

Amending a contract? Have you lost your right to terminate?

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It is important that organisations who try to amend their contracts tread carefully as the recent case of NHS Commissioning Board v Vasant (t/a MK Vasant and Associates) [2019] EWCA Civ 1245 demonstrates the difficulties that they can face. This case centred around whether NHS England was allowed to terminate the contractual arrangements with three dentists as there had been a variation to the original contract and each party has a different view on the consequences flowing from the variation.

There are a number of important points to take away from this case which are explained below.

Background

In 2006, the Primary Care Trust (PCT) (whose contracts were subsequently transferred to NHS England) entered into a contract with three dentists for the provision of general dental services ("GDS Contract"). That contract contained 3 key clauses: (1) no variation could be made unless it was in writing and signed by the parties; (2) an entire agreement clause which stated that the contract superseded all prior agreements and represented the entire agreement between the parties; and (3) the contract could not be terminated by the PCT unless the dentists were in default.

In 2007, the parties entered into a fixed term contract for the provision of intermediate minor oral surgery services ("IMOS Contract") ending in November 2008. The parties could extend the IMOS Contract by agreement but the PCT was able to terminate by giving one month's notice. The parties renewed and continued the IMOS Contract beyond November 2008 by their own conduct.

In 2009, the parties wanted to formalise the extension of the IMOS services and so they signed a variation agreement form ("VAF"). It was a one page document that essentially stated that intermediate minor oral surgery services fell within the definition of "further services" to be performed under the GDS Contract. This in effect incorporated the IMOS services into the GDS Contract. The PCT believed at the time that this was a better approach than simply re-signing the IMOS Contract.

In 2016, NHS England tried to terminate the IMOS services by giving one month's notice. The dentists disputed the purported termination because the GDS Contract had been validly varied by the VAF which incorporated the IMOS services into the GDS Contract. The GDS Contract itself did not allow NHS England to terminate by simply giving notice unless the dentists were in default and there had been no default. NHS England argued that the IMOS Contract continued in operation and that the VAF itself failed for uncertainty as it did not contain enough detail about the contractual agreements that applied. The Court had to decide which contract applied – the IMOS Contract or the GDS Contract.

The Court's reasoning

The Court sided with the dentists. It said that the parties had clearly amended the GDS Contract so that the IMOS services were incorporated into that contract. Even though the VAF was brief, it was in writing (in accordance with the clause in the GDS Contract) and

the Court found that it contained enough detail and so it did not fail for uncertainty. Had the parties intended to incorporate the one month's notice termination provisions into the GDS Contract, they could have done so by simply referring to them. But they did not and so NHS England could not terminate as the GDS Contract did not allow them to terminate by notice.

The Court found that the VAF was valid meaning that the IMOS services were to be carried out as "further services" under the GDS Contract. Even though the VAF was brief, the Court found that it contained enough detail and so it did not fail for uncertainty. Once the variation took place in accordance with the GDS Contract, it was governed by the entire agreement clause. The contract was therefore made up of what was contained in the GDS Contract and the VAF and it was not possible to incorporate some or all of the terms of the IMOS Contract including the termination rights.

The stumbling block however was the reference within the VAF to "intermediate minor oral surgery services". Those services were not defined in either the VAF or the GDS Contract. The Court said it was necessary to look at the terms of the IMOS Contract in order to explain the meaning of "intermediate minor oral surgery services".

Practical considerations

This case shows that it is very important to take care when amending or trying to consolidate existing contracts. Here are some top tips:

1. Consider your requirements

It might seem obvious but consider what services or arrangements are going to be provided. Often, it might be easier to deal with the services in different contracts as opposed to trying to amend existing ones.

2. Review the existing framework

Consideration should be given to the terms of the existing framework and whether that model is suitable in the circumstances. When making an express variation to a contract it is important to consider the effect this has on other terms of the contract. You might need to have specific provisions which apply to a particular service but make sure that your wording is clear and precise.

3. Carefully consider any variation and entire agreement clauses

When making amendments to the existing framework ensure that the procedure for making amendments has been followed. In this case, the GDS Contract stated that no variation could be made unless it was in writing and signed by the parties. This is what is known as a no oral modification clause. These kinds of clauses give certainty as to what has been agreed and also avoids disputes about what the variation intended. Often, parties ignore these clauses and seek to vary the contracts orally which can cause issues later down the line.

Organisations also need to be aware that even though an earlier contract might be superseded and no longer applies, it can still be considered to help explain the meaning of an unconventional and/or technical expression within the subsequent agreement. Clearly, it is better to ensure that the meaning of all terms is clear within the relevant contract instead of having to look for additional evidence. This approach also avoids the unnecessary complication, costs and uncertainty of court proceedings to make a determination.

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