THE BANKER'S DUTY OF CONFIDENTIALITY

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy by Robert Anthony Stokes.

September 2005

PAGINATED BLANK PAGES ARE SCANNED AS FOUND IN ORIGINAL THESIS

NO INFORMATION MISSING

ACKNOWLEDGEMENTS

I am indebted to my primary supervisor, Professor Anu Arora for her unwavering faith and loyalty in both the thesis and myself. Her support, encouragement and perseverance throughout has been invaluable. Indeed, it is not overstating the matter, to say that this thesis would not have come to fruition without her supervision.

Thanks must also be extended to both my secondary supervisor, Mr Joseph Savirimuthu, and indeed to all members of the Liverpool Law School, past and present, who have succeeded in creating an environment of outstanding research, of which, I am proud to be a part.

It would be impossible to mention all those to whom I owe a debt of gratitude in the writing of this thesis, but I wish to specifically thank, in no particular order: Mr Barry Lewis; Miss Yvonne Windsor; Mr Colin Askew; Miss Naomi Madderson and Mr Eric Donnelly, all of whom have endured, with apparent cheerfulness, my thoughts on banking law. My gratitude must also be extended to Mr Philip Calvert, whose donations of whisky were as kind as they were timely. My sincere thanks also extend to Bella and Wolfie whom, during the earlier years of this thesis, successfully managed to keep the computer keyboard warm in my absence from my desk, and who have, I hope, failed in their furtive endeavours to amend the text of this thesis.

Finally my deepest gratitude must go to my family, and in particular, to my Mother who has been a source of great inspiration and support in good and bad times alike. To my family I can now say that my time as a student has come to an end.

RS

September 2005, Liverpool

TABLE OF CONTENTS

	Acknowledgements	*i*
	Table of Cases	*iv-x*
	Table of Statutes	*xi-xii*
	Table of Statutory Instruments	*xiii*
	Abstract	*xiv-xv*
Preface:	*The Banker's Duty of Confidentiality*	*xvi-xviii*
PART ONE	**Confidentiality and the Banker-Customer Relationship**	1-109
Chapter One:	*The Genesis and Early Development of Banking Confidentiality*	1-31
Chapter Two:	*The Development of the Qualifications to the Banker's Duty of Confidentiality Following the Decision of the Court of Appeal in Tournier*	32-84
Chapter Three:	*Fiduciary Obligations and Banking Confidentiality*	85-109

PART TWO	**Current Issues in Banking Confidentiality**	110-262
Chapter Four:	*Banking Confidentiality and the Duty to Report under the Money Laundering Legislation Within the United Kingdom*	110-156
Chapter Five:	*Banking Confidentiality, Criminal Confiscation and Civil Recovery*	157-187
Chapter Six:	*Banking Confidentiality and the Human Rights Act 1998*	188-230
Chapter Seven:	*Data Protection and Banking Confidentiality*	231-262
PART THREE	**Conclusions: Recent Developments and Future Challenges**	263-268
Chapter Eight:	*Conclusions on the Banker's Duty of Confidentiality – The Challenge Ahead*	263-268
	Bibliography	269-281
	Official Documents	282-285
Supporting Paper:	Stokes and Arora, *'The Duty To Report Under The Money Laundering Legislation Within The United Kingdom'*, [2004] *Journal of Business Law* 332-356.	286-319

TABLE OF CASES

Case	Citation	Page
Allied Dunbar (Frank Weisinger) Ltd. v. Frank Weisinger	November 17, 1987 The Times Law Reports 44....................	205
Arnott v. Hayes	(1887) 36 Ch. Div. 731..............................	37
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank	[2003] UKHL 37...........	221-223
Bank of Tokyo v. Karoon	[1987] AC 45...............	70
Barclays Bank plc v Bank of England	[1985] 1 All ER 385......	81
Barclays Bank plc v Khaira	[1993] 1 FLR 343.........	104
Barclays Bank plc v Quincecare Ltd and Unichem Ltd	[1992] 4 All ER 363......	104
Barclays Bank plc v. O'Brian	[1994] 1 AC 180..........	9
Barclays Bank plc v. Taylor; Trustee Savings Bank of Wales and Border Counties and another v. Taylor and another	[1989] 1 WLR 1066......	24, 26, 42,43,
Barker v. Wilson	[1980] 2 All ER 81.......	34-35
Barnes v. Addy	(1874) 9 Ch. App. 244..............................	87
Barthold v. Germany	(1985) 7 EHRR 383....	201
Beaumont v. Boultbee	(1802) 7 Ves. 599........	107
Beer v. Ward	Jac. 77........................	8
Bland v. Wainwright	(1835) 4 LJ Ex. Eq. 19................................	8
Bowman v. Fels	[2005] 2 Cr. App. R. 19................................	128

