BANK CONFIDENTIALITY

INTRODUCTION

The terms 'bank confidentiality', 'banker's duty of secrecy' and 'banker's duty of non-disclosure' all refer to the legal obligation of banks not to disclose information on their customers' affairs. Banks hold a tremendous amount of important information on the personal history, financial dealings and assets and liabilities of their customers. The information is properly recorded and stored and is normally easily retrievable. The information is usually provided by the customer himself or can be inferred from transactions he himself undertook or authorised and this gives immense probative value to the information.

The relationship between banker and customer is based on contract[1] and many of the terms are implied into the agreement. The duty of confidentiality was developed through judge-made law by way of implying terms into the contract. In Jamaica the Legislature has intervened and given statutory effect to the common law obligation in the new Banking Act and The Financial Institutions Act of 1992. A common example of the banker's acceptance of the duty of confidentiality is found in the euphemistic notation "refer to drawer" which the banker uses in returning a customer's cheque which cannot be paid. If the cheque were returned to the payee with a note that it could not be paid as there were insufficient funds in the account then the banker would be breaching his duty of secrecy to his customer.

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1. Foley v Hill (1848) 2 H.L. Cas. 28

THE COMMON LAW

The Common Law position is clearly enunciated in the case of Tournier v National Provincial and Union Bank of England[2] which is regarded as the **locus classicus** on the subject in England, various countries of the Commonwealth and even in the United States.

The Facts:

Tournier's bank manager learnt from another bank that Tournier had endorsed a cheque to a bookmaker. The bank manager, in a telephone conversation with Tournier's employers, disclosed this fact and also revealed that Tournier had an overdraft and had defaulted in his payments. As a result of these disclosures Tournier lost his job and he sued for slander and breach of an implied term not to disclose to third parties the state of his account or any transactions relating to it. The Court of Appeal held that the bank owed to its customer a legal, and not merely a moral duty of confidentiality and accordingly the bank could not lawfully disclose to third parties information concerning the customer's affairs. The breach of the duty gives rise to a claim for damages.

The privilege of non-disclosure to which the customer is entitled is based on the same principle which underlies the confidential relationship between doctor and patient and attorney-at-law and client. The Court held however that the duty was not absolute but qualified and it classified the qualifications under four headings:

1) where disclosure is under compulsion by law
2) where there is a duty to the public to disclose
3) where the interests of the bank require disclosure

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2. [1924] 1 K.B. 461

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

1) Compulsion by Law

The duty of secrecy is based on contract and contractual terms are illegal and unenforceable where there is a contrary duty either at common law or under statute. There are many statutes which can be used to compel a bank to disclose information and the list includes the following:

1) The Banking Act; Section 30; paragraph (f) Fourth Schedule;

2) The Financial Institutions Act, Section 30; paragraph (f) Fourth Schedule;

3) The Drug Offences (Forfeiture of Proceeds) Act; Section 38; Section 44; Section 45

4) The Income Tax (Double Taxation Relief) (U.S.A) Order 1958.

5) The Bankruptcy Act; Section 154

6) The Companies Act; Section 246 (liquidation) Sections 160 and 168, Section 369

7) The Evidence Act; Section 37

8) The Income Tax Act; Section 75 (5)

9) The Trade Act; Section 15

Each statute outlines the procedure to be followed in obtaining disclosure and the safeguards for the interest of the customer, if any, which Parliament has deemed appropriate in each case. Some of the statutes empower an authorised person seeking the disclosure to summon the banker to give evidence or produce documents. Other statutes make provision for applications to be made to the Court for an order to compel disclosure by the bank.

The Evidence Act and the Drug Offences (Forfeiture of Proceeds) Act merit brief discussion.

The Evidence Act

The provisions in the Evidence Act are the most widely used to compel disclosure and are a favourite with the police. Section 37 of the statute falls under Part II of the Act which deals with Bankers' Book Evidence. This Part of the Evidence Act deals with two separate matters. Firstly it provides a convenient procedure for the proof of the contents of bankers' books which include all books used in the ordinary business of the bank. Secondly, it confers a jurisdiction on the Court to make inspection orders to compel a bank to disclose confidential information on its customers.

