Michaelmas Term
[2017] UKPC 44
Privy Council Appeal No 0075 of 2016

JUDGMENT

Whitlock and another (Appellants) *v* Moree (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lady Hale
Lord Wilson
Lord Sumption
Lord Carnwath
Lord Briggs

JUDGMENT GIVEN ON

21 December 2017

Heard on 19 October 2017

Appellants	*Respondent*
Gavin Kealey QC	Kahlil D Parker
James Goudkamp	Roberta W Quant
(Instructed by Clyde & Co)	(Instructed by Cedric L Parker & Co)

LORD BRIGGS: (with whom Lady Hale and Lord Sumption agree)

1. This appeal from the Court of Appeal of the Bahamas is about the beneficial ownership of money held on joint account at a bank. The account holders were Mr Francis Lennard until his death in February 2010, and his friend Mr David Moree, who is the respondent to this appeal. The money in the account, which amounted to some $190,000 by the date of his death, was all contributed by Mr Lennard, mainly if not entirely from an account previously in his sole name at the same bank, the First Caribbean International Bank (Bahamas) Ltd. The sole question in these proceedings is whether, upon Mr Lennard's death, the beneficial interest in the previously joint account passed to Mr Moree by survivorship, or whether it formed part of Mr Lennard's estate, by reason of the operation of the equitable doctrine of presumed resulting trust, since Mr Lennard had provided all the money.

2. On the setting up of the joint account in November 2009, both Mr Lennard and Mr Moree signed an account opening application in the Bank's standard joint account form which included the following provision, at clause 20:

> "JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the Account (including all interest) is our joint property with the right of survivorship. That means that if one of us dies, all money in the Account automatically becomes the property of the other account holder(s). In order to make this legally effective, we each assign such money to the other account holder (or the others jointly if there is more than one other account holder)."

At the heart of this appeal lie two questions:

(1) Does clause 20 deal with the beneficial ownership of the joint account, or merely with the bare legal title to the chose in action against the bank represented by the account?

(2) Is the fact that Mr Lennard and Mr Moree opened the joint account by means of a signed written application containing clause 20 determinative of its beneficial ownership, as at the date of Mr Lennard's death?

3. This was not how the issues were identified in the courts below. There, it appears to have been common ground that, upon Mr Lennard's death, Mr Moree held the money on resulting trust for Mr Lennard's estate unless he could prove, the burden being on him, that Mr Lennard had intended to make a gift of the money to him. The Chief Justice decided at the trial that Mr Moree had failed to discharge this burden. The Court of Appeal took the opposite view.

The Facts

4. Mr Lennard was a successful businessman, in his mid-90s by 2009. By his will dated 19 October 2009 he gave his home in Nassau to Mr Moree. Out of the rest of his estate, including "Cash in Banks", he gave a number of pecuniary legacies, including $55,000 to Mr Moree and $75,000 each to the Bahamian Salvation Army and the Bahamas Humane Society. He divided the residue equally between Mr Moree, Dorothy Jack and Norman Whitlock. In the event of a shortfall for the payment of legacies he specified that the requests to the Salvation Army and the Humane Society should abate first, so as to enable payment of the other legacies in full. The executors named in the will were Mr Moree and a lawyer named Mr Pinder.

5. On 20 November 2009 Mr Lennard and Mr Moree visited the First Caribbean International Bank (Bahamas) Ltd ("FCIB") for what the judge described as the purpose of joining Mr Moree to Mr Lennard's existing bank accounts. There is some uncertainty whether Mr Lennard had one or more accounts at FCIB. In any event Mr Moree was to be joined to all such accounts. Nothing turns on whether there was one or more and, like the judge and the parties, the Board will refer to the accounts or account in the singular. The mechanism adopted was for both Mr Lennard and Mr Moree to sign account opening forms as joint account holders on FCIB's standard forms for that purpose. The substantial balance then standing to the credit of what had until then been Mr Lennard's sole account was thereafter treated as standing to the credit of the newly opened joint account.

6. The only evidence about what, if anything, was explained to Mr Lennard and Mr Moree by FCIB on the opening of the joint account, as to the consequences of Mr Moree's joinder, was a statement from Mr Moree that both he and the late Mr Lennard "understood that it was explained to us that we were converting his personal account to a joint account between us, so that upon his death the amounts held on that account became my property". No evidence was called from any bank official about that event, nor was there any documentary record of what took place, other than the account opening forms themselves.

7. The judge did not accept Mr Moree's evidence, regarding it as self-serving. The account opening form signed by Mr Lennard also contained, in a box headed "State

Purpose of Account", a manuscript note "to pay utilities" which, it was common ground, had been made by an unidentified bank official. Both forms contained, immediately above Mr Lennard's and Mr Moree's respective signatures, a declaration in the following terms:

> "I hereby declare that the information provided by me in this application is correct and complete to the best of my knowledge and that I have received, read, understood and accepted the agreement (detailed section 5 above) and the "Disclosure Documentation" and shall be bound by its terms."

Section 5 included, at clause 20, the provision as to Joint Tenancy set out above.

8. By codicil to his will made on 12 January 2010 Mr Lennard revoked the legacies to the Salvation Army and Humane Society, thereby reducing the aggregate amount of the specific legacies by $150,000.

9. Mr Lennard died on 18 February 2010, at which time the joint account was in credit in the amount of $190,000.

10. On 11 March 2010 Mr Moree attended FCIB and re-constituted the former joint account with Mr Lennard as a joint account between himself and his wife.

11. Meanwhile, as the legally qualified executor, Mr Pinder set about preparing for the administration of Mr Lennard's estate, and in particular for the obtaining of probate. He obtained information from his co-executor Mr Moree on 30 March which, he said, included being told that the assets of the estate included $190,000 (on current and deposit accounts) at FCIB. Later, on 9 June 2010, Mr Pinder and Mr Moree signed the Executors' Oath for the purposes of obtaining Probate. The annexed Schedule makes reference to $100,000 held at FCIB. This may have been a misprint for $190,000, since otherwise the aggregate in the Schedule cannot be reconciled with its detail.

The Proceedings

12. In July 2013 each of Mr Moree's fellow residuary beneficiaries, Ms Jack and Mr Whitlock, issued originating summonses in the administration of Mr Lennard's estate seeking declarations that the balance held in the joint account at Mr Lennard's death was thereafter held by Mr Moree on trust for the three residuary beneficiaries, rather than having passed to Mr Moree by survivorship.

13. A singular feature of the litigation which then ensued, both at first instance and in the Court of Appeal, was that it was treated as common ground between counsel, and therefore accepted by both courts, that a resulting trust of the money in the joint account was to be presumed in favour of the estate if Mr Moree could not discharge the burden of proving that Mr Lennard intended to make a beneficial gift of that money to him. In substance therefore, the litigation took the form of Mr Moree seeking to prove the requisite intention on the part of Mr Lennard, and the plaintiffs Mr Whitlock and Ms Jack seeking to challenge that evidence, but otherwise to rely upon the presumption. Mr Moree and Mr Pinder gave evidence by affidavit, and were cross-examined at the trial. Mr Moree relied upon his own statement, summarised above, about what happened at FCIB when the joint account was opened and, heavily as the judge noted, on the terms of clause 20 in the account opening forms.

