IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
[CIVIL APPEAL NO: 02-105-10/2017(W)]

Between

CIMB Bank Berhad
(No. Syarikat: 13491-P) ... Appellant

And

1. Anthony Lawrence Bourke
(Passport British No: 099217263)

2. Alison Deborah Essex Bourke
(Passport British No: 307728086) ... Respondents

[In the Matter of the Court of Appeal of Malaysia at Putrajaya
Civil Appeal No. W-02(NCC)(W)-1345-07/2016]

Between

1. Anthony Lawrence Bourke
(Passport British No: 099217263)

2. Alison Deborah Essex Bourke
(Passport British No: 307728086) ... Appellants

And

CIMB Bank Berhad
(No. Syarikat: 13491-P) ... Respondent

CORAM

ZULKEFLI BIN AHMAD MAKINUDIN, PCA
ZAINUN BINTI ALI, FCJ
ZAHARAH BINTI IBRAHIM, FCJ
AZAHAR BIN MOHAMED, FCJ
BALIA YUSOF BIN WAHI, FCJ

JUDGMENT OF THE COURT

[1] This case deals with the issue of whether an exclusion clause in an agreement entered into between two parties, a house buyer and a bank may be struck out by the provisions of section 29 of the Contracts Act 1950.

Salient facts

[2] The parties in this appeal will be referred to as they were in the High Court.

[3] The Plaintiffs are husband and wife. They are foreigners and living in the United Kingdom. To finance the purchase of a property, they applied for and was granted a term loan facility of RM715,487.00 by the Defendant bank. The loan was provided under the Housing/Shop house Loan Agreement dated 22.04.2008 (Loan Agreement). The property purchased was still under construction and payment was to be made progressively against the certificate of completion issued by the architect at each progress billing. The Defendant, under the Loan Agreement is obligated to make direct payment on a progressive basis to the developer on behalf of the Plaintiffs, whenever such sums become due for payment.

[4] On or about 12.3.2014, the developer sent an invoice No. IV000003408 which contained an architect's certificate dated 28.2.2014 and sought payment of RM25,557.12. The notice was received by the Defendant on 13.3.2014 and the due date for payment was 25.03.2014 (Due Date). Eight days after receipt of the invoice, that is on 20.03.2014, the disbursement department of the Defendant sent an email requesting its branch to conduct site visit inspection on the property.

[5] Three months after the invoice Due Date, there was no confirmation of any site visit inspection being conducted on the property. The Defendant's disbursement department sent several other internal emails dated 24.04.2014, 17.05.2014, 29.05.2014, 11.06.2014

and 25.06.2014 to its branch to conduct the site visit. Still, there was no response to any of these emails.

[6] The Defendant did not notify either the developer or the Plaintiffs on the need of a site visit inspection as an additional condition to disburse payment on the Invoice. The Defendant also had never made any request to the developer to extend the invoice Due Date in order for them to conduct the site visit. After about a year, the sum remained unpaid and by a notice of termination dated 10.4.2015 sent to the Plaintiffs, the Sale and Purchase Agreement was terminated.

[7] The Plaintiffs filed a claim against the Defendant seeking for damages suffered resulting from the termination of the SPA. The claim was premised on a breach of contract and/or negligence and breach of fiduciary duty.

[8] The Plaintiffs' claim was dismissed. The learned Judicial Commissioner (JC) found Clause 12 of the Loan Agreement absolved any liability against the Defendant.

[9] Dissatisfied with the decision of the High Court, the Plaintiffs appealed to the Court of Appeal.

[10] The appeal was allowed. The Court of Appeal found that despite her analysis of the facts and evidence before her, the learned JC did not make any findings of fact as to whether or not the Defendant was in breach of the Loan Agreement or was in breach of its duty of care under the tort of negligence to the Plaintiffs. The learned JC merely placed whole reliance on the effect of Clause 12 of the Loan Agreement.

[11] The Court of Appeal then proceeded to do so and finally concluded that the Defendant had breached its main obligation under the Loan Agreement when it failed to fulfill the terms to pay the invoice issued directly to it under the Loan Agreement. 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.

[12] The Court of Appeal also observed that the learned JC did not address the application of section 29 of the Contracts Act 1950 and had not considered the relevant authorities in arriving at her finding that Clause 12 of the Loan Agreement bars the Plaintiffs' claim entirely.

