

Common but controversial clauses

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Introduction

1. This paper outlines some of the key legal and practical considerations for employment lawyers dealing with cases that involve the following contractual issues:
 - 1.1. Unilateral variation clauses;
 - 1.2. Entire agreement clauses;
 - 1.3. No oral modification clauses; and
 - 1.4. Exclusion clauses.

Unilateral variation clauses

2. Employers will frequently seek to reserve to themselves the power to modify employees' terms and conditions of employment, without having to seek the specific consent or approval of an employee, or workforce more generally, prior to implementing the change. A question commonly arises in practice as to whether an employer may safely rely on a particular unilateral variation clause ("**UVC**") contained within a contract of employment, in order to force through their desired change(s). The stakes will often be high; employees may react to such a change(s) by resigning and asserting that the employer's conduct constitutes a repudiatory breach of contract, giving rise to a constructive dismissal situation.
3. This paper focuses on the legal principles governing the construction and utilisation of UVCs; plainly there will also be important commercial, practical and industrial relations considerations for employers to take into account, when contemplating the unilateral imposition of changes to employees' terms and conditions.
4. UVCs vary widely in terms of their ambit – for instance, some are very specific and narrow in scope, whereas others are far more general in terms of the type and/or

nature of contractual modifications which may, on the face of it, potentially fall within the scope of the UVC.

5. Unsurprisingly, the courts have emphasised the importance of clear and unambiguous drafting, in circumstances where one party is reserving to itself the power to modify the terms of a contractual agreement in the future, *absent* the agreement of the counterparty. In **Wickman Machine Tools Sales v LG Schuler** [1974] AC 235, HL, Lord Reid held that as a general principle of contract law:

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make their intention abundantly clear.”

6. In **Amberley (UK) Ltd v West Sussex County Council** [2011] EWCA Civ 11, Aikens LJ (with whom the remainder of the Court of Appeal agreed) held:

“...[t]here is no doubt that, subject to any possible statutory safeguards (which it is not suggested are applicable in this case), parties to a contract can agree that one party shall be able, unilaterally, to vary the terms of the contract to the detriment of another. But, as Staughton LJ said in *Lombard Tricity Finance Ltd v Paton*, that is an unusual provision in a contract and, in general, clear words would be required to achieve that result.”

7. In **Esso Petroleum Company Ltd v Addison** [2003] EWHC 1730 (Comm), Moore-Bick J held:

“...I do not doubt that parties are free to make an agreement under which one of them effectively puts himself in the power of the other in relation to some aspect of the contract – see the comments of Staughton LJ in *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918 at p 923 – but it would be an unusual thing to do and I do not think that one should readily accept that it was what the parties intended. In deciding the matter it is, of course, necessary to examine both at the language of the contract and its commercial context.”

8. Furthermore, as noted by Longmore LJ in **Triodosbank NV v Dobbs** [2005] EWCA Civ 630:

“...it is important to distinguish between a true variation of an existing obligation and the entering of what is in fact a different obligation even though it may purport to be no more than a variation. In that sense it is perfectly possible (and, indeed, right) to put a ‘limit on the power to vary’.”

9. Where there is *genuine* ambiguity as to the meaning / scope of a UVC, that ambiguity will be resolved against the drafter of the contractual provision, pursuant to the *contra proferentem* rule.

10. With regard to a selection of cases in the employment sphere, illustrating the importance of clear and unambiguous language for UVCs in this context:
 - 10.1. In **Wandsworth London Borough Council v D'Silva** [1998] IRLR 193, CA, Lord Woolf held (in *obiter* remarks) that: "*The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort.*" On the facts, the Court held that the Code of Practice that the Council had amended was not contractual and that the changes were therefore permissible.

 - 10.2. In **Security and Facilities Division v Hayes** [2001] IRLR 81, CA, Peter Gibson LJ held that: "*Had the parties intended a provision allowing the unilateral variation of the rate of allowances, in my judgment the contractual terms would have had to provide unambiguously for that.*"

 - 10.3. In **Land Securities Trillium v Thornley** [2005] IRLR 765, EAT, in seeking to make significant and detrimental changes to an employee's job title and duties, the employer relied on an express clause which stated "*You will perform to the best of your ability all the duties of the post and any other post you may subsequently hold and any other duties which may reasonably be required of you and will at all times obey all reasonable instructions given to you...*" The Tribunal rejected the employer's argument, holding that its actions constituted a fundamental breach of the claimant's contract of employment. The EAT upheld the Tribunal's decision, holding that the particular term under consideration did not entitle the respondent unilaterally to change the claimant's role. In the EAT's judgment:

