TWENTY ESSEX

Don't estop me now: the Supreme Court revisits contractual variation and the effect of 'no oral modification' clauses

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***Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48**

In May 2018 we authored a bulletin ("our May 2018 Bulletin") addressing the landmark decision of the English Supreme Court in *Rock Advertising v MWB Business Exchange Centres Limited* [2019] AC 119 ("*Rock Advertising*") in respect of the effect of "no oral modification" clauses ("NOM clauses").

In May 2021 we commented in a further bulletin ("our May 2021 Bulletin") on a notable decision of Singapore's apex court, which had picked up on our May 2018 Bulletin, and which chose not to follow the Supreme Court in *Rock Advertising:* the case of *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("Lim"). The focus of this bulletin is a further development in respect of a lingering controversy arising out of Lord Sumption's judgment in *Rock Advertising*, discussed in our May 2021 Bulletin, as to the circumstances in which estoppel might help escape the strictures of a NOM clause.

I want to break free (of a NOM clause): estoppel under pressure

As observed in our previous bulletins, the controversy concerns the extent to which the scope for estoppel in this particular context is limited by the requirements mentioned by Lord Sumption at [16] in *Rock Advertising*, that at the least there would have to be

1. Some words or conduct unequivocally representing that the variation was valid *notwithstanding its informality*, and

2. Something more for this purpose than the informal promise itself. Such limits naturally raise the further question as to what evidence might suffice for these purposes in practice; what is the elusive "something more"?

In his relatively brief discussion of estoppel in *Rock Advertising*, Lord Sumption did not himself provide any example of what evidence might satisfy the requirements he suggested, which leaves scope for debate as to precisely what he intended. Furthermore, Lord Sumption also recognised on the facts in *Rock Advertising* that, "*This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation.*"

Against this background, in the Court of Appeal's decision in *Kabab-Ji SAL v Kout Food Group* ("*Kabab-Ji*") [2020] 1 Lloyd's Rep 269, Flaux LJ suggested at [72] to [75] that Lord Sumption had in mind that the English law of estoppel was broadly equivalent to the proviso in the UNIDROIT Principles of International Commercial Contracts 2016 Article 2.1.18 that "*... a party may be precluded by its conduct from asserting [a NOM clause] to the extent that the other party has reasonably acted in reliance on that conduct.*" However, Flaux LJ cited an illustration from the Comment on the UNIDROIT Principles which does not appear to us to import the strict requirements to which Lord Sumption referred. In particular, neither the illustration, nor Article 2.1.18, seem to require an unequivocal representation *going beyond* the promise to vary, to modify or not to enforce a particular aspect of the agreement, so as to include *in addition* an unequivocal representation not to enforce the NOM clause. Yet that is what Lord Sumption appears to have envisaged would be required.

It is possible that Flaux LJ was seeking subtly to sidestep the full rigour of Lord Sumption's view in this regard; in any event his analysis might have been prayed in aid by any party wishing to run an estoppel point in this context. That said, in the next breath of his judgment (at [76]), Flaux LJ did advert to the possibility that "*... the UNIDROIT principles are enunciating some broader test for preclusion than that laid down by Lord Sumption ...*", and his analysis at [80] indicates the Lord Sumption 'something more than the informal promise' test was being applied. We therefore perceive a tension in Flaux LJ's judgment, as to whether the test under the UNIDROIT Principles is the same or different to what is necessary for an estoppel to circumvent a NOM clause as a matter of English law.

Further fuel for the debate may be derived from *Lim*. As we observed in our May 2021 Bulletin, the Singapore Court of Appeal in that case appears to have applied (obiter) a less restrictive test for estoppel than contemplated by Lord Sumption.

All this left the ground ripe for argument about the scope for estoppel in the context of circumvention of a NOM clause.

The Supreme Court decision in *Kabab-Ji* relating to estoppel: we will *Rock Advertising* you

The latest development is the Supreme Court decision in *Kabab-Ji* ([2021] UKSC 48), upholding the decision of the Court of Appeal. The principal issues in that case, which have attracted much commentary, were what law governed the arbitration agreement in the context of enforcement of an award, and whether the Respondent was a party to the relevant arbitration agreement. The effect of various NOM clauses was central to resolution of the latter issue, with these having decisive effect applying the majority's decision in *Rock Advertising*. The combined judgment of Lord Hamblen and Lord Leggatt (with whom all other members of the Court agreed) appears to endorse, at [58], [67], [72], [74] and [80], the strict requirements to found an estoppel stated by Lord Sumption in *Rock Advertising*.

However, the facts of the case did not test the exact ambit of these requirements. It seems that the correctness, and intended scope, of Lord Sumption's proposed estoppel tests were not challenged before the Supreme Court. For a powerful critique of *Rock Advertising*, and a persuasive view that neither *Kabab-Ji* nor any prior or following case has settled the precise meaning and effect of Lord Sumption's proposed strictures on the doctrine of estoppel, nor the occasion for their application (if ever), see: Thomas Raphael QC, "Tying Your Own Hands: the Supreme Court's Decision in Rock Advertising" [2022] 138 LQR 299.

On one view, the passing treatment of the UNIDROIT Principles (at [72]) suggests that because these could preclude reliance on a NOM clause in wider circumstances, they contradict the minimum requirements set out in *Rock Advertising*. In any event, none of the cases to date have addressed whether what needs to be proved to establish an estoppel might vary according to the particular language and type of the NOM clause or clauses in question. This could be important, given that, as the cases illustrate, such provisions come in a variety of guises (see, for example, the recent decision of Moulder J in *BP Oil International Ltd v Glencore Energy UK Ltd* [2022] EWHC 499 (Comm) at [283, 292-300]).

The Supreme Court did not have cited to it, and did not refer to, *Lim* at all (which was decided between the Court of Appeal's decision, and the hearing in the Supreme Court, in *Kabab-Ji*). This may be unsurprising given the general divergence from *Rock Advertising* espoused by Singapore's top court.

In these circumstances, and pending a case whose facts properly test the scope for estoppel to evade a NOM clause, we do not believe the latest pronouncements of the Supreme Court will be the last word on this subject, whether in this jurisdiction, or further afield.

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