14. The judge directed himself (at para 20) as follows:

> "In the present case there is a presumption that Mr Lennard did not intend to make a gift to Mr Moree and the burden is on Mr Moree to rebut that presumption. In considering whether Mr Moree has discharged that burden I am obliged to look at all the evidence adduced and determine whether at the civil standard of a balance of probabilities Mr Moree has discharged that burden and establish[ed] that Mr Lennard intended to give the moneys at FCIB to him."

15. The judge noted that the only evidence supportive of such a finding was Mr Moree's statement about what happened at FCIB, which the judge rejected, as noted above. He expressed surprise that no one had been called to give evidence from FCIB either as to a recollection of the transaction in question, or as to the bank's usual practice when opening joint accounts. He rejected the submission that clause 20 was probative of Mr Lennard's intention mainly because of the absence of any evidence showing that clause 20 had been explained to Mr Lennard, or drawn to his attention.

16. He concluded that a number of factors, including the "to pay utilities" notation on the account opening form, the terms of Mr Lennard's recently made will dealing with cash at banks, and Mr Moree's information to Mr Pinder about the joint account money being an asset of the estate made it more likely than not that Mr Lennard had no intention to make a gift to Mr Moree, but had added him to the account in his old age simply to assist him in paying his bills.

17. The Court of Appeal reviewed the same evidence, but reached the opposite conclusion, namely that Mr Moree had indeed discharged the burden of proving that Mr

Lennard intended to make a beneficial gift to him. The Court of Appeal were persuaded by the combination of the following four factors:

> (1) The close personal and intimate relationship between Mr Moree and Mr Lennard.
>
> (2) The terms of FCIB's account opening documents which indicated that the survivor should have the moneys standing at the time of the other's death.
>
> (3) The revoking of the bequests to the Humane Society and the Salvation Army, and
>
> (4) The devise of his house to Mr Moree, together with his body and his pets.

18. After considering the extent to which the Court of Appeal should interfere with findings of the trial judge, it was held that the Judge had unreasonably failed to draw an inference that Mr Lennard had been aware of the terms of the account opening form. At para 50, giving the leading judgment, Isaacs JA said:

> "… by placing scant reliance on the pellucidly clear opening documents he proceeded beyond what was necessary for his determination: as per *Aroso*. Although a document for the protection of FCIB, it is never the less a clear agreement between Mr Lennard, FCIB and the appellant that the appellant was to have the legal and beneficial interests in the account; and demonstrates Mr Lennard's intention to so benefit the appellant."

19. Before the Board, the appellants' main submission was that the Court of Appeal had been wrong to interfere with what was essentially a fact-finding exercise by the Judge, since it was not vitiated by any error of law, nor was it plainly wrong. Further, it had been arrived at after hearing cross-examination at trial, such that the Judge was better placed to make reliable findings of fact than an appellate court, looking at the documents.

Analysis

20. There are a large number of *dicta* from eminent courts around the common law world, including Australia, Canada, the Caribbean, England, Hong Kong, Ireland and Singapore, about the principles to be applied for the resolution of disputes about the beneficial ownership of money held on joint account at a bank. Some of them were cited

in the judgments of the courts below. Several more were cited by the parties on this appeal. Many of them are helpfully summarised in *Ellinger's Modern Banking Law* 5th ed (2011) at pp 327-332. They are not all easy to reconcile. It is therefore necessary to start from first principles.

21. Under the common law, legal title to (as opposed to beneficial ownership of) property in co-ownership can only be joint title. Survivorship, that is the devolution of those legal rights upon the survivor or survivors of joint owners is an inevitable, indeed inherent, aspect of joint legal title.

22. In sharp contrast, joint ownership (often called joint tenancy), with a right of survivorship, is only one of numerous ways in which property may be co-owned beneficially. The interposition of a trust between the persons with legal title and the beneficial owners means that there is an almost infinite variety of ways in which the property may be beneficially co-owned, even when the beneficial owners are the same as those holding the legal title.

23. There are well-established principles which assist the courts in resolving disputes as to beneficial ownership of property, and the order in which what may be described as the contents of an equitable toolkit are to be deployed for that purpose. Thus, where the relevant property is transferred to the legal holders by a written instrument, a statement as to the beneficial ownership of the property in that instrument is usually conclusive: see *Vandervell v Inland Revenue Commission* [1967] 2 AC 291, at 312 per Lord Upjohn. The same passage makes clear that any question whether the instrument does address beneficial ownership, and any issue as to what that beneficial ownership is, falls to be decided as a matter of construction of the instrument, which is an objective process, in which evidence as to the subjective intention of the maker of the instrument is inadmissible. See also *Inland Revenue Commission v Raphael* [1935] AC 96, per Lord Wright at 142-143. Of course, the binding effect of instruments of that kind is subject to the usual equitable challenges such as fraud, duress, undue influence, misrepresentation and rectification, and to the more restricted common law doctrines of *non est factum* and mistake: see generally *Goodman v Gallant* [1986] Fam 106, at 114A-117D.

24. Next, the co-owners receiving a transfer of property into joint names may themselves declare their agreement as to the beneficial interests on which that property is or is to be held and, if they do so in a written instrument, such as the conveyance to them, the identification of those beneficial interests will again be a matter of construction of the instrument, and recourse to doctrines of resulting, implied or constructive trust is impermissible: see *Pettitt v Pettitt* [1970] AC 777, per Lord Upjohn at 813 and *Gissing v Gissing* [1971] AC 886, per Lord Diplock at 905.

25. Persons acquiring property, in particular residential property in joint names, at least in England, have a notoriously poor track-record in making an express declaration as to their beneficial interests in relation to the property. In the numerous cases where this has not been done, equity has recourse to a variety of techniques for establishing what those beneficial interests are. They include the constructive or common intention trust, the implied trust and the resulting trust. Generally speaking, the resulting trust is the solution of last resort, where the intention of the joint holders of the property as to their beneficial interests cannot otherwise be ascertained. Indeed, in the context of joint residential property, the presumption that the beneficial interest accrues to the provider of the money has now been replaced by the opposite assumption, namely that the beneficial interest follows the joint legal title unless the contrary is shown: see *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432, paras 53 and following.

26. These principles are by no means confined to beneficial interests in real property. *Inland Revenue Commission v Raphael* was about personal property, namely an interest in a fund. There is no reason why property which is, slightly misleadingly, described as money in a bank account should be subject to any different principles when the court is called upon to resolve a dispute about its beneficial ownership. The property in question consists, of course, not of money, but of a contractual chose in action enjoyed by the account holder (or holders in the case of a joint account) as against the bank. The rights by which that chose in action is constituted derive entirely from the contract between the account holders and the bank, whereby the account is set up and operated. Where, as here, the joint account has two account holders, there are three parties to the relevant contract, namely the account holders and the bank. It is, and must be, if it is to work at all, a single contract, not two separate contracts between each account holder and the bank. That is so, regardless of whether the account is established pursuant to a single account opening document signed by both account holders, or (as here) two identical documents, each signed by one of them. If by some mishap two separate account opening documents used to establish a single joint account are not in identical form, this may give rise to problems of construction or rectification, but it cannot give rise to separate, different, contracts.

