same outcome: that statutory prescription is imposed onto the parties' agreement and

<sup>44</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1608 [10].

<sup>45</sup> *Contra*. Jonathan Morgan, 'Contracting for self-denial: on enforcing "No Oral Modification" clauses' (2017) 76 *Cambridge Law Journal* 589 at 607.

<sup>46</sup> An analogy from the Parliamentary world comes from the difficult distinction to draw between provisions which impose 'manner and form' limitations, and those which impose substantive limitations: *West Lakes v South Australia* (1980) 25 SASR 389 at 396-8 (King CJ).

<sup>47</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1609 [13] - 1611 [14].

<sup>48</sup> The CISG, for example, provides in Article 11 that a contract of sale 'need not be concluded in or evidenced by writing and is not subject to any other requirements as to form'. Despite this flexibility which mirrors the common law approach, Article 29(2) provides that 'a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement...'

<sup>49</sup> See Lord Briggs' analysis in *Rock Advertising* [2018] 2 WLR 1603 at 1614 [25] - 1615 [28].

cannot be derogated from regardless of any agreement to the contrary. For that reason:<sup>50</sup>

... case law concerned with the consequences that can flow from non-compliance with formal requirements imposed by statute ... has no bearing on the present question which involves the legal effect to be given to self-imposed ... formal requirements.

Of course, if those other legal regimes apply only by virtue of party agreement, then the same difficulty still exists regarding whether that agreement has simply been overridden by the later inconsistent oral variation of the parties. In either scenario, the analogy does not make the point it purports to.

The entire agreement clause analogy is also inappropriate because those clauses do not impede or restrict party autonomy, as distinct from what NOM clauses purport to do. Entire agreement clauses simply act, in effect, as an agreement to terminate all other agreements which already exist but which are not contained in the relevant document.<sup>51</sup> That is far removed from the situation contemplated by NOM clauses, which are instead directed to future agreements yet to be reached. As those future agreements may or may not take precedence over the NOM clause itself (which is, after all, the entire conceptual problem), the analogy to entire agreement clauses rather begs the question. Thus, as put by Professor Corbin:<sup>52</sup>

Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today.

At this point, Lord Sumption has completed his exposition without satisfactorily explaining how the common law can, consistent with the principles of party autonomy and freedom of contract (as his Lordship's approach is declared to be), create a rule which actually limits the capacity of parties to agree to future matters. We postpone – until after Lord Briggs' approach is analysed – the question of undermining those principles to reach the same conclusion. Of course, by virtue of speaking for the plurality of the United Kingdom's highest court, Lord Sumption's approach is now the law. This does not mean that his reasoning should be adopted in Australia.

<sup>50</sup> *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 61 [216] (Finn J).

<sup>51</sup> It is not a 'covenant that at all times until the contract comes to an end the contractual arrangements between the parties will be set out within the "four corners" of the document': *Manjul Vasant v NHS Commissioning Board* [2018] EWHC 3002 (QB) at [86] (Murray J).

<sup>52</sup> Arthur L Corbin, 'The Parol Evidence Rule' (1944) 53(4) *Yale Law Journal* 603 at 607.

### C *The Approach of Lord Briggs*

Lord Briggs, writing alone, concurred in the outcome but adopted a self-described 'narrower' approach.<sup>53</sup> The basic proposition in Lord Briggs' analysis is that the contracting parties do not intend to dispense with a NOM clause simply by agreeing to an oral variance in defiance of it.<sup>54</sup> Consequently, that subsisting NOM clause attaches to the oral variation, depriving it of legal effect until it is recorded in writing (Lord Briggs also mentions an exception if dispensation of the NOM clause is "strictly necessary", but that issue can be placed to one side). Put another way, under Lord Briggs' approach, an oral variation made without reference to, or in non-compliance with, a NOM clause, operates as a conditional variation, and only takes effect once that variation is reduced in writing.

If Lord Briggs, in saying that contracting parties do not intend to dispense with a NOM clause simply by agreeing to an oral variation (contra. Australian law), was speaking of their subjective intent regarding the continued existing of the clause, he is no doubt correct. But, of course, subjective intent is irrelevant in Australian and English contract law. The correct question is not one which enquires into the legal mechanisms adopted by the parties (i.e. whether they specifically wanted to dispense with the NOM clause), but rather one which enquires into what they wished to be the agreement which bound them.

When asked that way, the answer becomes obvious: no party would take the time to agree to something which would be legally ineffective (perhaps with one exception to which we will shortly come). Had they been aware of the NOM clause then, even on Lord Briggs' view, they would have complied with it in making the same agreement. It follows that it is entirely reasonable to impute, from the fact that an oral variation was agreed, an intention to dispense with the NOM clause as well. And, given that Lord Briggs' approach does not involve the actual deprivation of contractual power (contrary to the plurality's approach), that intention becomes critical.

