

## The Immortal Consequential Loss?

by Steven S Y Tee

This is a story about a bank and two customers.<sup>1</sup> It lent money to the customers, a British couple, to buy a property. The property was being constructed by the developer at the time of the loan. The bank agreed to pay the loan amount in instalments directly to the developer based on construction progress. These payments would fulfil the couple's obligations to pay the purchase price to the developer under the sale and purchase agreement for the property. This is usual practice.

However, the bank failed to make payment of the instalment amount due under an invoice issued by the developer. The developer then terminated the sale and purchase agreement, after more than a year had passed from the time the invoice was issued. The couple sued the bank for their losses resulting from the termination of the sale and purchase agreement.

The High Court<sup>2</sup> held that the couple could not succeed for various reasons, including that the limitation of liability provisions in clause 12 of the loan agreement excluded any liability of the bank. The clause states that:

"Notwithstanding anything to the contrary, in no event will the measure of damages of payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profits or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed."

However, the Court of Appeal took a different view, and held that the limitation of liability clause was void under section 29 of the Contracts Act 1950.<sup>3</sup> It reasoned that:

- (a) clause 12 excluded the bank's liability for all loss or damage; and
- (b) while clause 12 does not expressly restrain any legal proceedings by the couple, it has effectively done so since any action against the bank would be futile as no damages could be recovered.

To legal practitioners, clause 12 appears to be a fairly usual clause excluding liability for what is often loosely described as "consequential" loss. Such exclusion is an important tool in managing and allocating risks between contracting parties in industries such as oil & gas,

<sup>1</sup> *Anthony Lawrence Bourke & Anor v CIMB Bank Berhad* [2017] 4 AMR 725; [2017] 1 LNS 999; [2017] MLJU 771 (CA). The grounds of judgment may also be accessed here: <[http://www.kehakiman.gov.my/directory/judgment/file/W-02-\(NCC\)\(W\)-1345-07-2016.pdf](http://www.kehakiman.gov.my/directory/judgment/file/W-02-(NCC)(W)-1345-07-2016.pdf)>

<sup>2</sup> [2016] MLJU 1512

<sup>3</sup> Section 29 provides, among others, that: "... every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals ... is void to that extent".

insurance and construction, to name a few. For instance, the contractor under a building contract will often exclude liability for any delay in completing the building works except for a pre-agreed amount of liquidated damages. The contractor benefits since it will know in advance the scope of its liability for delay. The contractor can then include the risk of such liability in the contract price that it offers for carrying out the works. The employer accepts this limitation since it will receive a more attractive contract price which will not include a contingency for undetermined liability. The Court of Appeal's decision now appears to suggest that liability for consequential loss may no longer be excluded. This is troubling.

The decision also seems to rest on an interpretation of clause 12 that is wider than its express language would support. It first identifies specific categories of loss which are to be excluded, namely, loss of *income* or *profit* or *savings*. It then goes on to provide that *indirect*, *incidental*, *consequential*, *exemplary*, *punitive* or *special* damages would also be excluded. It does not, however, say that direct losses or damages, e.g. transaction costs or fees incurred in relation to the loan or property purchase as in this case, are excluded. It is not clear why these costs or fees could not potentially be claimed. If they are recoverable, then clause 12 does not exclude the bank's liability for all loss or damage. It would therefore not amount to an effective restraint of legal proceedings prohibited by section 29 of the Contracts Act 1950.

It would be difficult to argue against the justice of the court's decision not to allow the bank to evade responsibility for its breach by relying on the exclusion clause. Unfortunately, this may have the unintended effect of immortalising liability for consequential loss.

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#### About the author



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