

CONTRACT LAW

Loan agreement – Failure of lender to make payment on behalf of borrower – Breach of agreement – Whether lender negligent – Exemption clause – Whether applicable – Contracts Act 1950, section 29

Anthony Lawrence Bourke & Another v CIMB Bank Berhad
[Rayuan Sivil No. W-02-(NCC)(W)-1345-07/2016], Court of Appeal

Facts The appellants, a married couple are foreigners living in the United Kingdom. The appellants had entered into a sale and purchase agreement (SPA) with the developer and took a loan (“Loan Agreement”) with the respondent bank in order to finance their property purchase. The property purchased was under development and payment was to be made progressively by the respondent as a financier to the developer. Although a notice for payment was sent by the developer to the respondent, the respondent, however, failed to make payment, and neither sought an extension of time, nor informed the appellants that it would not be paying. As a result, the developer terminated the SPA. The appellants filed a claim against the respondent seeking damages as a result of the termination. The High Court dismissed the appellant’s claim and held that Clause 12¹ (“the exemption clause”) of the Loan Agreement was an absolute exemption clause that excluded the respondent from all liabilities. The appellants appealed.

Issue The main issue was whether the respondent could rely on the exemption clause to absolve them from any liability arising from the Loan Agreement.

Held In allowing the appeal, the Court of Appeal held that the exemption clause under the Loan Agreement contravenes section 29² of the Contracts Act 1950 because it is a clause that effectively restrains any form of legal proceedings by the appellants against the respondent, and is thus considered void.

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¹ Clause 12 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.”

² Agreements in restraint of legal proceedings void