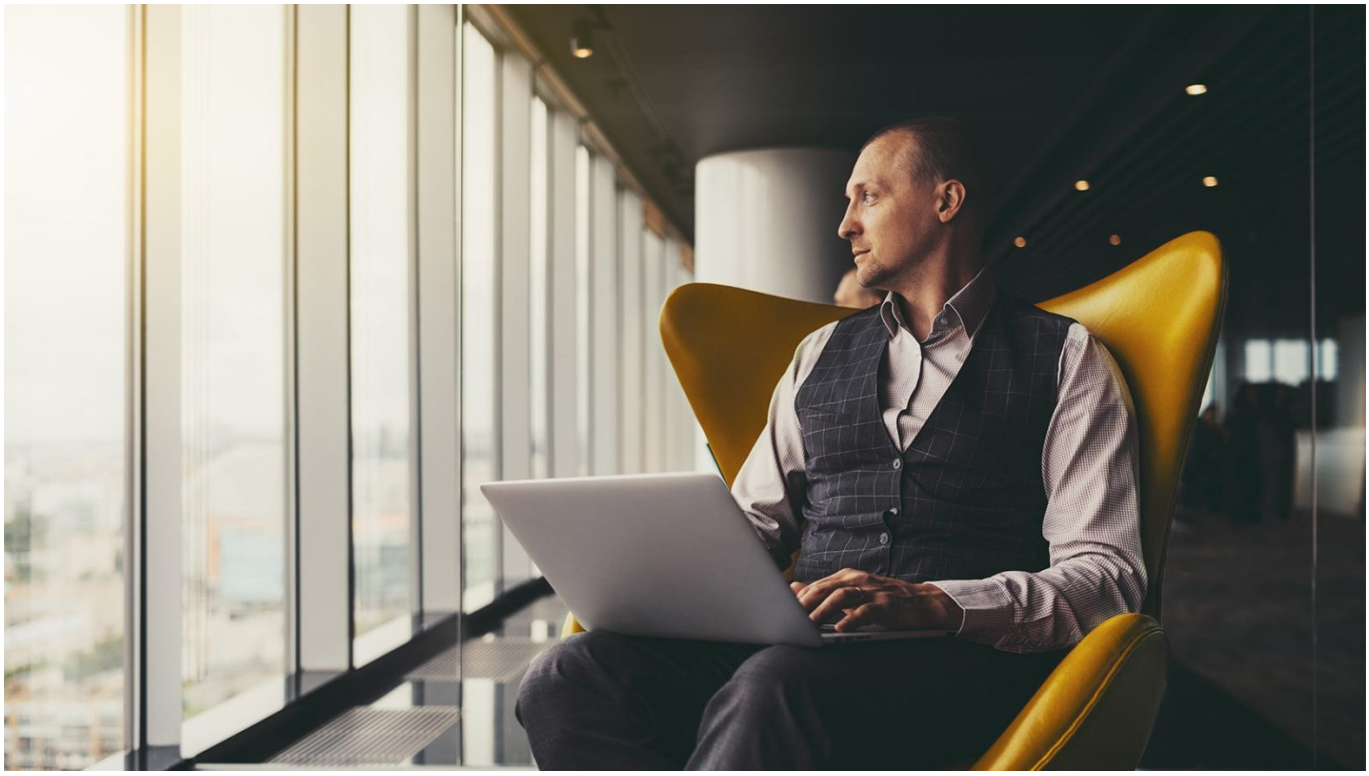
Variation, termination, or novation?



Earlier this year the High Court ruled on some interesting issues involving an implied novation of a written contract which specified that any variations, and any notice of termination of the contract, needed to be in writing.

Background

The case of *Gama Aviation (UK) Limited & International Jet Club Limited v. MWWMMWM Limited* [2022] EWHC 1191 (Comm) concerned the owner of a Boeing BBJ 737 aircraft (MWWMMWM Limited) (**MWW**), which in 2008 entered into a written Aircraft Support Services Agreement (**ASSA**) with International Jetclub Limited (**IJL**) for the supply of aircraft maintenance and operational support services.

