

VARIATIONS TO LEASES

1. The formalities requirements which apply to agreements for leases, and leases, are familiar.
 - (a) An agreement for a lease may need to comply with s.2 of Law of Property (Miscellaneous Provisions) Act 1989. This section applies to any agreement for a lease of longer than three years¹. It provides that such a contract can only be made in writing, incorporating all the expressly agreed terms in one document, or in each of a pair of exchanged documents.
 - (b) A lease of longer than three years² must be by deed (s.52 of the Law of Property Act 1925).
2. Also, any interest in land can only be created or disposed of by writing signed by the person creating or disposing of that interest (s.53 of the 1925 Act).

Formalities for variations?

3. What are the formalities requirements for variations to leases? While the common law rule was that a deed could only be varied by another deed, it seems that in equity, a deed can be varied by a mere contract under hand. As explained in *Berry v Berry* [1929] 2 K.B. 316 by Swift J (with whom Acton J agreed):

“It is clear, as was said by Bosanquet J. in *West v. Blakeway* 10 L. J. (C. P.) 173, 177, that “no rule of law is better established than that a covenant cannot be varied or dispensed with, but by some contract of equal value; and this covenant, therefore, cannot be varied but by some instrument under seal.” But, although that was the rule of law, the Courts of Equity have always held themselves at liberty to allow the rescission or variation by a simple contract of a contract under seal by preventing the party who has agreed to the rescission or variation suing under the deed. [...]

¹ And any agreement for a lease not taking effect in possession, or not at the best rent which can reasonably be obtained without taking a fine.

² And any lease not taking effect in possession, or not at the best rent which can reasonably be obtained without taking a fine.

That being the state of the law and of the equitable practice, the Supreme Court of Judicature Act, 1873, provided, by s. 25, sub-s. 11, that "in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." That provision is now re-enacted by s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925. It seems to me, therefore, that, when the question arises whether or not a deed can be varied by any agreement which is not itself contained in a deed we must have regard to the principles which Courts of Equity would have applied to the matter when the rules of the common law would have prevented such a thing being done."

4. Section 49(1) of the Senior Courts Act 1981 similarly provides that the rules of equity shall prevail to this day. So it seems that even where a lease is required to be made by deed, it can be varied by a less formal agreement.
5. A variation can be contained in a collateral agreement, and still run with the reversion to the lease. In *Weg Motors Ltd. v Hales* [1962] Ch. 49 an option to renew was contained in a separate agreement from the lease, which was a mere contract under hand, not a deed. The Court of Appeal held that it ran with the reversion under s.142(1) of the Law of Property Act 1925. In the joint judgment of Lord Evershed MR and Harman LJ, number of objections to this proposition were rejected, including the following:

"(a) The first objection taken is that the section deals with the lessor's covenants and that the covenantor was not the lessor when the contract was made. This is the same point with which we have already dealt and the fallacy is that it treats the option as a concluded agreement before the execution of the lease. In our judgment this is wrong and the relationship of lessor and lessee did exist between the parties when the contract to grant an option came into force.

(b) Next, it is said that this covenant, like the covenants referred to in the preceding section 141 which deals with the benefits of lessee's covenants, only applies to covenants contained in the lease. That is so in the case of section 141 but in this section 142 the language is different. It is "entered

into by a lessor with reference to the subject matter of a lease." We take "subject matter" to mean the demised property. This contract satisfies those words and we see no reason why, provided the relationship of lessor and lessee exists, a covenant to renew should not be included in an independent document.

(c) It is next objected that the option contract is under hand only. We have been unable to see the force of this. The lease itself would have taken effect in equity if under hand only, and we do not think that the word "covenant" in section 142 is limited to covenants under seal."