27. If the question is asked, in relation to money held in a joint bank account, what instrument might be thought to constitute the appropriate document (by way of analogy with co-ownership of land) where a binding declaration as to beneficial interests might be expected to be found, the obvious answer lies in the account opening document. This is because it sets out the contract pursuant to which the chose in action which constitutes the relevant property is created. It will not necessarily be a document of transfer (like a conveyance in relation to land or, in England, a Land Registry Transfer) but, since it creates the relevant property, it is none the worse for that. Furthermore, if, as in this case, the account opening document contains an express assignment by each account holder to the two of them jointly of any money separately owned by that account holder, it does indeed constitute a document of transfer, even in the strict sense.

28. The fact that an account opening document, duly signed by the joint account holders, would qualify as a binding declaration of the beneficial interests in the account does not of itself answer the question, in relation to any particular document of that kind, whether it contains any such declaration. That is a separate question which depends upon the true construction of the document, in its context, in accordance with modern principles of interpretation.

29. The application of this simple analysis based upon established principles about the ascertainment of beneficial interests in co-owned property leads the Board to this conclusion: that where two or more holders of a joint account all sign an account opening document (or separately sign identical documents) which, on their true construction, declare or set out their respective beneficial interests in the property constituted by the account (loosely, the money in the account), then those are the beneficial interests of the account holders, pending any subsequent variation of them by agreement or otherwise, and an examination of the subjective intentions of the account holders, or of those of them who place money in the joint account, is neither relevant nor permissible. Still less is recourse to the doctrine of presumed resulting trusts permissible, because the potential beneficial owners have declared what are their beneficial interests by signed writing. Further, this must be *a fortiori* the position where the accounting documents contain an express assignment of the type found in clause 20 in the present case, although this is not in the Board's view necessary for the application of this principle.

30. A number of consequences flow from this conclusion. The first is that the question whether the attention of an account holder was drawn to the terms of any such declaration as to beneficial interest, or had it explained, is in principle irrelevant, unless of course a case of mistake or *non est factum* is being deployed, or the document is challenged on the basis of fraud, duress, undue influence, misrepresentation and the like, or if it is sought to be rectified. In all those cases the onus lies squarely on the person challenging the effect of the document, and no such case has been advanced in these proceedings. The reason why the extent to which the document has been read, explained to or understood by an account holder is irrelevant is because the document is determinative of itself in relation to the beneficial interests in the account, rather than merely a guide, of infinitely variable weight, to the common intention of the account holders or to the intention of those of them who deposited money in the account.

31. The second is that there is plainly no room for the application of the doctrine of presumed resulting trusts, in favour of an account holder who places money in the account, as Mr Lennard did in this case. This is because the account holder is a party to the document which is determinative of the account holders' beneficial interests, and because they have been ascertained by the primary tool for the determination of any dispute as to beneficial interests, namely the terms of the document creating or transferring the property, just as much as beneficial interests in other types of co-owned property are determined by a conveyance, a transfer or a declaration of trust.

32. The third consequence is that, where such a document upon its true construction does deal with the beneficial interests of the account holders, the question what precisely those interests are is a question of law (like any other question of construction) and not a fact-finding exercise. Provided therefore that there is no factual uncertainty about the terms of the relevant document, an appellate court is as well placed as the trial judge to apply the law, that is, to construe the document. To this general proposition may be added this caveat: that the first instance and appellate courts which sit habitually in the jurisdiction where the relevant documents were created and signed may sometimes be better placed than this Board, because they may be better attuned to the context of business life against which the document falls to be construed.

33. This is all as it should be. Where the parties to a joint account have declared their beneficial interests in it in signed writing, it would be both extraordinary and unsatisfactory for the courts to have to resolve a dispute about their beneficial interests by an open-ended factual inquiry about their subjective intentions, or the subjective intentions of whichever of them provided the money. If the dispute is about beneficial survivorship, one of the original account holders will have died, and be unable to give direct evidence of intention. If the presumption of a resulting trust would otherwise leave the money beneficially part of the estate of the first to die, evidence of intention by the survivor will always be self-serving. The account may have been opened many years previously, and it will often be pure chance whether any independent witness of the opening of the account can assist, either with evidence of the deceased's intention, or with a recollection of whether the deceased had the terms of the account opening form explained, before signing it. Above all, the expense and delay involved in a fact-finding inquiry of that type will far exceed that of the occasional case where the signed declaration raises a real issue of construction.

34. It comes as some surprise to the Board that the principles thus stated should not be found to be the unanimous conclusion of those reported cases in common law jurisdictions where recourse has been had, with varying degrees of success, to bank account opening documents for the purpose of resolving disputes as to the beneficial interests of joint account holders. In his dissenting opinion, Lord Carnwath analyses a number of those authorities.

35. Some of them appear to regard a statement as to beneficial interests in a signed joint account opening document as just evidence of intention of varying weight from case to case, as part of a wider fact-finding inquiry in which any other evidence of intention is also admissible. A comprehensive analysis may do no more than reveal that, as between the Bahamas and some of those jurisdictions, the relevant streams of the common law diverge rather than converge. It is not however suggested that there is as yet a such divergence as between the common law of the Bahamas and that of England.

36. Perhaps the nearest recent antecedent statement of the principle enunciated above is to be found in the judgment of Lawrence Collins J (as he then was) in *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241. That was a case about a joint account, the mandate for which contained these provisions:

> "We confirm that the funds and assets deposited with you and which may herein after be deposited shall be in our beneficial ownership and shall not be held by us upon trust for any other person or persons whom so ever … we fully understand that in the event of the death of one or more of us the survivor or survivors shall remain and be entitled to the entire assets deposited with you for the account."

The question was whether the survivor of the joint account holders was beneficially entitled to the money then in the account, or whether he held it upon resulting trust for the deceased, who had contributed the money. It was, on the face of it, a case in which evidence from the bank proved that the relevant terms of the mandate had been explained to the deceased, and there was other evidence probative of his intention to make a beneficial gift to the survivor. Nonetheless, at para 22, Lawrence Collins J said this:

> "The starting point is that where a person transfers property or directs a trustee for him to transfer property, otherwise than for valuable consideration, and where the presumption of advancement does not apply, it is a question of the intention of the transferor in making the transfer whether the transferee was to take beneficially or on trust, and if on trust, what trusts (*Vandervell v Inland Revenue Commission* [1967] 1 All ER 1 at 8; [1967] 2 AC 291 at 312 per Lord Hodson). If as a matter of construction of the document making or directing the transfer, it is possible to discern the intentions of the transferor, that is an end of the matter and no extraneous evidence is admissible to correct and qualify his intentions so ascertained, but if the document is silent, then a resulting trust arises in favour of the transferor, but this is only a presumption and is easily rebutted. All the relevant facts and circumstances can be considered in order to ascertain the intentions of the transferor with a view to rebutting the presumption. Ibid See also *Westdeutche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961 at 990; [1996] AC 669 at 708."

37. This valuable dictum goes part, but not quite all, the way towards the conclusion which the Board conceives to be correct. It is apparent from elsewhere in his judgment

that Lawrence Collins J regarded the mandate in that case as the "document making or directing the transfer", and that, as a matter of construction, it clearly dealt with the beneficial interests in the account: see para 35. The Board agrees with his conclusion that where such a document, upon its true construction, does so, that is the end of the matter, so as to exclude any further evidence. But it does so not merely because it is incontrovertible proof of the transferor's intentions. Rather it is because it is itself dispositive of those beneficial interests, where (as here) the transferor is one of the account holders.