Case	Citation	Page
Bramwell v. Lucas	(1824) 2 B & C 745......	9
Brown v. Stott (Procurator Fiscal, Dunfermline) and another	[2001] 2 All ER 97........	204, 207
Bruggerman and Scheuten v. Germany	(1981) 3 EHRR 244......	195
C v. S	[1999] 2 All E.R. 343....	130, 135
Chant v. Brown	(1849) 7 Hare 79..........	8
Chassagnou and others v. France	App. Nos. 25088/94, 28331/95 and 28443/95, judgment of April 29, 1999..............	203
Christofi v. Barclays Bank plc	[1999] 2 All ER (Comm.) 417................	67
CIBC Mortgages plc v. Pitt	[1993] 4 All ER 433.....	96
Cloverbay Ltd. (Joint Administrators) v. Bank of Credit and Commerce International S.A.	[1991] Ch. 90................	47
Cornish v. Midland Bank plc	[1985] 3 All ER 513......	105-106
Davies v. Waters	(1842) 9 M&W 608.......	
DB Deniz Nakliyati TAS v. Yugopetrol	[1992] 1 All ER 205......	35
De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and others	[1999] A.C. 69..............	208-209
Desborough v. Rawlins	(1838) 3 My & Cr..........	8
Douglas v. Pindling	[1996] AC 890..............	34, 62
Dudley Metropolitan Borough Council v. Debenhams plc	(1995) Tr. LR 182.........	52
Duff v. Law Society	[2004] EWHC 419........	131

Case	Citation	Page
Durant v. Financial Services Authority	[2003] EWCH Civ 1746	234-235, 257
El Jawhary v. Bank of Credit and Commerce International	[1993] BCLC 396	26, 65-67
English v. Dedham Vale Properties Ltd	[1978] 1 All ER 382	94
Foley v. Hill	(1848) 2 H.L. Cas. 28	97
Foster v. Bank of London	3 F&F 214	11-13, 15-16, 19
Gaskill v. United Kingdom	Case No 2/1988/146/200	197
Governor and Company of the Bank of Scotland v. A Ltd and others	[2001] 1 W.L.R. 751	130
Hall and Company Ltd. v. Shoreham-by-Sea U.D.C.	[1964] 1 W.L.R. 240	205
Handyside v. UK	(1979-80) 1 EHRR 737	206
Hardy v. Veasey	(1868) LR 3 Ex. 107	13, 17- 20, 22, 264
Henderson v. Merrett Syndicates Ltd	[1995] 2 AC 145	93
Howard v. Beall	(1889) 23 QBD 1	37
Idiot's Asylum v. Handysides	(1906) 22 T.L.R. 573	34
JH Rayner Ltd v. Department of Trade	[1990] 2 AC 418	190
Keech v. Sandford	(1726) Sel. Cas. Ch. 61	95-96
Leander v. Sweden	Case No 10/1985/96/144	197, 238
Libyan Arab Foreign Bank v. Bankers Trust Co.	[1989] QB 728	62
Lloyds Bank Ltd v. Bundy	[1975] QB 326	105, 108

Case	Citation	Page
Loyd v. Freshfield	(1826) 2 C & P 325.......	22, 33
LRT and another v. Mayor of London and another	Decision of 24 August 2001, unreported..........	209
Mackenzie v. Yeo	(1841) 2 Curt. 866........	8
Manchester Trust v. Furness		87
Marckx v. Belgium	(1979) 2 EHRR, 330.....	194
Meath Bp v. Winchester	(1836) 10 Bli. NS 330...	8
Mutual Life and Citizen's Assurance Co. Ltd. v. Evatt	[1971] AC 793...............	85
National Westminster Bank v. Morgan	[1985] AC 686..............	96, 100, 108
New Zealand & Australian Land Co. v. Watson	(1881) 7 QBD 374........	87
Niemietz v. Germany	(1992) 16 EHRR 97......	194
Owen v. Sambrook	[1981] Crim. L.R. 329...	37
P v. P	[2003] EWCH Fam. 2260.............................	130
Parry-Jones v. The Law Society	[1969] 1 Ch. 1..............	32
Perry v. Phosphor Bronze Co Ltd	(1894) 71 L.T. 854........	37
Petersen v. Idaho First National Bank	83 Idaho 578	*xvi*
Pharaon and others v. Bank of Credit and Commerce International S.A. (in liquidation)	[1998] 4 All ER 455.......	61, 75, 185-187, 228
Pollock v. Garle	[1898] 1 Ch. 1..............	37
Poplar Housing and Regeneration Community Association v. Donoghue	[2001] EWCA Civ. 595...............................	221
Price Waterhouse (a firm) v. BCCI Holdings (Luxembourg) S.A. and others	[1992] BCLC 583..........	58-61, 63, 185-187
R v. A (No. 2)	[2001] 2 W.L.R. 1546...	208

