DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

[RAYUAN NO. 02(f) - 133 - 11/2017 (W)]

ANTARA

PUBLIC BANK ... PERAYU

DAN

1. NEW ACE DIGITAL PRINT SDN BHD

2. CHEAH YANG KIANG ...RESPONDEN-RESPONDEN

[Dalam Mahkamah Rayuan Malaysia

(Bidang Kuasa Rayuan)

Rayuan Sivil No. W-02(NCC)(W)-1976-12/2015

Antara

1. New Ace Digital Print Sdn Bhd

2. Cheah Yang Kiang ... Perayu-Perayu

Dan

Public Bank Berhad ... Responden

(yang diputuskan oleh Yang Arif Datuk Lim Yee Lan, Yang Arif Tan Sri Idrus bin Harun, dan Yang Arif Dato' Asmabi binti Mohamad, di Mahkamah Rayuan pada 26 Mei 2017)

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur

Dalam Guaman No. 22NCC-1711-11/2012

Antara

1. New Ace Digital Print Sdn Bhd

2. Cheah Yang Kiang ... Plaintiff-Plaintif

Dan

Public Bank Berhad ... Defendan

(yang diputuskan oleh Yang Arif Dato' Has Zanah Binti Mahat di Kuala Lumpur pada 27 Oktober 2015)]

CORAM:

AHMAD HAJI MAAROP, CJM
ZAHARAH IBRAHIM, FCJ
BALIA YUSOF HAJI WAHI, FCJ
ALIZATUL KHAIR OSMAN KHAIRUDDIN, FCJ
ROHANA YUSUF, FCJ

JUDGMENT

[1] Leave to appeal has been granted by this Court on the following question:

> *"Whether a survivorship clause which is found in the banking contract and/or the nature of the joint account itself automatically operates upon the death of a joint account holder and allows the Bank to pay the money to the surviving joint account holder to obtain a good discharge where the survivor subsequently presented to the Bank a cheque containing the forged signature after the death of the other joint account holder".*

[2] In the High Court, the first and second respondents sued the appellant bank in relation to a joint current account opened by the late husband of the second respondent, Loo Keng Tatt (LKT) together with Lim Chee Wan (LCW). LKT was the controlling shareholder and the alter ego of the first respondent company known as New Ace Digital Print Sdn Bhd. LCW was its Managing Director. The joint account was opened by LKT and LCW at the main branch of the appellant bank in Kuala Lumpur and was subjected to the terms stipulated by the appellant bank as stated in the application form for the opening of the account.

[3] Of relevance to this appeal were two main terms of the joint account. The first being that all cheques issued in the account required the signatures of both account holders. The other is the Survivorship and Discharge Clause (Survivorship Clause) which spells out the obligation of the bank on how the credit outstanding in the joint account was to be dealt with upon the death of one account holder.

[4] LKT passed away on 22.07.2009 leaving LCW as the surviving joint account holder. At the time of LKT's death, there was a balance of RM586,079.69 outstanding in that account. Three weeks after the death of LKT a sum of RM500,000.00 was drawn by LCW on the account *via* a cheque No. 067709. The cheque was honoured by the appellant bank, leaving a balance outstanding of RM89,788.60. The deceased's wife, the second respondent, complained to the appellant bank that the purported signature of her late husband LKT on cheque No. 067709 presented by LCW was forged. On that complaint, the appellant bank proceeded to freeze the joint account.

[5] In order to reactivate the account that was then frozen, LCW by way of Originating Summons No. D-24NCC-258-2010 (the OS), filed at the Kuala Lumpur High Court, sought and obtained a declaration that he, being the survivor of the joint account, was entitled to be paid the balance amount of RM89,788.60. The second respondent was notified by the appellant bank

of the OS. Despite the notification, the second respondent did not intervene in the said OS proceedings. Neither did the second respondent take any step to set aside the orders made pursuant to the OS.

