



Court: Bank may not use exemption clause to escape liability

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PUTRAJAYA: The Court of Appeal today ruled that a bank is liable for breach of contract and liable in tort for refusal to make a housing loan progress payment to a developer.



A three-man bench chaired by Rohana Yusuf said CIMB Bank Bhd could not rely on an exemption clause in the loan agreement with a British couple.

"The exclusion of a liability clause in the agreement cannot be sustained and cannot absolve the bank from liability in contract or tort," she said of the unanimous decision.

Justices Vernon Ong Lam Kiat and Hasnah Mohammed Hashim were the other members of the bench.

As for the drawdown expiry date issue, Rohana said it was clear that the bank had waived its rights by conduct of making further disbursements after the expiry date had passed.

"Therefore, they cannot now rely on this clause as an excuse for non-payment," she said in allowing the appeal from Anthony Lawrence Bourke and Alison Deborah Essex Bourke, who had sued CIMB.

Rohana said the bank was liable for non-payment of the sum due to the developer.

The Bourkes, now living in the United Kingdom, bought a piece of property on Jalan Sultan Ismail in Kuala Lumpur from developer, Crest Worldwide Resources Sdn Bhd in 2008.

To finance the purchase, they took a loan from the bank the same year.

It was a term loan agreement where the couple would service the monthly instalments and the bank would essentially pay to the developer progress payments whenever they were due.

However, CIMB failed to make payment on one of the invoices and as a result, the developer terminated the sale and purchase agreement with the couple.

The couple lost their property because of CIMB's non-payment of the sum due to the developer.

In 2015, the Bourkes sued the bank for negligence and breach of contract.

CIMB's defence was heavily premised on the bank's standard exclusion liability clause which protects the bank from any claim being made by the borrower.



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It also relied on another clause in the loan agreement which stated the bank need not have to disburse the loan if full drawdown was not made within a certain period of time.

Last year, the High Court dismissed the suit on the grounds that the exclusion liability clause protected CIMB from being sued for damages.

The trial court also found that because the drawdown expiry deadline had lapsed when the invoice for the sum due from the developer was received, CIMB was not obliged to make disbursements on it.

Lawyer Ong Yu Jian submitted to the bench that the exclusion liability clause which protected the bank was against public policy.

"The clause is also in contravention of Section 29 of the Contracts Act 1950 which is to protect public interest."

Ong, who was assisted by Jowe Ninoy Almeida, told the bench it was time Malaysian common law recognised the patent unfairness of such clauses.

This, he said, was for the protection of the public who had no choice but to agree to such clauses when dealing with banks.

On the drawdown expiry date issue, he said despite the clause, CIMB had continued the relationship with the plaintiffs as if it had waived its rights under this clause.

"It continued disbursing payments to the developer even after the deadline had lapsed. Therefore, to now claim protection from this clause when it had benefited from waiving it earlier on should not be allowed."

Counsel Wong Hock Mun and Sharifah Alliana Idid represented the bank.

Ong said the ruling today was an important one because previously, banks were protected from liability, damages and claims in Malaysia by such liability exclusion clauses.

"Previously, Section 29 of the Contracts Act and public policy consideration did not seem to be taken into account by our appellate courts when construing the applicability of liability exclusion clauses," he told FMT.

He said the decision showed that a bank might still be successfully sued for acts of negligence despite the presence of such clauses.

"The decision of the Court of Appeal is welcome as it seeks to balance the bargaining position between a bank and a customer.

"I believe this decision will improve the standards of the banking industry as it will make them more careful and accountable to their customers in their dealings."

Ong said following the Court of Appeal ruling, a High Court registrar would assess the damages due to his clients.

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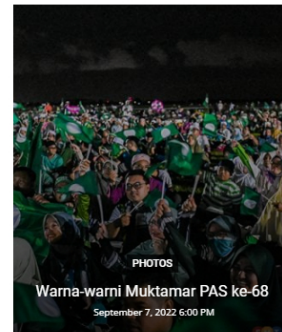


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