R v. Ali (Liaquat)	[2005] EWCA Crim. 87.................................	125
R v. Central Criminal Court, ex parte Adegbesan and others	[1986] 1 W.L.R. 1292............................	41
R v. Crown Court at Leicester, ex parte Director of Public Prosecutions	[1987] 1 W.L.R. 1371....	43
R (Daly) v. The Secretary State for the Home Department	[2001] 2 W.L.R. 1622....	207-210
R (on the application of Pretty) v. D.P.P.	[2001] 3 W.L.R. 1598....	208
R. v. Bono	(1913) 29 TLR 635.......	36
R v. Cuthbertson	[1981] AC 470..............	158
R v. Dadson	[1983] 77 Cr. App. R. 91................................	35
R v. Grossman	(1981) 73 Cr.App.R. 302..............................	35, 37
R v. Harmer	[2005] 2 Cr. App. R. 2...	125
R v. Kinghorn	[1908] 2 KB 949...........	35
R v. Jonathan Michael Duff	[2003] 1 Cr. App. R. (S.) 88..........................	131
R v. Ministry of Defence, Ex parte Smith	[1996] QB 517.............	207-208
R. v. Nottingham Justices, ex p. Lynn	(1984) 79 Crim. App. Rep 234.......................	37
R. v. Rezvi	[2002] 2 W.L.R. 235.....	208
Re an inquiry into Mirror Group Newspapers plc	[2000] Ch. 194.............	50
Re British & Commonwealth Holdings Plc (No's. 1 and 2)	[1992] Ch. 342.............	45
Re Castle New Homes Ltd.	[1979] 1 W.L.R. 1075....	46
Re Coomber, Coomber v. Coomber	[1911] 1 Ch. 723..........	93

Re Esal (Commodities) Ltd.	[1989] B.C.L.C. 59........	46
Re Goldcorp Exchange Ltd	[1994] 2 All ER 806.......	92
Re Rolls Razor Ltd	[1968] 3 All ER 698.......	45-46
Re Wait [1927]	1 Ch. 606......................	88
Reading v. R	[1949] K.B. 232	95
Regal (Hastings) Ltd. V. Gulliver	[1942] 1 All ER 378.......	107
Rekvenyi v. Hungary	App. No. 25390/94, judgment of May 20, 1999..............................	203
Scandinavian Trading v Flota Ecuatoriana	[1983] 2 WLR 248.........	88
SEC v Chenery Corp	(1943) 318 US 80..........	92
South Staffordshire Tramways Co v. Ebbsmith	[1895] 2 QB 669...........	37
Squirrell v. National Westminster Bank plc.	[2005] 2 All E.R. 784....	130
Storey v. Lennox	(1836) 1 Keen. 341................................	8
Sunday Times v UK	(1979-80) 2 EHRR 245................................	200-201
Sunderland v. Barclays Bank Ltd.	(1938) 5 LDAB 163................................	64-65, 68, 71
Target Holdings v Redferns	[1996] 1 AC 421...........	
Tassell v. Cooper	(1850) 9 CB 509...........	4, 10- 12, 19, 264
Taylor v. Blacklow	(1836) 3 Bing. (N.C.) 236................................	1, 8,
The Duchess of Kingston	11 St. Tr. 243................................	9

Case	Citation	Pages
Tournier v. National and Provincial and Union Bank of England	[1924] 1 KB 461............	1-4, 18-20, 23-33, 43-44, 58,60-61, 64, 68, 73-76, 180, 183, 185, 201, 227-228, 264-268
Turner v. The Royal Bank of Scotland	[1999] 2 All ER (Comm.) 664................................	76-81,
Walker v. Wildman	(1821) 6 Madd. 47.........	9
Walsingham v. Goodricke	(1843) 3 Hare 122	8
Waterhouse v. Barker	[1924] 2 KB 749............	37
Weld-Blundell v. Stephens	[1920] AC 956..............	23, 58, 85, 87-88,
Westdeutsche Landesbank v Islington LBC	[1996] AC 669..............	99
Williams v. Barclays Bank plc.	[1988] QB 161..............	35
Williams v. Summerfield	[1972] 2 QB 512...........	36
Wilson v. Rastall	4 T.R. 753......................	9,
Woods v. Martins Bank Ltd	[1959] 1 Q.B. 55...........	85, 96, 102-104
X AG v. A Bank	[1983] 2 All E.R. 464.....	*xv*
Z v. Finland	(1997) 25 EHRR 371.....	198-199

