PUBLIC BANK BERHAD

v.

NATIONAL FEEDLOT CORPORATION SDN BHD & ORS AND ANOTHER APPEAL

Federal Court, Putrajaya
Hasnah Mohammed Hashim CJM, Abdul Rahman Sebli CJSS, Abu Bakar Jais FCJ
[Civil Appeal Nos: 02(f)-14-05-2024(W) & 02(f)-15-05-2024(W)]
1 July 2025

Banking: *Banker and customer — Alleged breach of statutory, fiduciary and contractual duties — Disclosure of respondents' confidential banking information by bank's employees without bank's authority — Whether allowing bank to avoid liability by shifting blame on its employees would defeat object behind s 97(1) Banking and Financial Institutions Act 1989 — Whether common law principles propounded in Tournier v. National Provincial And Union Bank Of England and Philipp v. Barclays Bank UK Plc not relevant in determining whether bank liable for breaching duty of secrecy to respondents*

The respondents in Appeal No: 02(f)-14-05-2024(W) ('Appeal 14'), which were also the appellants in Appeal No: 02(f)-15-05-2024(W) ('Appeal 15'), had sued the appellant in Appeal 14, Public Bank Berhad ('Public Bank') for breach of statutory duty under the Banking and Financial Institutions Act 1989 ('BAFIA'), as well as breach of fiduciary and contractual duties, arising from the disclosure of their confidential banking information. The claim against Public Bank arose following a press conference by one Rafizi Ramli ('Rafizi') on 7 March 2012, during which Rafizi made statements concerning the respondents' confidential banking information and disclosed the same to the media. Public Bank's defence was that the information was disclosed by two of its employees who had, without its authority, accessed and printed the said information; and therefore it could not be held liable or responsible for such unauthorised and unforeseen acts, or for the breach of its duty of secrecy and confidentiality to the respondents. The High Court dismissed the respondents' claim on the basis that liability had not been proven. The Court of Appeal allowed the respondents' appeal in part and held that Public Bank had breached its implied contractual duty of confidentiality to the 1st, 2nd, 3rd and 5th respondents. The Court of Appeal's decision was grounded on the common law principle in *Tournier v. National Provincial And Union Bank Of England* (*'Tournier')* that a bank's duty of secrecy and confidentiality arose out of contract and was not absolute but qualified. Hence, the appeal by Public Bank in Appeal 14 on liability, and the appeal by the respondents in Appeal 15 on the award of nominal damages of RM10,000.00 by the Court of Appeal despite liability having been established. Two questions of law were posed by Public Bank for determination, namely:

(i) whether a bank's implied contractual duty of confidentiality was a qualified duty (as opposed to absolute) in that there were defences or exceptions to such duty; and (ii) where a bank's implied contractual duty of confidentiality was qualified, whether a bank's liability under a banker-customer contract of service was a fault-based liability (as opposed to strict liability). Public Bank admitted that none of the exceptions laid down in *Tournier* applied in its favour but contended that no liability ought to be attached to it if the breach of secrecy and confidentiality was not committed by the bank itself, but by others within the establishment without its knowledge. The respondents submitted that in the Malaysian context, the scope of a banker's duty of secrecy was, in addition to the general principles enunciated in *Tournier*, provided in BAFIA, which replaced the Banking Act 1973. It was argued that Public Bank, being a 'corporation' and therefore a 'person' within the meaning of s 2 of BAFIA, could be held liable under s 97(1) BAFIA for breach of banking secrecy. Public Bank, however, argued that the said provision was directed at the directors or officers of the bank, and not at the bank as a financial institution.

Held (dismissing the appeal):

(1) Allowing the bank to avoid liability by shifting blame onto its employees would defeat the object behind s 97(1) BAFIA and render the said provision redundant and bereft of all meaning. The argument that the bank's duty of secrecy under s 97(1) BAFIA was not directed at the bank but at its directors or officers, was misconceived. (para 24)

(2) Based on the terms of ss 97(2), 98(1) and 99(1) BAFIA, the exceptions to the bank's duty of secrecy were more precise and elaborate than the four broad exceptions set out in *Tournier*, and none of the aforesaid provisions applied in favour of Public Bank. Hence, Public Bank's breach of s 97(1) BAFIA was without justification. (para 27)