- 10.3.1. the reference to “*any other post*” ought to be construed as being a reference to any new post to which the employee was appointed consensually; and
- 10.3.2. the employee’s obligation to perform, to the best of her ability, “*any other duties which may reasonably be required of [her]*” did not afford the employer carte blanche to require her to undertake any duties they wished her to, but was expressly subject to a requirement of reasonableness (vis-à-vis the individual employee). On the facts, that requirement was not satisfied: the Tribunal had found that the effect of the changes on the employee meant that she “*would no longer be exercising the skills of an architect; that she would thereby be significantly deskilled; and that in consequence she would be materially disadvantaged in both her present and any future employment.*”
- 10.4. In **Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA** [2010] IRLR 715, the Court of Appeal held that a clause providing that “*the bank maintains the right to review or remove this formula-linked bonus arrangement at any time*” was not sufficiently clear to allow the employer unilaterally to vary the formula for calculating an employee’s bonus for a particular year, as distinct from conveying an indication that everything might change in a subsequent year. As Jacob LJ held “*...If you are to give with one hand and take away with the other, you must make that clear.*”
- 10.5. In **Norman v National Audit Office** [2015] IRLR 634, the NAO wished unilaterally to reduce employees’ entitlement to privilege leave and sick leave, pursuant to a provision in employees’ offer letters which stated “*...The following paragraphs summarise the main current terms and conditions of your employment in the NAO. Detailed particulars of conditions of service are to be found in the relevant sections of the HR Manual of the NAO. They are subject to amendment; any significant changes affecting staff in general will be notified by Management Circulars (MCs), Policy Circulars (PCs) or by General Orders (GOs), while changes affecting your particular terms and conditions will be notified separately to you....*” The EAT held that the wording of this clause came “*nowhere near*” being sufficiently clear and

unambiguous to permit the imposition of unilateral changes by the NAO. HHJ Hand QC held that “*Taken in isolation and looking at the language itself, the third sentence of clause 2 does no more, in our judgment, than simply point out that the clauses can be amended and that, if they are amended, and the changes are significant and of general effect, they will be notified...*”

10.6. In **Hart v St Mary’s School (Colchester) Ltd** [2015] UKEAT/0305/14, the EAT held that a contractual clause stating that a part-time teacher’s hours “*may be subject to variation depending on the requirements of the school timetable*” was not sufficiently clear and unambiguous to permit the unilateral imposition by the school of a materially different pattern of work for the claimant. HHJ Hand QC held that:

10.6.1. “*from the factual matrix...what the parties intended was the scope of her part-time work would be three days a week*”; and

10.6.2. “[*The words*] ‘*May be subject to variation depending upon the requirements of the School Timetable*’ might incline one to think that the variation is more likely to take place at the behest of the school. But I do not regard the wording as making that entirely and completely unilateral. The variation could be at the request of the part-time teacher. Both variations would have to be subject to the requirements of the school timetable. The school may refuse a teacher’s request for a variation and vice versa. Even though the requirements of the school timetable might suggest to the employer that there should be a variation, in my judgment it does not amount to a power to vary unilaterally.”

10.7. By contrast, in **Bateman v Asda Stores Ltd** [2010] IRLR 370, the EAT held that a UVC was sufficiently clear and unambiguous to permit the imposition of a new pay structure by the employer. The clause in question stated that: “*The company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation...*”

- 10.8. Similarly, in **Malone v British Airways Plc** [2010] IRLR 431, a dispute arose as regards BA's entitlement to make a reduction in crew complements on Heathrow flights, contrary to the terms of a collective agreement. BA relied on a UVC which provided that "*the company reserves the right to make reasonable changes to any of your terms of employment from time to time. Such changes may be made by way of a general notice applicable to all employees or by way of specific notice to you.*" The High Court held that the changes were "*objectively reasonable in the prevailing circumstances*" and therefore permissible. On appeal, the Court of Appeal concluded that the collective agreement was not contractual and so the UVC issue was rendered academic and "*artificial*".
- 10.9. In **British Airways Plc v Airways Pension Scheme Trustee Ltd** [2017] EWHC 1191 (Ch), it was held that the trustees of the BA pension scheme were permitted to rely on a UVC contained in a trust deed to increase benefits to pensioners, without having to obtain BA's consent.
- 10.10. In **Sparks & another v Department for Transport** [2015] IRLR 641, the High Court held that the language of a paragraph in an agencies' handbook was sufficiently clear, unambiguous and certain as to be interpreted as amounting to the reservation by the defendant of the right to impose unilateral changes to terms and conditions that were not detrimental to an employee. On the facts, however, the High Court held that the purported changes (to 'trigger points' under the absence management process) were detrimental to employees and therefore fell outside the bounds of the UVC. This conclusion was upheld on appeal: [2016] IRLR 519.
11. If a UVC is clear and unambiguous, and on its face gives the employer the power *in principle* to impose the type of contractual change(s) under consideration, to what extent may an employee argue that they are nevertheless not bound by the clause, or that the employer's reliance on the clause is not permissible in their particular situation? Arguments potentially available to employees in such a situation include the following:
- 11.1. The UVC conflicts with a clause(s) of the written agreement between the parties, which should prevail in the event of any inconsistency.