[13] On the effect of section 29 of the Contracts Act 1950 on Clause 12 of the Loan Agreement, the Court of Appeal concluded at paragraph 57 of its judgement in the following terms:

> ***"[57] In conclusion, from the evidence appearing in the appeal records in this case and for all the reasons stated above, we find the Respondent bank was in breach of the fundamental term of the Loan Agreement in failing to pay the Invoice in accordance to its term. The Respondent had breached its duty of care to the Appellants as its customer in the handling of the loan disbursement which had directly caused the termination of the SPA causing the Appellants to suffer loss and damage. We further find Clause 12 in effect is a clause that absolutely restrains legal proceedings and it is void under section 29 of the Contracts Act."***

[14] Leave was granted to the Defendant to bring the present appeal on the following two questions of law:

> ***1) Whether section 29 of the Contracts Act, 1950 may be invoked to strike down and invalidate an exclusion clause which exonerates a contract breaker of liability for a breach of that contract (exclusion clauses that absolve primary obligations);***
>
> ***2) Whether section 29 of the Contacts Act, 1950 may be invoked to strike down and invalidate an exclusion clause which negates the contract breakers liability to pay compensation for non-performance of that contract (exclusion clauses which absolve general secondary obligations).***

The Defendant's submission

[15] As the Appellant in this appeal, the Defendant submitted that in dealing with an exclusion clause, it is a matter of construction. Whether such clause is fair/equitable is not relevant. A court of law must apply

the clause according to its meaning. Clause 12 of the Loan Agreement is an exclusion which excludes the Defendant's liability in respect of the loss and/or damage suffered therein regardless of the cause of action from which it might arise. By the said exclusion clause, the parties have agreed that the loss and damage as specified therein are expressly excluded. The Plaintiffs do not have the right to such loss and damage. Courts must give effect to the clear and plain meaning of the words in exclusion clauses regardless of how unreasonable the court might find it to be. The effect of the clause is merely to exclude the Plaintiffs' right to the type of loss and damage expressly stated in the same. Thus, as their 'right' to those specific loss and damage has been excluded, the Plaintiffs cannot seek to enforce the same as it would be contrary to the express terms of the Loan Agreement. It does not prohibit the Plaintiffs' access to court nor the right of the Defendant.

[16] On section 29 of the Contracts Act 1950, it was contended by learned Counsel that the said provision has its roots in public policy to wit that parties cannot oust the jurisdiction of the Court. It protects the parties' right to sue which is the public policy consideration underpinning that provision. On a plain reading of the said provision, it expressly refers to "restraint of legal proceedings" which must be taken to mean that of a restriction or prohibition against the commencement of a legal action. Clause 12 on the other hand, does not in any way, in the opinion of learned Counsel, restricts the Plaintiffs' right to commence legal action against the Defendant bank for the breach of the Loan Agreement. It merely excludes certain types of damages to be claimed and not a total ouster of the court's jurisdiction and thus does not offend section 29 of the Contracts Act 1950.

Plaintiffs' submission

[17] As the Respondents herein, the Plaintiffs submitted that Clause 12 of the Loan Agreement is an exclusion of liability provision that absolves the Defendant from both primary obligation (breach of contract) and general secondary obligation (liability to pay compensation for breach) and this offends section 29 of the Contracts Act 1950 and is therefore void. In the first place, in a contractual claim,

no action can be sustained without establishing the Defendant's primary obligation towards the Plaintiffs. There will be no cause of action if a defendant owes no primary obligation to a plaintiff. Thus a contractual term which excludes primary obligation is essentially one which restrains legal proceedings completely. As for secondary obligation, liability to compensate for breach essentially falls within the realm of relief or remedy. It is trite that relief or remedy is ancillary to and not separable from a cause of action. Once a plaintiff is restrained from seeking any relief or remedy against a defendant, the suit becomes futile. Thus, a contractual term that excludes secondary obligation is essentially one which renders the whole legal proceeding redundant. There can never be a situation where a suit may be sustainable if either the primary obligation or the secondary obligation is excluded. In either case, the action will fail and thus section 29 of the Contracts Act 1950 can be invoked.

[18] Clause 12 effectively deprives the Plaintiffs from enforcing their rights under the contract. It is an absolute bar to the Plaintiffs from suing the Defendant for the breach of the Loan Agreement. Moreover, courts should strike out and refuse to enforce exclusion clauses because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts. A party to a contract will not be permitted to engage in unconscionable conduct, secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause. The inclusion of such clause is opposed to public policy.

Our Decision

[19] The issue before us is rather straightforward in that it calls for determination whether Clause 12 of the Loan Agreement offends section 29 of the Contracts Act 1950. Clause 12 reads as follows:

> ***Liability***
>
> ***"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."

[20] As rightly submitted by learned Counsel for the Defendant, we are hereby tasked with the issue of the interpretation and construction of the said Clause 12.

