Valid oral variations to SMSF trust deeds … that prohibit oral variations

- by Matthew Burgess, Director, View Legal

In theory, decisions from the UK are not necessarily of utility in Australia. In practice, however, UK cases can give insights as to the likely position in Australia, and the UK decision in *MWB Business Exchange Centres Limited v Rock Advertising Limited* [2019] AC 119 is a useful example how even what would otherwise be seen as abundantly obvious, is not necessarily so.

A timely reminder of this fact was made last week in the decision in *Martin v Dee-Tech Pty Ltd* [2021] NSWSC 434.

Background

In this case, there was a written agreement that had a standard "no oral variation (or modification)" clause stating:

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

The initial judge held that this was a clear clause which precluded an oral re-negotiation of a core term of the agreement.

This was on the basis that "anti-oral variation" clauses promote "certainty, avoid false or frivolous claims of an oral agreement and stop a person in a large firm unintentionally creating an outcome that is inconsistent with a provision in a contract between the firm and an external party".

An outcome that was arguably to be expected.

First appeal decision

On appeal, however, the above position was reversed. Instead, it was held that despite the prohibition on oral amendments, an oral amendment could in fact amend that very clause and, in turn, the written agreement. The outcome was that an oral agreement which had been made by one party's credit controller (apparently without proper authority) was binding on that party.

In particular, it was said:

"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…"

Second appeal decision

Then on further appeal, the initial judge's decision was effectively reinstated, with the court confirming that "no oral variation" clauses, while not forbidding oral variations, will cause any purported oral variation to be invalid.

The court confirmed that in order to ensure commercial certainty this outcome was appropriate, in particular allowing "no oral variation" clauses to operate:

1. Prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment.
2. In circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, helps avoid disputes not just about whether a variation was intended but also about its exact terms.
3. Provides a measure of formality in recording variations and, in turn, makes it easier for corporations to police internal rules restricting the authority to agree them.

Australian position

Interestingly, however, as confirmed in *Martin v Dee-Tech Pty Ltd* [2021] NSWSC 434, in Australia, while the party seeking to rely on the alleged oral representations has the onus of proof, subject to this, a "no oral modification" clause cannot prevent the parties to a contract containing it from agreeing orally to vary it (see *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91 and *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87).

That is, the Australian courts have effectively (at least to date) adopted the approach of the first appeal court in the above-summarised UK decision.

This said, it appears to be the case that "no oral modification" clauses under Australian law, even though not preventing valid oral modifications, will provide important context in considering whether the requisite contractual intention to modify or vary a written contract, objectively ascertained, exists (see *White v Philips Electronics Australia Ltd t/as Philips Healthcare* [2019] NSWCA 115).

SMSF trust deeds

Some SMSF trust deeds will expressly prohibit oral variations.

Based on the Australian case law, a prohibition in an SMSF trust deed on oral variations will not in fact achieve such a restriction — that is, oral variations are likely to still be permissible.

However, if only because of the case law position in the UK, the preferred approach for SMSF trust deeds is that they should expressly permit oral variations, if that is the intended extent of authority the trustee is to have.