# Shattering the Legal Bulletproof of Exclusion Clauses: A Discussion of the Landmark Decision in Contract & Banking Law, *Anthony Bourke & Anor v CIMB Bank Berhad*

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## I INTRODUCTION

Exclusion clauses are nothing new. We have grown accustomed to it being shoe-horned into all manner of agreements; none more common and staple than those prepared by institutions such as banks and large corporations.

Typically, an exclusion or inter-changeably, limitation clause, sets out expressly parameters to a contracting party's claim against the contract-breaker in the event of a breach occurring. Practically, there are legitimate benefits to having exclusion or limitation clauses. They are especially useful for agreements which may have knock-on damages that may be unquantifiable, or liability causes which are hard to be ascertain in the event of a breach. Thus, such clauses prevent parties from being able to sue for unlimited amounts under unlimited circumstances. Such clauses allow two contracting parties from its inception to agree on types of liability to be excluded or limit the types of damages that may be claimed.

Just like everything else however, the concept of an exclusion or limitation clause has evolved in its usage through time. Soon, contracting parties who held stronger bargaining positions started drafting these clauses in a way which made it increasingly difficult for the counter-party to sue or recover damages. It became common practice for large institutions such as banks or corporations to engage teams of highly skilled corporate lawyers to draft ironclad exclusion or limitation clauses that lopsidedly protected the contract-breaker's position. To compound matters further, consumers or lay persons who had no bargaining power were not able to negotiate on or vary such clauses. It became the norm for anyone contracting with large corporations like banks to just accept whatever wordings drafted in exclusion clauses as 'standard'.

This led to the creation of the all-encompassing exclusion clause. The most extreme of its kind, this clause had the effect of completely protecting the contract-breaker from being sued for any type of liability or for any type of damages at all. Simply put, whenever an agreement is executed where such a clause exists, the one whom this clause benefits becomes untouchable in law, even if they were clearly negligent or had breached an agreement for no reason whatsoever. This type of exclusion clause allowed the contract-breaker to become legally bulletproof.

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In 2015, a British couple discovered the full effects of one such exclusion clause when they tried to sue CIMB Bank Berhad ('Bank') for breach of contract and negligence. Anthony and Alison Bourke's case was dismissed by the High Court of Malaya at Kuala Lumpur due to the existence of an all-encompassing exclusion clause found in their loan agreement with the Bank. This was despite the High Court making several findings of fact which heavily suggested negligent conduct and breach of contract by the Bank.

Undeterred, the couple appealed to the Court of Appeal. The Court of Appeal heard full arguments from both sides and, surprisingly, struck down the exclusion clause under s 29 of the Contracts Act 1950 and under public policy. The usage of s 29 of the Contracts Act 1950 to oust or invalidate an exclusion clause in a commercial contract was both unprecedented and novel. Unsurprisingly, the Bank appealed to the Federal Court.

Obtaining leave unopposed, the Bank asked the Federal Court to decide whether s 29 of the Contracts Act 1950 was capable of striking down an exclusion clause of this nature. The Federal Court answered in the affirmative, and in doing so, upheld the Court of Appeal's decision. The couple got their win against the Bank, and new law was created.

## II FACTS

In 2008, the couple from Hertfordshire, United Kingdom, bought from a Developer, a residential property in the heart of Kuala Lumpur, which had yet to be developed. The couple then obtained a standard housing loan from the Bank to part-finance the purchase of the property.

As was common in such build-and-sell purchases, the Developer would progressively build the property and then bill its purchasers periodically according to stages of its development until the property was fully developed. Under the housing loan granted to the couple, the Bank had undertaken to pay these periodic payments whenever the Developer would issue them an invoice backed up by an architect's certificate. In return, the couple was obliged to service their monthly loan installments to the Bank.

Everything was progressing smoothly, until 12 March 2014 when the Developer issued the Bank with an invoice and architect's certificate for the sum of RM25,553.12. The due date of the invoice was 25 March 2014. By the time the due date came and went, the Bank had not done anything with the said invoice. In fact, a year later, the invoice was still unpaid. It was at this juncture, around 10 April 2014, that the Developer decided to terminate the sale of the property.

