

Limitation of liability clauses: do caps work?

A Court of Appeal case has pointers to (a) getting liability under the cap and (b) interpretation of LoL clauses.

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In *I-Health v iSoft*¹, the Court of Appeal dealt with whether a \$5m cap in a limitation of liability clause included within that cap any court award of interest in favour of the purchaser. Like many English-based law systems, Courts have discretion under legislation (s87 Judicature Act in NZ) to award interest on damages judgments. Is the maximum payable (a) \$5M (so the LoL clause overrides the legislation) or (b) \$5M plus statutory interest?

First, the Court looked at whether parties could contract out of statutory interest liability. Yes, said the Court. Some statutory obligations can be overridden by agreement and some cannot. For a number of reasons, parties can contract out of this obligation.

In our experience, one of the biggest liability sources as to which it is difficult to contract out of is Fair Trading Act liability. That means that, often, a claim under the Fair Trading Act will be stronger than a claim in contract and tort, etc. However, careful wording can reduce that risk, and there are some major relevant changes in the proposed consumer legislation currently in Bill form post-Select Committee.

Having decided that statutory interest can be overridden by contract, the Court then considered whether this LoL clause, which made no express reference to statutory interest, brought such interest within the cap. Again the vendor won out. The LoL cap limited that interest to within the \$5M.

The Court went through the typical sort of contractual and LoL interpretation, applying

long standing authorities such as *Investors Compensation v West Bromwich, Vector and DHL v Richmond*. The case is helpful for those having to deal with perennial issues such as around a neutral approach to interpretation of LoLs versus an approach more favourable to the party not relying on the clause. This question is not yet fully resolved although there is increasing clarity².

While the Court said "*the Court should not lightly attribute to the parties an intention to waive a statutory right such as a right to seek interest*", the agreement, in the context of "admissible background circumstances" was effective in overriding statutory interest.

The main factor in support of that conclusion – which is often not in other LoL clauses – is that the contract expressly excluded legal costs from the cap. As the Court stated, "*this [the separate treatment of legal costs] was the opportunity for them to [contract out as to interest] but they did not.*"

Statutory interest can build up to a substantial figure over the duration of a typical court case. But more to the point is that the decision highlights the wider issue of the desirability of carefully considering what should be captured by LoL provisions in all respects.

1. [2011] NZCA 575

2. See for example *Vance and others v Huhtamaki and Anr* [2011] NZCA 602 at Footnote 4

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