38. In *Niles v Lake* [1946] 2 DLR 177, the Court of Appeal of Ontario had to consider the terms of a document described as an "Agreement re joint account" addressed to the bank which contained the following terms:

> "We the undersigned, having opened a Savings Deposit Account with the above named branch … in our joint names do for valuable consideration … hereby mutually agree, jointly and each with the other … that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor … of them."

39. Giving the leading judgment, Laidlaw JA said that the language of the agreement was perfectly plain and free from all ambiguity and doubt although, on appeal, the Supreme Court of Canada took the opposite view. But Laidlaw JA continued, at p 180:

> "It is my view that the determination of the question in controversy in this appeal does not depend upon the application or effect of the presumption relied upon by counsel for the respondents. It depends, I think, upon the construction to be given to the plainly expressed provisions of the agreement under which the bank account was constituted. There is no express limitation or condition of any kind annexed by either party to the assignment and transfer by one of them of any or all moneys to be joint property of both of them. No such limitation or condition can be properly implied. There is no evidence to show that the late Georgina Arnott intended to keep the beneficial ownership of the

> moneys, or any of them, in herself. There are no circumstances which in any way destroy or alter the effect in law of the provisions of the agreement."

40. By this dictum (with which Roach JA in substance agreed) Laidlaw JA recognised that a joint account agreement may be effective in itself to determine the beneficial interests of the account holders, if on its true construction it declared them, rather than merely serve as a guide to the intentions of the contributor of the money. Roach JA held that the agreement prevailed, there being no defence of *non est factum*.

41. In the Supreme Court [1947] SCR 294, there was found to be a resulting trust in favour of the deceased's estate, mainly upon the ground that the court did not share the Court of Appeal's view about the true construction of the joint account agreement. In their view it related only to the legal rather than beneficial title. The question whether, if it had on its true construction been dispositive of the beneficial ownership, it would have bound the joint account holders did not therefore arise, although there are dicta which suggest that the question remained, from first to last, one of rebutting a presumed resulting trust.

42. There is a much more recent analysis by the Supreme Court of Canada of the approach to the ascertainment of beneficial interests in joint accounts, in *Pecore v Pecore* [2007] SCC 17; [2007] 1 SCR 795. At para 60-61 there is a brief observation by Rothstein J that, in the past, the Supreme Court had held that bank documents that set up a joint account are an agreement between the account holders and the bank about legal title, not evidence of an agreement between the account holders as to beneficial title, and reference was made to *Niles v Lake*. But it does not appear that, in that case, there were any words in an account opening agreement dipositive of the beneficial interests in the joint account nor, therefore, any submission that, if there had been, this would be determinative of those beneficial interests so as to absolve the court from any examination of the transferor's subjective intention. In the Board's view, there can be no general rule that account agreements are only about legal title, or only about the relationship between the account holders and the bank, rather than their relationship as beneficial owners *inter se*. In each case it will depend upon the true construction of the relevant agreement. If either of the decisions of the Supreme Court of Canada in *Niles v Lake* and *Pecore v Pecore* are to be read as deciding that there is such a general rule, then the Board agrees with the submission of counsel for Mr Moree that the common law of the Bahamas contains no such rule.

43. Reference in this context is frequently made to *Russell v Scott* (1936) 55 CLR 440, a joint account decision of the High Court of Australia in which a presumption of resulting trust in favour of a deceased account holder was rebutted. There is, in the joint judgment of Dixon and Evatt J, at pp 450-451, a well-known and, in the Board's view, entirely accurate description of the way in which the contract between the bank and the

account holders creates a chose in action which constitutes the property in issue. There was nothing in that case about the terms of the contract between the bank and its customers constituting a declaration or statement as to the beneficial interests in the account. Unsurprisingly therefore, the High Court had recourse to questions of intention and resulting trust in concluding that the survivor had obtained a beneficial interest in the joint account.

44. Lord Carnwath makes reference to the dictum of LaForme JA in *Saylor v Madsen Estate* (2005) 261 DLR (4th) 597, at para 27, to the effect that bank documents do not even have a presumptive value in the search for evidence of subjective intention sufficient to rebut the presumption of advancement. For the reasons already given, the Board respectfully disagrees with that analysis.

45. It is fair comment that, reading the common law authorities about beneficial ownership in relation to joint bank accounts as a whole, there emerges a general impression that, where the deceased account holder is the contributor of the money, the approach which requires the survivor to discharge the burden of proving an intent to benefit him, in which account opening documents play a purely evidential role in the search for subjective intention, has been widely adopted. But, with the exceptions of the *Aroso v Coutts*, *Niles v Lake* and *Saylor v Madsen* cases, none of them appears to come near to addressing the question arising in this case, where there is an allegedly clear declaration as to beneficial interests in the account opening agreement between the joint account holders and the bank.

Construction of the Account Opening Documents

46. As noted above, the Court of Appeal in this case regarded the interpretation of the account opening documents, and of clause 20 in particular, as a pellucidly clear declaration that the survivor of Mr Lennard and Mr Moree was to have the beneficial interest in the joint account. For the appellants, Mr Gavin Kealey QC submitted that clause 20 related to nothing more than legal title, and was silent as to beneficial interest. Relying on dicta in *Yanner v Eaton* [1999] HCA 53 (by Gummow J at para 85) and *Slater v Pinder* (1871) LR 6 Exch 228 (by Martin B at 236) about the inherent or potential ambiguity in the meaning of the word “property”, he submitted that the first sentence of clause 20 did not (or at least not clearly) refer to anything other than joint legal property with its inherent right of survivorship, that the second sentence merely explained the first in terms, and that the assignment was no more than what was needed to achieve survivorship, *quoad* legal title alone. He contrasted clause 20 with provisions in other account opening documents in reported cases which referred (as in the *Aroso* case) expressly to a beneficial interest, and he relied upon the common features as between clause 20 and the relevant clause in *Niles v Lake*, as supportive of the submission, accepted by the Supreme Court of Canada in that case, that the relevant words, including the express assignment, concerned nothing more than the legal title.

47. On this issue, the Board respectfully agrees with the Court of Appeal. clause 20 falls to be construed in its context, in a standard form of joint account agreement prepared for FCIB for use by private customers seeking to open joint accounts in the Bahamas in the 21st century. In the Board's view, the key phrases are: "Joint Tenancy", "our joint property with the right of survivorship" and "if one of us dies, all money in the Account automatically becomes the property of the other account holder(s)". The meaning of those phrases is to be ascertained by reference to an objective assessment as to what reasonable Bahamian private customers of a bank would think that they meant. Private customers of a bank, whether in the Bahamas or elsewhere in the common law world, do not go around, like lawyers, thinking constantly of distinctions between legal title and beneficial ownership when contemplating the ownership of property. Even to a lawyer, the part of clause 20 which would stand out would be the opening words "Joint Tenancy". There would be no need to make express provision by clause 20 merely in relation to the bare legal title, which would be held jointly in any event, whereas beneficial ownership might be as joint tenants or tenants in common, or in some other form. Furthermore the phrase "unless otherwise agreed in writing" can only have been about beneficial ownership, since there is only one form of joint legal title, whatever the parties may otherwise purport to agree. Thus, in the Board's view, even a legally qualified intending customer of FCIB would regard clause 20 as there for a purpose, namely to deal with beneficial ownership.

