Contract clauses stopping oral variations don't work?

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Speed read

Contracts for complex supplies, such as software and outsourcing agreements, often contain an anti-oral variation clause, so that all changes must be agreed in writing. But changes in such contracts over time are the norm, not the exception. For example, waterfall software development contracts rarely involve no change between the get go and later on.

An April 2016 English Court of Appeal case shows that there can still be oral variations despite an anti-oral variation clause. But it is still worthwhile having anti-oral variations in contracts, as they make it harder to establish an oral binding variation.

The Detail

Until this April 2016 decision[1], there were two conflicting Court of Appeal decisions on the issue of oral variations to a contract, reflecting policy differences, such as:

- The objective of certainty and sticking to written agreements, varying them clearly only when this is evidenced in writing; and
- On the other hand, that parties have freedom of contract to agree what they want, how they want, including, for example, changes to the original contract (or by that mechanism the subject of law school exam questions: the collateral/separate contract).

This decision landed on the side of the second point, upholding freedom of contract and the freedom to vary contracts as the parties choose (of course having agreed to do so, albeit orally).

Having outlined the obvious benefits of forcing parties to agree variations only in writing, when they have said that is to be so, the Court of Appeal explained the other policy perspective:

> *"It seems to me entirely legitimate that the parties to a formal written agreement should wish to insist that any subsequent variation should be agreed in writing (and perhaps also, as here, in some specific form), as a protection against the raising of subsequent ill-founded allegations that its terms have been varied by oral agreement or by conduct: even though ill-founded, such allegations may make the obligations under the contract more difficult to enforce, most obviously by making it more difficult to obtain summary judgment. But the arguments in favour of a flexible approach are also strong; and in the end, even if it were desirable to treat provisions of this kind as entrenched, I cannot see a doctrinally satisfactory way*

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> *of achieving that result. I have considered whether there might be some kind of half-way house, which made it formally more difficult for a party to establish a "non-conforming" variation; but none was suggested in argument and I cannot see any that would be of realistic value."*

In other words, there can still be oral variations despite an anti-oral variation clause.

Does this mean that anti-oral variation clauses are a waste of time? No. As one of the Judges said:

> *"It does not follow that [anti-oral variation clauses] have no value at all. In many cases parties intending to rely on informal communications and/or a course of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing that both parties intended that what was said or done should alter their legal relations; and there may also be problems about authority. Those difficulties may be significantly greater if they have agreed to a provision requiring formal variation."*

And not to be forgotten is that this issue, a difficult one, hasn't necessarily played out decisively in England, let alone in New Zealand.

1 *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 (20 April 2016)

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