IN THE CONSUMER CLAIMS TRIBUNAL MALAYSIA
AT SHAH ALAM, SELANGOR

CLAIM NO: TTPM-B-(P)-655-2011

KHOR SAW HOON - CLAIMANT

ACESCUBE (M) SDN. BHD. - RESPONDENT

GROUNDS OF JUDGEMENT

By a written Agreement For Services dated the 25th March 2011 ("Agreement"), the Claimant had appointed the Respondent to provide the business of advisory services known as SIM 50 in relation to the Claimant's Mortgage Loan Facility with AmBank (M) Bhd ("AmBank"). Basically, it was alleged that by the use of such services, the Claimant may shorten the outstanding housing loan tenure and slash interest repayment by 50%. Pursuant to the appointment, the Claimant had paid to the Respondent the sum of RM6,332.60 being the services charges on the Services provided via SIM Report to the Applicant. It was not disputed that the ledger SIM 50 was collected by the Claimant.

However, the Claimant alleged that following the advice given by AmBank through a letter dated the 1st June 2011, she would not be able to utilize the SIM service provided by the Claimant. It soon became apparent at the proceedings what the Claimant was saying was that she could not derive any benefit from the contract entered into and/or from the services provided by the Respondent. Subsequently, the Claimant wrote a letter dated 15th June 2011 to the Respondent demanding for a refund of the said sum of RM6,332.60 from the Respondent.

In response to the said allegations, the Respondent, among other things alleged that they will only refund in accordance with Clause 2.2 of the Agreement. More importantly, it was alleged that AmBank had advised the Claimant to make payment over the counter and specify the extra amount for principal repayment (which the Claimant failed to do), the Respondent found that the reason for seeking the refund is not valid in terms of the Agreement.

Upon careful reading of the pleadings, the materials and evidence, I found as of fact that the Claimant had not benefited whatsoever from the services provided under the SIM 50. What the Claimant had done was this. On the 29/3/2011, she had deposited a house cheque of RM5,521.32 for April 2011 installment. However, she discovered that she only had to pay RM1,087.68 for the month of May. Upon clarification with AmBank, the Claimant was advised that any excess payment made over and above monthly installment (amounting to RM3,3000.00) will be deemed as an "Advance Payment". Therefore, any excess payment made will not benefit the Claimant in terms of any interest benefit since it will not reduce the principal outstanding amount. AmBank however advised the Claimant to obtain such benefit, she must make payment over the counter and specify the amount for principal payment "or notify [the bank] in writing after the repayment."

It would therefore be obvious that the purpose of which the Claimant had appointed the Respondent and thereby entering into the Agreement which would shorten the outstanding loan and slash interest repayment by 50% by the advise given by AmBank was not achieved. Here, it can be said that the services provided by the Respondent did not address or take into account of the method or place of payment by the Claimant to AmBank. It goes without saying that in law it is a total failure of consideration.

As applied to contracts, this term (total failure of consideration) does not necessarily mean a want of consideration, but implies that a consideration, originally existing and good, has since become worthless or has ceased to exist or been extinguished, partially or entirely. It means that sufficient consideration was contemplated by the parties at the time the contract was entered into, but either on account of some innate defect in the thing to be given (in the form of goods or services), or non-performance in whole or in part of that which the promise agreed to do, nothing of value can be or is received by the promise.

With this judgement, I have no fault to find that where the contract has wholly failed, the party may be allowed to recover. It cannot be denied that the general principle of law is that a party is not to be placed in a position worse than another; and if a party were to pay money for which he had received no consideration, he would be entitled to recover.

Here there was no benefit derived by the Claimant, the contract was continuous and for future benefits. If the Claimant derived no advantage from the contract, and if the parties can be placed in the same position as before, I do not see why the contract may not be ended by means allowed by law. By the letter dated the 1st June 2011, the Claimant had evinced her intention to terminate the contract. I do not see any reason why she was not entitled to repudiate the contract where she did not benefit into entering at her expense.

No case has been produced or used in argument by the parties to destroy or weaken the effect of the general principle, and this Tribunal are at perfect liberty to decide the case as it is presented to its consideration. In fine, the contract is rescinded upon legal grounds and is defeated by reason which the law allows.

In this case, a promise to perform an existing duty or the performance of it should be regarded as good consideration only because it is a benefit to the person to whom it is given [see Lord Denning's judgment in *Ward v. Byham* [1956] 2 All E.R. 318; [1956] 1 WLR. 496, Court of Appeal]. On the balance of probabilities, I found that in this case the facts show that there were no benefits accrued to the Claimant for the services contract she had entered with the Respondent.

For the above reasons, I would allow the claim in terms of the Awar delivered on the 9th August 2011.

MOHD NASRIM BIN DATO' HJ MOHD SALLEH
PRESIDENT
CONSUMER CLAIMS TRIBUNAL
MALAYSIA.

Dated: 09 August 2011