48. It is true that the account opening form in *Niles v Lake* was expressed in similar terms to that in the present case. There were however other passages in it which did point to its purpose being limited to ensuring that the bank could obtain a good receipt from the survivor. But it would be wrong, in the Board's view, to treat a decision about the meaning of a different document, made in a different context and in a different era, as having binding force in the present context.

49. In his dissenting opinion, Lord Carnwath places emphasis on two factors: first, the fact that clause 20 is part of a standard form prepared by the bank, and second, the insertion of the phrase "to pay utilities" in the purpose box on the form. As to the first, the additional phrase "unless otherwise agreed in writing" (absent from the document in *Niles v Lake*) shows that the bank was not dictating to its customers what were to be the beneficial interests in the joint account, but merely (and sensibly in the Board's view) requiring the customers to identify in writing any agreement that the beneficial interests were to differ from joint tenancy. As to the second, the statement as to the purpose of the joint account during Mr Lennard's lifetime is not inconsistent with there being a beneficial joint tenancy, still less with Mr Moree having a beneficial right of survivorship, on Mr Lennard's death. In the Board's view neither of those two factors, separately or in the aggregate, come near to displacing the clear meaning of clause 20, as identified above and by the Court of Appeal.

50. This is, therefore, a case in which the two holders of a joint account have, by an agreement with the bank to which they were both parties, expressly set out above their

signature a declaration as to the beneficial interests in that joint account which, on its true construction, provides for any balance on the account to be the beneficial property of the survivor, upon the death of the other account holder, regardless who contributed the money to the credit of the account before that date. It is, in the Board's view, a case in which there was no need to conduct an open-ended factual analysis as to the subjective intention of Mr Lennard, since the account opening forms signed by him and Mr Moree were, by themselves, dispositive of the beneficial interest in that account, subject to any contrary agreement or later variation, and there was none. Had the matter turned on such a factual analysis there would, in the Board's view, have been much force in the appellants' submission that the analysis conducted by the trial judge should not have been disturbed by the Court of Appeal. But for the reasons given above, the Court of Appeal's decision was correct. It was based upon a sound perception as to the meaning of clause 20 with which the Board agrees.

51. The Board will therefore humbly advise Her Majesty that this appeal should be dismissed. It is understood that in these circumstances issue (4) relating to costs does not arise. Accordingly, subject to any submissions received within 28 days of this judgment, costs before the Board will follow the event.

LORD CARNWATH: (dissenting) (with whom Lord Wilson agrees)

52. The issue which divided the courts below, and the only issue raised by the appeal as presented, was whether the Court of Appeal erred in disturbing the Chief Justice's conclusion that the presumption of resulting trust had not been rebutted. On that issue, as I understand, the Board is of one mind. Apart from the issues of construction considered below, and applying the ordinary principles applicable to the role of an appellate court, there were insufficient grounds for the Court of Appeal to interfere with the Chief Justice's assessment of the evidence as to the testator's intentions.

53. However, in the view of the majority, the decision of the Court of Appeal should be upheld on a narrower ground, that is, that the meaning of clause 20 is clear in effect and itself determinative of the disposition of both legal and beneficial interests. Further, the majority have highlighted what they regard as a lack of clarity or consistency in cases from around the common law world. They have therefore thought it necessary to go back to "first principles", and to provide a plain man's guide to the law of co-ownership, so that the common law of The Bahamas and England may be set on the true path, whatever divergences there may be in other parts of the common law world (para 35).

54. I am unconvinced, with respect, that there is any difficulty or uncertainty about the general principles governing joint bank accounts, whether in the courts of The Bahamas, or in the common law world more generally. I agree with the majority that

there is an area of potential uncertainty in relation to the relevance in that context of the specific terms of the bank documents under which the joint account was established. This arises in particular out of a line of judgments of the Canadian courts. However, although this appeal provides an opportunity to review those cases, the issue is not critical for the present appeal. As both parties accept, in my view rightly, the law was accurately stated by Lawrence Collins J in *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241, which was the case principally relied on (but misapplied - see below) by the Court of Appeal.

55. Furthermore, the emphasis placed by the majority on authorities from other property contexts, such as *Vandervell v Inland Revenue Commission* [1967] 2 AC 291 and *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432, seems to me with respect misleading, in that it tends to divert attention from the particular characteristics of a joint banking account, as compared to other forms of property transaction. For example, in *Vandervell* there was no doubt that the purpose of the relevant transaction was to effect a permanent transfer of property; the only issue was as to the effect in law of that transfer. By contrast, from the point of view of the customer, the purpose of a bank account is not generally seen as to effect the transfer of property in the longer term, but rather to provide a convenient vehicle for holding and dealing in money for the time-being. It does involve the transfer of funds to the bank, and the creation of a new form of property, a chose in action; but they are no more than the mechanisms which the law uses to achieve that purpose, and of which the customer is likely to be unaware. The same in principle applies to a joint bank account. The ordinary expectation is that, rather than being intended to effect a permanent transfer of value from one customer to the other, it is intended as no more than a convenient vehicle for their co-operation (for whatever reasons) in handling funds for the time-being. Issues of construction should be approached against that background.

56. Accordingly, if one is to go back to first principles, it is more useful in my view to go back to the established principles relating to joint bank accounts, and to consider issues of interpretation of a particular bank agreement in that context.

Joint accounts - general principles

57. As noted by the majority (para 43) a 1936 judgment of the High Court of Australia (*Russell v Scott* (1936) 55 CLR 440) contains an "entirely accurate" description of the legal status of such a joint account. That concerned a joint bank account set up by an elderly lady of means and her nephew, with funds provided by her. Her intention was that the account should be used until her death to supply her own wants, but on her death the balance would go to her nephew. At her death some £1,395 stood to the credit of the account, and the question for the court was whether the nephew was beneficially entitled to this sum.

58. The concurring judgment of Dixon and Evatt JJ (p 450-1) explained the issue in these terms:

> "The contract between the bank and the customers constituted them joint creditors. They had, of course, no right of property in any of the moneys deposited with the bank. The relation between the bank and its customers is that of debtor and creditor. The aunt and the nephew upon opening the joint account became jointly entitled at common law to a chose in action. The chose in action consisted in the contractual right against the bank, ie, in a debt, but a debt fluctuating in amount as moneys might be deposited and withdrawn. At common law this chose in action passed or accrued to the survivor …
>
> The right at law to the balance standing at the credit of the account on the death of the aunt was thus vested in the nephew. The claim that it forms part of her estate must depend upon equity. It must depend upon the existence of an equitable obligation making him a trustee for the estate. What makes him a trustee of the legal right which survives to him? It is true a presumption that he is a trustee is raised by the fact of his aunt's supplying the money that gave the legal right a value. As the relationship between them was not such as to raise a presumption of advancement, prima facie there is a resulting trust. But that is a mere question of onus of proof. The presumption of resulting trust does no more than call for proof of an intention to confer beneficial ownership; and in the present case satisfactory proof is forthcoming that one purpose of the transaction was to confer upon the nephew the beneficial ownership of the sum standing at the credit of the account when the aunt died. As a legal right exists in him to this sum of money, what equity is there defeating her intention that he should enjoy the legal right beneficially? Both upon principle and upon English authority we answer, none …"

59. In that case, as the majority rightly observe, there was no suggestion that the answer could be found in a specific clause in the banking contract. However, the judgment provides a clear indication of the position as it would have been in the present case, if there had been no clause 20. On that basis, there could have been no criticism of the court's use of the ordinary equitable toolbox, including the presumption of a resulting trust, to arrive at the answer. Thus the issue comes down, not to any debate about general principles, but to a narrower question about the interpretation of clause 20 in the context of this particular banking agreement.