[21] Learned Counsel for the Defendant submitted that the reading of the said clause makes the Plaintiffs' action unsustainable as such clause had excluded the Defendant's liability in respect of the loss and/or damage specified therein only. Parties must be taken to have agreed that those types of losses as specified in the clause are excluded. Parties are bound by the terms of the contract and Courts must give effect to the clear and plain meaning of the words in the said clause.

[22] The Court of Appeal disagreed with the Defendants' contention on the meaning and purport of Clause 12 of the Loan Agreement stating in paragraph 50 of its judgment as follows:

"[50] As we had earlier adverted to, Clause 12 no doubt does not appear to restrict a claim of the appellants to file a suit either under contract or tort. However, the effect of Clause 12, as has also been pointed out in the grounds of judgment of the learned JC, is a clause that effectively restricts the appellants from initiating any claim against the Respondent bank for any liability or any loss and damage arising under the contract. There was no dispute between parties as to the effect and implication of Clause 12. Learned Respondent's counsel both in his oral and written submission agreed that,

"Clause 12 of the Loan Agreement is an exclusion clause which exclude liability not only in respect of the respondent's primary obligation but also general secondary obligation.""

[23] It is worth noting that by the Defendant's own admission, Clause 12 of the Loan Agreement "is an exclusion clause which excludes liability not only in respect of its primary obligation but also general secondary obligation." The learned JC had stated at paragraph 80 of her judgment that the Court agreed with the Defendant's learned counsel that Clause 12 makes the Plaintiff's claim against the Defendant unsustainable.

[24] It was the concurrent finding of the two courts below that the said clause effectively restricts the Plaintiffs from initiating any claim against the Defendant for loss and/or damage arising under the contract. It is a clause that negates the right of the Plaintiffs to a suit for damages, the kind spelt out therein which encompass all forms of damages for breach of contract or under a suit for negligence.

[25] An exclusion clause has been 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 recognized relationship between parties. The traditional conception of such a clause envisage it as a defensive shield raised by a party to a claim brought either in contract or tort, usually for breach of some implied term of the contract, for breach of a duty of care at common law or for misrepresentation. (See: The Construction of Contracts, Interpretation, Implication and Rectification Second Edition. Gerard Mc Meel).

[26] We agree with the Defendant that parties are bound by the terms of the contract which they entered into and that it is the court's duty to give effect to the clear and plain meaning of the words in the said clause. That is quite trite.

[27] The law recognises the principle of freedom of contract. Parties to a contract are free to determine for themselves what their obligations are. As Sir George Jassel MR said in ***Printing and Numerical Registering Company v. Simpson*** **[1874-75] LR 19 at 465:**

> ***"…. men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract."***

[28] It is also trite that an agreement must be construed by the words used in the agreement and the court is not empowered to improve upon the instrument which it is called upon to construct. This we have stated in *Berjaya Time Square Sdn. Bhd. v. M Concept Sdn. Bhd.* [2010] 1 MLJ 597 where it was reiterated:

> ***"The court has no power to improve upon the instrument which it is called upon to construct, whether it be a contract, a statute or article of association. It cannot introduce terms to make it fairer or more reasonable. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning to a reasonable person having all the background knowledge which would reasonable be available to the audience to whom the instrument is addressed; See Investors Compensation Scheme Ltd v West Bromwich Building Society. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament or the intention of whatever person or body was or is deemed to have been the author of the instrument."***

[29] The House of Lords in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] IWLR 896 had observed:

> ***"The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one were to nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention, which they plainly not have had."***

[30] In respect of exclusion clauses, the approach to be adopted was explained by the House of Lords in *Allson Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd.* [1983] 2 AC where Lord Wilberforce explained:

> ***"…Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem …one must not strive to create ambiguities by strained construction, as I think the appellants have striven to do. The relevant words must be given, if possible their natural, plain meaning."***

[31] In dealing with the issue of interpreting and applying exclusion clauses, we take it as settled law and agree with the submissions of the Defendant that post *Photo Production Ltd v. Securicor Transports Ltd* [1980] AC 827 whether an exclusion clause applies is a matter of construction as was decided by this Court in *CIMB Bank Bhd v. Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169. As such we do not deem it necessary to dwell any further on the issue of the applicability of the concept of fundamental breach or a breach of the fundamental term of the agreement.

[32] We are dealing here with Clause 12 of the Loan Agreement. In our view, given its natural and ordinary meaning, the said clause is susceptible to one meaning only and that meaning must be given effect to and enforced however unreasonable the court may think it is. The words in the clause are clear and one does not even need to resort to the contra proferentum rule of construction.