- 11.2. The UVC itself has not validly been incorporated into the contract of employment, on the basis that: (a) the clause is contained in a document which the employee did not sign (for example, in an employee handbook); (b) the clause is particularly onerous and not generally known; and (c) the employer took insufficient steps to draw it to the attention of the employee, thereby failing to satisfy the requirements of the 'red hand rule'.
 - 11.3. Utilisation of the UVC is subject to a test of reasonableness (see e.g. the wording of the clause in **Malone v BA**), which is not established on the facts.
 - 11.4. Utilisation of the UVC is subject to some form of procedural restriction, such as genuine and meaningful consultation with the employee and/or employee representative and/or trade union prior to implementing the change.
 - 11.5. The particular change(s) that the employer has purported to introduce have not been properly notified to the employee.
 - 11.6. Whilst a UVC may bestow a discretionary power on an employer, that discretion has on the particular facts been exercised arbitrarily, capriciously, irrationally and/or for an improper purpose, and therefore unlawfully.
 - 11.7. The *way in which* their employer has sought to impose a unilateral change to their terms and conditions of employment, pursuant to a UVC, constitutes a breach of the implied term of mutual trust and confidence and/or the '*Braganza duties*' of procedural fairness.
 - 11.8. Even if the change was *contractually* permissible pursuant to the UVC, the detrimental treatment is nevertheless unlawful because it constitutes an act of discrimination or victimisation, for example.
12. An important recent case in the area of UVCs is **Daniels & another v Lloyds Bank plc & another** [2018] IRLR 813, HC. Shortly after Lloyds' acquisition of HBOS plc, it made conditional awards of shares to various employees (the "**Integration Awards**") under a long-term incentive plan (the "**LTIP**"), which would vest in the event that performance conditions attaching to the integration process were satisfied (the

“Performance Conditions”). The Remuneration Committee (the **“RemCo”**) determined that the Performance Conditions for the 2009 and 2010 tranches of the conditional awards had been satisfied, which was communicated to the claimants. In February 2012, however, the RemCo purported to approve amendments to the LTIP rules, providing (in a new rule 6.4) that *“The Committee may adjust downwards (including to nil) the number of Shares in respect of which an Award Vests if in their discretion they determine that the performance of the Company, any Member of the Group, any business area or team and the conduct, capability or performance of the Participant justifies an adjustment.”* The RemCo purported to introduce this change pursuant to the existing rule 17.1 of the LTIP rules, which provided *inter alia* that *“Except as described in the rest of this rule ... the Committee may at any time change the Plan in any way.”*

13. In March 2012, it was determined that the Performance Conditions had been satisfied in full. The Board resolved that the Bank would honour all of the Integration Awards, save in respect of four individuals who had been executive directors at the time of the acquisition, on the basis that this was considered to be *“in the best interests of the Group, and its shareholders generally...”* The claimants sued for their alleged entitlement to the Integration Awards; in its defence to the claim, the Bank asserted (*inter alia*) that rule 6.4 of the LTIP rules permitted it to withhold these Integration Awards.
14. The claimants applied to the High Court for summary judgment on their claims. Cockerill J allowed the application, concluding that the defendants’ defences had no reasonable prospect of success. In reaching this conclusion, the learned Judge identified various factors that will be relevant when analysing an employer’s purported reliance on a UVC:
 - 14.1. The *“limited scope of review”*, in the context of challenging an employer’s exercise of a discretionary power, means that *“one must look carefully first at whether the discretion relied upon exists...”*
 - 14.2. In addition, *“the question of purpose forms a part of the exercise of contractual construction when determining whether the discretion contended for exists.”*

