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An End To Exclusion Clauses?

Revisiting CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1

Contact Persons:

Ooi Bee Hong
Partner
+603 6209 5401
beehong@rdslawpartners.com

Chia Loong Thye
Partner
+604 370 1122
ltchia@rdslawpartners.com

Ong Eu Jin
Partner
+603 6209 5488
eujin@rdslawpartners.com

Tan Gek Im
Partner
+604 370 1122
gekim@rdslawpartners.com

Annabel Kok Keng Yen
Senior Associate
+603 6209 5400
annabel@rdslawpartners.com

Exclusion clauses are no stranger when it comes to contracts. They are defined as any clause in a contract or term in a notice which purports to restrict, exclude, or modify a liability, duty, or remedy which would otherwise arise from a legally recognised relationship between parties[1].

The issue on the reliance of exclusion clauses was discussed in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1 (the CIMB case), where the Federal Court ruled that commercial banks cannot rely on exclusion clauses which negate and absolutely restrains legal proceedings as such clauses contravene Section 29 of the Contacts Act 1950 (CA 1950).

Background

The Plaintiffs, Anthony Lawrence Bourke and Alison Deborah Essex Bourke purchased a property from Crest World Resources Sdn Bhd (the Developer) by way of a Sale and Purchase agreement dated 18.2.2008 (SPA). They are foreigners residing in the United Kingdom. The Defendant, CIMB Bank Bhd, granted a loan of RM715,487.00 to the Plaintiffs to finance the purchase of the property pursuant to a loan agreement. As the property at the time is still under construction, the Defendant was to make payments to the Developer upon invoices issued to them, at progressive stages of the development.

Sometime around 12.3.2014, the Developer sent a notice for a progressive payment to the Defendant vide an invoice on which contains the architect's certificate. The sum due for this progressive payment was RM25,553.12 and the due date was 25.3.2014. It was an internal policy enacted by the Defendant sometime in February 2014 requiring the site visit

[1] *The Construction of Contracts, Interpretation, Implication and Rectification* (2nd Ed) Gerard Mc Meel

inspections to be conducted as a condition for disbursement of invoices for certain developments which the Defendant asserts that the invoice in question herein fell within the scope of such policy.

After receiving the invoice, the disbursement department of the Defendant requested its branch to conduct a site visit to inspect the property. Three months after the payment due date, and despite five internal emails by the Defendant's disbursement department, the branch did not conduct the site visit or respond to the e-mails. The Defendant did not inform the Developer or the Plaintiffs of the requirement for a site visit as a condition to disburse payment. Further, the Defendant also did not request the Developer to extend the payment due date in order to conduct the site visit.

After about one year, the sum remained unpaid, and the Developer terminated the SPA with the Plaintiffs by sending a Notice of Termination dated 10.4.2015 (the Notice) to the Plaintiffs. The Plaintiffs only became aware of the Defendant's alleged breach of the agreement when they received the Notice from the Developer which terminated the SPA due to the default in the Plaintiffs' repayment.

The First Plaintiff came personally to Malaysia from the United Kingdom to settle all the outstanding sums with the Developer but to no avail, as the Developer has maintained its position that the SPA is terminated. Following that, the Plaintiffs filed a claim against the Defendant seeking damages resulting from the termination of the SPA on grounds of breach of contract and/or negligence and breach of fiduciary duty on the part of the Defendant.

Decision Of The High Court

The Plaintiffs relied on the following causes of action:

1. Breach of agreement;

2. Negligence in observing the duty of care; and/or

3. Fiduciary duty.

The Defendants relied on Clause 12 of the Loan Agreement which states:

> *"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."*

The High Court dismissed the claim and held that Clause 12 of the Loan Agreement absolved the Defendant from any liability to the Plaintiffs. The Plaintiffs then appealed to the Court of Appeal.

Appeal Before The Court Of Appeal

The Plaintiffs' appeal was allowed by the Court of Appeal. The Court of Appeal did not agree with the High Court. The court found the Defendant had breached a fundamental term of the loan agreement in failing to pay the progress payment and had also breached its duty of care to the Plaintiffs by causing the SPA to be terminated and the respondents to suffer loss and damage. Such a breach in the view of the Court of Appeal was a breach of the most fundamental term of the loan agreement which goes to the root of the contract. In addition, the Defendant had breached its duty of care to the Plaintiffs too, as its customer in the handling of the loan disbursement which had directly caused the termination of the SPA.

Moreover, the Court of Appeal also observed that the High Court did not address the application of Section 29 of the CA 1950.