[6] Instead, the second respondent together with the first respondent filed a claim against the appellant bank by a writ action at the Kuala Lumpur High Court about two years later in Suit No. 22NCC-1711-11/2012 (which formed the subject of the current appeal) for wrongful payment of the sum of RM500,000.00 from the joint account through a forged cheque. It was contended that the payment which was based on a forged cheque was a nullity and void *ab initio* as it was made in breach of section 24 of the Bills of Exchange Act 1949 (BEA). Apart from the allegation of breach of section 24, the appellant bank was alleged to have breached the terms of the joint account when it honoured cheque No. 067709 which was not jointly signed by LKT. Further, the respondents pleaded negligence on the part of the appellant bank for failure to freeze the account in order to avoid any fraudulent dealings in the joint account, having been made aware of the death of LKT.

[7] The appellant bank had added LCW as a third party to the proceedings. The respondents, however did not seek to join LCW as a party or bring him as a witness.

High Court decision

[8] After a full trial, the learned High Court Judge made the finding of fact that the signature on cheque No. 067709 was a forged signature of LKT. The trial Judge then proceeded to determine the other four issues before her and held that -

i. The contractual relationship in respect of the joint account existed only between the appellant bank with the account holders, LKT and LCW, hence both respondents were not privy to that contract;

ii. The terms of the joint account bound the account holders and the bank and these terms would determine the rights of the joint account holders against the appellant bank;

iii. The joint account was opened as a personal joint account and not for the benefit of the first respondent, as clearly stated in the application form for the opening of the joint account;

iv. Since the joint account was stipulated as a personal account of LKT and LCW, any evidence to insist that the joint account was opened for the benefit of any person, other than the joint account holders would contradict the written terms and therefore inadmissible as evidence by virtue of section 94 of the Evidence Act 1950;

v. The Survivorship and Discharge Clause which formed the basis of the contract between the joint account holders and the bank granted the right to the account to the surviving account holder LCW, and it had already accrued upon the death of LKT on 22.07.2009;

vi. The submission on a breach of section 24 of the BEA on the reason of forgery, was of no relevance because the whole of the monies in the account and the right to it had already vested in LCW upon LKT's death on 22.07.2009;

vii. Consequently, the payment made by the bank though in breach of section 24 of the BEA and the fact that the Survivorship and Discharge Clause, which must be read "subject always to the provisions of the Estate Duty Enactments, Faraid Laws and the Laws of Malaysia or any future legislation", did not affect LCW's rights as the surviving joint account holder;

viii. The second respondent who sued as a director and shareholder of the first respondent, as well as for the estate of the deceased, would not be entitled to claim from the appellant bank on the forged cheque since the whole of the balance in the joint account had already accrued to LCW on the death of LKT and would not go to LKT's estate;

ix. The fact that LCW obtained the money by forging the signature of the other signatory on cheque No. 067709 was immaterial since the right to that account had already vested solely in LCW upon LKT's death, about almost 3 weeks earlier;

x. Even though LCW did not include a prayer in relation to the monies drawn on cheque No. 067709 for the sum of RM500,000.00 in the OS filed at the Kuala Lumpur High Court, the result would still be the same because the Order given was made in reliance on the same Survivorship and Discharge Clause.

[9] The claim by both respondents was dismissed by the learned Judge. Aggrieved by the High Court decision, the respondents then filed an appeal to the Court of Appeal against the whole of the decision of the High Court. The appellant bank also cross appealed on the finding of forgery made by the learned High Court Judge.

In the Court of Appeal

[10] The Court of Appeal affirmed some of the findings by the learned Judge and overruled some others. The Court of Appeal agreed with the learned trial Judge that the first respondent not being an account holder of the joint account, would have no cause of action against the appellant bank, for breach of section 24 of the BEA, or breach of contract or negligence for failure to freeze the account.

[11] The second respondent was found to have had a cause of action against the appellant bank for breach of section 24 of the BEA, for negligence and breach of the account holders' mandate. In holding so the Court of Appeal opined that the second respondent's cause of action was in the capacity of administrator and beneficiary of LKT's estate.