The couple was at all times unaware of the non-payment. They only discovered this when they received the notice of termination from the Developer. Alarmed, the couple tried to salvage the situation by personally flying into Malaysia to try and pay whatever was due and outstanding. It was too late, as the Developer could not agree to rescind the termination. The couple had lost their property due to the Bank's non-payment of that particular invoice.

The couple then made a demand against the Bank to compensate them for their loss and damage suffered, on grounds that the Bank's continual failure to pay the invoice was the cause of the Developer terminating the sale and purchase agreement. The couple opined that the Bank should take responsibility for this predicament, as their loan was

good, there were no repayments outstanding and no reason at all, at the material time, for the Bank not to pay on that invoice. The Bank refused to accept liability or to compensate the couple for their troubles. The couple had no choice but to initiate legal proceedings against the Bank.

## III REASONING OF THE COURT

When sued, the Bank relied essentially on three grounds of defence:

(a) that they did not pay the invoice because of an internal policy which stipulates that they could only make payment after conducting a 'site visit inspection';
(b) that the loan agreement contained a 'drawdown expiry date' which had lapsed by the time the said invoice had come in; and
(c) that the loan agreement contains an exclusion clause which absolves the Bank from both its primary and secondary obligations to pay damages to the couple.

After a full trial, the High Court agreed with the Bank on all three grounds raised in its defence. This was despite the same High Court making several factual findings which suggested at the Bank having no reason not to pay upon the same invoice. This indicated that the High Court's decision turned primarily on a legal point: the exclusion clause.

At the Court of Appeal, it was argued that the 'site inspection visit' was not a *bona fide* issue as facts established at trial showed that this condition was never communicated or made known to the Developer before the expiry date of the invoice. The Court of Appeal agreed[1] and even went on to say 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 Sale and Purchase Agreement ('SPA') on behalf of the customers, applying *Hoo See Sen & Anor v Public Bank Bhd & Anor*,[2] therefore an implied term existed between a bank and a customer that the bank will employ reasonable skill and care in the execution of a customer's orders, applying *Public Bank Bhd & Anor v Exporaya Sdn Bhd.*[3]

As for the "drawdown expiry date" issue, it was argued that once again this was not a *bona fide* issue but instead an afterthought belatedly raised to justify its non-payment; that facts established at trial showed that whilst the drawdown expiry date had lapsed, the Bank elected to carry on with the loan and even made several payments *after* this expiry date. The Court of Appeal agreed with these arguments[4] and applied *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*[5] to state that having made its election to waive the drawdown expiry date and by continuing to disburse on the loan, the Bank had effectively waived it by conduct.

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1 Paragraphs 34 to 41 of *Anthony Bourke & Anor v CIMB Bank Berhad (Court of Appeal)* [2017] 10 CLJ 167.
2 [1988] 1 CLJ 768.
3 [2013] 2 CLJ 753.
4 Supra n1 para 15 to 32.
5 [1995] 4 CLJ 283.

With both factual issues decided in this manner, all that stood between the couple's claim and the Bank was an exclusion clause which the High Court deemed had excluded both the Bank's primary and secondary obligations.[6]

Counsel for the couple argued primarily that s 29 of the Contracts Act 1950 acts to invalidate a contract which absolutely restricts a party from enforcing the rights to sue by usual legal proceedings. We also argued that such an exemption clause was against public policy and that, alternatively, if the Court did not consider the clause to be an absolute exemption clause, then it means that the clause should not absolutely protect the Bank from all liability and damages.[7]

Fortunately, the Counsel of the couple did not have to explore the alternative point as the Court of Appeal agreed that the exclusion clause, which was absolute in nature, offends s 29 of the Contracts Act 1950.[8] To this end, the Court of Appeal observed that from the evidence appearing in the appeal records, the Bank was in breach of the fundamental term of the loan agreement in failing to pay the invoice, making it a breach of its duty of care to the couple as its customers which resulted in the couple suffering loss and damage.

