

Summary of Constitutional Court Ruling

No. 37/2547

Dated 30th March B.E. 2547 (2004)*

Re: The Civil Court referred the objection of defendants (The CEC Construction Company Limited and others) which requested for a Constitutional Court ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was contrary to or inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

Chanthaburi Asset Management Corporation, as plaintiff, filed claims against The CEC Construction Company Limited, the first defendant, and others as defendants in the Civil Court for breaches of loan agreements, promissory notes, guarantees, pledges and mortgages. The facts could be summarized as follows. The first defendant entered into a memorandum of loan credit with Phatra Thanakij Finance Public Company Limited with the second to sixth defendants as personal guarantors of the first defendant's credit. Subsequently, Phatra Thanakij Finance Public Company Limited sold and assigned its inferior quality receivables and guarantees to the plaintiff pursuant to the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which included the debts to which the first defendant and its guarantors were jointly liable. The plaintiff had already sent a notice to all the defendants but the defendants did not take any action. All six defendants filed defenses and denied the plaintiff's claims. Thereafter, the first, second, fourth and sixth defendants filed a motion at the Civil Court objecting that section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which provided that the Asset Management Corporation could procure a source of finance without being subject to the application of the law on financial or credit foncier businesses was contrary to or inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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2. Preliminary issue

The Constitutional Court accepted the application for proceedings and consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issue considered by the Constitutional Court

The issue which had to be considered by the Constitutional Court was whether or not section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was contrary to or inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court considered the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), and reached the following opinion. Section 29 paragraph one laid down the principle that the restriction of rights and liberties recognized by the Constitution could not be imposed on a person except by virtue of provisions of law specifically enacted for the purpose determined by the Constitution and only to the extent of necessity and provided that it should not affect the essential substances of such rights and liberties. Paragraph two especially provided that a law which was enacted to impose a restriction of such rights and liberties should be of general application and should not be intended to apply to any particular case or person. After considering section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which provided that the procurement of finance capital or loans by an asset management corporation should be in accordance with rules prescribed by the Bank of Thailand, thereby having the characteristics of a financial or credit foncier business operation not subject to the application of the law on financial and credit foncier businesses, the Constitutional Court held that the objective of establishing an asset management corporation was to remedy the problems of low quality assets which formed an obstacle to the capitalization of financial institutions and affected the ability to extend credit in the economy. Upon the passage of this Emergency Decree, a financial institution which assigned its low quality assets to an asset management corporation would be in a position to continue extending credit in the economy. Nevertheless, in the management of assets, an asset management corporation was under an obligation to observe the laws and rules prescribed by the Bank of Thailand, especially the procurement of financial capital by the asset management corporation which had to be undertaken by means of a loan and the issue of securities only in the forms of shares or debentures or other debt instruments, but not including the taking of deposits from the people. Moreover, a procurement of financial capital by an asset management corporation should be made for the purpose of buying low quality assets and rehabilitating the businesses of the debtors as well as for providing the working capital of the corporation. A loan could be made only to debtors from whom the asset management corporation had received an assignment of low quality assets for the purpose of enhancing the value of properties received from the assignment. Because of these objectives and necessities, the Emergency Decree exempted an asset management corporation from the application of the law on financial and credit foncier businesses. In this

connection the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), contained provisions which were applicable to asset management corporations incorporated under such emergency decree and was therefore a law generally applicable not intended to apply to any particular case or person. Also, section 5 paragraph two was an exemption of an asset management corporation from the application of provisions relating to the procurement of financial capital or the provision of loans. Hence, the provision was not relevant in any way to the applicant which was a limited company.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 5 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was neither contrary to nor inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