In order to circumvent this difficulty, Lord Briggs draws an analogy to the legal treatment of negotiations subject to contract:<sup>55</sup>

Where parties agree to negotiate (or declare that they are negotiating) under the subject to contract umbrella and, at the end of those negotiations, reach consensus ad idem supported by consideration sufficient (but for the umbrella) to give rise to a contract, no binding obligations thereby ensue unless or until they have made a formal written contract, or expressly

<sup>53</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1613 [20], 1616 [31]-[32].

<sup>54</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1615 [29].

<sup>55</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1615 [29].

agreed to dispense with that umbrella. Its abandonment will not be implied merely because they have reached full agreement, unless such an implication was necessary.

Although not spelt out in terms, it appears that the purpose of the analogy is to demonstrate that the law already recognises circumstances where a former agreement of the parties can evince an overriding intention which takes precedence over, and negates, a latter agreement.<sup>56</sup> The difficulty, however, is that the ‘subject to contract’ cases are instead more compatible with the present Australian approach to NOM clauses than with his Lordship’s proposed approach.

The starting point is that the so-called ‘subject to contract umbrella’ operates by acting as a clear mutual statement that the parties do not intend to create legal relations until their agreement is reduced to writing. In turn, it is well established that a contract is only formed in the presence of an agreement and an intention to create legal relations.<sup>57</sup> It follows that to pierce the ‘subject to contract’ veil simply because an oral (or other informal) agreement exists would impermissibly elide the distinction between those two essential elements.

It is unreasonable, however, to interpret a NOM clause as negating the intention to create legal relations in the same way. The ‘subject to contract’ umbrella ordinarily attaches to a single, high-value transaction. The parties negotiate with that fact in mind. In contrast, in the typical case where the efficacy of a NOM clause is in issue, the reason for non-compliance with it is because the parties were unaware of, or forgot about, its existence (a fact even accepted by their Lordships in *Rock Advertising*).<sup>58</sup> The parties have then made an oral variation with the intent that it would be binding and acted upon. In those circumstances it would be artificial to hold that somehow the parties did not intend their variation to have legal effect, and thus the very basis of the ‘subject to contract’ rule does not apply in these circumstances.

Further, and in any event, Lord Briggs’ analysis overstates the conclusiveness of the ‘subject to contract’ umbrella. It may be accepted that, as the High Court made clear in *Masters v Cameron*,<sup>59</sup> such an umbrella "prima facie create[s] an overriding condition" (or presumption) that what has been agreed is not a contract

<sup>56</sup> See, however, *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* (2007) 20 VR 487 (in Australia) and *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 (in the UK) for examples of where the subsequent agreement made in non-compliance with the "subject to contract" requirement was given effect.

<sup>57</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105 [24] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>58</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1611 [15].

<sup>59</sup> (1954) 91 CLR 353.

in itself, but rather the basis for a future contract.<sup>60</sup> That statement, however, must be read in context; *Masters* was a case dealing with a contract for the sale of land, as has most of the subsequent case law in this topic. Consequently, it is clear why the law would generally create such an ‘overriding condition’: it is unlikely that parties contracting over something as important as the transfer of land would intend mere informal exchange to constitute their agreement.<sup>61</sup> Indeed, the general law also typically implies a presumption in contracts for the sale of land that no binding contract exists until contracts are exchanged.<sup>62</sup>

If we move outside the case of land, however, we reach a wide range of commercial and personal transactions where that analysis is less applicable. Consequently, as Young CJ in Eq noted in *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd*,<sup>63</sup> the strength of the presumption that there is no contract "may be weaker in other circumstances". His Honour went on to give the examples of guarantees and construction contracts. The import of the Chief Judge’s comments is that it is not possible to circumvent the inquiry into the true intentions of the parties as to whether they had intended their agreement to have legal effect by reference to conclusionary rules.

When viewed in this way, the treatment of the ‘subject to contract’ cases is entirely consistent with the present Australian approach to NOM clauses: the existence of a NOM clause is a matter to be taken into account in determining whether a variation had been agreed, but is not conclusive in denying that variation legal efficacy. To use the language of Young CJ in Eq, the strength of the evidentiary and substantive presumption created by the NOM clause will vary depending on the circumstances. And considering that many NOM clauses are of a boilerplate variety, it is easy to see why they have been held to have been displaced in some of the cases.

#### D *A Third Approach?*

There is a third approach which might be thought to be open. Neither judgment in *Rock Advertising* explicitly challenges the pre-eminence of the principle of party autonomy: Lord Briggs cleverly circumvents the issue,<sup>64</sup> whilst Lord Sumption considers his approach to be consistent with party autonomy.<sup>65</sup> But what if that pre-eminence were challenged? After all, given that the principle of party autonomy is

<sup>60</sup> *Masters v Cameron* (1954) 91 CLR 353 at 363 (Dixon CJ, McTiernan and Kitto JJ).