(3) Given that there was written law in Malaysia after the coming into force of the Civil Law Act 1956 ('CLA') on 7 April 1956 on the bank's duty of secrecy in the form of s 97(1) BAFIA, *Tournier*, being the common law of England which was decided in 1924, had no relevance in determining whether Public Bank was liable for breaching its duty of secrecy to the respondents. On this ground alone, Public Bank's appeal based on the *Tournier* principle failed. It was BAFIA that governed the bank's duty of secrecy and not the common law principles propounded in *Tournier* and *Philipp v. Barclays Bank UK Plc*. (paras 35 & 40)

(4) In the circumstances and given that the two leave questions were predicated on the common law of England, which had no application in light of s 3(1) CLA, it was deemed unnecessary to answer the questions posed. (para 41)

Case(s) referred to:

CIMB Islamic Bank Berhad v. Mohd Saufi Taib & Ors [2015] MLRAU 192 (refd)

Greaves & Co (Contractors) Ltd v. Baynham Meikle And Partners [1975] 3 All ER 99 (refd)

Hilton v. Westminster Bank Limited [1926] 135 LT 358 (refd)

Selangor United Rubber Estates Ltd v. Cradock (A Bankrupt) And Others (No 3) [1968] 2 All ER 1073 (refd)

Liverpool City Council v. Irwin [1977] AC 239 (refd)

National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Berhad [2023] 6 MLRA 720 (refd)

Ng Lee Kiau & Anor v. Malayan Banking Berhad [2011] 6 MLRH 665 (refd)

Philipp v. Barclays Bank UK Plc [2023] 4 All ER 847 (not folld)

Platform Funding Ltd v. Bank Of Scotland Plc (Formerly Halifax Plc) [2009] QB 426 (refd)

Robertson v. Canadian Imperial Bank Of Commerce [1995] 1 All ER 824 (refd)

Stanford Asset Holdings Ltd And Another (Appellants) v. AfrAsia Bank Ltd (Respondent) [2023] UKPC 35 (refd)

Tan Eng Seong v. Malayan Banking Berhad [1997] 1 MLRH 293 (refd)

Tey Por Yee & Anor v. Protasco Bhd & Other Appeals [2020] MLRAU 69 (refd)

Tournier v. National Provincial And Union Bank Of England [1924] 1 KB 461 (not folld)

Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Haji Abdul Razak [2018] 1 MLRA 419 (refd)

Wong Yeng Mun v. CIMB Bank Bhd [2010] 2 MLRH 68 (refd)

Legislation referred to:

Banking and Financial Institutions Act 1989, ss 2, 97(1), (2), 98(1), 99(1)(d), (g), (h)

Civil Law Act 1956, s 3(1)

Other(s) referred to:

G A Weaver & C R Craige, *The Law Relating to Banker and Customer in Australia*, The Law Book Company Limited, 1975, para 6-5

G H Treitel, *Frustration and Force Majeure*, 3rd edn, p 5

G H Treitel, *The Law of Contract*, 8th edn, 1991, p 739

J Milnes Holden, *The Law and Practice of Banking Vol 2: Securities for Bankers' Advances*, 7th edn, para 2-100

JW Carter, *Carter's Breach of Contract*, LexisNexis Butterworth, 2011, Australia, para 2-65

Mark Russell, *Introduction to New Zealand Banking Law*, 2nd edn, The Law Book Company Limited 1991, p 58

S N Gupta, *The Banking Law in Theory and Practice*, 3rd edn, Vol 1, Universal Law Publishing Co Pvt Ltd, p 246

WS Weerasooria, *Banking Law and the Financial System in Australia*, 5th edn, Butterworths, Australia, 1000, para 27.4

Counsel:

For the appellant: Chan Kok Keong (Tiang Min Min with him); M/s Shook Lin & Bok

For the respondents: Muhammad Shafee Abdullah (Sarah Abishegam, Noor Farhah Mustaffa, Tharrence Anthony (PDK) & Suhail Shamsuddin (PDK) with him); M/s Shafee & Co

[For the Court of Appeal judgment, please refer to *National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Berhad* [2023] 6 MLRA 720]

JUDGMENT

Abdul Rahman Sebli CJSS:

[1] There were two appeals before us. Appeal No 02(f)-14-05/2024(W) was an appeal by the appellant ("Public Bank") against the decision of the Court of Appeal allowing the respondents' appeal on liability whereas Appeal No 02(f)-15-05/2024(W) was an appeal by the respondents against the Court of Appeal's decision awarding them only nominal damages of RM10,000.00 despite having proved liability against Public Bank. They had claimed RM60 million for general damages, RM250 million for aggravated damages and RM250 million for exemplary damages, totalling RM560 million.

