

KNOW YOUR LIMITATIONS

LITIGATION AND DISPUTE RESOLUTION

Inserting an exclusion clause into a contract will reduce a party's liability to pay damages but it will increase the chances of an injunction being made on the basis that damages are not an adequate remedy. That is the effect of the recent Court of Appeal decision in *AB v CD* [EWCA] Civ 229.

CASE OVERVIEW

- ◆ In *AB v CD*, the claimant sought an interim injunction restraining the defendant from terminating a licence to use an internet based marketing platform.
- ◆ The claimant argued that damages would not be an adequate remedy if it was subsequently decided (at an arbitration) that the defendant had wrongfully terminated the licence, because an exclusion clause in the licensing agreement prevented the claimant from recovering damages for all of its losses.
- ◆ The defendant, on the other hand, argued that the parties had agreed in their contract what damages would be recoverable and a finding that the contractually agreed level of damages was an inadequate remedy would fail to give effect to the parties' commercial expectations.

THE DECISION

- ◆ Overturning the first instance decision, the Court of Appeal agreed with the claimant. A limitation clause (or a liquidated damages clause, provided that it is not a penalty) will be determinative in a claim to recover damages. However, such a clause does not constitute an agreed price (or an excuse) for a party to refuse to perform its primary contractual obligations and the Court can still use other remedies, such as an injunction, to force a party to perform those obligations.
- ◆ The mere existence of an exclusion or limitation clause will not automatically entitle a party seeking an interim injunction to claim that damages are an inadequate remedy. However, where a party is able to show that it will suffer loss, which the relevant clause prevents it from recovering, this "opens the door" to the exercise of the Court's discretion to grant an injunction.

COMMENT

- ◆ Although he did not give the leading judgment, the point was succinctly put by Laws LJ as follows: "*Where a party to a contract stipulates that if he breaches his obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which in justice tends to favour the grant of an injunction to prohibit the breach in the first place.*"
- ◆ It is important, therefore, to be aware that inserting an exclusion clause into a contract may have unintended consequences. Whilst this may reduce a party's exposure to a damages claim, it may also increase the chances of the court granting an injunction requiring that party to continue to comply with the terms of a contract against its will. The same principles would apply to a limitation clause or a liquidated damages clause. In some situations, the benefits of using these types of clause may be outweighed by the disadvantages. This consideration should also be taken into account when exercising a disputed right to terminate a contract.

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MAY 2014

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