[12] In this regard, the Court of Appeal found and held that in reality the joint account was opened for the benefit and purpose of the first respondent company because all funds in the account provided by LKT were obtained from the first respondent company. In the first respondent company, LKT was a director and a majority shareholder, and LKT and his wife held 75% of the shares in the company. The second respondent and the rest of the shareholders were all nominees of LKT and they all acted under his direction with regard to the usage or withdrawal of the money in the joint account.

[13] The Court of Appeal affirmed the finding of forgery by the High Court. The learned Judge's finding was not disturbed by the Court of Appeal as it was a finding of fact which was substantiated also by expert opinions.

[14] On the application of the Survivorship Clause, the Court of Appeal disagreed with the High Court and found that the statement of law on the effect of a Survivorship Clause made by the learned trial Judge was against the general principle governing that clause as established by a number of local and foreign decided cases. In particular, the Court of Appeal referred to the decision of this Court in *Latifah Bte Mat Zain v. Rosmawati bte Sharibun & Anor* [2006] 4 MLJ 705 as its guiding authority.

[15] It was also found by the Court Appeal that any *prima facie* intention in the Survivorship Clause that the beneficial ownership of the money in the joint account would go to LCW had already been rebutted by the respondents through their witnesses. Therefore, by paying the sum of RM500,000.00 from the joint account under a forged cheque, the appellant

bank was strictly liable to LKT, the other innocent joint account holder for the loss because the appellant bank could not bring itself within the exception to section 24 of the BEA, for want of pleadings.

[16] The Court of Appeal held that the appellant bank could not rely on the Survivorship Clause to give a good discharge by paying out RM500,000.00 to LCW from the joint account because the appellant bank had failed to comply with the condition mandating the requirement of both account holders' signatures since LKT's signature was forged. Thus, by paying RM500, 000.00 under a forged cheque, the appellant bank was strictly liable to LKT. The fact that the appellant bank did not raise the exception to section 24 as its defence would preclude the appellant bank from relying on it to exonerate itself. Thus, the appellant bank was held to be absolutely liable to make good the loss based on the tort of conversion which is a strict liability for paying under a forged cheque.

[17] The Court of Appeal further found that the Survivorship Clause which stated that payment made under it was subject to the "laws of Malaysia" must be read to include the BEA. Thus, payment made in breach of the Act which was a nullity had resulted in the appellant bank committing an act of conversion against the customer, by virtue of the unauthorised withdrawal and forgery perpetrated by the other account holder, causing loss to the account. The appellant bank was therefore liable to make good the loss.

[18] In conclusion the Court of Appeal found the appellant bank liable only to the second respondent. The appeal by the second respondent was allowed but the first respondent's appeal was dismissed. No order was made by the Court of Appeal on the cross appeal of the appellant bank.

In the Federal Court

[19] Before us the appellant's main complaint against the decision of the Court of Appeal was on its failure to appreciate-

i. the effect of a Survivorship Clause in a banking contract between the account holders and the bank;

ii. that the Survivorship Clause and the nature of the joint account itself automatically operated upon the death of LKT, in this case on 22.7.2009, and by virtue of which the payment to LCW as a surviving joint account holder had given the appellant bank good discharge of any liability under the joint account, despite the forgery contained in the cheque which conveyed the payment;

iii. that when the appellant bank paid the sum of RM500,000.00 out of the joint account to LCW on 7.8.2009, the Survivorship Clause had already kicked in earlier, and therefore that payment had offered a valid legal discharge to the appellant bank. It would not be the concern of the appellant bank whether LCW was to hold the money on trust for LKT, or where the source of money in the said joint account originated;

iv. the second respondent as the executrix of the estate of LKT had no cause of action to file or to continue with this suit to claim from the appellant bank for the return of RM500,000.00 since the money in the joint account was not part of the estate of LKT, but belonged to LCW who was the survivor of the said joint account after the death of LKT.