[2] In reversing the decision of the High Court on liability, the Court of Appeal found Public Bank to be in breach of an implied term of contract imposing a duty of confidentiality not to disclose the respondents' banking information. As for the reason why the Court of Appeal awarded only nominal damages of RM10,000.00 to the respondents despite having found liability to have been proved against Public Bank, it was because the respondents were found to have failed to prove their loss. The learned judge of the High Court who tried the case at the first instance even suggested a token sum of RM15.00 (Fifteen Ringgit) as nominal damages had she allowed the respondents' claim, which she did not.

[3] Having heard submissions on 26 February 2025, 16 April 2025 and 26 May 2025, we dismissed Public Bank's appeal on liability and adjourned the case to another date to hear arguments on damages. These are the grounds of our decision on liability.

[4] The respondents' claim against the bank arose from a press conference held by one Rafizi bin Ramli ("Rafizi") on 7 March 2012. At the press conference, Rafizi made statements concerning the respondents' confidential banking information and circulated them in the form of Annexures A to E in his media statement.

[5] The confidential banking document that Rafizi disclosed to the media was Annexure E, which referred to the 5th respondent's loan application with Public Bank for a loan facility to purchase 8 units of condominium at KL Eco City. He highlighted and explained the details of Annexure E, which is a

management assessment document to enable Public Bank to assess and decide if the 5th respondent and his son were sufficiently eligible to obtain the loan facility from Public Bank.

[6] The 5th respondent's loan application was approved on 23 May 2011. However, after 6 months had lapsed, the loan offer was withdrawn by Public Bank on 4 January 2012, and the loan was terminated. Therefore, there was no loan taken by the 5th respondent, contrary to the allegation made by Rafizi in his press conference on 7 March 2012.

[7] In finding Public Bank liable for breach of banking secrecy and confidentiality, the Court of Appeal made the following observations at paras [38] and [39] of its grounds of judgment:

> "[38] Insofar as the contractual duty is concerned, there is no dispute that there is an implied term in the contractual relationship between the Plaintiffs and the Bank that information relating to the Plaintiffs' banking details (CP-BS) will remain confidential and will not be disclosed to unauthorised persons. This is trite and is plain commercial and common sense. This is because confidentiality is the cornerstone of all banking business. The confidentiality is necessary to give confidence to customers in entrusting their banking business to financial institutions.
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> [39] Thus, pursuant to BAFIA (FSA) the Bank as a financial institution owed a duty of secrecy over the customers' banking information. Indeed, if such a duty into a banking contract is implied, then that would be repugnant to the statutory protection of customers' banking information. Thus, the need to imply such a term is obvious, imperative and necessary."

[8] The respondents' case against Public Bank was that in disclosing their confidential banking information, the bank had breached its: (a) statutory duty under the Banking and Financial Institutions Act 1989 ("BAFIA"); (b) fiduciary duty; and (c) contractual duty.

[9] In its defence Public Bank pleaded, amongst others, that two of its staff, namely one Cheam Chen Hooi and one Johari bin Mohamad working hands in glove had, without its authority, accessed and printed the respondents' confidential information from a restricted area of its computer system and for that reason it could not in law be held liable or responsible for the unauthorised and unforeseen acts of its staff.

[10] It was submitted that the two "rogue" employees of the bank had gone beyond the scope of their employment and were on a frolic of their own. In other words, it was the bank staff and not the bank itself that should be held responsible for breaching the bank's duty of secrecy and confidentiality to the respondents. Apparently, the basis for this legal proposition is that the domestic inquiry that was conducted by Public Bank against the two bank staff had found both of them guilty.

[11] On 29 July 2019, after a trial that lasted 5 years and was heard before two judges (the first having retired before the trial was concluded), the learned judge who took over the conduct of the trial dismissed the respondents' claim with costs of RM350,000.00 on the ground that the respondents failed to prove liability.