[33] In concluding that Clause 12 of the Loan Agreement is caught by section 29 of the Contracts Act 1950, the Court of Appeal had placed reliance on a decision of the Supreme Court in *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 CLJ Rep 230.

[34] The facts of the case in ***New Zealand Insurance*** are as follows. Under a fire insurance policy, the appellant agreed to indemnify the respondent against loss and damage occasioned by fire to the property situated at the respondent's premises. A fire occurred at the premises in consequence of which the respondent submitted a claim to the appellant. The claim was rejected. The respondent filed a suit 17 months after the fire and after the expiry of the stipulated 12 months period within which a suit may be brought as contained in a condition of the policy. The defence put up at the trial among others was that the claim was barred by reason of the commencement of the action after the expiry of the 12-month period stipulated in the policy. Condition 19 of the insurance contract states that: In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration. The trial judge gave judgment for the respondent. On appeal to the Supreme Court it was held that the condition that the action be commenced within a 12-months period from the date of the commencement of the loss or damage was void by virtue of the imperative words of section 29 of the Contracts Act 1950 as it clearly limited the time within which the respondent could enforce his right under section 6(1)(a) of the Limitation Act 1953.

[35] A number of Indian authorities were considered by the court dealing with section 28 of the Indian Contract Act, which is similar to our provision. At page 238 of the report, LC Vohrah J, delivering the judgment of the court said:

> ***"it would appear from the authorities submitted by Counsel for both parties that the preponderant view of the Indian Courts is that conditions similar to Condition 19 of the fire policy do not infringe or contravene s. 28 of the Indian Contract Act the provisions of which, as mentioned, are identical to those of s. 29 of our Contracts Act. It would appear that the validity of a condition similar to Condition 19 of the fire policy has been upheld in the Indian cases called in aid by Counsel for the appellant principally on the distinction that has been made between rights on the***

> ***one hand and remedies on the other clearly implied in ground (5) of the passage quoted above from the judgment of A.N. Grover J in the Peal Insurance Co. case.***
>
> ***This distinction between the existence of right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this Court in Hock Hua Bank Bhd v. Leong Yew Chin [1987] CLJ (Rep) 126."***

Continuing further at page 239,

> ***"It is clear therefore that the legal distinction that obtains in the relevant Indian decisions that have been referred to between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law in the eyes of which the distinction is merely semantic. We do not think that a right can be dissociated from its remedy. We are therefore of the opinion that Condition 19 of the fire policy contravenes s. 29 of the Contracts Act."***

[36] In *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] CLJ (Rep) 126 the Supreme Court held that a relief or a remedy is ancillary to and not separable from a cause of action. Syed Agil Barakbah SCJ at page 132 of the report had the following to say:

> ***"Relief means a remedy sought by a plaintiff in an action. A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the Court a remedy against the defendant. ... There must be a cause of action before a plaintiff can claim a relief in an action. ... Relief is part and parcel of a new cause of action and in fact ancillary to it. (Emphasis added)"***

[37] We agree with the Court of Appeal when it opined that it is not right to think that a right can be dissociated from remedy and as can be clearly demonstrated by the instant appeal, where despite the finding that there is a breach by the bank, if Clause 12 of the Loan Agreement is allowed, it would be an exercise in futility for the Plaintiffs to file any suit against it. The Plaintiffs are precluded from claiming the remedies against the bank. Clause 12 of the Loan Agreement negates

the rights of the Plaintiffs to a suit for damages, and the kind of damages as spelt out in the said clause encompasses and covers all forms of damages under a suit for breach of contract or negligence. There is an absolute restriction. Section 29 of the Contracts Act 1950 prohibits such restriction.

[38] The decision in *New Zealand Insurance* has been followed in two other High Court decisions in *J & Wong Logging Contractor v. Arab Malaysian Eagle Assurance Bhd* [1993] (MLJ) 240, a decision by Steve Shin J (as he then was) and *Sarawak Electricity Supply Corp v. MS Shipping Sdn Bhd* [2000] 5 MLJ 721, a decision by Ian Chin J. The Court of Appeal in *MBf Insurans Sdn Bhd v. Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)* [2008] 2 NKH 398 also followed the decision in *New Zealand Insurance*.

[39] Section 29 of the Contracts Act 1950 reads:

> **Agreements in restraint of legal proceedings void**
>
> 29. 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.

[40] The pertinent question to ask is whether the Plaintiffs were absolutely restricted from enforcing their rights under or in respect of the contract. Once again, we have to examine Clause 12 of the Loan Agreement. From our reading of the said clause (which we have reproduced at paragraph 19 earlier) the Plaintiffs are precluded from claiming any loss or damage and the Defendant will not be liable for any amount for loss of income or profit or savings, or any indirect, incidental, consequential, exemplary, punitive or special damages.