<sup>61</sup> See NC Seddon and RA Bigwood, *Cheshire & Fifoot, Law of Contract: 11<sup>th</sup> Australian Edition*, LexisNexis, Sydney, 2017 at [3.9] and particularly the cases extracted at footnotes 93-95.

<sup>62</sup> *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634.

<sup>63</sup> [2005] NSWCA 235 at [73].

<sup>64</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1613 [20], 1616 [31]-[32].

<sup>65</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1608 [11].

a common law doctrine, what stops the High Court from simply abrogating that principle in the face of a NOM clause?

Tempting whilst this approach may be, the principle is so fundamental that its (partial) abolition is better left to Parliament rather than the courts.<sup>66</sup> It is a doctrine which is well-recognised in all common law jurisdictions,<sup>67</sup> and it is telling that none of their Lordships took this ‘shortcut’. Further, to the extent that there exist other common law restrictions on party autonomy, such as the doctrine of consideration or the rule against penalties, those restrictions are similarly long-standing; “it is 350 years and a civil war too late”<sup>68</sup> to introduce new restrictions.

#### IV CONCLUSION

The current Australian treatment of NOM clauses, being to give such clauses a variable evidentiary effect, is orthodox and principled. Unfortunately, it also denies commercial parties the benefits that they perceived in agreeing to such clauses. Although the United Kingdom has purported to resolve this difficulty, this note suggests that it does so in a way that is apt to introduce incoherence into established principles of contract law and equity.

One possible solution to this tension is to replicate the approach taken some 341 years ago in regard to contracts for the sale of land: introducing legislation.<sup>69</sup> This is an approach which has already been adopted in some other common law jurisdictions.<sup>70</sup>

It might be thought strange that legislation could be introduced to require compliance with conditions that the contracting parties agreed would be in their interests to follow. That concern is misplaced: commercial parties might well recognise that there is a danger that they would not later act in what they now perceive to be their interests (either by inadvertence or otherwise) and wish to guard against that. The point is elegantly made by the imperfect analogy of Homer's *The Odyssey*, where Odysseus is tied to the mast so that he can hear the sirens sing, ordering his sailors to disobey any later command to untie him.<sup>71</sup>

The obvious benefit of such legislation is that it would allow commercial law, viewed holistically, to promote the legitimate commercial interests of contracting

<sup>66</sup> See *Cavendish Square Holding BV v Talal El Makdessi* [2016] AC 1172 at [36]-[37] per Lords Neuberger and Sumption regarding why the rule against penalties should not be abolished by the courts.

<sup>67</sup> Papp, above, n 7, at 517-9, and particularly the references extracted therein at footnotes 18-20.

<sup>68</sup> *BBC v Johns* [1965] Ch 32 at 78 (Diplock LJ).

<sup>69</sup> AWB Simpson, *A History of the Common Law of Contract*, Clarendon Press, Oxford, 1975 at 599-620.

<sup>70</sup> See, eg, § 15–301 of the New York General Obligations Law; § 1698(c) of the Civil Code of California.

<sup>71</sup> Morgan, above, n 45, at 589-90.

parties.<sup>72</sup> Further, and importantly, the "unforeseen problems"<sup>73</sup> created by the Statute of Frauds do not arise as the proposed legislation would be opt-in (by including a NOM clause in a contract). Indeed, a party has only itself to blame for not being aware of, and complying with, its own agreement to restrict variations to those in writing.

Were such an approach to be adopted, a sample provision could be modelled on Article 29(2) of the CISG in the following terms:

A contract in writing which contains a provision requiring any modification by agreement to be in writing [or other formalities as specified in the regulations] may not be otherwise modified by agreement.

This hypothetical legislation would need to be strictly construed in order to retain its purpose.<sup>74</sup> In Lord Sumption's view, before any estoppel (and, it is suggested, part performance) could have effect:<sup>75</sup>

[a]t 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.

Regardless of whether such an approach is adopted, what is clear is that this is an area, like the law regarding penalties, where Australian law should differ from its English parent.<sup>76</sup>

<sup>72</sup> *'The commercial law should foster and support commercial practice, not fight it': United Group Rail Services Ltd v Rail Corporation New South* (2009) 74 NSWLR 618 at 634 [57] (Allsop P). See also P Devlin, 'The Relation between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249.

<sup>73</sup> Richard Calnan, 'Contractual variation clauses' (2018) 8 *Journal of International Banking and Financial Law* 487 at 489.

<sup>74</sup> As Lord Kenyon CJ said in the context of the Statute of Frauds, "if the Courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought": *Chater v Beckett* (1797) 7 Term Reports 201 at 204; 101 ER 931 at 933.

<sup>75</sup> *Rock Advertising* [2018] 2 WLR 1603 at 1612 [16].

<sup>76</sup> *Paciocco v ANZ Banking Group Ltd* (2016) 258 CLR 525 at 538 [6] - 541 [10] (French CJ).