The Drug Offences (Forfeiture of Proceeds) Act

This Act which was passed in 1994 is the most recent statutory provision mandating disclosure of confidential information by banks and other financial institutions. Section 38 authorises the police to apply to a judge in Chambers for an order for the production or inspection of documents for the purposes of identifying the property of a person convicted of a prescribed offence. The section applies to any person in possession of the information and would clearly include a bank. Section 44 applies only to financial institutions and creates an instrument called a Monitoring Order which can be issued by a judge to compel the institution to disclose information about transactions conducted through an account by a named person. Section 45 (1) expressly prohibits the financial institution from disclosing the existence or operation of

the Monitoring Order, except to an employee, to ensure that the law is complied with or to an attorney at law for obtaining legal advice. Section 48 is an interesting provision which authorises a bank on its own volition to disclose information to the police or to the Director of Public Prosecutions if it thinks the information is relevant in an investigation or of assistance in the enforcement of the Act. It therefore imposes a fearful moral obligation on banks.

2) Public Interest

An example of the exception to the duty of secrecy under this heading is where a higher duty than the private duty is involved, as where danger to the state or public duty may supersede the duty of the agent to his principal. The textbook writers give the example of trading with the enemy during war time.

3) Disclosure in the Bank's Interest

The usual example under this heading is the information disclosed in a statement of claim by a bank seeking to recover a debt.

4) Authorised Disclosure

The customer may consent to disclosure either expressly or impliedly. The customer's consent to disclosure may be implied where, for example, he gives his banker's name in response to a request for a banker's reference.

THE STATUTE LAW

The Banking Act and the Financial Institutions Act were enacted into law on December 31, 1992 and the statutes regulate the licensing and operations of commercial banks and merchant banks respectively.

The two Acts contain similar provisions and Section 45 of the Banking Act and Section 44 of the Financial Institutions Act are entitled "Secrecy of Bank Officials". The sections are identical and have to be read in conjunction with the Fourth Schedule of each Act. For the purposes of this paper reference to the statute law will be to the Banking Act. The provisions read as follows:

"Section 45

(1) Subject to subsection (2), no official of any bank and no person who, by reason of his capacity or office has by any means access to the records of the bank, or any registers, correspondence or material with regard to the account of any customer of that bank shall, while his employment in or, as the case may be, his professional relationship with the bank continues or after the termination thereof, give, divulge or reveal any information regarding the money or other relevant particulars of the account of that customer.

(2) Subsection (1) shall not apply in any of the circumstances specified in the Fourth Schedule.

(3) Any person who contravenes subsection (1) shall be guilty of an offence."

"The Fourth Schedule

Circumstances in which information on customer's accounts may be disclosed:

Section 45 (1) shall not apply in any case where -

(a) the information is disclosed by an officer of the bank to another officer of the bank;

(b) the customer or his personal representative gives written permission for disclosure of the information;

(c) the customer is an undischarged bankrupt or, if the customer is a company, it is being wound up;

(d) the information is disclosed in connection with civil proceedings -

(i) arising between the bank and the customer relating to the customer's banking transactions; or

(ii) brought by the bank by way of interpleader in connection with competing claims by two or more parties to money in the customer's account;

(e) the information is disclosed to an authorized officer;

(f) the disclosure is made on the written direction of the Minister to the police or to a public officer who is duly authorized under the provision of any law for the time being, in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence;

(g) the bank has been served with a court order attaching money in the account of the customer;

(h) the information disclosed is required by the head office of a foreign bank and pertains only to credit granted by the Jamaican operations of that bank;

(i) the Minister in writing directs such disclosure to a foreign government or agency of such government where there exists between Jamaica and such foreign government an agreement for the mutual exchange of information of such kind and the Minister considers it in the public interest that such disclosure be made."

The prohibition against disclosure applies to employees and directors of the bank, and to professionals such as attorneys-at-law or accountants who may be retained by the bank. It also covers other officials, primarily Bank of Jamaica employees who may also have access to the records of the bank.

In enacting Section 45 Parliament has made it a criminal offence to divulge information on the client's account. The Third Schedule to the Act provides for a fine of $200,000 and/or imprisonment for

a term not exceeding two years for making unauthorized disclosures. The provision is not therefore lacking in teeth.

