

Duty of Confidentiality: Still an Active Duty Imposed on the Banks

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Abstract: *Duty of confidentiality originated from the Tournier case requires the banks to protect interests and confidences of their customers. However, powered by the development of modern banking business, increasingly statutory exemptions to disclose information about the customers seem to put this duty in an unimportant place. However, in essence, the disclosure does not completely override the duty of confidentiality, instead it further burdens the bank and third parties to reasonably exercise the disclosure. Also, the Tournier case has been reaffirmed in some contemporary legal documents. Therefore, though the duty of confidentiality has been eroded due to the changing society, it is still a significant duty that the bank should obey.*

Keywords: *duty of confidentiality, public interest, disclosure, banking business*

1. Introduction

Duty of confidentiality is a duty imposed on a bank based on the relationship between bank and customer. This duty was firstly determined as a legal duty by the *Tournier* case, along with four qualifications to it. However, the *Tournier* seems too old to catch progress of banking business, resulting in erosion of duty of confidentiality. This article will discuss the establishment and development of the duty of confidentiality. Primarily it will explain specific content of duty of confidentiality based on the relationship between bank and customer. Secondly, it will focus on how modern developments are affecting such duty.

2. Customer, Bank and Their Relationship

To explain duty of confidentiality, the fundamental concept of it should be considered further, namely customer, bank and their relationship. The customer is not defined by statute while the Money Laundering Regulation 2007 imposes duty on bank to identify and verify the ‘customer’. In other words, when a person opens an account in a bank, the person becomes a customer of a bank without an habitual process. Regarding bank, the Capital Requirements Regulation 2013 regulates that bank is “undertaking business of which is to take deposits or other repayable funds from the public and to grant credits”. Lastly, among various arguments about relationship between customer and bank, an acceptable definition “debtor (bank)-creditor (customer) type contract” is laid down in the case of *Foley v Hill*. This means the bank could use the money deposited for its own purposes and should repay the amount equal to what has been paid on demand. Besides, according to different nature of banking business, the relationship could vary. For example, in situation of investment banking, the bank may be entrusted by a customer with money to invest on their behalf. In that situation the relationship of agent and principle would arise.

3. Duty of Confidentiality

Once the relationship is established, there are some statutory and contractual duties imposed on the bank, and duty of confidentiality would be specifically explained as follows. Generally, in modern UK, duty of confidentiality exists as an implied term in the banker-customer contract, which roots in the *Tournier* case. This means some legal assurance from the bank should be given to financial information of a customer that such information would not be disclosed to third parties. From a historical perspective, duty of confidentiality was operated as a matter of moral obligation not legal obligation. Bank as a trustee of customer should act responsibly for his customers, like protecting their interests and confidences, which is in harmony with common sense. When the *Tournier* case had been

determined, this duty was confirmed as a legal duty imposed by the common law.

Besides, with respect to the scope of duty of confidentiality, general information of customer and accounts should fall within the scope, such as details of transactions, personal information, frequency of using the account and so on. Moreover, there is a notable question referring to whether information derived prior to opening of an account and after termination of it should fall within the scope: (i) if information acquired by bank before opening an account is under reasonable anticipation of opening the account, it should fall within the scope of duty of confidentiality; (ii) information acquired when the account exists remains confidential even though the account is closed or becomes inactive, which is stated by *Atkin LJ* in *Tournier*.

Additionally, *Tournier* also stated four qualifications of arising duty of confidentiality: (i) disclosure could be compelled by law. For instance, bank is required to disclose information by the court in order for a criminal investigation. It is noted that arising duty of confidentiality should firstly investigate abrogation of such duty in the statute before citing common law. This can be interpreted from another perspective as that common law is unable to create exceptions to disclosure compelled by statute; (ii) there is a duty for the public interest to disclose, which is also regarded as 'higher duty' in *Stephens*. (iii) It is in the interest of the bank to disclose, which usually arises when bank sue customer to repay an unpaid loan or overdraft facility; (iv) the bank could disclose information of customer with his implied or express consent. It could be justified through that the relationship between bank and customer has its roots in contract, which should represent their volitional characters.

4. The Struggling Duty

It is evident that the duty of confidentiality has been eroded owing to increasingly legislation and judiciary exceptions to this duty. Basically, from the outset the *Tournier* case itself showed clearly that the duty of confidentiality is not absolute, but intrinsically involves qualifications based on public policy and law considerations.