- 14.3. Importantly, whilst parties “*are of course perfectly free to agree whatever terms they wish, ...before concluding that a party has made an agreement which puts him in the power of his contractual counterparty the court will want to look at the wording of the contract and its commercial context.*”
- 14.4. The nature of the parties’ relationship (in particular, the equality of inequality of bargaining power) is significant, and “*the fact that a party is an employee vis à vis his contractual counterparty will tend to increase the Court’s vigilance when considering words and the commercial context.*”
- 14.5. As a matter of principle, there is “*no reason why relatively broad words in the correct context in a tightly drawn agreement might not give the degree of clarity required.*”
- 14.6. That being said, however, “*it is clear that it will generally be the expectation that broad words are not enough.*”
- 14.7. “*When you have an approach which produces a result which lacks sense or completely recasts the obligations under the original contract, the clause which purports to do this...should not generally be read in that sense.*”
15. On the facts of **Daniels v Lloyds**, what was in question was “*a broad power to alter a party’s contractual rights.*” Notwithstanding the claimants’ experience and standing as senior executives, there was “*nothing in this case which would make it other than one where the words relied on would have to be very carefully scrutinised.*”
16. Having analysed the facts, Cockerill J discerned “*a distinct parallel*” to the **Khatri** case. On the question of construction, she held that:
- 16.1. the purpose of rule 17 was not “*directed to alterations of awards, but rather to alterations (probably off a minor nature) to the structure and administration of the Plan which are not caught by the specific regimes in Clause 17.2...*”;
- 16.2. rule 17 was not apt, taken in context, to permit the introduction of a rule of the kind contained in (new) rule 6.4; and

- 16.3. it was “*far more coherent*” to conclude that the parties had intended a “*fallback power of tidying up*”, rather than “*a swingeing power to rewrite the terms of the LTIP Awards.*”
17. Accordingly, Cockerill J held that rule 17.1 of the LTIP scheme did not permit the unilateral introduction of rule 6.4, and the defendants’ reliance on rule 6.4 was therefore misplaced.
18. In light of Cockerill J’s findings on the other issues (including that the shares had in any event vested in full as of 14 March 2012), her discussion in respect of the ‘exercise of discretion’ issue was an academic, but nevertheless interesting and instructive one. As an alternative argument, the claimants had contended (in summary) that:
- 18.1. any discretion to make an “*adjustment*” to an Integration Award referred to a slight recalibration of the award, and did not encompass a swingeing cut (which in their cases had resulted in a nil award);
- 18.2. the defendants had wrongly failed to consider the claimants’ individual performance, which was a requirement of rule 6.4; and
- 18.3. the Bank had exercised its discretion in an arbitrary, capricious or otherwise irrational manner.
19. Cockerill J’s observations and conclusions in respect of these arguments included the following:
- 19.1. The word “*adjustment*” was plainly qualified by the words “*including to nil*”, and it would be “*fallacious*” to regard a change (to nil) as “*minor*”, simply because the total ‘adjusted’ is smaller in case A than in case B; the learned Judge noted that “*in either event the recipient is being deprived of 100% of his or her entitlement*”. Furthermore, the claimants’ construction would “*involve unacceptable uncertainty as to where the minor effects ceased.*”
- 19.2. This was a case of a “*parametered discretion sitting atop an objective system*”, which was somewhat different to cases of “*pure discretionary*”

bonuses.” In the circumstances, “It would not be necessary to show arbitrariness or capriciousness or irrationality at large, but only by reference to the criteria of Rule 6.4.”

- 19.3. As a matter of construction, the Bank was bound to take into account the individual performance of eligible employees in the exercise of its discretion. To hold otherwise would be contrary to the language of rule 6.4 and the purpose of the scheme. In short, “*a set up where an adjustment could be made by reference solely to the performance of any Member of the Group or business area, and without any relevant consideration by reference to the affected individual*” would “*not seem to make any sense.*”
- 19.4. There was no evidence of “*consideration of the relevant test in the Minutes.*” The factual position seemed to be similar to that in **Mallone v BPB Industries plc** [2002] IRLR 452, where there was “*no sign of consideration of why it was permissible to take away the earned bonus of an employee who had not committed any misconduct.*”
20. One final point to note in relation to UVCs is the distinction that may need to be drawn between reliance on a UVC *during* the employment relationship on the one hand, and *post-termination* reliance on the other. In **Baynham and others v Philips Electronics (UK) Ltd and others** [1995] OPLR 253, the employer sought to rely on a UVC to withdraw permanent health insurance for retired former employees. The High Court considered whether the UVC, contained within the members’ contracts of employment, could be relied upon by the employer to vary the members’ rights post-retirement. Latham J held that it could not, stating:
- 20.1. “*...it does not seem to me to be apt to cover a right to vary rights which have accrued when the contract has come to an end...I do not consider that this clause was intended to affect accrued rights such as the right to cover after retirement, nor, on its proper construction, does it in fact do so. In other words, it does not survive the end of the Contract of Employment itself...*”
- 20.2. “*On its face, the promise [to lifetime medical benefits] has become an accrued right. It would need a clear express term to entitle Philips to retain an*

entitlement to vary such a right. There is no such term in any of the Contractual documents...