[20] The main thrust of the appellant's case was that it had no contractual relationship with both the first and second respondents *vis-a-vis* the joint account. The appellant therefore maintained that both the respondents had no cause of action over the joint account to which the respondents were not parties. As against the joint account holders, in reliance on the Survivorship Clause, the appellant bank submitted that it had already discharged its duty to the joint account holders. This clause bound the parties and had taken effect upon the death of LKT. It was the appellant's

case that the clause had been agreed to by both the joint account holders as a term spelt out in the contract for the opening of the joint account. In complying with the same, it was contended, the liability of the appellant stood discharged.

[21] Having perused through the grounds of judgment of both the High Court as well as the Court of Appeal, it became clear to us that the crux of this appeal rested solely on the issue of the capacity of both the respondents, in staking their claims against the appellant bank. The Court of Appeal had agreed with the High Court that the first respondent had no cause of action against the appellant bank because it was not a party to the contract on the joint account. The Court of Appeal however ruled that the second respondent was conferred with the necessary cause of action to sue the appellant bank as an administrator of LKT's estate.

[22] Our perusal of the pleadings revealed that the claim made by the respondents was first premised on the tort of negligence. Paragraph 14 of the Statement of Claim pleaded the duty of care owed by the appellant bank to the respondents. The breaches of that duty were enumerated in paragraphs 14.1 and 14.2. At paragraph 15, the respondents pleaded breaches of contract by the appellant bank for failure to freeze the joint account despite being made aware of LKT's death. In its defence, the appellant pleaded laches and that the respondents had no cause of action against the bank over the joint account. It was also pleaded that there was no disclosure made to the appellant bank that the first respondent was the alter ego of LKT. The appellant maintained that the joint account was personal in nature and not for the benefit of any other person.

[23] It could not be discerned from its grounds of judgment the reasoning of the Court of Appeal in holding that the second respondent's claim as an administrator of LKT's estate was sustainable. The underlying reason for this decision was not clearly articulated in the grounds of judgment. The

Court of Appeal seemed to adopt the reasoning of the learned High Court Judge where in paragraphs 40 and 43 Her Ladyship remarked that:

> *[40] Oleh kerana dapatan Mahkamah bahawa akaun bersama tersebut bukan untuk manfaat plaintif pertama tetapi seperti yang ditunjukkan oleh boring pembukaan akaun tersebut, jika ada hak plaintif kedua, adalah sebagai benefisiari, wasi atau pentadbir pusaka si mati. Berdasarkan asas tersebut plaintif kedua mempunyai kausa tindakan terhadap defendan sekiranya wang baki selepas kematian si mati dalam akaun bersama tersebut adalah harta si mati.*

And at paragraph 43,

> *[43] …Oleh kerana wang baki dalam akaun telah menjadi hak Lim Chee Wan selepas kematian si mati, maka plaintif kedua tidak berhak untuk menuntut daripada defendan kerana wang tersebut bukan harta pusaka si mati tetapi hak Lim Chee Wan.*

[24] In the above paragraph 40, the High Court did not affirmatively hold that the second respondent had the necessary cause of action, and only conjectured that if at all, the cause of action of the second respondent would be in the capacity of the administrator of her late husband's estate. But because the High Court found that the money in the account had already vested in LCW by virtue of the Survivorship Clause nothing was left for the estate of LKT from the joint account. It was mainly for that reason that the High Court dismissed the claim of the second respondent.

[25] The Court of Appeal however held that the second respondent was entitled to sue the appellant bank for breach of section 24 of the BEA, for negligence and breach of mandate. In arriving at this conclusion and at paragraph 13 of the judgment it first disagreed with the learned High Court Judge that the money in the joint account did not form part of LKT's estate. The Court of Appeal, by inferring from the evidence that the money in the joint account originated from the first respondent company, held and found

that the joint account was for the benefit of the first respondent company. In the first respondent company, LKT was a director and he and his wife were the majority shareholders of 75% of the shares in the company. The second respondent and the rest of the shareholders were nominees of LKT and they all acted under his direction with regard to the usage or withdrawal of the money in the joint account. The money in the joint account was then presumed by the Court of Appeal to be for the benefit of the first respondent where LKT was its alter ego.