The passage of legislation to regulate bank disclosure is not unique to Jamaica. Some legislative enactments have been made in England and in certain offshore financial centres in the Caribbean. The Cayman Islands provide an example. It has been said that "the secret of the success of Cayman is secrecy itself". Confidentiality is the hallmark of financial dealings in the Islands and bank secrecy is assured. The Cayman Islands Legislature enacted the Confidential Relationship Law 1976 to fortify the common law in Tournier's Case. The Act makes it an offence to divulge confidential information but allows certain exceptions as far as criminal investigations are concerned.[3]

It is appropriate to indicate here that a Court will not ordinarily make an order affecting documents held by a foreign branch of a local bank and relating to a person who is not a national of the country of the Court's jurisdiction. This is so especially in a case where the customer is not a party to the proceedings and where disclosure abroad would be unlawful.[4]

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3. See Grace A. Smith, Bank Secrecy in the Cayman Islands, 10 W. Indian LJ 114 (1986) and Patrick O'Hagan, Secrecy and Criminal Investigation in the Cayman Islands, New Law Journal Volume 142, 1346, October 2, 1992.

4. R.V. Grossman (1981) 73 Cr. App. R. 302

JUDICIAL INTERPRETATION OF THE FOURTH SCHEDULE

THE MEGILL AND MAYNE CASES

The Banking Act provisions on bank confidentiality were seriously challenged in the courts in a consolidated action which was heard by the Court of Appeal in February 1994 in the cases of Troy Megill v the Attorney General and Trevor Lawrence and Lloyd Chito and Gregory Mayne v The Attorney General and Douglas Folkes.[5]

The Facts

Both cases had their genesis in the so-called Bank of Jamaica Foreign Exchange scandal. Megill and Mayne were Bank of Jamaica foreign exchange sub-agents and they had accounts at Eagle Commercial Bank (Eagle) and Mutual Security Bank (Mutual) respectively. Both sub-agents had sold foreign currency cheques to the BOJ and had then subsequently put stop orders on the cheques thereby effectively preventing the clearance and payment of the instruments through the international banking system.

The Minister of Finance issued separate written Directives to the two banks under paragraph (f) of the Fourth Schedule requiring disclosure of information in respect of certain accounts and transactions of Megill and Mayne. In the case of Mutual the disclosure was made to the police. Eagle failed to make any disclosure although it did not question the Minister's authority to order the disclosure. Both Megill and Mayne retained the same Counsel to represent them and they sought similar declarations from the court. The decision of the Court of Appeal was delivered by

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5. SCCA Nos. 47 & 48 of 1993

Downer JA with Wright JA and Wolfe JA expressing their full agreement with his judgment. The Court held as follows:-

1) Paragraph (f) of the Fourth Schedule is an enabling provision under which the Minister of Finance can compel disclosure of confidential information. The Minister's direction was mandatory and if there was a failure to comply the Attorney General could have sought an expedited hearing to secure a declaration and injunction to compel the officers of the bank to obey the law. The Ministerial direction was a source of law.

2) Disclosure pursuant to the Ministerial direction issued under paragraph (f) was not unconstitutional as being in breach of Section 22 of the Jamaican Constitution as it was a legal power reasonably required for public order as contemplated by Section 22(2). (Section 22 of the Constitution provides that a person shall not be hindered in the enjoyment of his freedom of expression and a statement of Lord Diplock in Hinds v The Queen suggested that it was concerned with protection from disclosure of matters of purely personal concern.)[6]

3) Banks which are served with ministerial directions should not disclose this fact to their customers nor should the bank subsequently inform the customer that information on his affairs had been disclosed to the police.

The last holding of the Court is deserving of further discussion.

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6. [1976] 1 All E.R. 353 at 369

Disclosure by banks of Ministerial Direction

The Banking Act is silent as to whether a bank should advise its customers of disclosures made or to be made in respect of an account. Downer JA was critical of Mutual for advising its customer that information had been disclosed to the police. He was equally critical of Eagle (which had not disclosed the information to the police) for having advised its customer that it had received the directive from the Minister. The judge referred to "The unusual manner in which the vital details of the Minister's direction was revealed to the appellants who are suspects..."[7] and opined that "Such information could be used to the appellant's advantage at a delicate stage of an investigation of a conspiracy to defraud. It could create the impression that the Bank was ill-advisedly warning conspirators of the investigations".[8]

Downer JA referred to the case of Inland Revenue Commissioner v Rossminster Limited[9] as illustrating that the usual course "is that the challenge is subsequent to the search and if the search and seizure are unlawful then redress in the form of compensation, is available".[10]

Downer JA found support for this stance in the case of Barclays Bank plc v Taylor[11] and quoted with approval the following extracts from the case:-

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7. SCCA Nos. 47 & 48 of 1993, at 5

8. Ibid ., 6 & 7

9. [1980] A.C. 953

10. SCCA Nos. 47 & 48 of 1993, at 8

11. [1989] 3 All E.R. 56

"There is a public interest in assisting the police in the investigation of crime and I can think of no basis for an implied obligation to act in a way which, in some circumstances would without doubt hinder such inquiries".