- 20.3. *“The fact that it [the employer’s post retirement medical benefits scheme] had become far more expensive to fund the commitment than was originally envisaged cannot affect the contractual nature of the commitment.”*

Entire agreement clauses

21. Entire agreement clauses commonly seek to exclude parties from relying on any representations or statements made by the parties in the course of pre-contract negotiations, but which have not been expressly incorporated into the written contractual agreement. The purpose of such a clause is to make it clear that the terms and conditions governing the parties’ contractual relationship are contained within a single contractual document (or a clearly specified set of documents).

22. In **Inntrepreneur Pub Co v East Crown Ltd** [2000] 3 EGLR 31, Lightman J held that:

“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) upon 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 that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence, as is suggested in *Chitty on Contract* (28th edn) vol. 1 para. 12–102; it is to denude what would otherwise constitute a collateral warranty of legal effect.”

23. In **Rock Advertising Ltd v MWB Business Exchange Centres Ltd** [2018] UKSC 24 (discussed further below in the context of no oral modification clauses), Lord Sumption observed that entire agreement clauses are *“intended to achieve contractual certainty about the terms agreed...by nullifying prior collateral agreements relating to the same subject matter.”*

24. In the context of employment disputes, in **White v Bristol Rugby Ltd** [2002] IRLR 204, a rugby player signed a three-year contract with Bristol, pursuant to which (*inter alia*): (a) he was due to join the club once his existing contract with Saracens expired (in approximately a year's time); and (b) he was entitled to receive a salary advance of £15,000. Mr White subsequently changed his mind about joining Bristol and his agent notified the club accordingly, enclosing a cheque for £15,000 (i.e. returning the salary advance that Mr White had received). It was alleged that: (a) Bristol's chief executive had represented that Mr White could walk away from the agreement to join the club at any time prior to commencing employment, provided that he repaid the salary advance; and (b) it was only in reliance of that representation that Mr White had agreed to sign the contract. The club returned the cheque to Mr White, maintaining that no such representation had been made and that, in any event, the contract was valid and binding.
25. The High Court concluded that Mr White was not entitled to walk away from his contract with Bristol, holding (*inter alia*) that the entire agreement provision in clause 15 of the contract of employment "*precludes Mr White's contention that the contract here included a separate oral term not reflected in the written document or that anything said by Mr de Scossa at the meeting on 12 May which is not reflected in the written wording may nevertheless have acquired contractual force as a contract term or collateral warranty.*"
26. In **Paturel v DB Services (UK) Ltd** [2015] EWHC 3659, the claimant had, for two years, been awarded a bonus of around 1% of the profits he had generated. He subsequently learned that two colleagues had been awarded bonuses of circa. 8% and 11% respectively. As part of his claim, the claimant sought to rely on a statement made to him during the recruitment process, to the effect that traders (including him) should expect to earn between 5-10% per year of what they generated for the bank – 5% in "*bad*" years and 10% in "*good*" years. The High Court rejected the notion that the Claimant had any reasonable expectation, or contractual entitlement, to a 'baseline' bonus payment of 5% per annum. In so concluding, Singh J noted that the letter of appointment, which the claimant had signed, included the following statement: "*For the sake of clarity, this letter supersedes any prior offers or representations, whether verbal or written.*"

27. It is important to note that whilst an entire agreement clause may preclude a party from establishing the existence of *contractual rights* not set out within the body of the written contract, it will not prevent a Tribunal from looking at the reality of the parties' relationship, for the purpose of determining whether or not a claimant is entitled to the benefit of *statutory* protections afforded to employees and/or workers. In other words, a contract of employment which includes (a) an express statement that the individual is not to be regarded for any purpose as an employee or worker of the company, and (b) contains an entire agreement clause, will not necessarily be determinative of the question of whether the Tribunal has jurisdiction to determine a claim for unfair dismissal or discrimination, for example.
28. With regard to attempts by parties to escape the effect of entire agreement clauses, including by seeking to rely on the existence of an alleged collateral contract, in **Rock Advertising** Lord Sumption distilled the applicable principles as follows (underlining added):

“...In *Brikom Investments Ltd v Carr* [1979] QB 467, 480, Lord Denning MR brushed aside an entire agreement clause, observing that ‘the cases are legion in which such a clause is of no effect in the face of an express promise or representation on which the other side has relied.’ In fact there were at that time no cases in which the courts had declined to give effect to such clauses, and the one case which Lord Denning cited (*J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078) was really a case of estoppel and concerned a different sort of clause altogether. In *Ryanair Ltd v SR Technics Ireland Ltd* [2007] EWHC 3089 (QB), at paras 137-143, Gray J treated Lord Denning’s dictum as a general statement of the law. But in my view it cannot be supported save possibly in relation to estoppel. The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent its enforcement: see *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] L & TR 26 (CA), at para 43, and *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715 at paras 57 (Briggs J), 82-83 (Longmore LJ). But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement. As Longmore LJ observed in the *North Eastern Properties Ltd* case, at para 82:

‘if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said.’”