At the Federal Court, the Bank premised its appeal on the fact that s 29 of the Contracts Act 1950 has its roots in public policy *to wit* that parties cannot oust the jurisdiction of the court, and this ought not to apply to the exclusion clause in question as the said exclusion clause does not restrain the couple from suing the Bank but rather excludes certain types of damages to be claimed.[9]

The Federal Court disagreed with this contention, noting that the Bank themselves had taken the position at both courts below, confirmed by the High Court and Court of Appeal respectively, that the exclusion clause excludes liability not only in respect of its primary obligation but also its general secondary obligation.[10]

Once it was established that the exclusion clause was in fact one which absolutely prevented the couple from making any claim against the Bank,[11] the Federal Court confirmed that s 29 of the Contracts Act 1950 could be invoked to strike down the exclusion clause, noting that the statement of law on the efficacy of exclusion clauses under s 29 of the Contracts Act 1950 in the Supreme Court case of *New Zealand Insurance Co Ltd v Ong Choon Lin*[12] was correct.[13]

The Federal Court also considered the exclusion clause to be against public policy, stating that the exclusion clause was typical of those found in most banking agreements where the powers of parties to the agreement are different and on unequal terms. The unequal bargaining power between the couple and the Bank, the Federal Court opined, resulted in patent unfairness and injustice to the couple. The Federal Court also commented

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6 Supra n1paragraphs 50 and 51.

7 Supra n1para 44.

8 Ibid para 55 to 58.

9 Paragraph 16 of *Anthony Bourke & Anor v CIMB Bank Berhad* (Federal Court) [2019] 2 CLJ 1.

10 Ibid para 23 and 24.

11 Ibid para 40 to 43.

12 [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230.

13 Supra n9 para 59.

that it was unconscionable on the part of the Bank to seek refuge behind the clause and abuse the freedom to contract.[14]

## IV LEGAL CONTEXT

The biggest implication of this decision is in redefining the boundaries of exclusion clauses. Previously, the courts were not allowed to curb or curtail the operation of an exclusion clause, based on the principle of freedom to contract, relying on the principle first expounded in the English case of *Printing and Numerical Registering Company v Sampson* way back in 1875.[15]

This principle was adopted and refined in our Federal Court case of *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd*[16] where the principle laid down there was that an agreement must be construed strictly by the words used and courts have no power to improve upon the instrument which it is called upon to construct.

Specifically for exclusion clauses, our courts appear to have followed the House of Lords case of *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*[17] which said that 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. This case went on to say that the relevant words must be given their natural and plain meaning.

This position was cemented in our law through the landmark case of *CIMB Bank Bhd v Maybank Trustees Bhd & Other appeals*[18] which held that whether an exclusion clause applies is a matter of construction of the terms of the said clause. The courts were not allowed to improve upon or interpret the exclusion clause no matter how unfair or lopsided it may appear to be.

On the face of it, this decision appears to have overruled *CIMB Bank Bhd* and changed the position of law to one which allowed courts to interfere with exclusion clauses. However, this is not the case.

The present decision only applies to cases where s 29 of the Contracts Act 1950 can be invoked. This is a very crucial distinction. As the case of *CIMB Bank Bhd* did not involve an exclusion clause which offended s 29 of the Contracts Act 1950, the decision of this case does not affect it. Instead, it appears that this case has created new legal territory which is capable of existing, side by side, and applied, sequentially, with *CIMB Bank Bhd* to govern the way courts would interpret and treat exclusion clauses.

Thus, if we were invited to ponder how this decision would be applied for future cases involving a dispute as to an exclusion clause, the approach would likely be as follows: firstly, to enquire if the exclusion clause in question offends s 29 of the Contracts Act 1950. If yes, then the present decision applies and the exclusion clause may be struck

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14 Ibid para 66.

15 (1875) LR 19 Eq 462 at 465.

16 [2010] 1 CLJ 269.

17 [1983] 1 All ER 101; [1983] 2 AC.

18 [2014] 3 CLJ 1.

out. If no, then the case of *CIMB Bank Bhd* would apply to that exclusion clause, as it had always been since 2014.