6. This principle can apply even where the agreement is expressed to be personal to one of the parties, such as a variation to a lease, agreed in a side letter, which operates only while the original tenant remains the tenant. In *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 the parties to a 21-year lease entered into a side letter by which the landlord agreed to accept a surrender of the lease following a rent review, and varied the repairing obligations in the lease, while the tenant held the lease. The agreement was expressly personal to the tenant, but the Court of Appeal held that it was still binding upon the landlord's successor in title, pursuant to s.142(1) of the Law of Property Act 1925. As explained by Morritt LJ (with whom Millett and Leggatt LJ agreed), on the correct construction of the side letter, the obligations it contained still touched and concerned the demised land. Millett LJ added (at 51B):

"It was argued that the fact that the provisions in question were contained in a side letter and not in the leases which were being granted on the very same day should predispose the court to construe the letter so as to be personal to the two parties. A side letter, it was said, is not an appropriate way of varying the terms of the lease. But the fact that two of the three provisions of the side letter consisted of a modification of the tenant's covenants in the lease – covenants the benefit of which was to inure to the landlord from time to time – points in the other direction. [...]"

7. Does this mean that there are no formalities requirements for the variation of a lease, even one required to be made by deed? A contract for the variation of a lease

is not a contract for the sale or other disposition of an interest in land (within s.2 of the 1989 Act), nor is it a conveyance of land or any interest therein (within s.52(1) of the 1925 Act). Nor is it an instrument required to be in writing by s.53 of the 1925 Act, as it does not create or dispose of an interest in land. So, it seems that there is nothing to prevent the parties to a lease agreeing orally to vary its terms. By contrast, it seems that the terms of an agreement for lease cannot be varied orally, as that would mean that the parties' written agreement no longer incorporated all of the terms which they had expressly agreed (*McCausland and Another v Duncan Lawrie Ltd* [1997] 1 W.L.R. 38). This is a curious asymmetry.

8. Further, the parties to a lease can be estopped from relying upon certain of its terms, in appropriate factual circumstances. Such an estoppel can arise from things said, as well as things written. However, the principles of estoppel work differently from those for the effecting of a contractual variation. A contractual variation, as a species of contract, requires offer, acceptance, and consideration. Estoppels, by contrast, do not require a meeting of minds, and the passing of consideration, but instead require representation (or promise), reliance and detriment, and (in the round) unconscionability.

Contracting for formality?

9. Until recently, it has seemed that the parties could not, by the terms of their contract, prevent themselves from varying its terms orally, even by an express term requiring variations to be in writing. However, it has now been clarified by the Supreme Court that the parties can, by the terms of their agreement, prevent themselves from relying on purported oral variations. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24 concerned certain oral modifications to a licence to occupy certain premises. All the members of the Court apart from Lord Briggs JSC agreed with Lord Sumption JSC, who explained:

“[7] At common law there are no formal requirements for the validity of a simple contract. The only exception was the rule that a corporation could

bind itself only under seal, and what remained of that rule was abolished by the Corporate Bodies Contracts Act 1960. The other exceptions are all statutory, and none of them applies to the variation in issue here.”

10. Lord Sumption considered and rejected the arguments normally advanced for the ineffectiveness of “no oral modification” clauses. Those arguments are expressed vividly by Cardozo J in the New York Court of Appeals in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380, 387–388:

“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. ‘Every such agreement is ended by the new one which contradicts it’: *Westchester F Ins Co v Earle* 33 Mich 143, 153. 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 ...”.

11. Lord Sumption explains why he disagrees, and the core of his reasoning is found in the following passage:

“11 The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties’ intentions. 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. In the Court of Appeal, Kitchin LJ observed that the most powerful consideration in favour of this view is “party autonomy”: [2017] QB 604, para 34. I think that this is a fallacy. 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. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.”

12. This does not exclude the possibility of something equivalent to a variation being achieved by an estoppel. That is why it is important to distinguish genuine contractual variations (which can be required to be in writing, if the parties so choose) from estoppels. This salutary effect is emphasised by Lord Sumption:

“[16] The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. 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.”

13. The effect of the Supreme Court’s judgment is to allow the parties to contract for a formalities requirement on the variation of a lease (or other contract). So, parties to leases who do not wish to find themselves embroiled in factual disputes about who said what to whom, when, would be well advised to include “no oral modification” clauses in their leases. That will not mean that they cannot be drawn into such disputes, where estoppels are alleged, but it will cut down the scope for them, in a similar way to “entire agreement” clauses. As explained by Lightman J in *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611, para 7:

“The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the

contracting parties posed by the need which may arise in its absence to conduct such a search.”

14. It is now clear that this applies to “no oral modification” clauses too, for the period following the grant of the lease.