TABLE OF STATUTES

Bank of England Act 1694 5

Bank of England Act 1696 5

Bank of England Act 1708 5

Bank of England Act 1694 5

Extradition Act 1873 33

Bankers' Books Evidence Act 1879 33-38

Tribunals of Inquiry and Evidence Act 1921 59

Trade Descriptions Act 1968 .... 54, 57

Theft Act 1968 114

Taxes Management Act 1970 50-51

Misuse of Drugs Act 1971 158

Consumer Credit Act 1974 .... 51-52, 57, 261

Mental Health Act 1983 54

Police and Criminal Evidence Act 1984 38-44

Data Protection Act 1984 233

Companies Act 1985 .... 48-50, 52, 261

Insolvency Act 1986 45-48

Financial Services Act 1986 52

Building Societies Act 1986 54

Drug Trafficking Offences Act 1986 .... 114-115, 158, 160, 162

Criminal Justice Act 1987 47-49

Income and Corporation Taxes Act 1988 51

Criminal Justice Act 1988 .... 115, 126, 128, 129, 130, 159, 160

Companies Act 1989 49

Finance Act 1989 51

Criminal Justice (International Co-operation) Act 1990 160

Criminal Justice Act 1993 .... 115-118, 126, 128, 129, 160

Drug Trafficking Act 1994 .... 128, 130, 160

Criminal Justice and Public Order Act 1994 160

Proceeds of Crime Act 1995............................ 160
Proceeds of Crime (Scotland) Act 1995.......... 160
Human Rights Act 1998.................................. 189-230, 231, 254, 261
Data Protection Act 1998................................ 231-262
Crime and Disorder Act 1998......................... 160
Financial Services and Markets Act 2000....... 53-54, 56
Terrorism Act 2000.. 122, 267
Enterprise Act 2002....................................... 51
Proceeds of Crime Act 2002........................... 56-58, 118, 122-140, 141, 145, 147, 148, 150, 152, 154, 156, 158, 161-187, 190, 191, 210-216, 217, 220, 229-230, 256, 260-261, 265-266
Serious Organised Crime and Police Act 2005... 124, 125, 129, 132, 135,

TABLE OF STATUTORY INSTRUMENTS

Instrument	Reference	Page
The Money Laundering Regulations 1993	(1993 SI 1993/1933)...............	118-122, 141, 144
The Money Laundering Regulations 2001	(2001 SI 2001/1819)...............	141, 143
Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) 2003	(2003 SI 2003/3074)...............	135
The Money Laundering Regulations 2003	(2003 SI 2003/3075)...............	132, 140, 141-147, 152, 156, 265-266
The Serious Organised Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) 2005	(2005 SI 2005/1521)...............	132

THESIS ABSTRACT

THE BANKER'S DUTY OF CONFIDENTIALITY

Mr Robert A. Stokes

The scheme of doctoral research is concerned with the banker's duty of confidentiality, something traditionally recognized as forming the corner-stone of the banker-client relationship. However, the law relating to banking confidentiality has undergone an active period of reform since the judicial recognition of such a duty. Indeed, the duty (or perhaps more accurately, the exceptions to the duty) has developed through retrospective incremental reforms, facilitated through both judicial decisions and through statute. The aim of the research is to analyse and explore the existing law, looking particularly at the development of the relevant practice and law, and consider whether it is true to suggest confidentiality is the exception rather than the rule. In order to successfully ground the importance of this scheme of research in the modern banking climate, the genesis and early development of the duty of confidentiality shall be analysed, before considering the development of the obligation through the Twentieth Century.

Consequently, this study will concentrate upon the establishment of the duty of confidentiality through the decision in *Tournier* v. *National Provincial and Union Bank of England*[1], and consider the four heads of exception that Bankes L.J., discussed. The growth of these four heads of exception needs to be analysed, for, as the Jack Committee lamented in their final report, "the last two decades have seen a torrent of new legislation, which has since become a spate in the past few years, requiring or permitting bankers, in a wide range of specified situations, to disclose confidential information in the public interest".[2] Since the presentation of the Jack Report this 'spate' has continued, and the scope of the various exceptions to the duty arising from,

[1] [1924] 1 KB 461
[2] *Banking Services: Law and Practice*, London: HMSO, Cmnd. 622 (1989), at para. 5.07.

for example, the Proceeds of Crime Act 2002 (as amended) and the Money Laundering Regulations 2003 will need to be analysed.

The thesis will also investigate certain key issues which are currently affecting the scope and nature of the banker's duty of confidentiality, including, the growth of the domestic anti-money laundering regime; the emergence of the criminal confiscation and civil recovery systems and associated investigatory powers and the dawn of the Human Rights Act era coupled with the growth of data protection considerations under the Data Protection Act 1998. These issues, whilst only coming to the fore in recent times, are all likely to play an important role in the future development and direction of the banker's duty of confidentiality, and are as such worthy of academic consideration.

PREFACE

THE BANKER'S DUTY OF CONFIDENTIALITY

The Banker's Duty of Confidentiality raises a number of challenging issues, particularly those arising out of the need to preserve private rights (that is for example, confidentiality) whilst maintaining a satisfactory balance with any conflicting public interests. Thus whilst there is strong justification in support of customers who prefer information in respect of their financial dealings to be kept secret, it is not necessarily true that such a preference is automatically justified. In particular, such confidentiality may legitimately be overlooked in circumstances where there is strong public interest in disclosure. An alternative justification however, for keeping financial information confidential is economic: Certainly commercial efficiency is dependant upon confidentiality, and this could be adversely affected where sensitive financial information (such as trading figures for example) is disclosed to the wider world.[1] Moreover, even outside of the business arena, it is clear that the disclosure of sensitive financial information may have detrimental effects upon individual customers, particularly, for example, in relation to that individual's credit rating.

