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Subject Area - Law Confidentiality Customer Banker

Banker Customer Relationship

In the light of a “massive erosion of the principle of confidentiality”. In the Banker/ Customer Relationship Review Committee on Banking Services Law (1989) recommended that “the government should not further extend the statutory exceptions to the duty of confidentiality, without taking full account of the consequences for the banker/ customer relationship” Critically discuss how the principles of confidentiality has developed the potential aspect on banker/customer relationship.

Introduction

The banking service plays a major role in within modern society. It is estimated that over 90% of all adults in the UK hold a bank or building society account. Therefore the proper deliver of services by banks is of significance to the majority of UK consumers.

The issue of confidentiality is an essential feature of the service.

In 1989, the Treasury and the Bank of England set up the first independent review on banking services law and practice within the UK. That report is known as the ‘Jack Report’. The objectives of the report were to achieve four main objectives:

- i) achieve fairness and transparency of dealings
- ii) maintain confidence
- iii) promote efficiency
- iv) preserve the bankers’ duty of confidentiality.

Amongst its 83 recommendations, the Report recommended that the government should not further extend the statutory exceptions to the duty of confidentiality, without taking full account of the consequences for the bank/customer relationship.

This paper seeks to analyze how the principles of confidentiality have developed since 1989 in relation to the banker and consumer.

History

The obligations of confidentiality in relation to banking law within the UK stem from the common law. The leading case in this area was *Tournier v National Provincial and Union Bank of England*. The bank had released information

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related to the plaintiff's debt to the bank to his employers, and this subsequently led to his dismissal. The Court of Appeal confirmed that it is an implied term of the banker/customer contract that the banker has a duty of secrecy. In the circumstances of the case, it was found that the bank had breached its duty, and the court found for the plaintiff.

Banks LJ stated that confidentiality may be breached:

- i) Where disclosure is made under compulsion of law;
- ii) Where there is a duty to the public to disclose
- iii) Where the interests of the bank requires disclosure
- iv) Where the disclosure is made by the express or implied consent of the customer.

The decision was more recently affirmed by the Court of Appeal in 1989 in *Lipkin Gorman v Karpnale*.

Therefore, the primary rule in UK banking law is that all information relating to the state of a customers account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account is confidential, subject to the four Tournier exceptions.

Statutory Law

The first exception in Tournier permits the bank to disclose confidential information under compulsion of law. This may be either at common law or statute.

The Committee took the view that too many inroads had been made by legislation into banking confidentiality. At the time of the Jack Report, the following legislative exceptions existed:-

Banking Acts

The Banking Act 1979 was the first formal legal framework to banking regulation within the UK. Part V of the Banking Act 1987 sets out restrictions on the disclosure of information without consent. It does not extend to any information within the public domain. Exceptions are set out at Sections 83 and 84. These permit, inter alia, restricted information may be released to an auditor if that information would assist the FSA in discharging its functions.

Section 7 - The Bankers Books and Evidence Act 1879

This permits any party to legal proceedings to apply to the court for an order granting him permission to inspect and take copies of any entries in a bankers books, for the purposes of such proceedings. This power is discretionary, and will only be exercised with great caution. An order is only usually made against the account of the party who is involved in the litigation or, if it is in the name of some other person, the account which is really the account of the party. It will only be made against non parties in very exceptional circumstances. Further, there is an implied

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undertaking on discovery only to use the documents for the purposes of the action in which discovery is given.

The Taxes Management Act 1970 S1 & 2

Various provisions under this act permit the Commissioners to decide whether or not in their opinion tax has been unlawfully evaded.

Therefore, the ambit of this exception is wide. However, it is only the office holder, such as the Administrator or liquidator that may make an application to the court for an order under this provision.

Police and Criminal Evidence Act 1984

The police are entitled to obtain access to special procedure material for the purposes of criminal investigation. If an order is made relating to bank confidential information, the bank is under no obligation to resist the order, nor to inform the customer that an order is being sought.

Financial Services Act 1986

S177 allows the Secretary of State to appoint inspectors to carry out investigations to establish whether or not an offence of insider dealing has been committed. The Inspectors may order any person whom they consider may be able to give information to produce any documents in his possession or control.

Insolvency Act 1986 s.236(1)

The court may summon any person known or suspected to be in possession of any property of the company or supposed to be indebted to the company; or any person whom the court thinks capable of giving information concerning the promotion, formation, dealings, affairs or property of the company. It can require production of any records in his possession or control relating to these issues. The provision is not limited to documents required to reconstitute the state of the company's knowledge.

Criminal Justice Act 1987

By Section 2, in cases of serious or complex fraud, the Director of the Serious Fraud Office may require any person to produce specified documents that appear to the Director to relate to any matter relevant to the investigation.

The Jack Report

The report examined the banker's duty of confidentiality and, in particular, the exception at iii) above in the Tournier case - that disclosure may be permitted where the interest of the bank requires disclosure.

The committee recommended that legislation should be enacted to state that damages for breach of confidentiality should include compensation for distress, embarrassment

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or inconvenience, regardless of whether financial loss could be proved.

The report expressed concern in particular in relation to the growing perception within some banks that they are permitted to release confidential information to other members of their group without any express consent. An additional concern related to the disclosure of confidential information to credit reference agencies.

