

Summary of Constitutional Court Ruling

No. 40/2547

Dated 20th April B.E. 2547 (2004)*

Re: Nakhon Pathom Provincial Court referred the objection of a defendant (Mr. Wirachai Ue-wilaijit) 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 3, section 4 and section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were 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

Nakhon Luang Thai Bank Public Company Limited, as plaintiff, filed claims against Mr. Wirachai Ue-wilaijit, as defendant, at the Nakhon Pathom Provincial Court for breaches of loan and mortgage agreements. The facts as summarized were as follows. The defendant entered into a loan agreement with the plaintiff and in that connection mortgaged 5 plots of lands together with the buildings thereon as security for the loan. The defendant consented to pay the highest rate of interest as notified by the plaintiff bank and agreed to repay the debts to the plaintiff within 24 months as from the date of contract. However, the defendant failed to make the repayments according to the agreement. The defendant took no action despite demands made by the plaintiff. As a result, the plaintiff filed a claim against the defendant in this case. The defendant submitted a defence which denied the plaintiff's claims. Subsequently, Nakhon Luang Thai Bank Public Company Limited transferred all its claim rights against the defendant to Phetchaburi Asset Management Corporation Limited pursuant to the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998). The latter therefore filed a motion to assume Nakhon Luang Thai Bank's right to participate in these proceedings as plaintiff. The defendant objected to the subrogation motion and filed an objection that the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1998), and that section 3, section 4 and section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were 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 further proceedings and consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issues considered by the Constitutional Court

There were two issues which had to be considered by the Constitutional Court, as follows:

The first issue was whether or not the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was contrary to or inconsistent with section 26, section 29 paragraph one and section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. The defendant's objection that the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), did not specify the provisions of the Constitution which authorized its enactment amounted to a contention that the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was enacted inconsistently with the provisions of the Constitution. On this matter, the Constitutional Court had already ruled in Constitutional Court Ruling No. 35-36/2544, dated 30th October B.E. 2544 (2001) and Constitutional Court Ruling No. 26-34/2545, dated 4th June B.E. 2545 (2002) that section 264 of the Constitution did not confer a right on an applicant to raise an objection relating to the unconstitutionality of a legislative process. Therefore, the Constitutional Court did not have to reconsider such issue.

The second issue was whether or not section 3 (the definitions of the words, "low quality assets" and "asset management corporation"), asset management section 4 and section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998) were contrary to or inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), laid down the principle that a restriction on the rights and liberties of a person as recognized by the Constitution could not be imposed except by virtue of provisions of the law specifically enacted for a purpose determined by this Constitution and only to the extent of necessity and provided that it should not affect the essential substance of such rights and liberties. Section 29 paragraph two specifically provided that such law restricting rights and liberties should be of general application and should not be intended to apply to any particular case or person. After considering section 3 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which stated the definitions for the words "asset management" and "low quality assets", the Constitutional Court reached an opinion that low quality assets were

claims or outstanding debts owed by debtors of a financial institution to the extent of affecting the operations of such operations. In other words, those assets presented an obstacle to increasing the capitalization of the financial institution and affected the ability to extend credit in the economy. Such problems, if not remedied urgently, would require the financial institution to reserve sums of money to satisfy the increase in bad debts. A consequence of this would be a gradual reduction in the actual ability to extend credit in the economy, leading to a cycle of liquidity problems and increasing severity of the economic crisis respectively. The enactment of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), by the State in order to incorporate asset management corporations to undertake asset management by buying and receiving transfers of low quality assets from financial institutions, including securities for such assets, with the object of managing or distribution those assets and securities was directed at remedying such problems. The outcome was that a financial institution which transferred its low quality assets to an asset management corporation would return to a state where it would be able to continue extending credit in the economy. Therefore, even though the provisions of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which provided for the distribution of low quality assets by financial institutions to asset management corporations affected low quality asset debtors of financial institutions, such provisions were applicable to the extent that was necessary under the intentions or objectives of the law and the preservation of public benefits. As for the designation of claims or debts owed by debtors to financial institutions as low quality assets, the law conferred powers on the Bank of Thailand to issue rules and notifications generally applicable to financial institutions, including generally to debtors of financial institutions, and not specifically to any particular claim or debt. Moreover, the provisions of section 3 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), merely designated definitions to words in the law, which did not have any characteristics of being contrary to or inconsistent with section 29 of the Constitution. With respect to the objection that section 3 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), which defined the word “asset management corporation” as meaning a limited company registered under this Emergency Decree, and section 4, which provided that a limited company purporting to undertake the business of asset management must be approved by the Governor of the Bank of Thailand under rules and procedures for registration applications and registration processes to be prescribed by Ministerial Regulation, that according to the law had to be published in the Government Gazette in order to come into force, it could be seen that limited companies under the Civil and Commercial Code or public limited companies under the law on public limited companies were also entitled to apply for registration as asset management corporations under the rules prescribed by Ministerial Regulation. Therefore, section 4 of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), was applicable generally and was not directed at any particular case or person.

As for the objection as to 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, the Constitutional Court had already

decided in Ruling No. 37/2547, dated 30th March B.E. 2547 (2004), that section 5 paragraph two 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). Therefore, the Constitutional Court did not have to reconsider this issue.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 3 (the definitions of “asset management”, “low quality assets” and “asset management corporation”), section 4 and section 5 paragraph two of the Emergency Decree on Asset Management Corporation, B.E. 2541 (1998), were neither contrary to nor inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