Beyond such economic justification however, it is clear that there is considerable public interest in maintaining the ideal of confidentiality: In 1989, the *Report of the Committee on Banking Services*,[2] whilst appreciative of the strong arguments in favour of disclosure and transparency, expressed concern at the pace and direction in which this area of banking law was

[1] *X AG v. A Bank* [1983] 2 All E.R. 464.

[2] *Banking Services: Law and Practice, Report by the Review Committee* ('The Jack Report'), London: HMSO, Cmnd. 622 (1989).

travelling. The Jack Committee suggested the balance between private rights and disclosure in the public interest had moved too far in the direction of disclosure, and was failing to adequately protect individual rights. More fundamentally, the Committee felt that the issue of preserving confidentiality between bank and client should be addressed "because its roots go deeper than the business of banking: it has to do with the kind of society in which we want to live".[3] The judiciary has also recognized such moral justification: In *Petersen* v. *Idaho First National Bank,*[4] it was emphasized that that there is a strong public interest in maintaining confidentiality "based upon the principles of loyalty and fair dealing".[5] Certainly customers will generally regard any information they entrust to banks as being sensitive and thus confidential. It is therefore unsurprising that they might resent disclosure of such information even where the information is in itself totally innocuous.

Despite such justification, there are compelling reasons in support of disclosure on occasion. Thus if customers behave in a manner which is threatening to others, such as through engaging in criminal activity, the disclosure of financial information may provide the relevant authorities with vital intelligence upon which action may commence to prosecute the offending individual or organization. Most people would, in such circumstances support the disclosure of sensitive financial information. Indeed, even jurisdictions, which are noted for their strong ideals of confidentiality, in the face of such compelling public interest factors supporting disclosure, are having to make concessions allowing such information to be disclosed. Switzerland instantly comes to mind, coupled with the fall-out from the collapse of BCCI, and more specifically, the tendency to rely upon banking secrecy as a (successful) vehicle for illicit transactions to occur unabated, will need to be considered. The difficulty then, is the challenge of striking the correct balance between these conflicting demands, and it may be queried whether the traditional idea of banking confidentiality, as enunciated in *Tournier* v. *National Provincial and*

---

[3] *Ibid*, at para. 5.26.
[4] 83 Idaho 578.
[5] *Ibid*, quoted in Wadsley and Penn, *Penn and Shea: The Law Relating to Domestic Banking*, London: Sweet & Maxwell (2000), at 137.

Union Bank of England[6], is still viable in the modern world of financial services.

The study will concentrate upon the establishment of the duty of confidentiality through the decision in *Tournier*, and consider the four heads of exception that Bankes L.J., laid down. The growth of these four heads of exception needs to be analysed, for, as the Jack Committee lamented in their final report, "the last two decades have seen a torrent of new legislation, which has since become a spate in the past few years, requiring or permitting bankers, in a wide range of specified situations, to disclose confidential information in the public interest".[7] Since the presentation of the Jack Report this 'spate' has continued, and the scope of the various exceptions to the duty arising from, for example, the Money Laundering Regulations and the new Proceeds of Crime Act 2002 will need to be analysed.

Moreover, issues arising out of other areas of the Law will have an impact on the development of the duty of confidentiality in the banking sector. In particular, issues arising out of the Data Protection Act 1998, and the system of protection it offers to personal data, and the storage of such data, will need to be assessed. A similar issue also of considerable modern relevance, is that of the impact of the Human Rights Act 1998 upon the banker's duty of confidentiality. In particular, the compatibility, interpretive and jurisprudential obligations imposed under the Human Rights Act will need to be considered. The erosion of the traditional concept of the duty of confidentiality raises significant questions as to the level of protection afforded to individual (human) rights under the Human Rights Act, and consideration will have be afforded to the possibility of any claims under the more pertinent provisions of the Act.

---

[6] [1924] 1 KB 461.
[7] *Op cit*, above, n. 2, at para. 5.07.

PART ONE: CONFIDENTIALITY AND THE BANKER-CUSTOMER RELATIONSHIP

CHAPTER ONE

THE GENESIS AND EARLY DEVELOPMENT OF CONFIDENTIALITY BETWEEN BANKER AND CUSTOMER

"the law is never better employed than in enforcing the observance of moral duties".

Taylor v. *Blacklow* (1836) 3 Bing. (N.C.) 236, at 249, *per* Vaughan J.