[12] On 30 August 2023, the Court of Appeal allowed the respondents' appeal in part by holding that Public Bank had breached its implied contractual duty of confidentiality owed to the 1st, 2nd, 3rd and 5th respondents. In its grounds of judgment, the Court of Appeal saw the case as "one which turns on the question whether the Bank had breached its implied contractual duty to maintain confidentiality over the Plaintiffs' banking information".

[13] It was no doubt a decision that was grounded on the common law principle enunciated by the English Court of Appeal in *Tournier v. National Provincial And Union Bank Of England* [1924] 1 KB 461 ("*Tournier*"), where it was *inter alia* held by Bankes LJ as follows:

> "At the present day, I think it may be asserted with confidence that **the duty is a legal one arising out of contract**, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits."
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> (Emphasis Added)

[14] The *ratio decidendi* of the case is that the bank's duty of secrecy and confidentiality arises out of contract and is not absolute but qualified. It laid down and defined the scope of a banker's duty of secrecy and confidentiality to its customers.

[15] Arising from the decision of the Court of Appeal, two questions of law were posed by Public Bank for our determination, and they were as follows:

Question 1

> "Whether a bank's implied contractual duty of confidentiality is a qualified duty (as opposed to absolute duty) in that there are defences or exceptions to such a duty."

Question 2

> "Where a bank's implied contractual duty of confidentiality is a qualified duty, whether a bank's liability thereunder, in a banker-customer contract of service, is a fault-based liability (as opposed to a strict liability)."

[16] Question 1 seeks to persuade this court to adopt *Tournier*, the case that formulated the scope of a banker's implied duty of secrecy and confidentiality and laid down four exceptions to such duty. Question 2 is a follow-up and corollary to Question 1.

[17] The four exceptions to the bank's duty of secrecy and confidentiality that *Tournier* laid down are as follows:

(1) where disclosure is under compulsion of law;

(2) where there is a duty to the public to disclose;

(3) where the interest of the bank requires disclosure; and

(4) where the disclosure is made by express or implied consent of the customer.

[18] *Tournier* was a landmark decision which has been accepted as the correct position of the law on banking secrecy and confidentiality in the following Commonwealth jurisdictions: United Kingdom — See "*The Law and Practice of Banking Vol 2: Securities for Bankers' Advances*", Seventh Edition, J. Milnes Holden, ELBS at para 2-100; the Privy Council case of *Robertson v. Canadian Imperial Bank Of Commerce* [1995] 1 All ER 824, 829; the Privy Council case of *Stanford Asset Holdings Ltd And Another (Appellants) v. AfrAsia Bank Ltd (Respondent)* [2023] UKPC 35; the Australian position as can be seen in "*The Law Relating to Banker and Customer in Australia*" by G.A. Weaver and C.R. Craigie, The Law Book Company Limited, 1975 at para 6-5; "*Banking Law and the Financial System in Australia*", 5th edn, WS Weerasooria, Butterworths, Australia, 1000 at para 27.4; In New Zealand see "*Introduction to New Zealand Banking Law*" by Mark Russell, Second Edition, The Law Book Company Limited 1991 at p 58; In India see "*The Banking Law in Theory and Practice*", Third Edition, S.N. Gupta, Vol 1, Universal Law Publishing Co Pvt. Ltd at p 246.

[19] In Malaysia, the principle has yet to be affirmed and formally adopted by this court. It has however been accepted by the High Court and the Court of Appeal in the following cases: *Tan Eng Seong v. Malayan Banking Berhad* [1997] 1 MLRH 293 (High Court); *Wong Yeng Mun v. CIMB Bank Berhad* [2010] 2 MLRH 68 (High Court); *Ng Lee Kiau & Anor v. Malayan Banking Bhd* [2011] 6 MLRH 665 (High Court); *Tey Por Yee v. Protasco Bhd* [2020] MLRAU 69 (Court of Appeal); and in the present appeal case as reported in *National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd* [2023] 6 MLRA 720 where S Nantha Balan JCA speaking for the Court of Appeal said at para [27]:

> "[27] At p 471, the legal position at common law was clearly established that there is 'no absolute contract' that the customers confidential information will never be disclosed under any circumstances. In this regard, Bankes LJ made the following legal propositions: "I hold, as a matter of law, that there is no such absolute contract as Sir Harold Smith has contended for between a banker and his customer. He has contended that there is an absolute contract that the banker shall not under any circumstances disclose the state of a customer's account to any person. I hold, as a matter of law, that there is no such absolute contract.
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> ...