## V LEGAL ANALYSIS

So, what then are the types of exclusion clauses which would fall foul of s 29 Contracts Act 1950? Any exclusion clause which absolutely restricts a contracting party's rights and remedies under the contract is deemed to offend s 29. The Federal Court, in delivering the present decision, very clearly expressed that this decision does not negate nor does it affect the operations of all exclusion clauses.[19] Instead, only exclusion clauses which does not give room for a contracting party to sue for any damages or upon any liability at all shall be deemed as one capable of invoking s 29's intervention. Exclusion clauses which merely limit the extent of the damages or liability of a party does not fall within s 29's purview and, hence, stays untouchable by courts.

From a practical viewpoint, this could lead to a legal evolution in the drafting of exclusion clauses. In order not to fall foul of this new law, draftsmen will be forced to be more careful in ensuring that their clauses are not absolutely restrictive or leave no room for a contracting party to enforce their rights.

This would, in turn, bring a positive knock on effect on corporations and bodies which typically rely on all-encompassing exclusion clauses. Without the absolute protection of an all-shielding exclusion clause, these corporations and bodies would have to be more cautious in carrying out their obligations under the contract. Banks, together with all other corporations and entities which are used to having such exclusion clauses as their bullet-proof vest, will have to improve their standards and conduct in carrying out obligations in their contracts. This leads to a betterment of standards in banks, and other corporations and entities, that rely on such exclusion clauses.

We must also not forget the public policy argument raised at the Federal Court, which was applied in conjunction with s 29 of the Contracts Act 1950. The Federal Court was quite expressive in their rebuking of banks and financial institutions which they feel are rarely on equal bargaining terms as their customers. The Federal Court goes on to suggest that it was this patently unfair scenario that justified judicial intervention against the absolute freedom to contract.

This appears to be the Federal Court importing the concept of 'fairness' into contractual law via common law. Unlike the UK, which has an Unfair Contract Terms Act 1977,[20] Malaysian law does not have statute which allows courts to interpret contracts from the perspective of fairness. The closest legislation available in Malaysia is in Consumer Protection Act 1999[21] where harsh, oppressive, unconscionable clauses, or those which exclude or restrict liability for negligence or contract without adequate justification

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19 Supra n9 para 70.

20 An Act to impose further limits on the extent to which under the law of England and Wales and Northern Ireland civil liability for breach of contract, of for negligence or other breach of duty, can be avoided by means of contract terms and otherwise, and under the law of Scotland civil liability can be avoided by means of contract terms.

21 Section 24D.

can invite judicial interference. However, the scope and jurisdiction of the Consumer Protection Act 1999 is limited and does not govern banker-customer relationships. Therefore, in so far as banking contracts go, the concept of fairness in contracts does not exist in statute. This decision, therefore, is common law stepping in to fill the statutory void for fairness in contract.

Already this decision has seen an immediate reaction by Bank Negara, the central bank of Malaysia, to push for banking reforms. In its *Financial Stability and Payment Systems Report 2018*, Bank Negara has revealed that the Association of Banks in Malaysia ('ABM') and the Association of Islamic Banking and Financial Institutions Malaysia ('AIBIM') are working with banking institutions to review the standardised key terms and conditions for housing loan agreements. Such reviews are meant to ensure fairness and clarity of terms and conditions in the contracts entered by banks with retail customers and small and medium enterprises. It was reported in The Edge Markets that Bank Negara had claimed that these initiatives were consistent with this particular decision.[22]

The ripple effect of this decision can only grow bigger, with time. With the Federal Court showing that they are now willing to interpret s 29 of the Contracts Act 1950 in conjunction with public policy considerations in order to strike down all-encompassing exclusion clauses, this may signal the beginning of judicial activism wherein courts interpret existing law to bring balance between the freedom to contract, the notion of conscionability and fairness in contract.

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[22] BNM Financial Stability and Payment Systems Report: BNM tells banks to use plain language in housing loan contracts: *https://www.theedgemarkets.com/article/bnm-tells-banks-use-plain-language-housing-loan-contracts?fbclid=IwAR0oRve8N6BxKt_udbpBgDP5dpifuSKHyhzPg7WI195RYrE8PYbZx45rBBM*