INTRODUCTION

A brief survey of the relevant literature on the subject of banker customer confidentiality quickly reveals that the "locus classicus"[1] of this concept is the 1924 decision of the Court of Appeal in *Tournier* v. *National Provincial and Union Bank of England*.[2] The position is summed up well in the Banking Services: Law and Practice, Report by the Review Committee[3], in stating that, "...it [Tournier] is generally taken as the starting-point of the history of the banker's duty of confidentiality".[4] Moreover, the standard position of modern literature is to begin any discussion of banking confidentiality with a discussion of the *Tournier* decision and the respective judgments of Bankes, Scrutton and Atkins LJJ.[5] Whilst, *Tournier* is properly deemed the 'leading

---

[1] Goode, 'The Banker's Duty of Confidentiality', [1989] *JBL* 269, at 269.
[2] [1924] 1 KB 461.
[3] London: HMSO, Cmnd. 622 (1989).
[4] *Ibid*, at para. 5.01.
[5] See for example, the analysis in Wadsley and Penn, *Penn & Shea: The Law Relating to Domestic Banking*, 2nd ed., London: Sweet & Maxwell, 2000, at 139 et seq., and that in Ellinger, Lomnicka and Hooley, *Modern Banking Law*, 3rd edition, Oxford: OUP, 2002, at 136 et seq.

case',[6] and thus, the decision of the Court of Appeal will constitute the overriding focus of this chapter, it may be suggested that a beneficial area of investigation for the purposes of this thesis, is the pre-*Tournier* origins of the relationship of confidence (in the sense of secrecy) as operative between a banker and customer. Clearly, just as law does not operate in a vacuum, judicial determinations are not born of a vacuum. It is both interesting and lamentable then, that there has been, as far as ascertainable, no academic investigation into the pre-*Tournier* judicial decisions concerning and affecting the relationship of confidentiality between banker and customer. The opening sections of this chapter then shall rectify this omission and reveal the background to the decision in *Tournier* and analyse the genesis of confidentiality as it applies to the relationship of banker and customer. Before considering the early development of banker customer confidentiality however, it is beneficial to briefly restate the Court of Appeal facts and decision in the *Tournier* case.

Tournier, a customer of the National Provincial and Union Bank of England, was overdrawn by £9, 8s, 8d and following attempts by the defendants to obtain payment of the overdraft, it was mutually agreed that Tournier should pay off the weekly sum of £1 until the debt was satisfied. The plaintiff paid three instalments before ceasing payment. Shortly thereafter, Tournier gained employment with Kenyon & Co. under a three-month agreement. Subsequently, a cheque for £45 was drawn in favour of Tournier (by a fellow customer of the defendant bank), although the cheque (having endorsed the cheque to a third party) was ultimately presented for payment by the London City and Midland Bank. Intrigued, the (acting) manager of the defendant's branch[7] made inquiries of the presenting bank, and discovered that payment of the cheque had been obtained by a bookmaker. In an attempt to contact Tournier, the branch manager called Kenyon & Co. and spoke with two directors of the company. Through the course of the conversation, the branch manager disclosed to the plaintiff's employers that Tournier was

[6] See, for example, Ellinger Lomnicka and Hooley, Modern Banking Law, 3rd edition, Oxford: OUP, 2002, at 136 *et seq*.

[7] Oddly, there would appear to be some confusion over which branch this, in fact, was with Moorgate mentioned (at 462) and also Finsbury Pavement (at 467, *per* Bankes L.J.).

overdrawn, and that he was "mixed up with bookmakers".[8] These were the words proved in evidence at the trial.[9] Kenyon & Co., clearly unimpressed with the inferences following on from this information, decided not to renew the employment agreement with Tournier following the expiry of the original, three-month agreement. Tournier brought an action on two separate grounds: Firstly, for slander, and secondly, for breach of an implied contract that the bank would not disclose to third persons the state of the account, or other information relating to the account.[10] At first instance[11] the jury found in favour of the defendant bank on both counts, and thus, Tournier appealed against both verdict and judgment on the ground of misdirection by Avory J., and sought a retrial.

The appeal in respect of the second head of the claim, was centred upon the question left to the jury by Avory J., namely that of "[W]as the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?"[12] The actual direction of Avory J., to the jury on this matter was as follows:

> "I shall have to ask, in view of the other claim for breach of contract, whether the communication of the state of the plaintiff's account at the bank, which was made to his employers, was, under the circumstances, made on reasonable and proper occasion; that is to say, whether there was a reasonable justification for his making that communication? I shall 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 another person. I hold, as a matter of law, that there is no such absolute contract. But, if the banker has made that disclosure justifiably, that is to say, if, under the

---

[8] [1924] 1 KB 461, at 463.
[9] *Cf.* The words complained of in the statement of claim.
[10] Neither the validity or success of the first head of the action need not be considered at this point.
[11] Before Avory J.
[12] [1924] 1 KB 461, at 464.