> At the present day, I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified."

[20] At the hearing before us, learned counsel for Public Bank candidly admitted that none of the exceptions laid down in *Tournier* apply in Public Bank's favour. What he then urged upon us was to open up *Tournier* to a new exception, which is a fault-based exception instead of the duty of secrecy and confidentiality being a strict liability duty. Simply put, the contention was that no liability ought to be attached to the bank if the breach of the bank's duty of secrecy and confidentiality was not committed by the bank but by others within the establishment without its knowledge.

[21] On his part, learned counsel for the respondents submitted that in the Malaysian context, the scope of the banker's duty of secrecy is, in addition to the general principles enunciated in *Tournier*, provided in the BAFIA, which replaced the Banking Act 1973. It was submitted that the appellant had breached the law across all manner of confidentiality, contractual, fiduciary and statutory duties. On the bank's duty of secrecy, we were referred to s 97(1) of BAFIA, which provides as follows:

> "Secrecy.
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> (1) No director or officer of any licensed institution, or of any external bureau established, or any agent appointed, by the licensed institution to undertake any part of its business whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer."

[22] It can thus be seen that in Malaysia, the bank's duty of secrecy is regulated by statute and not an implied contractual duty as in the case of common law under the *Tournier* principle. Learned counsel for Public Bank however, argued that the provision does not apply to the bank. It was submitted that the provision is only directed at the bank's director or officer and not at the bank as a financial institution.

[23] In refuting the argument, learned counsel for the respondents submitted that the word "person" in the second part of the section includes the bank and not just its directors or officers. The argument was that Public Bank, being a "corporation" and therefore a "person" within the meaning of s 2 of BAFIA, can be held liable under s 97(1) of the Act for a breach of banking secrecy.

[24] I agree because it makes no sense that a bank whose duty of secrecy is regulated by statute should be absolved of liability where the breach of that duty is committed by those under its employment, supervision and care. It

may be hard on the bank to be burdened with such responsibility, but to allow it to avoid liability by shifting the blame on its employees is to defeat the object behind s 97(1) of BAFIA rather than to put its object into effect. That will render the provision redundant and bereft of all meaning.

[25] It needs to be appreciated that it is the second part and not the first part of s 97(1) that imposes the duty of secrecy on the bank. What the first part provides is to prohibit a director, officer, external bureau, or agent appointed by the bank from undertaking, at any time, any part of the bank's business. It has nothing to do with the bank's duty of secrecy. Therefore, the argument that the bank's duty of secrecy under s 97(1) is not directed at the bank but at its director or officer is misconceived.

[26] BAFIA will be noted not only to provide for the bank's duty of secrecy. It also provides for exceptions to the duty, and these exceptions are found in ss 97(2), 98(1) and 99(1). While s 98 applies only to the Central Bank, ss 97(2) and 99(1) are meant to absolve licensed financial institutions from liability provided they satisfy the strict criteria therein. The three subsections are reproduced below:

Section 97(2)

> "97.(2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it."

Section 98(1)

> "98.(1) Section 97 shall not apply to the disclosure of any information or document-
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> (a) To the Bank, or to any director, officer or
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> (b) employee of the Bank, or to any person
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> (c) appointed by the Bank under subsection 3(3), or to the Advisory Panel, where the disclosure is for the purpose of the exercise of powers, the performance of functions or the discharge of duties of the Bank, or of the director, officer or employee of the Bank, or of the person appointed under subsection 3(3), or of the Advisory Panel; or (b) to any person rendering professional services to the Bank in relation to any matter of law, accountancy, valuation, or any other matter requiring professional knowledge, where he is authorised in writing by the Bank to obtain the information from the licensed institution for the purpose of his services to the Bank."