[26] With respect we were not able to agree with the Court of Appeal on both findings namely, that the joint account was for the first respondent's benefit and that the second respondent had a cause of action against the appellant bank. In our view the finding that the second respondent had a right to claim as an administrator of LKT's estate would be unfounded and difficult to justify. In the first place, both respondents had no contractual relationship with the appellant bank over the joint account and had no contractual or legal basis to make any claim on it. The Court of Appeal had contradicted itself when it held that the money in the joint account was for the benefit of the first respondent, yet the first respondent had no cause of action against the appellant. On the other hand, the second respondent who also had no contractual relation, was held to have a good cause of action purely in the capacity of an administrator of LKT's estate. Now, if the joint account was for the benefit of the first respondent, how did it become part of the estate of LKT. This finding in our view ignored the distinction between a company and its shareholders.

[27] It is a trite principle of company law which represents an important facet of a separate legal entity that the shareholders had no legal or equitable right to any assets of the company (*see Law Kam Loy & Anor v. Boltex Sdn Bhd & 5 Ors* [2005] 4 AMR 525). The assets of a company do not belong to a shareholder and hence the second respondent could not inherit such assets even if LKT was the alter ego of the first respondent or even if he owned all the shares in the first respondent (see *Abdul Aziz b*

Atan & 87 Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 2 MLJ 165). The first respondent remained a separate entity, it being a company incorporated under the Companies Act 1965. Even if the second respondent inherited the shares of LKT in the first respondent company, the entity of the first respondent remained distinct. Thus when the Court of Appeal held that the joint account was for the benefit of the first respondent, it would not be possible for the account to be inherited as an estate of LKT. Hence no substratum of claim was available to the administrator over the account.

[28] It had always been the appellant's case that both the respondents here were clearly not the joint account holders to found the basis of a claim over the account. In this regard, we agree with the appellant that as far as the first respondent was concerned, the Court of Appeal was correct to affirm the decision of the trial court which held that the first respondent had no cause of action, on the basis that there was no contractual relationship between the first respondent and the appellant bank. Likewise, we also agreed with the contention of the appellant that the second respondent too had no contractual relationship with the appellant bank to acquire the right of action over the joint account.

[29] The decision of the Court of Appeal in holding that the joint account was for the benefit of the first respondent was flawed for yet another reason. The joint account was clearly stated by the parties as a personal account. Hence it was not an account for any other party's benefit. In inferring that the account was for the benefit of the first respondent, the Court of Appeal had run foul of section 94 of the Evidence Act 1950. It is trite law that interpretation of a contract is a question of law to be decided by the Court and not by witnesses through their oral evidence as held in the case of *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 MLJ 38, unless there is ambiguity in the clause (see *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] MLJ 464). The learned High Court Judge had correctly ruled that section 94 disallowed any oral evidence from being admitted to contradict a written

term. The Court of Appeal however, in admitting the oral evidence to contradict that written term, did not address this evidential point.

[30] The other reason offered by the Court of Appeal in deciding that the money in the joint account was not for the benefit of LCW made reference to the Survivorship and Discharge Clause. In the vast majority of cases, a bank will obtain a good discharge by paying in accordance with the Survivorship and Discharge Clause in a joint account upon the demise of one account holder. Often this clause takes a standard form as it did in this appeal. We reproduce it here for a better appreciation, and it reads thus:

> "Where this application is for a Joint Account, I, being one of the joint holders of this account hereby agree that in the event of my demise, the Bank is authorised to pay (subject always to the provisions of the Estate Duty Enactments, Faraid Laws and the Laws of Malaysia or any future legislation) the balance standing to the credit of this account to the survivor(s) and such payment shall constitute a valid discharge of the Bank of the amount due on the account ..."