circumstances of the particular case, it was reasonable and proper that he should make the communication, then there is no breach of contract on his part".[13]

This direction was, counsel for the appellant suggested, defective, as it did not afford the jury any guidance as to in what circumstances it would be reasonable and proper to disclose information concerning a customers bank account. The Court of Appeal concurred with such contentions, with Bankes L.J., (who delivered the leading judgment of the Court) suggesting that the direction of the learned judge did not constitute a "sufficient explanation of what is a difficult and hitherto only a very partially investigated branch of the law".[14] The appeal was successful, and thus confidentiality became recognised as being "at the heart of the banker-customer relationship".[15] The decision and respective judgments of the Court of Appeal in *Tournier* shall be analysed subsequently, however, it is necessary at this juncture to consider the 'hitherto only very partially investigated' area of law that was banker-customer confidentiality in 1924.

BANKER CUSTOMER CONFIDENTIALITY PRIOR TO 1924

The earliest reported case directly concerning the specific issue of the relationship between banker and customer is that of *Tassell* v. *Cooper* in 1850.[16] It is immediately intriguing that it would appear to have taken until 1850 for such a crucial issue to be the subject of legal action. Indeed, it may be suggested that this lack of judicial consideration of banker customer confidentiality is particularly surprising if one considers the relative wealth of litigation concerning the obligation of secrecy owed by an attorney (as members of the legal profession practising in the era were referred to) to his client.[17] The oddity of the complete dearth of pre-1850 consideration of

---

[13] Quoted by Bankes L.J., in Tournier [1924] 1 KB 461, at 471.
[14] *Ibid.*
[15] *Banking Services: Law and Practice, Report by the Review Committee* ('The Jack Report'), Cmnd. 622, (1989) at para. 5.26.
[16] (1850) 9 CB 509.
[17] This case law surrounding this parallel issue will be considered shortly, and, as shall be illustrated, was relied upon by counsel to support a similar obligation in the analogous relationship of banker and customer.

banker customer confidentiality is confounded by the state of the banking profession at the time. Whilst it was certainly an almost alien industry to that which operates in modern society, both in practice and in theory, it was, essentially established, and moreover, relatively highly regulated for the era. This is supported by the statute law, which has governed the banking profession since the 17th Century.[18] Moreover, it is surprising that even between 1850 and the decision of the Court of Appeal in *Tournier* in 1924 there is a relative dearth of authority on point, and it would appear that breaches of confidence by a banker were infrequent visitors to court. As to the reason for this infrequency, one can do no better than to note the eternally optimistic view of Scrutton L.J., in his judgment in *Tournier* itself, where he states that:

> "It is curious that there is so little authority as to the duty to keep customers, or clients' affairs secret, either by banks, counsel, solicitors or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion".[19]

What then, was the attitude of the judiciary to banker customer confidentiality in the early cases on the issue? Certainly, the attitude of the court in *Tassell* v. *Cooper* was markedly different to that of the court in *Tournier*, (merely) some seventy-four years later. The facts, as they are relevant to the discussion of confidentiality between banker and his customer were relatively straightforward. The plaintiff, Tassell, a farming bailiff of Baron De L'Isle and Dudley received a cheque for £180 following the termination of his employment with the Baron in respect of wheat sold by the plaintiff, but belonging to the Baron. The plaintiff paid the cheque into his own account with London & County Joint Stock Banking Co. who gave the plaintiff credit for the £180, but subsequently, and following an intervention and indemnity

[18] See for example, The Bank of England Act 1694 (5 & 6 Will. and Mar. c. 20); The Bank of England Act 1696 (8 & 9 Will. 3 c. 20); Bank of England Act 1708 (7 Anne c. 30) and The Bank of England Act 1716 (3 Geo. I c. 8). On the early development of banking, and financial services, in the United Kingdom, see Gilligan, 'The Origins of UK Financial Services Regulation', (1987) *The Company Lawyer*, 18(6), 167.
[19] [1924] 1 KB 461, at 479.

from the Baron, refused to allow the plaintiff to draw on the funds in question. The Baron, upon terminating Tassell's employment as farming bailiff, visited the London & County Bank in order to gain access to the account book. The branch manager declined, with the caveat that if the Baron sought, and gained, the permission of the Head Office of the bank, he would allow access to the account book. It would appear that gaining the permission of the Head Office was of minimal effort for the Baron, clearly a man of some social pedigree, and he was able thus, to view the account details of the plaintiff.