Section 99(1)

"99.(1) s 97 shall not apply to the disclosure of any information or document-

(a) Which the customer, or his personal representative, has given permission in writing to disclose;

(b) In a case where the customer is declared bankrupt, or, if the customer is a corporation, the corporation is being or has been wound up, in Malaysia or in any country, territory or place outside Malaysia;

(c) Where the information is required by a party to a *bona fide* commercial transaction, or to a prospective *bona fide* transaction, to which the customer is also a party, to assess the creditworthiness of the customer relating to such transaction, provided that the information required is of a general nature and does not enable the details of the customer's account or affairs to be ascertained;

(d) For the purposes of any criminal proceedings or in respect of any civil proceedings-

(i) Between a licensed institution and its customer or its guarantor relating to the customer's transaction with the institution; or

(ii) Between the licensed institution and two or more parties making adverse claims to money in a customer's account where the licensed institution seeks relief by way of interpleader;

(e) Where the licensed institution has been served a garnishee order attaching moneys in the account of the customer;

(f) To an external bureau established, or to an agent appointed, by the licensed institution with the prior written consent of the Bank;

(g) Where such disclosure is required or authorised under any other provision of this Act;

(h) Where such disclosure is authorised under any Federal law to be made to a police officer investigating into any offence under such law and such disclosure to the police officer being, in any case, limited to the accounts and affairs of the person suspected of the offence; or

(i) Where such disclosure is authorised in writing by the Bank."

[27] By the terms of ss 97(2), 98(1) and 99(1) of BAFIA, it is patently clear that under Malaysian law, the exceptions to the bank's duty of secrecy are more precise and more elaborate than the four broad exceptions provided by *Tournier*. None of these statutory exceptions apply in favour of Public Bank, and none was pleaded in its defence. It must therefore be taken that the breach of s 97(1) by the bank was without justification.

[28] Given the fact that there is written law in force in Malaysia on the bank's duty of secrecy and the exceptions to the duty, we had on the second date of hearing on 16 April 2025 invited parties to address us on the applicability of *Tournier*, an English common law position, in the light of s 3(1) of the Civil Law Act 1956 ("the Civil Law Act") although not addressed by the parties both in their written and oral submissions.

[29] With s 3(1) of the Civil Law Act staring us in the eyes, it would not have been proper for us to close one eye to the statutory provision just because it was not brought to our attention. It is our duty as the apex court to uphold the law. This is especially necessary in view of Public Bank's heavy reliance on *Tournier* (and the cases that followed it) to avoid liability and its proposal to open up a new exception to the four already set out in the case, as encapsulated in leave Question 2.

[30] If indeed *Tournier* has no application in the light of s 97(1) of BAFIA read with s 3(1) of the Civil Law Act, then it will not be open to Public Bank to rely on the four common law exceptions or on any new common law exception outside the scope of ss 97(2) and 99(1) of BAFIA to avoid liability. It is a cardinal principle of legislative interpretation that Parliament does not legislate in vain. It would have inserted in s 99(1) the fault-based exception as suggested by learned counsel for Public Bank if it had such intention, but Parliament in its wisdom omitted to do so.

[31] An example where the *Tournier* principle is incorporated into BAFIA is subparagraph (1)(a), and to some extent subparagraphs (1)(d), (g) and (h) of s 99, which allow for disclosure of confidential information or documents by the bank under those limited circumstances. These are adoptions, albeit in different terms, of exceptions 1, 2 and 4 of the bank's duty of secrecy and confidentiality under the *Tournier* principle.

[32] It was with a view to clear our minds on this issue that half way through the submissions on 16 April 2025, we adjourned the hearing to another date to give ample time and opportunity to both counsel to provide us with written submissions on the interplay between s 97(1) of BAFIA and s 3(1) of the Civil Law Act *vis-à-vis* the common law position as laid down in *Tournier*. They had obligingly done so, for which we are thankful, and the matter was fully argued on the third and last day of hearing on 26 May 2025.

[33] Section 3(1) of the Civil Law Act provides as follows:

> "Application of U.K. common law, rules of equity and certain statutes
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> 3.(1) Save so far as other provisions has been made or may hereafter be made by any written law in force in Malaysia, the Court shall-

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity and statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3) (ii);

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

[34] I had occasion to deal with this provision in *Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Haji Abdul Razak* [2018] 1 MLRA 419 where, in delivering the unanimous decision of the Court of Appeal, I had said at para [16]:

"[16] Common law refers to rules of law developed by judges as opposed to those created by statute. Section 3 of our Interpretation Acts 1948 and 1967 ("the Interpretation Acts") defines "common law" to mean the common law of England. But it must not be assumed that every sphere of the common law of England is applicable in this country. Its applicability is governed by s 3(1) of the Civil Law Act 1956 ("the Civil Law Act") which provides as follows...