[41] Such are the kind or form of damages and losses that the Defendant seeks to disclaim under the said clause.

[42] In their statement of claim, the Plaintiffs were seeking for the following reliefs as stated in paragraph 21:

> 21. AND THE PLAINTIFFS claim from the Defendant:
>
> (a) Special damages in the sums of:
>
> (i) RM273,996.24 being the total amount of loan payments that the Plaintiffs had paid to the Defendant under the Facility;
>
> (ii) the sum of RM747,481.42 being the Plaintiffs' total losses suffered due to the termination of the S&P; and
>
> (iii) the sum of RM10,975.30 being all other miscellaneous costs and expenses the Plaintiffs have incurred due to the Defendant's breach,
>
> (b) General damages to be assessed;
>
> (c) Aggravated and/or exemplary damages;
>
> (d) Costs; and
>
> (f) Any other or further reliefs this Honourable Court deems fit and proper.

[43] We agree with the views of the Court of Appeal that the kind of damages spelt out in the said Clause 12 encompasses all forms of damages under suit for a breach of contract or negligence. One may ask: If the Plaintiffs were precluded from claiming the remedies they sought under paragraph 21 of their statement of claim, what can they claim against the Defendant? Are they not totally restricted from enforcing their rights in respect of the contract? In our considered view, on the plain meaning of the words used in the said Clause 12 of the Loan Agreement, whatever the Plaintiffs are claiming has been negated and as such section 29 of the Contracts Act 1950 ought to be invoked.

[44] We will now refer to the case of *Pacific Bank Bhd (sued as guarantor) v. Kerajaan Negeri Sarawak* [2014] 6 MLJ 153, a case relied upon by the Defendant in this appeal. The issue in that case was whether the terms and conditions in the letter of guarantee which limited the time or restricted the period for making the claim was void. It is necessary to reproduce the factual background of the case in some detail in order to appreciate the distinction which we are seeking to make in the instant appeal.

[45] Niah Native Logging Sdn Bhd (Niah Native) the first defendant in the court below was issued timber licence by the respondent pursuant to the Forest Ordinance Of Sarawak to extract timber. As a condition for the issuance of the said timber licence, Niah Native (the licensee) provided the respondent a letter of guarantee dated 25 April 1997 as security for the payment of royalties to be charged for the extraction of timber from the licensed area. The purpose of the letter of guarantee, as issued by the appellant as a guarantor, was that it guaranteed the respondent that Niah Native would pay all royalties due to the respondent under the said licence. In the event that Niah Native fails to pay the royalties due, the appellant as guarantor, would then be liable to pay the respondent a sum not exceeding RM100,000. The duration of the guarantee was from 25 April 1997 until 24 April 1998. In consideration of the appellant issuing the guarantee in favour of the respondent, Niah Native's contractor, one Syarikat Mustafa & Ngu Timber Sdn Bhd, issued a letter of indemnity dated 24 April 1997 in favour of the appellant which was valid for a year. Both the letters of guarantee and indemnity would expire on 24 April 1998. On 14 April 1998, before the expiry of the said letter of guarantee and indemnity, the appellant informed Niah Native's contractor of the impending expiry of the same and inquired as to whether they wished to renew the said guarantee. There was no response from Niah Native's contractor. The appellant wrote to the respondent to inform them that the said letter of guarantee had expired that it was thus cancelled. The respondent duly acknowledged the appellant's letter and did not raise any objection nor did it dispute its content. It was the appellant's case that the cancellation of the letter of guarantee rendered the guarantee null and

void and of no further force and effect. In the meantime, Niah Native continued to extract timber in the licensed area, even in the absence of a bank guarantee. During the currency of the letter guarantee, there became due from and payable by Niah Native to the respondent, some royalties and other payments under the timber licence. Niah Native owed RM118,790.69 in respect of timber royalty. It had defaulted in its obligations to pay the said amount.

[46] The respondent then filed a suit in the High Court against Niah Native for failing to pay royalties and other payments payable under the said licence amounting to RM685,110.85 and against the appellant as guarantor to the licensee. The appellant in the meantime, filed its summons in chambers for an order that the respondent's writ of summons and the statement of claim be struck out. The deputy registrar allowed the appellant's striking out application on 18 August 2000. The respondent appealed against the deputy registrar's decision. By an order made on 25 September 2001, the High Court ordered, inter alia, that the only issue between the respondent and the appellant in the suit was whether section 29 of the Contracts Act 1950 was applicable to the terms and conditions stipulated in the said letter of guarantee that required all claims to be made during the one year guarantee period and that such question of law and the construction of the said impugned clause in the letter of guarantee be determined under O 14A of the Rules of the High Court 1980. The High Court reversed the decision of the deputy registrar on the ground that section 29 of the Contracts Act 1950 was applicable and made the order. The appellant's appeal against the decision of the High Court was dismissed by a majority decision of the Court of Appeal.