29. Finally on this topic, it is important to note that an entire agreement clause will not ordinarily preclude the implication of terms that are necessary to give business efficacy to the parties' agreement. In the recent case of **JN Hipwell & Son v Szurek** [2018] EWCA Civ 674, Hildyard J held that:

“...it is well established, and was not disputed before us, that a term may be implied where it is necessary to give business efficacy to the contract in question. In such a context, the touchstone is always necessity and not merely reasonableness, and the term is implied as a matter of fact in the particular case, rather than as a matter of law and as a legal incident of contracts of an identified type...a contract lacking business efficacy must, if possible, be supplemented to cure the defect. It cannot be supposed that the parties would have intended an entire agreement clause to cause the agreement to fail, and to prevent the court from saving it, if there is an available and appropriate means of doing so consistently with, and indeed to give effect to, what the Court finds must have been the true intentions of the parties.”

No oral modification clauses

30. Contracts will frequently stipulate that no modifications, amendments or variations will be valid unless they are in writing and signed by, or on behalf of, the parties. Here, the purpose of such clauses is to promote certainty of terms *during* the currency of the parties' contractual relationship.
31. As regards the level of formality that may be required in order to constitute a valid written and signed amendment, in **C&S Associates v Enterprise Insurance Company** [2015] EWHC 3757, the contract included the following express term: “*Any variation of this Agreement shall not be effective unless made in writing and signed by or on behalf of each of the Parties to this Agreement.*” On the facts, the High Court held that an exchange of emails between the parties was sufficient to vary the contractual terms, noting that the email correspondence included signature footers. Males J held that the clause under consideration did “*not go so far as to insist on manuscript signatures, paper documents, or that both parties' signatures must be on the same document. I see no reason as a matter of construction of clause 24.1 why documents in electronic form, in particular an exchange of emails, signed on behalf of both parties should not satisfy the requirements of the clause, provided of course that the other requirements of contract formation and variation such as an intention to be bound are also present.*”

32. The validity and effectiveness of no oral modification (“**NOM**”) clauses¹, which has been the subject of considerable academic and appellate court debates over the years, was given a thorough review in the recent judgment of the Supreme Court in **Rock Advertising**. Lord Sumption (with whom three other members of the Court agreed) was clear that “*the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.*” In his judgment, Lord Sumption held that:

32.1. The effect of the rule applied by the Court of Appeal (whose judgment the UKSC reversed) was to override the parties’ intentions.

32.2. The CA’s reliance on the principle of “*party autonomy*” was a “*fallacy*”. This was because “*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...*”

32.3. There are at least three legitimate commercial reasons for including NOM clauses in contracts:

32.3.1. first, it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment applications;

32.3.2. secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended by also about its exact terms; and

32.3.3. thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them.

¹ Although this is a useful shorthand title for such clauses, it is important to remember that many clauses of this nature stipulate that any variations must be in writing and signed, in order to be validly made and effective.

- 32.4. The reasons advanced in the case law for disregarding NOM clauses are “*entirely conceptual*”.
- 32.5. “*It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.*”
- 32.6. The English law doctrines of estoppel may potentially be prayed in aid, in order to prevent a party from relying on a contractual provision laying down conditions for the formal validity of a variation. However, such circumstances are likely to be very limited in scope: “*...the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering In Gl En SpA [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker).*”
33. Lord Briggs gave a separate judgment in **Rock Advertising**, agreeing that the appeal should be allowed, but reaching his conclusion on the NOM clause issue on different and narrower grounds than Lord Sumption. In particular, Lord Briggs preferred to analyse the critical questions as two-fold:
- 33.1. First, as a matter of principle, can parties orally agree to remove a NOM clause from their bargain?
- 33.2. If so, will such an agreement be implied where they agree orally upon a variation of the substance of their relationship, but without saying anything at all about the NOM clause?

34. Lord Briggs (unlike Lord Sumption) considered that the answer to the first question is yes, but that the answer to the second question will generally be no. Lord Briggs described his own approach as an “*incremental development of the common law which accords more closely with the conceptual analysis adopted in most other common law jurisdictions*”, before going on to comment on Lord Sumption’s “*more radical solution*”, which in Lord Briggs’ view “*would involve a clean break with something approaching an international common law consensus, unsupported by any societal or other considerations peculiar to England and Wales.*” As noted above, however, the other Justices (Lady Hale, Lord Wilson and Lord Lloyd-Jones) agreed with the judgment of Lord Sumption, whose reasoning is therefore to be applied by the lower courts.