[17] What this provision means in its application to Peninsular Malaysia is that the common law of England as administered on 7 April 1956 is only to be applied where there is no written law in force in Malaysia after the coming into force of the Civil Law act on 7 April 1956."

[35] Since there is written law in Malaysia on the bank's duty of secrecy after the coming into force of the Civil Law Act on 7 April 1956, in this case s 97(1) of BAFIA, the common law of England on such duty of the bank as administered on 7 April 1956 has no application. Therefore, being the common law of England on banking secrecy as administered prior to the coming into force of the Civil Law Act, *Tournier* has no relevance in determining whether Public Bank is liable for breaching its duty of secrecy to the respondents. The case was decided in 1924, some 30 years before the cut-off date of 7 April 1956. On this score alone, Public Bank's appeal, based as it was on the *Tournier* principle, must fail.

[36] With regard to the fault-based exception, the argument of learned counsel for Public Bank was that under a banker-customer contract of service, a bank has a "Quincecare duty" to carry out a customer's instructions

with reasonable care and skill. Like *Tournier*, the "Quincecare duty" is also a common law concept that was expounded in *Hilton v. Westminster Bank Limited* [1926] 135 LT 358 and which culminated in the recent Supreme Court case of *Philipp v. Barclays Bank UK Plc* [2023] 4 All ER 847, 849 where it was held at para [34]:

> "[34] As for any contract for the supply of services in the course of a business, there is a term implied by law in a contract between a bank and its customer that the bank must carry out the services with reasonable care and skill.."

[37] The following authorities were also cited in support: *Carter's Breach of Contract*, JW Carter, LexisNexis Butterworth, 2011, Australia at para 2-65; *Liverpool City Council v. Irwin* [1977] A.C. 239 (House of Lords); *Trietel, Law of Contract*, Eighth Edition, 1991, by G.H. Treitel at p 739; *Frustration and Force Majeure*, Third Edition, at p 5; *Greaves & Co (Contractors) Ltd v. Baynham Meikle And Partners* [1975] 3 All ER 99,103; *Platform Funding Ltd v. Bank Of Scotland Plc (Formerly Halifax Plc)* [2009] QB 426; *CIMB Islamic Bank Berhad v. Mohd Saufi Taib & Ors* [2015] MLRAU 192.

[38] *Westminster Bank* was followed in *Selangor United Rubber Estates Ltd v. Cradock (A Bankrupt) And Others (No 3)* [1968] 2 All ER 1073; [1968] 1 WLR 1555. On the strength of these common law authorities, it was submitted that Public Bank is only required to carry out its implied contractual duty of confidentiality with reasonable care and skill. It was submitted that so long as the bank has carried out its implied contractual duty of secrecy and confidentiality with reasonable care and skill, the bank cannot be faulted or held liable for breach of contract if the customer's confidential information/ documents were disclosed by its rogue employee or employees.

[39] Public Bank's dissatisfaction with the decision of the Court of Appeal was in failing to hold that the bank's implied contractual duty of confidentiality is a qualified duty, ie that Public Bank's liability under such qualified duty, in a banker-customer contract of service, is a fault-based liability and not a strict liability. But the judgment of the Court of Appeal does not bear this out. Paragraph [27] of the grounds of judgment reproduced in para [19] above clearly shows that the Court of Appeal proceeded on the basis that the duty is qualified and not strict.

[40] Of pertinence to note is that Public Bank accepted that the two individuals responsible for breaching its duty of secrecy, which led to the press conference by Rafizi, were its employees. With due respect to learned counsel, the distinction that he drew between qualified duty and strict liability is illusory at best, because if the bank's duty of secrecy is a qualified duty, it means that liability is not strict. Strict liability means there is no qualification or exception to the duty. The availability of the four exceptions in *Tournier* itself as defences to a breach of the duty of secrecy and confidentiality renders the argument wholly untenable. In any event, it is BAFIA that governs the bank's duty of secrecy and not the common law principles propounded in *Tournier* and *Barclays Bank*.

[41] It was for all the reasons aforesaid that we found no merit in Public Bank's appeal, hence the decision to dismiss the appeal with costs to the respondents. We saw no necessity to answer the two leave questions posed as they were predicated on the common law of England, which has no application in the light of s 3(1) of the Civil Law Act. My learned sister Hasnah Mohammed Hashim CJM, and my learned brother Abu Bakar Jais FCJ have seen this judgment in draft and have agreed with it.