[47] The majority judgment of the Court of Appeal approved the principle laid down in the *New Zealand Insurance* case and it also favoured the decision of another Court of Appeal in the *MBf Insurans Sdn Bhd* case.

[48] Leave to appeal to the Federal Court was granted to the appellant on the following question of law:

"whether the terms and conditions of the Letter of Guarantee which limit the time or restrict the period for making the claim is void."

[49] The appeal was allowed and the question was answered in the negative. In reaching the said decision, the Court found *inter alia*:

- The language of the letter of guarantee is clear ie the said clause only prescribes a time limit for a demand to be made before a cause of action can arise. Its plain and ordinary meaning must be given. [89]

- There is a need to distinguish between limiting a right and limiting the enforcement of that right. [96]

- The Indian courts have consistently held that s 28 only invalidates agreements which limits the time within which a person has to enforce his rights. It will not invalidate agreements which determines when a right arises or the time when a right will arise. In other words, there is the distinction between the accrual of cause of action and enforcement of cause of action. Time limitation on the accrual of cause of action does not infringe s 29. [97]

- The respondent was actually on a sound footing in that it had equal bargaining power with the appellant and Niah Native. It knew exactly where it stood as regards its rights under the letter of guarantee. It was free to reject the letter of guarantee at the very outset should the said clause be viewed as being adverse to its interests. [138]

[50] The Court dealt with the *New Zealand Insurance* case and drew a distinction and stated its reasons in the following paragraphs of the judgment:

"[142] Looking firstly at the New Zealand Insurance case, it is seen that the relevant clause therein differs from the relevant clause in the instant appeal.

[144] Thus in the New Zealand Insurance case, a claim demand was submitted to the insurance company within the validity period but it was rejected. The beneficiary then filed a suit after the expiry of the 12 months period as prescribed in the clause. It was alleged by the insurance company that the claim was invalid since it was filed late, outside of the 12 month period. The then Supreme Court held that such a clause would be rendered void by s 29.

[145] To reiterate, the facts in the instant appeal differs from the facts in the New Zealand Insurance case, since the latter case involved a claim made within time although the suit was filed outside of the agreed period. ……."

……..

……..

[175] Thus, it is our view that the time period is a limitation for making of a claim in the event of a default. Following the ordinary meaning of the language of the letter of guarantee, as accepted by the respondent and the guarantor, the claim must be made within the guarantee period upon an event of default. The word 'claims' which entails a demand for the payment when default occurs should be construed in its ordinary sense and meaning and thus the limitation paragraph does not amount to restricting one's right to enforce under s 29.

[176] The impugned clause of the letter of guarantee therefore does not offend s 29 and thus the question posed is answered in the negative."

[51] With the greatest of respect we wish to state that the Court had not given any consideration to the ratio of the ***New Zealand Insurance*** case pertaining to the views expressed by the Supreme Court then in respect of the "distinction between a right and remedy which as a matter of law does not appear to exist in our jurisprudence." In this regard we wish to reiterate the views expressed by Vohrah J (as he then was) in the said case as stated earlier in paragraph 35 of this judgment.

[52] For purposes of distinction, we must also say that ***Pacific Bank Bhd*** and the cases considered therein may also be distinguished from the instant appeal in that the exclusion clause in the instant appeal is one on the right to enforce rights by the usual legal proceedings under the first limb of section 29 of the Contracts Act 1950 while the ***Pacific Bank Bhd*** case and the authorities referred therein were in respect of the limitation of time to enforce those rights. Those authorities too, only dealt with matters in respect of insurance policy claim and on guarantees. In the instant appeal, we are dealing with the exclusion of rights of access to the courts, a totally different kind of restraint. ***Pacific Bank Bhd*** is clearly distinguishable.