60. Nor is there any reason to think that the relevant principles diverge materially across the common law world. A valuable discussion of the topic of joint accounts is found in *Ellinger's Modern Banking Law* 5th ed (Oxford 2011) pp 320-332 (a work edited by authors from Singapore, London and Auckland). Under the heading "Survivorship" (p 324ff) the authors deal with what happens where one of the holders of a joint account dies. As they point out, the issue is not the ownership of the funds as such, which remains with the bank; but the right to -

> "… the chose in action that entitled the deceased account holder to draw upon the credit balance or to instruct the bank to make payments from the joint account."

For this purpose, it is noted, the case law draws a distinction between legal and equitable title to this chose in action, the former being relevant mainly to disputes between the bank and its customer; the latter to disputes between the survivor and either the tax authorities or the deceased's estate. As they say:

> "… the bank's position is largely unaffected by questions concerning the identity of those beneficially entitled to the chose in action representing the account. The bank's main concern is to identify its legal owner and to meet that person's demands."

Russell v Scott is referred to as establishing the proposition that on a joint account-holder's death, the legal title rests with the survivor; a proposition said to have been "reiterated" more recently by the Supreme Court of Canada in *Pecore v Pecore* [2007] SCR 795.

61. A later section, under the heading "Beneficial entitlement to the chose in action representing the credit balance" (pp 327-328) discusses the "more complicated situation" where the joint account balance is largely the result of deposits by the deceased account-holder. In such a case, it is said, the beneficial interests depend on the deceased account holder's intention in maintaining the funds in the joint account, in particular whether the joint account was established "purely out of considerations of convenience" or whether the deceased intended to make a gift of the equitable interest; "as the deceased's intention is not usually on record its determination depends largely on the operation of presumptions". The cases cited by way of illustration include *Niles v Lake* [1947] SCR 294, to which I shall return, and *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241. The authors also refer to the latter decision as suggesting that the presumption of resulting trust is "seen as formally quite weak"; but they note that in *Pecore v Pecore* the Canadian Supreme Court confirmed that such presumptions "continue to have a role to play in disputes over gratuitous transfers in the context of joint accounts".

Banking documents

62. As I have said, the only area of potential uncertainty in the authorities concerns the relevance to this exercise of any specific terms about the nature of the account-holders' interests, in the banking agreement under which the joint account was established. As already noted, this is not a point of material disagreement in this case, since there is no dispute that, in the words of Lawrence Collins J in *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241, para 22:

> "If as a matter of construction of the document making or directing the transfer, it is possible to discern the intentions of the transferor, that is an end of the matter and no extraneous evidence is admissible to correct and qualify his intentions so ascertained …"

These words are taken directly from the words of Lord Upjohn in *Vandervell v Inland Revenue Commission* [1967] 2 AC 291, 312 (which the majority take as their starting point: para 23):

> "Where A transfers, or directs a trustee for him to transfer, the legal estate in property to B otherwise than for valuable consideration it is a question of the intention of A in making the transfer whether B was to take beneficially or on trust and, if the latter, on what trusts. If, as a matter of construction of the document transferring the legal estate, it is possible to discern A's intentions, that is an end of the matter and no extraneous evidence is admissible to correct and qualify his intentions so ascertained."

Thus, again, the critical issue comes down, not to any question of general principle, but to whether clause 20 in this particular agreement, properly construed in its context, satisfies that test.

63. It is right, as the majority point out (para 37), that if this test is satisfied, that is not merely conclusive as to the testator's intentions, as Lawrence Collins J indicated, but also dispositive of the relevant beneficial interest. That I take as having been implicit in Lord Upjohn's formulation. However, I do not see that this comment affects the nature of the test. The question is what the clause discloses about the common intentions of the parties, in respect of the beneficial (as opposed to the legal) interest in the relevant funds. Like any issue of construction, that has to be considered objectively from the point of view of the reasonable observer and in the context of the contents and purpose of the agreement as a whole, and against the factual background as known to the parties.

64. In reaching the conclusion that the test was satisfied - indeed that the clause was "pellucidly clear" - Isaacs JA relied in terms on the decision in *Aroso*, (para 50), having earlier underlined the words quoted above when referring to the case (para 18). By way of explanation he observed simply that the document, although for the protection of the bank, was "a clear agreement … that the appellant was to have the legal and beneficial interests in the account". He gave no further explanation. Nor did he mention the fact that, as noted by him earlier, the corresponding clause in *Aroso* had the significant difference that it referred in terms to the funds being in "our beneficial ownership".

Niles v Lake

65. It is unfortunate that it was only during the hearing of the present appeal that the Board's attention was drawn to the decision of the Canadian Supreme Court in *Niles v Lake* [1947] SCR 294, which concerned a clause much closer in language to clause 20 than the clause in *Aroso*. That case was mentioned in passing by Isaacs JA (para 33), but by reference only to a partial, quotation taken out of context from a Singapore judgment (*Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR 783), which omitted the most material part. It is not surprising therefore that Isaacs JA saw no inconsistency between that decision and his interpretation of clause 20. The full text of the Supreme Court's judgment in *Niles v Lake* was not available to the Board until after the hearing. The parties were invited to submit written comments on the decision, including whether it was "wrong or distinguishable".

66. The relevant facts can be shortly stated. The case concerned a joint bank account, opened by Mrs Arnott and her sister Mrs Lake. The money was all contributed by Mrs Arnott. The Bank's standard form, signed by them both, contained the following clause:

> "We the undersigned, having opened a Savings Deposit Account with the above named branch ... in our joint names do for valuable consideration … hereby mutually agree, jointly and each with the other … that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them …"

After Mrs Arnott's death, an issue arose as to the beneficial ownership of the money in the account. It was held by the Supreme Court (reversing the decision of the Ontario Court of Appeal [1946] 2 DLR 177) that this clause did not in itself determine the beneficial interest in the account, and there was insufficient evidence to rebut the presumption of a resulting trust in favour of Mrs Arnott's estate. In effect they regarded the clause as doing no more than spelling out in detail the ordinary legal consequences of establishing a joint bank account, including the rules of survivorship.

