

Don't hesitate to challenge unfair contracts, says couple who won CIMB case

By **V Anbalagan** - December 27, 2018 7:00 AM

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Anthony Lawrence Bourke (right) and wife Alison Deborah Essex Bourke who won their case against CIMB Bank last week.

PETALING JAYA: A British couple who won their case against a commercial bank which attempted to use an exemption clause in a housing loan agreement to ward off a civil suit has advised customers to test their rights in court.

Anthony Lawrence Bourke said they should first get legal opinion whether to proceed or otherwise.

"In our case, the first lawyer whom we met was not familiar with the subject matter but was kind enough to refer to another counsel who agreed to take up the case," Anthony told FMT via e-mail.

He and his wife Alison Deborah Essex Bourke, who now live in the United Kingdom, filed the suit in 2015 against CIMB Bank Berhad on the grounds that a clause in the agreement excluded the bank from liability.

It was a setback for the couple when the High Court in late 2015 dismissed their claim.

Two years ago, the Court of Appeal reversed that decision and last week the Federal Court, in a landmark ruling, affirmed the finding – a small win for bank customers.

"It was costly, stressful and time-consuming to pursue the action but we were encouraged by the unanimous decision of the Appeal court judges in agreeing with us and this gave us more confidence in the Malaysian justice system," Anthony said.

Anthony said the legal battle was challenging but as minion litigants against the giant bank, they had to be courageous and patient.

"It is a long process with many decisions to make along the way but we pursued our case as we believe the bank was unjust to us," he added.

Their lawyer Ong Yu Jian said the couple wanted to buy a property as they were participants of the "Malaysia My Second Home programme" where the government allows foreigners to live in the country on a long-stay visa of up to 10 years.

The bank, in 2008, granted them a term loan facility of RM715,000 to purchase the property in Kuala Lumpur from a developer.

The property was still under construction and payment was to be made progressively by the bank based on the certificate of completion issued by the architect to the developer.



Lawyer Ong Yu Jian.

In early 2014, the developer sent an invoice seeking a progress payment of RM25,557.12 but CIMB did not release the money as it needed to conduct site visit inspections on the property.

A year later, the developer terminated the sale and purchase agreement (SPA) with the couple as the bank had not paid the money.

The couple filed a claim against the bank for breach of contract, negligence and breach of fiduciary duty, seeking for damages suffered resulting from the termination of the SPA.

CIMB took the position that the courts must give effect to the clear and plain meaning of the words in exclusion clauses, regardless of how unreasonable it might be.

The three-member Federal Court said the exemption clause in the agreement was against public policy as Section 29 of the Contracts Act 1950 prohibited the right to sue.

Justice Balia Yusof Wahi, who delivered the ruling said the bargaining powers of the parties to that agreement were different and never equal.

"In today's commercial world, 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.

"There is the patent unfairness and injustice to the plaintiffs. It is unconscionable on the part of the bank to seek refuge behind the clause and abuse the freedom of contract," he said.

He said the right of access to the courts had always been jealously guarded by the common law and the general principle remained that contracts which sought to oust the jurisdiction of the courts were invalid.

Ong said this decision, was essentially a clarion call to banks that if you made a mistake you would have to pay for it, like everyone else.

He said the public did not have to worry anymore as the Federal Court had said that this sort of exclusion clause was no longer enforceable.

He said the court ruling would compel banks and other financial institutions to remove unfair exclusion clauses in their standard agreements.

Ong said this decision simply forced them to be more fair and careful when excluding their liability.

"If there are no longer such clauses to protect them from negligence or breach of contract, it would invariably force them to be more careful in their conduct.

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