[53] The Federal Court in ***Pacific Bank Bhd*** had also referred to and considered the Court of Appeal case of ***MBf Insurans Sdn Bhd (supra)***. The facts in ***MBf Insurans Sdn Bhd*** are as follows. By a security guarantee dated 18 August 1989 the appellant, an insurance company, agreed to provide a guarantee that the sum of RM22,017 would be paid by way of a security deposit upon demand by the respondent, a statutory body who had executed a contract with the contractor subject to the terms and conditions of the security guarantee. The period of the guarantee was from 15 June 1989 to 14 June 1990. It was then extended for another year by way of an endorsement with the words: 'This guarantee will expire on 14 June 1991. Claims, if any, must be received on or before this date.' When the contractor did not complete its works under the contract awarded to it by the respondent, a demand was made on 21 June 1991 demanding that the sum of RM22,107 be paid to the respondent pursuant to the security guarantee. The appellant rejected the claim on the ground that the claim was made after the expiry of the guarantee. The Magistrate's court dismissed the respondent's action on the ground that the respondent's claim was out of time as the claim was made after the expiry of the said guarantee. The High Court reversed the Magistrate's decision. The learned High Court judge was of the view that the shelf-life of the said guarantee which is embodied in the said endorsement was contrary to section 29 of the Contracts Act 1950 and therefore void as an attempt to contract out of the Limitation Act

1953. Dissatisfied with the decision, the appellant appealed to the Court of Appeal.

[54] The Court of Appeal unanimously dismissed the appeal. Suriyadi JCA (as he then was) delivered the court's judgment following ***New Zealand Insurance*** which had ruled that there is no distinction between a right and its remedy in Malaysia, while Gopal Sri Ram JCA (as he then was) also dismissed the appeal although on a different ground. Gopal Sri Ram approached the issue at hand on the interpretation of the impugned clause in the insurance policy namely on the function of the court to ascertain what the parties meant by the words which they have used in the contract, whether there was absurdity or inconsistency in ascribing a particular meaning to the words used and also on the usage of the contra proferentum rule in the construction of contractual documents. The principle of favouring a commercially sensible construction which accords with business common sense was also adopted by the Court. Hassan Lah JCA (as he then was) concurred and also dismissed the appeal.

[55] Referring to the two cases, the Federal Court in ***Pacific Bank Bhd*** remarked: "Court should be mindful in following the decisions of both authorities of ***New Zealand Insurance*** and ***MBf Insurans Sdn Bhd*** [155]."

[56] From our scrutiny of the Federal Court's judgment, in issuing the caution against the two decisions, we note that the Court had omitted to deal with the ratio of the case in ***New Zealand Insurance*** and ***MBf Insurans Sdn Bhd*** that "the distinction between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law." In particular reference to the judgment of Suriyadi JCA in the ***MBf Insurans Sdn Bhd*** case, the Federal Court had side-stepped the issue and merely commented:

> ***"[151] The other judge in the MBf Insurance case went on to hold that the material clause was invalid as it breached s 29, in that it restricted the plaintiff's statutory period for bringing an action under the Limitation Act."***

[57] Earlier, commenting on Gopal Sri Ram's JCA judgment, the Court said "…. One other authority relied upon by the majority judges in the present appeal is the ***MBf Insurans Sdn Bhd*** case. The majority judges were in agreement with Gopal Sri Ram JCA (as His Lordship then was), who took on a 'commercial common sense approach' in interpreting the subject clause."

[58] In our view, ***MBf Insurans Sdn Bhd*** decided not only on the issue of interpretation of exclusion clauses as expounded in the judgment of Gopal Sri Ram JCA (as he then was) but also on the effect of such clause in relation to section 29 of the Contracts Act 1950 as explained in the judgment of Suriyadi JCA (as he then was). The Court of Appeal was unanimous in its decision although on different grounds.

[59] For the aforesaid reasons, we are of the considered view that the decision of this Court in ***Pacific Bank Bhd*** is not applicable as the issue of law on the distinction between rights and remedy as expounded in the decision of the Supreme Court in the ***New Zealand Insurance*** case which was followed in the other cases as mentioned in paragraph 38 of this judgment was not dealt with. The Court was concerned to distinguish between limiting a right and limiting the enforcement of that right and opined that time limitation on the accrual of cause of action does not infringe section 29. In that respect, we are of the considered view that the statement of law and the principle as stated by the Supreme Court in the ***New Zealand Insurance*** case is a correct statement of law on the efficacy of exclusion clauses under section 29 of the Contracts Act 1950.

[60] Moving on to a different ground, learned Counsel for the Plaintiffs also submitted on the issue of public policy and referred to a passage in ***New Zealand Insurance*** wherein it was stated:

> ***"… The primary duty of a Court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided they are not opposed to public policy or are not hit by any provision of the law of the land…(emphasis added)***

[61] Pollock and Mulla on Indian Contract Act and Specific Relief Act, 10th Ed. describes "public policy" in the following terms:

> ***"Public Policy – The Principle of public policy is this: ex dolo molo non oritur actio. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare."***
>
> (See also: *Holman v. Johnson* [1775 - 1802] ALL ER Rep 98)

[62] Section 24(c) of the Contracts Act 1950 explains that the consideration or object of an agreement is not lawful if it is opposed to public policy.