[31] By the above term, we found it plain and clear that LKT had agreed for the appellant bank to pay the balance outstanding to LCW upon LKT's demise. That payment, as stated in the term constituted a valid discharge of the appellant bank under the joint account. The wordings were plain enough that the payment made by the appellant bank after the demise of LKT to LCW would constitute a discharge of the bank's legal and contractual obligation to the account holders. The complication arose as a result of the payment being made *via* a forged signature on the cheque drawn by LCW on the account. This subject will be further discussed in subsequent paragraphs.

[32] It is also pertinent to note that the payment made by the appellant bank out of the joint account to LCW, after the demise of LKT, took place on two separate occasions. The first was the impugned payment of

RM500,000.00 by the cheque No. 067709 drawn on the joint account about three weeks after the death of LKT. The other was the sum of RM RM89,788.60 pursuant to the order of the Kuala Lumpur High Court. This order was obtained through the OS filed by LCW against the appellant bank after the joint account was frozen, as a result of the complaint lodged by the second respondent. However, despite lodging a complaint when the appellant bank notified the second respondent about the OS application by LCW, the second respondent took no step to intervene in the OS proceedings to stake her interest in the joint account. The claim made by the respondents in the current appeal appeared to be lacking in candour.

[33] The appellant's defence was that it had absolved its liability under the joint account, by adhering to the Survivorship Clause. The nub of the appellant bank's argument centred on the issue that it had complied with the Survivorship Clause which in fact was a written contractual term and binding on both parties, it had therefore been absolved of its contractual obligation to the joint account holders and it had no further obligation to any person who was not a party to the terms of the joint account.

[34] Before discussing the issue any further, let us be reminded of the contractual relationship of the parties in an account opening situation. When a person opens an account with a bank he enters into a contract with the bank. Their relationship will be determined upon the terms usually imposed by the bank by which the account holders agree to abide. It is therefore well settled that a bank's legal obligations in the opening of an account generally speaking, are governed by the terms of the contract between the bank and its account holders. Similarly, in the case of a joint account, the terms of the contract will set out the bank's obligation to the joint account holders and *vice versa*.

[35] The principle of law on a joint account was stated as early as 1953 when the Singapore Court of Appeal held that there was a presumption of joint ownership of funds deposited in a joint account, and upon the death

of one account holder, the balance belonged to the survivor (see *Re Wee Cheow Keng, Decd.,* (1953) 1 MLJ 206). The earlier cases seemed to rely on the principle of banking law that a presumption of joint ownership has to be made in respect of a joint account. Thus, any evidence to counter such a presumption would be readily acceptable by the court in order to determine the rightful payee of the joint account on the demise of one account holder.

[36] Contractual terms in the earlier cases did not deal with contracts with a Survivorship and Discharge Clause. Hence the cases did not address on the effect of a written Survivorship Clause. When the contractual terms between banks and customers took the form of more comprehensive written terms as in the instant appeal, the principles of law in construing a written contract must be adhered to, paramount of which being a written term of an agreement must be given a plain meaning. The Survivorship Clause here therefore, has to be interpreted by giving it its plain meaning. This cannon of interpretation of contracts had been analysed by this Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC.

[37] The implication of the Survivorship Clause was discussed by this Court in *Latifah Bte Mat Zain (supra)*. The Court of Appeal relied on this decision and had expressed its agreement when it held that the case authority had established that a Survivorship Clause without more was just a contractual arrangement between the bank and the joint account holders as to how to deal with the money in a joint account and therefore was not conclusive evidence of the parties' intention as to ownership of the money in the joint account. The Court in *Latifah Mat Zain* referred to learned author, J. Milnes Holden on the Law and Banking Practice and held at page 715 that "the survivorship clause or the right of survivorship merely entitles the survivor to receive the money and enables the bank to pay the money to the survivor and thereby obtain a good discharge..". It is well stated in that case that the duty of a bank is discharged upon payment made by the bank in accordance with the Survivorship Clause. It was further

observed that the Survivorship Clause would not form conclusive evidence of the parties' intention as to ownership of the money in the joint account.