"...it is often desirable that the people whose affairs are about to be investigated should be kept in ignorance of the fact".[12]

RELATIONSHIP BETWEEN THE COMMON LAW AND THE STATUTORY PROVISIONS

The judgement in the Megill and Mayne cases did not address the issue of whether the Banking Act had codified, supplemented or abrogated the common law. It was not necessary to do so as the Minister's power to compel disclosure under paragraph (f) of the Fourth Schedule was a new statutory creation unknown to the common law.

The sole reference to the relationships between the common law and the new legislation was in the Court of Appeal where Downer JA said (obiter):-

"Section 45 (1) and the exceptions in the Fourth Schedule of the Banking Act enact and extend the common law as adumbrated in Tournier v National Provincial and Union Bank of England".[13]

The question therefore remains as to whether the common law has been enacted and extended or abrogated by the statute.

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12. Ibid ., 569

13. SCCA No. 47 & 48 of 1993, 12

As a background to the discussion of this issue it is useful to recall two principles of statutory interpretation. Firstly, it is a fundamental principle that statutes should not be construed so as to make any alteration to the common law except in so far as the legislation is clearly and unambiguously intended to do so. Secondly, although a later statute may impliedly repeal an earlier one, if both can reasonably be construed in such a way that effect can be given to both then this should be done.[14]

In determining the relationship between the two sources of the law on bank confidentiality it is therefore necessary to examine Section 45 in detail. The section prohibits disclosure of information regarding **"the money or other relevant particulars of the account"** of a customer. What is the meaning of this phrase? Is it to be interpreted restrictively to relate only to the amount of money in the account, the rate of interest which is charged or earned and the names of the operators of the account? Or is **'relevant particulars of the account'** intended to be interpreted widely to refer to all the information which a bank may possess in respect of the account?

The bank would hardly record and store the information unless it were in some way a relevant particular of the account. The point is important because a restrictive interpretation of the phrase would admit to the continued relevance and operation of the common law. The common law would continue to govern disclosure of information which did not concern the money or other relevant particulars of the account.

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14. See Maxwell on The Interpretation of Statutes (12th ed) 116 & 191

A related issue for discussion is whether **"relevant particulars of the account"** only relate to information obtained from the account itself and not from sources external to the account. Suppose, as in Tournier's case, a bank manager was advised by a third party that his customer was gambling or was insolvent. Would that information be a relevant particular of the account the disclosure of which would breach Section 45 in addition to breaching the rule of non-disclosure in Tournier's case? It is not easy to come to firm conclusions on these matters and there have been little academic discussion or judicial pronouncements on the issue.

It can be argued however that the answers to these questions may be irrelevant as far as the practical application of the law is concerned. The point is that even if the common law rules continue to subsist, their application will be so restricted as to be of no practical use. It is difficult to think of actual circumstances where disclosure would be required that did not concern the money or other relevant particulars of the account of the customer however that term is interpreted. Once the information concerns those matters it would take the issue outside the common law and within the ambit of the statutory provisions.

It is submitted that the statute law has created uncertainties and impossible situations in the law on bank confidentiality. The exceptions tabulated in the Fourth Schedule are too restrictive and do not make exceptions for those disclosures which may be mandated by other statutes. The result is that disclosure under those other statutes would be in breach of Section 45 which prohibits all

disclosures which do not fall within the exceptions in the Fourth Schedule.

A practical example will illustrate the point. If a bank has been defrauded by a customer or employee it must disclose information on the money or other relevant particulars of the account of the customer to facilitate investigation and prosecution by the police. Under the common law the necessary disclosure to the police would fall under the head which allows disclosure in the bank's interest. But because the disclosure would concern the money or other relevant particulars of the account the matter would fall to be determined by reference to Section 45 and the common law would therefore have no application.