[63] A similar position prevails in India. The Indian Supreme Court in *ABS Laminart Pvt. Ltd and Ausher v. A.P. Agencies, Salem* [1989] AIR SC 1239, dealing with section 23 of the Indian Contract Act stated the following:

> ***"Under Sec. 23 of the Contract Act the consideration or object of an agreement is lawful, unless it is opposed to public policy. Every agreement of which the object consideration is unlawful is void. Hence there can be no doubt that an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy."***

[64] In *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay b. Abdullah* [2015] 5 MLJ 619 at pg. 640 this court had observed:

> ***[42] It should also be said that public policy is not static. "The question of whether a particular agreement is contrary to public policy is a question of law…. It has been indicated that new heads of public policy will not be invented by the courts for the following reasons… However, the application of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise … The rule remains, but its application varies with the principles which for the***

time being guide public opinion" (Halsbury's Law of England, (5th Ed Vol 22) at para 430.)

[65] Clause 12 may typically be found in most banking agreements. In reality, the bargaining powers of the parties to that agreement are different and never equal. The parties seldom deal on equal terms. 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 condition of a standard contract prepared by the other party. The Plaintiffs, as borrowers in the instant case, are no different. They have unequal bargaining powers with the Defendant. As succinctly put by Lord Reid in the House of Lords in *Suisse Atlantique Societe D'armement Maritime S.A v. N.V 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."

[66] In our considered view, this is one instance which merits the application of this principle of public policy. There is the patent unfairness and injustice to the Plaintiffs had this Clause 12 been allowed to deny their claim/rights against the Defendant. It is unconscionable on the part of the bank to seek refuge behind the clause and an abuse of the freedom of contract. As stated by Denning LJ in *John Lee & Sons (Grantham) Ltd and Others v. Railway Executive* [1949] 2 All ER 581:

"Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused."

[67] The House of Lords had also observed in *Suisse Atlantique Societe (supra)* that freedom of contract must surely imply some choice or room for bargaining. The Plaintiffs in this appeal had none. This Court too, must be vigilant and will not shrink from properly applying the principle in deserving cases. Public policy is not static.

[68] The right of access to the courts has always been jealously guarded by the common law, and the general principle remains that contracts which seek to oust the jurisdiction of the courts are invalid (See: *R A Buckley, Illegality and Public Policy* (Sweet & Maxwell, 3rd Ed. 2013 at para 8.02)

[69] In his written submission, learned Counsel for the Defendant had referred to the Singapore case of *CKR Contracts Services Pte Ltd v Asplenium Land Pte. Ltd and another appeal and another matter* [2015] SGCA 24 on the suggestion that "Courts should be careful not to apply this particular category of illegality and public policy to every contracts in which there were limitations placed on the rights and remedies of the contracting parties concerned, given the fact that contracts would be held to be void and contrary to public policy on only rare occasions."

[70] We pause here to state our view on the proposition that courts must be careful not to apply this principle where there are limitations placed on the rights and remedies of the contracting parties. In our view, limitations placed or spelt out in an exclusion clause does not offend section 29 of our Contracts Act 1950 which speaks of absolute restriction. Mere limitations and/or some restrictions added into an exclusion clause is insufficient to invoke section 29. There is a stark difference between the restriction placed under Clause 3.5.8 of the agreement in the Singapore case above quoted and Cause 12 of the Loan Agreement in our instant appeal. It is to be noted that the Singapore Court found in that case that: "Clause 3.5.8 does not attempt to restrict or limit an innocent party's right to damages at common law, it does attempt to limit or restrict a contracting party's right to an injunction in equity …. Such a clause is more in the nature of an exclusion or exception clause (as opposed to a clause seeking to oust the jurisdiction of the court)."

[71] Clause 12 of the Loan Agreement in the instant appeal on the other hand speaks of an absolute restriction to the Plaintiffs' right to damages. The difference is appreciable and thus the case is clearly distinguishable from the instant appeal.

[72] For the aforesaid reasons, the appeal is hereby dismissed with cost and both questions 1 and 2 are answered in the affirmative.

[73] This judgment is given pursuant to section 78(1) of the Courts of Judicature Act 1964 as two members of the coram, Zulkefli Ahmad Makinudin PCA and Zainun Ali FCJ have retired.

(BALIA YUSOF HJ. WAHI)
Federal Court Judge

Dated: 17 DECEMBER 2018

Counsel:

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