[38] The Court of Appeal had relied and accepted the ruling in *Latifah Mat Zain* that the Survivorship Clause was not conclusive for the purpose of determining the rightful beneficiary to the monies in the account. That notwithstanding, the Court of Appeal embarked on determining the rightful beneficiary to the money in the joint account by comparing the evidence on the source of fund to that of the Survivorship Clause. Greater weight was then given to the evidence on the source of funds leading to the conclusion that the first respondent was the rightful beneficiary. There was no basis for such a comparison, since the Survivorship Cause was only a clause to instruct the appellant bank on how to handle the outstanding balance in the joint account upon the demise of one account holder. The issue of who was the rightful beneficiary also did not arise in this case because that was not the concern or the business of the appellant bank.

[39] It was because the appellant bank had to abide by the terms of the Survivorship Clause that it paid out the money to LCW. Whether or not there was any other claimant to the money paid to LCW would not concern the appellant bank. The recourse open to the second respondent would not be against the appellant bank but perhaps against LCW instead. In this regard, we agree with the written submission of the appellant at paragraph 47 and the oral submissions before us that, since the money was paid to the survivor the claim must be brought against the survivor and not the appellant bank in this case. This Court had, in *Latifah Mat Zain* clearly stated that "...whether the survivor is beneficially entitled to the money is another question entirely and that is not the concern of the bank or the banking law...". It is for any beneficiary therefore to lodge any claim over that money against the one who received the money from the bank.

[40] This legal predicament of any person who claimed to be a beneficiary of a joint account was clearly demonstrated in *Latifah Mat Zain*, where the

plaintiff there initiated a suit against the other beneficiary of the deceased husband's estate which included some monies in the deceased husband's joint account. The plaintiff there did not file a suit against the bank directly to stake her beneficial right in the joint account. Hence the issue of the *locus* of the plaintiff in that case, did not arise. The second respondent here did not take a similar step. That was why her right to sue the appellant bank was called into question in this appeal.

[41] It was also observed that the learned High Court had, in the judgment appeared to have concluded that the balance in the joint account conclusively belonged to LCW. That finding in our view, was erroneously made since the objective of the Survivorship Clause was not to conclusively determine the beneficial owner of the balance in the account. The issue of who is the beneficial owner of the balance in a joint account cannot be determined by relying on the Survivorship Clause. It is a subject to be determined in separate proceedings between the claimant and the surviving account holder.

[42] From the above discussions we would agree with the appellant that a Survivorship Clause, if properly adhered to by the bank, would absolve it of its liability and discharge it from its obligation to the account holders. However, when the appellant bank made payment in breach of a statute, it would stand liable to its account holders unless it comes within the exception in section 73A of the BEA. Section 73A is a statutory defence available to the bank when the account holder contributed to the forgery.

[43] As observed earlier the application of the Survivorship Clause was made complicated in this appeal because the sum of RM500,000.00 drawn on cheque No. 067709 was a forged cheque. This then brought us to the next issue as to whether the payment made pursuant to a Survivorship Clause by way of a forged cheque and thereby in breach of section 24 of the BEA, indeed constituted a valid discharge by the appellant bank. We agree with learned counsel for the respondents that, generally speaking,

the bank would be strictly liable for any payment made upon a forged cheque. Earlier decided cases had established the principle of law that the bank is strictly liable for honouring a forged cheque. In *Syarikat Perkapalan Timor v. United Malayan Banking Corperation Bhd* [1982] 2 MLJ 193 it was held by Mohd Azmi J, that a bank did not get a discharge when it made payment on a cheque bearing a customer's forged signature.