Some years later, IJL was acquired by the Gama Aviation group, and in 2017 there was a re-organisation of that group in which the various regulatory approvals held by Gama group companies (enabling them to work on and manage aircraft) were moved to Gama Aviation (UK) Ltd (**Gama**). This meant that, from there onwards, services provided under the ASSA were fulfilled by Gama, rather than IJL.

Although at the time there was talk of entering into a new written contract, ultimately nothing was concluded and there was no written novation of the ASSA. Nevertheless, Gama went on to provide services to MWW, and MWW paid Gama on an ongoing basis (having previously paid IJL). This arrangement continued for almost 2 years, before MWW stopped paying.

In December 2020 Gama started proceedings against MWW in the London Circuit Commercial Court, seeking recovery of its unpaid charges. In doing so, Gama argued that there had been an implied novation of the ASSA

from IJL to Gama in 2017.

MWW didn't respond to the claim, and in April 2020 Gama obtained judgment in default in respect of their charges which were due at the point of issuing proceedings. MWW applied to set aside the default judgment and filed a defence in which it argued (among other things) that there had been no effective novation, in part because the ASSA contained clauses stipulating that:

- no alterations would be effective unless agreed by the parties in writing; and
- any notice of termination had to be given in writing.

The application to set aside was unsuccessful, and as Gama had continued to supply services during the proceedings (it being a bailee of the aircraft), it amended its claim to include the ongoing charges and applied for summary judgment on those amounts.

The implied novation

At the summary judgment hearing, the judge considered whether or not there had been an implied novation, and in doing so revisited the relevant authorities, noting that:

- A novation can be inferred from conduct;
- As per Lightman J in *Evans v SMG Television Limited* [2003] EWHC 1423 Ch (at 181) the test for inferring an agreement to novate a contract is objective, namely: *"... whether that inference is necessary to give business efficacy to what actually happened. The inference is necessary for this purpose if the implication is required to provide lawful explanation or basis for the party's conduct"*;
- Evidence of the parties' subsequent actions is admissible to establish whether or not there has been a novation by conduct; and
- The fact that parties may have negotiated (but not agreed) a revised written agreement is not necessarily inconsistent with an implied novation, and can actually reinforce its existence. It is arguably recognition by the parties of the need for a novation to give business efficacy to the new arrangements.

Overall, the judge concluded that in view of (i) MWW's requests for certain services, which due to its regulatory approvals only Gama could provide, (ii) the invoices for services being raised in Gama's name rather than IJL's, and (iii) payments having been made to Gama for almost 2 years, the objective test for inferring a novation had been satisfied.

Variation

But did the implied novation fall foul of the ASSA's requirement that:

"No alterations to the terms and conditions of this agreement shall be effective unless contained in a written document signed by authorised representatives of both parties"?

This question had been considered at the earlier hearing of MWW's application to set aside the default judgment, at which time the court concluded that it was not a realistically arguable defence.

This was because, as a matter of construction, the word *"alterations"* meant *"variations"*, and as such did not extend to novation – this being the rescission of an existing contract, and its implied replacement by another contract in similar terms between different parties.

Termination

What of MWW's argument that the ASSA's termination provision (which provided that it would continue: *"... until such time as either party gives the other not less than three months' notice in writing of termination of this agreement"*) operated to prevent an implied novation, because no written notice of termination had been given?

The judge ultimately found that although there were at least two alternative interpretations of this clause, the interpretation which was most consistent with commercial common sense was that it merely provided a right of unilateral termination and had no bearing on whether a mutual termination was available. MWW's interpretation – that it precluded any other form of termination other (including mutual termination by novation) – left too many unanswered questions, not least in relation to the required termination process. Consequently, the judge found that there was no contractual bar to a mutual termination by way of an implied novation.

Conclusion

This case serves as a useful reminder of the fundamental distinction between the variation and novation of contracts. It also highlights some of the potential limitations of common contractual protections in relation to novation, as well as the benefit of considering whether contracts should contain specific wording clarifying the circumstances in which a novation (written or by conduct) can and cannot take place.

How we can help

If you need advice or assistance in relation to a contract dispute, including disputes involving the aviation sector, please do get in touch with our commercial disputes team.

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