With respect to the second qualification, it is necessary to distinct what the public interest is and what the public might be interested to disclose: (i) the first question could justify the duty of confidentiality by way of public interest. There are two arguments supporting it, namely preventing from making a business in jeopardy and value in protecting personal autonomy for an individual. The jeopardy means unlimited disclosure of business information with market value would inevitably place the business in danger. Besides, the value reflects human rights to some extent that private financial information should not be unduly exploited and dominated by third parties; (ii) consideration of the second question mainly causes the uncertainty to the duty. Firstly, the duty of confidentiality sometimes lacks of economic efficiency. As what *Posner* held, hiding crucial financial information from creditors equals to fraud like that manufacturers conceal defects in their goods. In this hypothetical situation, most of the public would like to know not to be concealed what defects were on the goods before a transaction. Moreover, standing at a deeper level of point of public interest, the strict duty would negatively affect the market operation mechanism. For instance, some citizens would illegally avoid paying the accurate amount of tax through bank secrecy, and then it would influence on the integrity market. Consequently, required by the public interest, legislature legalized certain disclosure against tax evasion.

It is noted that although most situations of disclosure related to the public interest have been regulated by statute, it does not mean that the second qualification is redundant. This is because some situations requiring to disclose for the public interest are not expected by statute, which could be permitted by common law. For instance, when no statutory compulsion required Price Waterhouse to disclose information of a customer, the court could permit it considering the public interest.

Compared to the era when *Tournier* was made, modern banking environment based on economic globalisation changes a lot, making the duty of confidentiality a mask for crimes. The secret veil of bank becomes an attractive tool for crimes due to multifunctional operation of the banking system and its globalised factors. Duty of confidence as regards these crimes, such as laundering, tax evasion and terrorism, was gradually overridden by public policy, consequently introducing legislation which drastically stretched restrictions on this duty. In addition, except for criminal area, legislation referring to judicial co-operation especially for gathering evidence also weakens the duty. The case of *Barclays* even clarified that the bank owes no pro-active duty to customer, which could show that how considerably the duty is eroded under over-regulation phenomenon. In other words, undue statutory exceptions allowing disclosure for judicial co-operation inherently make bank look down on duty of

confidentiality.

Therefore, public interest is in a place to balance the duty of confidentiality, and operation of the balance would easily cause uncertainty to the duty. This may explain why common law and legislation have to constantly make exemptions to the duty. Public interest justifies the duty, and in turn provides conditions to erode it.

5. The Duty Is Still Active

Notwithstanding, that information is disclosed to a third party under the statutory exemptions does not completely override the duty. This is because such disclosure will not automatically make confidential information available to the public, and third parties requiring information should not reveal it further under separate statutory obligations. Besides, if the bank fails to best handle disclosure request, like notifying its customer, bank may also breach the duty of confidentiality.

Moreover, powered by development of computer science, burden on banks to keep duty of confidentiality is heavier than ever with sophisticated electronic banking system. This is due to the greater number of customer records, production of data that is more easily intercepted and more potential parties seeking data than ever. Likewise, banks should be subject to the Data Protection Act 2018, which initially originated from the European Directive. For examples, controller or processor of information of a customer should notify the customer when there is a data breach, and the customer has right to require companies to delete his data. Additionally, the duty and four qualifications to it established in *Tournier* was reaffirmed by the voluntary Code of Banking Practice, which now has become the Lending Code.

Accordingly, the duty still plays an important role in bank and customer relationship. This shows that duty of confidentiality is still alive as rooting in *Tournier* and exists as an implied term in the contract formed by bank and customer.

6. Conclusion

The *Tournier* case firstly turned a moral duty of confidentiality into a legal duty arising from bank and customer relationship. However, with the development of banking business, duty of confidentiality has been eroded by increasingly statutory and judiciary exemptions to it, which bases on *Tournier* that this duty is not absolute. Notwithstanding, the disclosure does not completely override the duty, and it further burdens bank and third parties to reasonably deal with the disclosure. Besides, The Data Protection Act 2018 emphasizes this duty of the bank on account of the electronic banking system, and the Banking Code reaffirmed the *Tournier* case. Therefore, although duty of confidentiality has been eroded, it is still active and plays an important role in banking business.

References

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