67. Although the decision was unanimous, there are some variations in the reasoning of the four substantive judgments. In the first judgment Kerwin J accepted that "the legal property in the chose in action" was now vested in Mrs Lake as the surviving account-holder, but that the estate of Mrs Arnott had an equitable interest by virtue of the doctrine of resulting trusts. In his view there was

> "… nothing in the document to cut down that equitable interest. The language is no more absolute or unequivocal than in a deed of land or a transfer of shares of stock by the owner to the joint names of the transferor and transferee." (p 297)

68. Taschereau J accepted that the document being under seal should be considered as "conclusive", but its terms did not warrant the view that it related to more than the legal title:

> "The words 'shall be the joint property of the undersigned' or 'right of survivorship' and 'all moneys in the account to be joint property of the undersigned' are indeed apt words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than a mere transfer is required to destroy the presumption of a resulting trust and an intimation of such an intent must appear in the document itself, or as a result of evidence which reveals the intention to benefit the transferee." (p 304)

69. Rand J considered that the language of the clause made it clear that what was intended was the creation of a relationship to the bank "in such terms as would preclude any challenge to the irrevocable authority of either of the depositors to deal with the account in unqualified fashion", and to remove the possibility of controversy involving the bank (p 307). References in the clause to "joint property" and "assignment" were "constituent elements of a conclusive relation to the bank", but irrelevant to "questions of ownership of funds dehors the bank":

> "To hold otherwise would, as the result of the bank's requirement, deny to a depositor the privilege of opening a joint account for the

> purpose of convenience: that, in other words, the bank would dictate the terms of beneficial ownership, irrelevant to its protection, as a condition of that form of accommodation. The common sense of the situation is confirmed by the language of the agreement in negativing such a construction." (pp 308-309)

70. To similar effect the fourth judge, Kellock J, held that the document was to be construed as -

> "not intended to affect the beneficial title as between the sisters at all, but merely to facilitate the bank in its dealing with the account." (p 312)

71. It is a fair criticism of some of the judgments that they do not distinguish clearly between the clause as evidence of subjective intention (potentially relevant to the application of equitable presumptions) and objective intention as an aspect of contractual interpretation. The judgment of Rand J seems to me, with respect, the most useful, since it has a detailed analysis of the contractual language, set in the context of the "common sense" of the agreement as it would have been understood by the parties, and the reasonable observer. I find that reasoning compelling.

Authorities subsequent to Niles v Lake

72. The comments of the court in *Niles v Lake* seem to have been taken in some later cases as having wider significance than as directed simply to the clause there in issue. There was a brief reference to *Niles v Lake* in *Edwards v Bradley* [1957] SCR 599, p 600, where Kerwin CJ (as he had become) said:

> "There is nothing in the document signed for the bank by the mother and daughter to cut down the former's equitable interest. *It has been pointed out in In re Mailman Estate [[1941] SCR 368; [1941] 3 DLR 449] and Niles v Lake that documents of this nature are drawn by the bank and cannot affect the resulting trust*. That does not mean that where the facts warrant it a finding may not be made that there was a present gift and that the presumption as to a resulting trust was overcome, but here the evidence falls short of what is required." (Emphasis added)

It does not appear from the report what if any terms of the bank documents in that case had been relied on in submission.

73. Much more recently, in *Pecore v Pecore* [2007] SCC 17; [2007] 1 SCR 795, Rothstein J made a brief reference to the case in the context of his discussion of different categories of evidence, although the issue did not arise directly on the facts of that case. Under the heading "Bank Documents" he said:

> "60. In the past, this Court has held that bank documents that set up a joint account are an agreement between the account holders and the bank about legal title; they are not evidence of an agreement between the account holders as to beneficial title: see *Niles* and *In re Mailman*.
>
> 61. While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death: see B Ziff, Principles of Property Law 4th ed (2006), at p 332. Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry."

(I note in passing that the current edition of Ziff Principles of Property Law, 6th ed (2014), p 360 does not go as far as that citation suggests. It observes that "the primary purpose" of the bank agreement is "to allow the bank to carry out transactions without fear of liability; its authority to act", adding that these documents "do not directly govern the rights of the account holders *inter se*", but they may provide "an indication as to their relative rights.")

74. In a concurring judgment Abella J also expressed the view that the law had moved on since the time of *Niles v Lake*:

> "It seems to me that bank account documents which specifically confirm a survivorship interest, should be deemed to reflect an intention that what has been signed, is sincerely meant. I appreciate that in *In re Mailman Estate* [1941] SCR 368, *Niles v Lake* [1947] SCR 291 and *Edwards v Bradley* [1957] SCR 599, *this court said that the wording of bank documents was irrelevant in determining the intention behind joint bank accounts with respect to beneficial title*. Fifty years later, however, I have difficulty seeing any

> continuing justification for ignoring the presumptive, albeit rebuttable, relevance of unambiguous language in banking documents in determining intention. I think it would come as a surprise to most Canadian parents to learn that in the creation of joint bank accounts with rights of survivorship, there is little evidentiary value in the clear language of what they have voluntarily signed." (para 104, emphasis added)

75. Such comments seem with respect to overstate the effect of the court's decision in *Niles*. As I read it, although there were differences in the various judgments, the ratio of the decision turned on the effect of a particular clause in a particular agreement, rather than on any more general statement about the relevance of bank documents in relation to beneficial interests.

76. In *Ellinger* (p 329), *Pecore* is relied on to support the inclusion of "bank documents" in a list of "types of evidence that might be adduced to rebut the presumptions". Footnote (86) observes that "English cases have indicated that these documents … may be of limited assistance in determining the rights of the joint account holders". However, it is not clear that the cases referred to in the footnote (*Aroso* para 33; *Sillett v Meek* [2007] EWHC 1169 (Ch), para 40) provide adequate support for that proposition. In *Aroso* the main difficulty seems to have been that the bank document had not been signed. In *Sillett* the matter was apparently put beyond doubt by a specific term in the agreement:

> "4. This contract shall govern solely the joint holder's right of disposal vis a vis the Bank, without regard to the relationships, in particular, as between the holders and their legal successors."

77. Finally a similar issue arose in the Singapore High Court in *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR 783; [2008] SGHC 119. The joint bank account had been set up by the deceased testator ("Bee Bee") and her boyfriend and cohabitant (the defendant), all the money having been contributed by her. It was held (by Chan Seng Onn J) that the presumption of advancement did not apply as they were not legally married. However, the same result was achieved on the basis of the evidence of her intentions, as evidenced (inter alia) by a term in the bank's standard agreement which she had signed:

> "In the event of death of a joint account holder *(except in the case of joint accounts designated as trust or executors' accounts)* the amount standing to the credit of the joint account shall be held *for the benefit* and to the order of the survivor(s) (regardless of the terms of the Account mandate)." (judge's emphasis)

78. The judge said of the deceased's signing of the bank agreement with her partner (para 80):

> "It was a deliberate and purposeful act on her part, which had been planned for and done with the intention to add him as the joint account holder with the mandate that the defendant was entitled to use and withdraw the moneys in the joint account at any time and with the further intention that 'the amount standing to the credit of the joint account shall be held <u>for the benefit</u> and to the order <u>of the survivor</u>'. These underlined words in the bank's terms and conditions, which both the defendant and Bee Bee agreed to, constituted very strong evidence of what Bee Bee's true intentions were, namely that he, the defendant, was to have the money beneficially if he survived her. The moneys were clearly not meant to be held in trust for her estate upon her death as that would be contrary to the express term and condition above in clause 9.4. Clause 9.4 was unambiguous and clear in its construction and meaning. There was also a further differentiation made for trust accounts by use of the words in the brackets - '(except in the case of joint accounts designated as trust or executors' accounts)' - in clause 9.4."