Exclusion clauses

35. It is relatively commonplace, even in the employment sphere, for contracts to contain clauses which purport to exclude liability in respect of certain types of claim and/or loss. At the outset it is necessary to make the point that contractual provisions that purport to prevent employees from enforcing their statutory rights in the Employment Tribunal – for example the right not to be unfairly dismissed and to be protected from unlawful discrimination – will be void (save where a settlement agreement satisfying various statutory requirements, or COT3, has been entered into). Similarly, contractual provisions that purport to prevent employees from making protected disclosures will be void.
36. With regard to exclusion clauses, it is necessary to distinguish between clauses which purport to exclude or limit a legal liability on the one hand, and on the other clauses which identify those matters which are and are not covered by a particular contractual agreement. For example, in the insurance sphere, there will be numerous ‘exclusions’ contained within a policy of insurance, which detail the types of activity for which an insured party will not be covered by the insurer. In the discussion that follows, the focus is on exclusion causes falling into the former category. The term “*exemption clause*” is generally used to encompass both ‘pure’ exclusion clauses (i.e. those which seek to exclude liability in certain respects), and those which seek to limit liability (but not to exclude it altogether).
37. In **Persimmon Homes Ltd & others v Ove Arup & Partners Ltd & another** [2017] EWCA Civ 373, Jackson LJ referred to a softening of the courts’ approach to

exemption clauses, especially since the enactment of the Unfair Contract Terms Act 1977 (“UCTA”). He held that, in the commercial context:

“Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree.”

38. A recent example of the court’s approach to exclusion clauses in the commercial sphere is **NF Football Investments Ltd v NFFC Group Holdings Ltd** [2018] EWHC 1346 (Ch). In this case, clause 12 of a share purchase agreement stated as follows: *“This agreement (together with the documents referred to in it) constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.”* The High Court was required to consider whether this entire agreement clause had the effect of excluding claims for misrepresentation. Master Bowles referred to the Court of Appeal’s judgment in **AXA Sun Life Services Plc v Campbell Martin Ltd & others** [2011] EWCA Civ 133, in which Rix LJ had held that any *“exclusion of liability for misrepresentation has to be clearly stated. It can be done by clauses which state the parties’ agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. However, save in such contexts, and particularly where the word ‘representations’ takes its place alongside other words expressive of contractual obligation, talk of the parties’ contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved.”*
39. On the facts of **NF Football Investments**, Master Bowles held that clause 12 of the share purchase agreement did validly exclude any claim for misrepresentation, stating that:

“...the deliberately wide language used in clause 12, read in the context of the considerable steps which have been taken by the parties to enable claims of a kind likely to arise under, or in respect, of the agreement to be dealt with within the four walls of the agreement and by reference to contractual structures created within the agreement, demonstrates that the parties’ core contractual intention was that disputes arising under, or in respect of, the agreement should

be resolved within the contractual framework established by the share purchase agreement and, consequently, that the parties were intended to be precluded, or excluded, to a significant extent, from making any claims arising out of, or in respect of, the agreement other than via the contractual structures created by the share purchase agreement; including, therefore, claims in statutory misrepresentation, should such claims otherwise arise.”

40. As noted above, in **Persimmon Homes** Jackson LJ referred to the impact of UCTA in this area of the law, which provides statutory protections to consumers in respect of certain unfair contract terms, including exclusion clauses. Of course, UCTA is not applicable to contracts of employment, on the basis that employees are not to be regarded as “consumers” for this purpose: see **Keen v Commerzbank AG** [2007] IRLR 132. As discussed in **Daniels v Lloyds** (see further below), it is clear that context (including the parties’ relative bargaining power) *will* be a relevant consideration when construing exclusion clauses contained in contracts between an employee and their employer.

41. Even where an exemption clause is clearly drafted, it may nevertheless be invalid and ineffective if it is, in effect, incompatible with the contractual nature of the agreement itself. In **Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale** [1966] 2 All ER 61, Lord Wilberforce held that:

“[An exception clause] must ... reflect the contemplation of the parties that a breach of contract, or what apart from the clause would be a breach of contract, may be committed, otherwise the clause would not be there; but the question remains open in any case whether there is a limit to the type of breach which they have in mind. One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force; to do so would be to reduce the contract to a mere declaration of intent.”

42. In **UGS Finance Limited v National Mortgage Bank of Greece** [1964] 1 Lloyds Rep 446, Pearson LJ held:

“...As to the question of 'fundamental breach,' I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties as reasonable men must have intended it to

have. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally.”

