

## **Informal Change of Contract Terms**

***By Peter Sheridan***

Frequently the situation arises during the course of construction projects where it is necessary or desirable to make a change to the terms of the contract originally agreed. Normally there is a formal construction contract, which the parties have signed. One way of changing the terms would be a formal supplemental agreement but sometimes a further agreement is made informally, even orally.

Often a formal construction contract will contain a boilerplate clause of the “entire agreement” type. The wording might be along the following lines: *“This Agreement is the only agreement between the parties. It can only be amended by a written document which (i) specifically refers to the provisions of this Agreement to be amended and (ii) is signed by both parties.”*

What if the parties make a subsequent agreement which changes the original contract, but they do so orally, or by their conduct, or informally by an exchange of emails (which, let us suppose, does not refer specifically to the original contract and is not signed).

This question, in relation to an amendment of a contract, orally or by conduct, with a clause of the type described above, came before the Court of Appeal recently in *Globe Motors Inc v TWR Lucas Varity Electric Steering Ltd* (2016). Previously, there were conflicting Court of Appeal decisions, so definitive guidance was now given.

On one view, a clause of the type described above means that it is not open to the parties to amend the contract orally, or by conduct, or by an informal exchange; the amendment must be in writing and signed by both parties. This type of clause promotes certainty and avoids false claims of, for example, an oral agreement. However, this was not the view taken in the Court of Appeal, whose approach was based on the principle of party autonomy, that the parties are free to decide on their contractual terms.

Beatson LJ stated: *“The parties have freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth or by conduct. The consequence in this context is that in principle the fact that the parties’ contract contains a clause such as [the entire agreement provision above] does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct.”*

It is possible for the parties to waive compliance with a clause of the type described above, just as they may waive compliance with any provision of a contract. Just as the parties can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties.

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