79. The judge considered but distinguished *Niles v Lake* on the basis that -

> "that the survivorship clause on the bank's standard form there was quite different in that, unlike the present case, there was no clear indication that in the event of the death of a joint account holder, the amount standing to the credit of the survivor would be held for his benefit, which would then have made very clear that the survivor not only had the legal interest, but also that he was to have the beneficial interest in the balance of the moneys in the joint account." (para 114)

80. As to the relevance of bank documents in general, he referred with approval to a judgment of LaForme JA in the Ontario Court of Appeal: *Saylor v Madsen Estate* (2006) 261 DLR (4th) 597, where the latter had said:

> "(27) Bank documents can be strong evidence of a party's intention at the time the parties signed them. I do not, however, agree that the bank documents should be assigned presumptive value when trying to determine a party's intention. The probative value of such documents, like any other relevant evidence, can

only be ascertained after an assessment of the totality of the relevant evidence. As this case demonstrates, the document does not always provide accurate evidence of the parties' intent.

(28) A judicially created presumption, which places documents at the top of the evidentiary ladder, may bring some predictability to the factual question of a party's intention, but it will do so, in my view, at the expense of the fact finding process. Triers of fact routinely determine questions of intention without any judicially created presumptions. I am confident that they can do so where bank documents constitute part of the evidentiary picture …

(31) The more recent bank agreements provide for a right of survivorship so it can no longer be said that the documents do not define rights as between the joint account holders. However, there is no reason to treat the documents as dispositive of the actual relationship between the parties. Documents remain a piece of evidence - perhaps a very important piece of evidence - going to the intention of the parties who created the document. Nevertheless, the weight to be assigned to such documents in any given case must be left to the trier of fact."

81. Adopting the same approach Chan Seng Onn J said (para 118):

"In my judgment, the terms and conditions that the parties have agreed to in the bank documents is a good starting point for any evidential search for the intention of the deceased as part of the judicial process of fact finding. When the terms and conditions are well drafted and have stipulated clearly how the legal and beneficial interests in the moneys outstanding in the joint bank account are to be dealt with upon the death of a joint account holder, and when the parties have been made or are fully aware of these terms and conditions (or at least the substance of these terms and conditions) before they inked their signatures to signify their acceptance of those terms and conditions, *then these bank documents can provide strong evidence of the parties' intent (in particular that of the deceased) at the time the parties executed the documents. In short, while bank documents may have strong evidential value, they do not have legal presumptive value*." (Emphasis added)

82. I have quoted these authorities at some length in an attempt to bring greater clarity to the discussion, and in particular to emphasise the distinction between two issues: first the relevance of bank documents in general, and secondly the interpretation of a particular clause. I agree with the majority that, by focussing on the status of such documents as evidence of intention, there is a danger of overlooking their significance as binding contractual commitments, which are not merely relevant as evidence but dispositive of the interest in question. However, to my mind that does not necessarily undermine their value as guidance on the possible approach of the court to interpretation of different forms of standard clause in typical banking agreements.

83. Thus, taking the Singapore case as an example, one may not endorse the judge's comments on the status of the bank documents as evidence, nor his adoption of the comments to similar effect of LaForme JA in the Ontario Court of Appeal (paras 78-79 above). On the other hand, his analysis of the particular clause (para 76 above) seems an entirely valid approach to the interpretation of the relevant contractual term, which could and should have led him to the same conclusion by a simpler and more direct route.

Clause 20

84. I turn to the banking agreement in the present case. It was on a document headed "Personal Account and Services Application". The first page had a number of printed boxes in which were inserted in handwriting the name and other details of the "First/Sole Applicant", namely Mr Lennard. In the box headed "State purpose of account", there was inserted "to pay utilities". The second page provided similar boxes for "Information on First Joint Applicant", which were filled in with the name and details of Mr Moree. There followed one-and-a-half pages of 23 closely printed terms, covering such matters as "1. Basic terms", "4. Security", "9. Overdraft and Credit Limit", and "23. Jurisdiction". Clause 20 which is directly in issue in this case read:

> "JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the Account (including all interest) is our joint property with the right of survivorship. That means that if one of us dies, all money in the Account automatically becomes the property of the other account holder(s). In order to make this legally effective, we each assign such money to the other account holder (or the others jointly if there is more than one other account holder)."

85. Although there were some differences in the language of the clause in *Niles v Lake* and that of the clause in the present case, Mr Parker, rightly in my view, does not suggest that the differences were material in respect of the distinction between legal and

beneficial interests. He relies on some factual differences in the surrounding circumstances and in the relationships of the parties. However, they can have no direct relevance to the issue of construction, which turns on the objective consideration of the document itself. Mr Parker is driven to argue that *Niles v Lake* was wrongly decided. For the reasons given above I do not agree.

86. Like the Canadian court in that case, I see nothing in the language of clause 20 to indicate an intention to deal with beneficial interests, rather than simply spell out the consequences of holding a legal estate in a joint bank account. The majority suggest that private customers do not go around "thinking constantly of distinctions between legal title and beneficial ownership". That may be true, but neither do ordinary people use language like that in clause 20 to make a personal gift. In any event, the meaning of such a standard clause cannot vary depending on the degree of sophistication or legal understanding of individual customers. It is designed to be part of a set of standard conditions, and as such to have a standard meaning.

87. Further, the particular clause cannot be read in isolation from the consideration of the purpose of the agreement as a whole, and the place of the clause within it, as understood by a reasonable observer. There is no doubt that it was a tri-partite agreement binding all three parties, the bank and each of its clients; and that it constituted a chose in action in which each of the account-holders had an interest. But what was the agreement for? Was it an agreement designed simply to provide a mechanism for the holding and handling of money by the customers, and to settle the legal relationship between them and the bank? Or was it intended to go further and to constitute a substantial gift from one customer to the other? That is a straightforward and common-sense distinction which does not require sophisticated understanding of banking law.

88. The first pointer to the answer is that the clause was part of a standard form prepared by the bank, with no input from the customers. The natural assumption is that it was designed to deal with matters in which the bank was concerned, that is in legal not beneficial interests. As Rand J observed in *Niles v Lake*, it is difficult to see any reason for the bank to use its standard terms to dictate to its customers how to dispose of the beneficial interests in funds held in its accounts. From the customers' point of view the primary purpose of a bank account is as a mechanism to hold and handle money. As I have said, it is not the sort of instrument one would expect to be used to make a very generous gift (in this case a half share in a fund of some $190,000) to a personal friend.

89. In any event, any suggestion that this was the purpose of the arrangement was negated in my view by the specific indication of the purpose of the document - not to make a substantial gift but for a more mundane purpose - "to pay utilities". In that respect it is a stronger case than *Niles v Lake* where the banking agreement contained

no such indication. In general such handwritten additions to a standard form of contract should bear added weight, "inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning" (*Chitty on Contracts* para 13-072).

Conclusion

90. For these reasons in my view, in respectful disagreement with the majority, the appeal should be allowed, and the decision of the Chief Justice restored.