43. In **Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd** [2013] 2 Lloyd's Rep 270, the Court of Appeal refused to uphold, as a general exclusion of liability, a term which stated: “*The Contractor hereby acknowledges and agrees that the Company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits...*” Tomlinson LJ held:

[19] In my view therefore the Agreement is, if the judge's construction of Cl 18.6 is adopted, effectively devoid of contractual content since there is no sanction for non-performance by the Respondent. It is inherently unlikely that the parties intended the clause to have this effect. The parties thought that they were concluding a mutually enforceable agreement. As Lord Wilberforce said in the *Suisse Atlantique* case [1967] 1 AC 361 at 431-2, [1966] 2 All ER 61, [1966] 2 WLR 944: [quoted above in paragraph 40].

[20] Nonetheless, where language is fairly susceptible of one meaning only, that meaning must be attributed to it unless the meaning is repugnant to the contract in which case it may be necessary to ignore it – see per Briggs J in *EU Network Fiber v Abovenet* [2007] EWHC 3099 (Ch) at para 257.²

[21] But as Lord Clarke of Stone cum Ebony pointed out in *The Rainy Sky* case, above, at para 21:

‘. . . The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would have reasonably been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.’

To similar effect is a passage in fact cited by the judge from the judgment of Hoffmann LJ, as he then was, in *Co-operative Wholesale Society Ltd v National Westminster Bank*, at p 99. After citing the well-known passage from the speech of Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios No 2)*, above, Hoffmann LJ continued:

² In paragraph 257(3) of that judgment, Briggs J held that “...if the effect of an exclusion clause is to deprive the agreement of the legal characteristics of a contract, by conferring on one party the liberty to ignore his obligations with impunity, the exclusion may be held to be repugnant to the contract and of no effect.”

‘This robust declaration does not however mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement.’

There also in my view comes into play the presumption that neither party to a contract intends to abandon any remedies for its breach arising by operation of law – see per Lord Diplock in *Modern Engineering v Gilbert-Ash* [1974] AC 689 at 717, [1973] 3 All ER 195, 72 LGR 1. Lord Diplock went on to say that clear words must be used to rebut this presumption and the judge plainly thought that the words here used were sufficiently clear for that purpose. The judge should not in my view have reached that conclusion without first examining the context.

[22] As I have already observed above, the judge cited some of these passages from the authorities but, in my view, he fell into error in thinking that the ascertainment of the meaning of apparently clear words is not itself a process of contractual construction. He failed to consider the words of the clause in their wider context.”

44. In **Daniels v Lloyds**, as part of its defence to the summary judgment application, the defendants sought to rely on an exclusion clause contained in rule 15.7 of the LTIP plan rules, which denied a right “*to compensation for any loss*” in relation to the plan in two circumstances:

44.1. first, where there was “*any loss or reduction of rights or expectations under the Plan in any circumstances*”, pursuant to rule 15.7.1; and

44.2. secondly, in relation to “*any exercise of a discretion or a decision in relation to an Award or to the Plan*”, pursuant to rule 15.7.2.

45. Ultimately, this issue was rendered academic by Cockerill J’s conclusion in respect of the invalidity of rule 6.4, which meant that the exemption clause could not ‘bite’ in the circumstances under consideration. Nevertheless, the learned Judge’s analysis of the exclusion clause issue is instructive.

46. With regard to the question of construction, the learned Judge noted the general principle (underlining added) that:

“When you have an approach which produces a result which lacks sense or completely recasts the obligations under the original contract, the clause which

purports to do this (whether exclusion clause, power of variation or discretionary amendment) should not generally be read in that sense.”

47. Cockerill J considered that there were similarities with the **Kudos** case, and that it was important to reiterate the passage from Tomlinson LJ’s judgment referred to above, which:

“...underlines the importance in this exercise of construing exclusion clauses of both paying due respect to the words used, but also (and particularly where they yield a surprising result) balancing the factors indicated by context and commercial context. It seems to me that the defendants are in effect inviting me to fall into the same error as was committed by the first instance judge in *Kudos* – looking at the words without their wider context. Once the context is properly considered, the result is, in my judgment, inescapably the same as that which followed in *Kudos*.”

48. The exclusion clause under consideration in **Daniels v Lloyds** had, in the learned Judge’s view, “*to be seen as having special reference to claims which are properly characterised as employment claims and not claims in the context of the Plan generally...*” The wording was certainly not sufficiently clear, “*given the context and the surprisingly extensive effect of [the defendants’] construction*”, to afford them a defence to the claimants’ claims in respect of the Integration Awards (even if they had been successful in establishing the validity of rule 6.4).

ANDREW SMITH
MATRIX CHAMBERS
4th October 2018