Disclosure could only then be made under the statute if it fell within one of the specified circumstances in the Fourth Schedule. And, unfortunately, none of the nine exceptions in the Fourth Schedule allows the bank to disclose information to allow for police investigation in the example cited. In fact the police themselves would be unable to compel disclosure under the customary powers in Section 37 of the Evidence Act as the Fourth Schedule has no exception under which such disclosure could fit. The only practical way out would be for the bank to request the Minister to direct disclosure under paragraph (f) of the Fourth Schedule and this could hardly have been the intention of the Legislature.

There are some things which are certain. The legislation has definitely enacted some aspects of the common law rule of non-disclosure and there are obvious areas of overlap. For example the common law provision allowing for disclosure in the bank's interest

is reproduced in part in paragraph (d) of the Fourth Schedule which authorises disclosure in civil proceedings between the bank and customer. The legislation has also extended the list of exceptions to the duty to include disclosures on a ministerial direction, in bankruptcy or liquidation and directly to a foreign government.

It is to be noted however that the four common law exceptions are of broader application than the nine statutory exceptions. The clearest indication of this is the common law exception based on compulsion of law. This provision could accommodate all cases arising from court orders or statute. In contrast the legislation contains no general or omnibus exception for disclosure which is mandated by statute law. Disclosures under The Banking Act, The Financial Institutions Act, The Bankruptcy Act and the section in the Companies Act mandating disclosure in liquidations can all be accommodated in the Fourth Schedule. However none of the exceptions there justify disclosures pursuant to statutory powers in The Income Tax Act, the Trade Act or, as already indicated, the Evidence Act.

A bank would be placed in an impossible situation if served with a court order mandating disclosure in accordance with one of these statutes. To disclose would breach Section 45 and not to disclose would mean disobeying a court order. The bank would then have to seek directions from the Court which might be forced to hold either that the section in the enabling statute was impliedly repealed by Section 45 of the Banking Act or otherwise that the common law exception still survives. The simplest answer to the matter however would be to have Parliament add another paragraph to the

Fourth Schedule providing an omnibus exception for disclosures mandated by other statutes.

The discussion above would not apply to The Drug Offences (Forfeiture of Proceeds) Act as this statute was passed subsequent to the enactment of Section 45 of the Banking Act. The provisions of that statute ought therefore to apply in the event of any conflict with Section 45.

DISCLOSURE TO CREDIT BUREAUX AND COMPANIES RELATED TO BANK

For completeness it is worthwhile mentioning that there are certain situations where it appears that only the written consent of customers can justify disclosure. One such case concerns credit information systems which provide comprehensive data on thousands of persons. These electronic data bases are normally established by independent entrepreneurs who sell the collected information to interested persons or subscribers to credit journals. It appears that banks cannot legally contribute to such systems unless they have received written permission from their individual customers. It could not be successfully argued that such disclosure was in the bank's interest and release of the information could not be justified under any of the other common law or statutory exceptions.

Another situation where it appears that only consent can justify disclosure concerns the release of information by a bank to its holding company or to a group of companies of which it is a member. Such exchange is desirable in the building of centralised group-client data bases.

The provision of such information is also indispensable when a bank is seeking to obtain a statutory guarantee under Section 13 (5) of the Banking Act from a parent company or some other guarantor in order to lend funds to a customer beyond the normal limits established by the Act. A guarantor can hardly give the guarantee required by the statute without being provided with credit information on the potential borrower and the purpose of the loan.

None of the exceptions in the Fourth Schedule authorises such disclosure and it has been judicially decided that the common law exceptions do not justify such disclosure by a bank to another company even if that company is its holding or related company.[15]

CONCLUSION

Banks are committed to protecting the confidentiality of their customers' affairs. All employees are required to sign Declarations of Secrecy on being employed to banks and routine training emphasises the importance of the duty of secrecy. Unless you are well known to the bank your request by telephone for the details on your account will normally not be entertained. The banks routinely resist requests for information from creditors of customers and persons not authorised by law. They refuse to provide information to authorised persons who are clearly on fishing expeditions or who want general information, for example, a list of the names of all depositors. However, the banks will definitely disclose information once this is mandated by law.

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15. Bank of Tokyo v Karoon, [1986] 3 All E.R. 468

Persons obtaining court orders for bank disclosure should bear in mind that some searches for information, especially those that relate to cheques or debit and credit vouchers, can take some time and precise details on the customer, branch involved, account numbers and dates of the transactions are required.

Finally, it is submitted that the existing law on bank disclosure would be in a more certain state if The Banking Act had simply codified the four common law exceptions in Tournier's case.

Lenworth A. Burke
Attorney-at-Law
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