Decision Of The Federal Court

The Federal Court granted leave to the Defendant on the following questions of law:

1. Whether Section 29 may be invoked to strike down and invalidate an exclusion clause which exonerates a contract breaker of liability for a breach of that contract (i.e. exclusion clauses that absolve primary obligations).

2. Whether Section 29 may be invoked to strike down and invalidate an exclusion clause that negates the contract breaker's liability to pay compensation for non-performance of that contract (i.e. exclusion clauses which absolve general secondary obligations).

Freedom To Contract

The Federal Court upholds the sanctity of the principle of the freedom to contract, whereby parties are free to determine themselves what obligations are agreed upon to which the contract is entered into freely and voluntarily. However, this is provided that such exclusion clauses are not opposed to public policy or contravenes any written law. The Federal Court highlighted that the pertinent question to ask is whether the plaintiffs were absolutely restricted from enforcing their rights under or in respect of the contract, and not on the clarity of the clauses and the manner of interpretation.

The Federal Court agreed with the views of the Court of Appeal in relying on the Supreme Court decision in *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 CLJ Rep 230 to conclude that Clause 12 was caught by Section 29 of the CA 1950.

Section 29 may be invoked to strike down and invalidate such a clause, as Clause 12 negates the rights of the Plaintiffs to a suit for damages, and the kinds of damages spelled out in that clause encompasses all forms of damages under a suit for breach of contract or negligence. Further, clauses that purport to limit the time or period to bring an action are equally void as well. The court added that if Clause 12 is allowed, it would be an exercise in futility for the Plaintiffs to file any suit against the Defendant as they are precluded from claiming the remedies against the Defendant.

Unequal Bargaining Power

The Federal Court took cognizance of the commercial realities today, where examples of Clause 12 may typically be found in most banking agreements as the bargaining powers of the parties are different and never equal. Parties seldom deal on equal terms as the reality is that if a customer wishes to buy a product or obtain services, he has to accept the terms and conditions of a standard contract prepared by the other party. The Plaintiffs, as borrowers in the instant case, were no different.

This reality is succinctly put described by the House of Lords in *Suisse Atlantique Société D'armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61:

> "*Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex conditions which are not so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining*."

Absolute Exclusion Clauses Invalid

The Federal Court unanimously upheld the Court of Appeal's decision and affirmed that where an exclusion clause in an agreement sought to:

1. Exonerate a contract breaker of its liability for a breach of that contract.

2. Negates the contract breakers' liability to pay compensation for non-performance of that contract, it would be void.

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Ooi Bee Hong
Partner
+603 6209 5401
beehong@rdslawpartners.com

Chia Loong Thye
Partner
+604 370 1122
ltchia@rdslawpartners.com

Ong Eu Jin
Partner
+603 6209 5488
eujin@rdslawpartners.com

Tan Gek Im
Partner
+604 370 1122
gekim@rdslawpartners.com

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annabel@rdslawpartners.com

Commentary

The Courts are generally obliged to give full effect to the clear and plain meaning of words or terms of any contracts, and this does not invalidate all exclusion clauses drafted in Malaysia unless it is against public policy. Each clause will be judged according to the individual facts of the case in the manner and form it is drafted. It will be for the Courts to determine whether an exclusion clause in effect operates as an absolute restriction to a party's right to claim damages according to the facts of the case.

On top of that, another point of contention in the CIMB Case is that the Court of Appeal held that banks have a duty of care owed in the handling of the loan disbursement to the borrowers. The Court of Appeal added that in a situation such as this, the bank is in effect an agent of the customer when it disburses the loan to pay under the SPA on behalf of the customers. This legal position was adopted by the Supreme Court in *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170. It was held by the Court of Appeal in *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 2 CLJ 753 that it is an implied term between a bank and a customer that the bank will employ reasonable skill and care in the execution of customer's order.

Taking into consideration of the above, banks need to ensure that it has exercised its duty of care with reasonable care and skill in disbursing the loan under the terms of the Loan Agreement and the SPA. In a nutshell, this decision may have wider implications on the validity of any exclusion clauses in Malaysia, as the Federal Court's judgment in the CIMB Case can apply to any other types of agreements that contain any exclusion or limitation clause. Therefore, it is prudent when it comes to drafting exclusion clauses under Malaysian Law by either the banks or any party, to ensure that such clause must not wholly exonerate a contract-breaker from liability for any breach of contract.

Authored by Venetia Wong Shin Yee, an associate from our corporate team.

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