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Bank's Exclusion of Liability Clause Declared Void

Anthony Lawrence Bourke & Anor v CIMB Bank Berhad^[1]

In April 2008, two borrowers obtained a loan from a bank to finance the purchase of a condominium unit which was under development. Under the loan agreement, the bank was required to disburse the loan progressively by direct payment to the developer on production of architect's certificates.

Six years later, and after having made some payments, the bank received an invoice accompanied by an architect's certificate from the developer for the next progressive payment. The bank did not pay on this invoice because its internal policy required its branch to conduct a site visit if the property was more than 50% completed. The bank did not notify the borrowers of the need to conduct a site visit or that it would not be paying on the invoice. Nor did the bank conduct any site visit.

The invoice remained unpaid for approximately a year and this led to the termination of the sale and purchase agreement by the developer. The borrowers then sued the bank for damages. Their claim was dismissed by the High Court and they appealed to the Court of Appeal.

On appeal, the Court of Appeal found the bank liable as it had failed to disburse the loan in accordance with the loan agreement — the failure to conduct the site visit was due to its own fault. The bank sought to exclude liability by relying on clause 12 in the loan agreement, which provided that:

“Notwithstanding anything to the contrary, in no event will the measure of damages 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 profit 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.”

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The Court of Appeal held that this clause was void as it contravened section 29 of the Contracts Act 1950.^[2]

“... Clause 12 has the effect of excluding the liability of the [bank] for any cause of action arising out of the Loan Agreement. Consequently it is a clause that negates the right of the [borrowers] herein to a suit for damages; the kind spelled out in that clause, which encompass [*sic*] all form of damages under a breach of contract or under a suit of negligence...”^[3]

“... In the circumstances we are of the considered view that Clause 12 contravenes section 29 of the Contracts Act, because in its true effect it is a clause that has effectively restrained any form of legal proceedings by the [borrowers] against the [bank]. It can be clearly demonstrated by the current appeal that despite our findings on the breach by the bank in this case if Clause 12 is allowed to stay it would be an exercise in futility for the [borrowers] to file any suit against the [bank].”^[4]

Section 29 of the Contracts Act 1950 provides 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, or which limits the time within which he may thus enforce his rights, is void to that extent.”

The judgment of the Court of Appeal may be viewed [here](#). The bank has applied for leave to appeal to the Federal Court.

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^[1]

[\[2\]](#) [Act 136] (Revised 1974)

[\[3\]](#) *Supra* n 1 at 740; <[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)> at [52]

[\[4\]](#) *Ibid*, at 741; <[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)> at [55]