[44] Numerous decided cases are in support of that trite legal proposition. There is no doubt that this legal position is trite. Any payment made in breach of section 24 of the BEA cannot form a valid payment. Case authorities are clear on this subject. In all cases the bank is responsible for making payment under a forged cheque as decided in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, *Prima Nova Sdn Bhd v. Affin Bank Bhd* [2014] 9 CLJ 442, *Bumiputra-Commerce Bank Ltd v. Globelink Container Line Sdn Bhd* [2014] 1 LNS 1462, *CIMB Bank Bhd v. Panaron Control Sdn Bhd* [2015] 1 CLJ 1056, *Public Bank Bhd v. Tetuan Kumar Jaspal Quah & Aishah* [2016] 3 CLJ 548. With the insertion of section 73A into the BEA, which took effect on 19.03.1998, the strict liability of a bank had been moderated. A forged signature is deemed to be that of the person it purports to be if that person had knowingly or negligently contributed to the forgery.

[45] In dealing with this issue the High Court seemed to hold that such an unlawful payment did not matter because the money in the account had already belonged to LCW as a surviving account holder, and he had then withdrawn his own money using that forged instrument. The Court of Appeal in dealing with this issue had gone to construe the Survivorship Clause in this way. The clause, which states that "...the bank is authorised to pay (subject always to the provisions of the Estate Duty Enactments, Faraid Laws and the Laws of Malaysia or any future legislation) the balance standing to the credit of this survivor(s) and such payment shall constitute a valid discharge of the Bank..." was construed by the Court of Appeal to include the BEA. In doing so the Court of Appeal went on to

construe the words "Laws of Malaysia", should not be read *ejusdem generis* with the other laws specified in the bracket, i.e. the Estate Duty Enactments and Faraid Laws because *ejusdem generis* is a rule of interpretation of a statute while the Survivorship Clause is a contractual provision governing the operation of the joint account. Then it went on to hold that since the Survivorship Clause was drafted by the appellant the *contra proferentum* rule applied against the appellant bank. It was further observed by the Court Appeal that had it intended the words "Laws of Malaysia", to have the same genus as the other laws in the bracket, it would have stated so clearly.

[46] We did not find it necessary to construe the Survivorship Clause in the way the Court of Appeal did, in order to determine whether or not a payment in breach of section 24 was unlawful and would not discharge the liability of the appellant bank. Section 24 will operate with or without the Survivorship Clause. A contractual term cannot exclude a clear provision in a statute. Payment in breach of a statute must be held to be unlawful, and an unlawful payment cannot discharge the appellant bank under a Survivorship Clause. As a matter of law, any payment made in breach of statute is illegal, invalid and against the appellant bank's own practice. This is again a trite legal principle. No court will acknowledge any payment made in breach of a statute as a valid payment.

[47] Since the payment by the appellant did not constitute a valid discharge, who then has a right to claim against the appellant. We are back again to the real issue of who then would have a cause of action against the appellant bank for such a breach. Any allegation of failure to discharge that obligation must be brought by the account holders and not anybody else. In this instance LCW would be in the position to sue but then he was the very person who committed the forgery and had even benefitted from the same. The second respondent may step into the shoes of the deceased account holder LKT as an administrator, to sue the appellant bank for breach of the conditions of the joint account. However, this was not the

pleaded case of the second respondent. Furthermore, the cause of action for the breach only arose after his death. Since no cause of action was available to LKT, the second respondent as administrator would be in a similar position. For all the reasons stated, in our view the Court of Appeal had erred in holding that the second respondent had the necessary cause of action against the appellant bank in this case. On this ground alone we would allow the appeal of the appellant.

[48] In view of our findings, it would not be necessary for this Court to answer the leave question posed. We therefore unanimously allow this appeal with costs. We set aside the order of the Court of Appeal and reinstate the order of the High Court.

(ROHANA YUSUF)
Judge
Federal Court, Malaysia

Dated: 14 MARCH 2019

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