These issues were considered in *Turner v Royal Bank of Scotland PLC*. In that case, the bank had responded to a number of status enquiries in its standard coded terms - appears to be fully committed at present). The court heard evidence that it was the standard practice of all banks not to seek customers' consents. The Court of Appeal held that customers were entitled, under *Tournier*, to have their affairs kept confidential, and it was not for banks to privately agree otherwise.

The banking code now makes clear the bank's obligations in these regards.

The Committee was concerned that the balance between public interest and private rights had moved too far in the direction of disclosure.

It is therefore clear, in light of the Jack Report, that the third exception within *Tournier* should not be used other than within the narrowest of situations.

The government responded cautiously to the Report, but supported the idea of a voluntary code of practice.

A voluntary code was developed by the banks. Although the code is voluntary, Almost all banks subscribe to it. The March 2003 edition of the Banking Code sets out the bank's obligations of confidentiality, which reflect the four exceptions within *Tournier*.

The Code also makes clear that the third exception within *Tournier* is designed to protect the institution's legitimate interests, and does not extend to the transfer of information for marketing purposes - unless the customer has provided specific consent to such disclosure.

Developments since the Jack Report

Since 1989, arguments in favour of disclosure have increased. This arises out of growing concerns related to drug trafficking and other forms of organized crimes. Concerns have escalated in the wake of 9/11 and the war on terrorism. Therefore, since the Report, the government has enacted further legislation, which create much tighter obligations on banks to disclose information relating to drug trafficking, money laundering, and terrorism, as follow.

Drug Trafficking Act 1994

This provides that where a person discloses to a constable a suspicion that funds are used in connection with drug trafficking, that disclosure will not be a breach of any statutory or other legal restriction. The police are also permitted to apply to the court for an order for disclosure in appropriate circumstances.

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Money Laundering Regulations 2001

The new regulations add a power to the commissioners to enter and inspect money service operators' premises. It also empowers the commissioners to seek a court order requiring any person in possession of specified information to allow them access to it, where there are reasonable grounds for believe that a money laundering offence has been committed.

Part 3 Anti-Terrorism Crime and Security Act 2001

This act was passed extremely quickly in response to the terrorist attacks on 11th September 2001. The Act was intended to ensure that government departments and agencies can collect and share information required for countering the terrorist threat. The disclosure powers within Part 3 have proved controversial, particularly since those powers are not limited to anti-terrorist investigations. There is naturally a perceived danger of citizens' privacy rights being breached if hitherto confidential information is disclosed to the police or intelligence agencies under this new legislation.

The Proceeds of Crime Act 2002

Under this Act, a crown court judge may make a disclosure order requiring any person to give tot he Director of the Assets Recovery Agency any relevant information. Under Sections 370-375, the court may also make a customer information order, which requires a bank to provide information relating to the affairs of the customer.

Civil Procedure Rules Part 31

The requirements for disclosure are extended beyond the pre 1999 court rules. The court has developed powers to order discovery of information at the earliest stages of an action to assist a claimant to trace and recover property to which he claims he is wrongfully deprived.

Conclusion

The Jack Committee felt that too many inroads had been made by legislation into banking confidentiality, and recommended that consolidating legislation be enacted.

It requested that any future exemptions should be made by reference to the new provision, and any not so made would not override the central duty of confidentiality.

No such legislation was introduced. The government did not accept that there had been a massive erosion of the duty. It is submitted however that the exceptions in 1989 were extremely wide, as set out above. Exceptions existed if there was suspicion of tax evasion, any crime (under PACE), insider dealing, or fraud. Further, documents were even then disclosable without any criminal activity, in the case of an insolvent company or where civil proceedings were commenced.

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The government has since enacted extensive additional legislation which further undermines the obligation of confidentiality, creating a new suspicion based reporting regime. The government will argue that the further inroads are justified in the fight against terrorism, drug trafficking and other serious crime.

The government must be seen to strike an appropriate balance in confidentiality laws vis a vis civil rights and public interest.

The important question is whether today's consumers accept that there is justification for the diminished duty. Consumers would normally view all information within the banks possession as entirely confidential, not to be released without their explicit consent. It is submitted however that, in light of today's atmosphere of abhorrence to terrorism and crimes that may fund terrorism, such as drug trafficking and money laundering, the inroads to the duty seem palatable.

Of course, the exemptions are far wider than most consumers would expect. For example, under the Bankers Books and Evidence Act, or under Part 31 of the Civil Procedure Rules, the court can require disclosure from a bank in connection with any civil court proceedings. This will not necessarily involve cases where there is any suspicion of criminal activity, and may simply relate to an alleged, ill founded claim for breach of contract.

It is essential in today's society that consumers are able to maintain trust in their bank, and rely on the implicit confidentiality of the relationship. The right to privacy is of fundamental importance to most consumers This is essential particularly in commerce. It is not conducive to commercial efficiency to have information relating to trading made open to competitors. A breach of confidence to a competitor can cause immediate, irreparable and incalculable loss to a company.

The courts have emphasized that there is a strong public interest in maintaining confidentiality based on the moral principles of loyalty and fair dealing. Consumers disclose information to banks on the understanding that it will remain confidential.

Of course, disclosure is justified in exceptional circumstances, for example control of banking fraud, or where an individual is involved in money laundering profits from terrorism or drug trafficking. However, it is submitted that the current extent of the statutory exceptions go far beyond this.

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