The plaintiff, somewhat unhappy at this course of events brought two actions, and various claims: Perhaps tellingly, the claim relevant to this thesis was the second (and final) claim under the second action: That of the exposing of Tassell's bank account details to a third party. More precisely, the second count stated, revealingly, that the defendant, Cooper, a public officer with the London & County Bank, was:

> "not to expose or disclose the state or particulars of the said account so to be kept by them as aforesaid, without the licence or authority of the plaintiff, to any person or persons, except the plaintiff and the clerks, agents, or servants employed by the said company in their said business, and except to any person who might present for payment to the said company any cheque, bill or note, drawn, accepted, or made by the plaintiff, upon or payable by, the said company, which the said company might be entitled to dishonor, for want of sufficient funds of the plaintiff of right applicable to the payment thereof, or unless compelled by due course of law so to do...".[20]

This is clearly a particularly useful passage, and reveals a great deal concerning the state of banker customer confidentiality at the time. The count clearly appreciates that there must always be a balance drawn and maintained in such matters, and that an absolute obligation of confidentiality

[20] Noted in the report, at 514.

is nonsensical.[21] Whilst then, the count argues, the standard position is that a banker should not disclose information regarding his customers' accounts, certain exceptions must, for reasons of either commercial efficacy or legal compulsion, be permitted where a banker can divulge financial information of a customer. Such a contention is striking for the parallels with the traditional ideal laid down by the Court of Appeal in *Tournier*. Like Bankes L.J., in *Tournier*, the specific exception pertaining to legal compulsion to disclose is raised, and clearly there can be no dispute that employees of the bank and the like will, for reasons of practicality, need to have access to a customer's accounts. An equally striking difference is abundant however: The argument presented by counsel for the plaintiff allows for the effective disclosure of the state of a customer's account where a cheque is presented for payment, and subsequently declined on the grounds that there are insufficient funds to meet the value of the cheque. As shall be seen through the discussion of later authority[22] the legitimacy of such disclosures has caused some difficulty for the judiciary, and it is perhaps surprising that counsel for the plaintiff did not seek to press this issue before the Court in *Tassell*. As a matter of law, the issue was clearly not conclusively determined, indeed the point had not been the subject of judicial consideration at that point in time. It may be suggested that, the acceptance of the legitimacy of such disclosures, made where there are insufficient funds to meet the cheque by counsel for the plaintiff in *Tassell* can be explained in the context of the legal era in which the argument was raised. Clearly, in 1850, the concept of banker customer confidentiality was hitherto an unexplored area of law. Certainly counsel was mindful of the more pioneering constituents of his various legal claims in *Tassell*, and was therefore understandably keen to soften the argument in relation to the disclosure of financial information to a third party. This softening, it was presumably believed, gave Tassell an increased opportunity of success in his claim and would perhaps make the Court more willing to consider the possibility of banker customer confidentiality.

[21] *Cf*, the contention raised by counsel for the plaintiff in the *Tournier* case, see further, the discussion post at page 21.
[22] *Foster* v. *Bank of London* 3 F&F 214, see post at pages 11-13.

Given the radical nature of counsel's claim that a banker owed a duty of confidentiality to their customers, and the lack of relevant authority, the argument was sustained through analogy to the legal profession, and the obligation of secrecy owed by legal advisors to their clients.[23] The principal case relied upon by counsel in this regard was that of *Taylor* v. *Blacklow*,[24] where an attorney disclosed sensitive information concerning his client to a third party who was attempting to obtain a mortgage. The disclosure had two detrimental effects on the client: Firstly, the disclosure delayed the raising of the money on the mortgage, and secondly, resulted in a higher rate of interest being payable on the mortgage. The claim in *Taylor* was that the attorney, in disclosing sensitive information regarding his client, at the detriment of his client was in breach of his professional duty of confidentiality. The Court unanimously found in favour of the plaintiff, with Gaselee J., finding that "the first duty of an attorney is to keep the secrets of his client".[25] Such sentiments were echoed emphatically by Vaughan J., who stated that, "[T]here can be no doubt that the Defendant has been guilty of a gross breach of a great moral duty",[26] before adding that "the law is never better employed than in enforcing the observance of moral duties".[27] This is an interesting statement by Vaughan J., and suggests that the duty of confidence owed by a legal advisor is a moral obligation, and not a legal duty. This clearly has important consequences for the scope and enforceability of the duty of confidentiality between a legal advisor and his client. Moreover however, the blurred distinction between moral and legal duties is also one which afflicted the banker customer relationship, and thus counsel for the respondents in *Tournier* stated that "it has never yet been decided that the duty not to disclose the state of a customer's account is anything more than a moral one".[28]

---

[23] Examples where the judiciary were required to consider the duty of confidentiality as between a legal advisor and his client include: *Beer* v. *Ward* (Jac. 77); *Bland* v. *Wainwright* (1835) 4 LJ Ex. Eq. 19; *Meath Bp* v. *Winchester* (1836) 10 Bli. NS 330; *Storey* v. *Lennox* (1836) 1 Keen. 341; *Desborough* v. *Rawlins* (1838) 3 My & Cr; *Mackenzie* v. *Yeo* (1841) 2 Curt. 866; *Walsingham* v. *Goodricke* (1843) 3 Hare 122 and *Chant* v. *Brown* (1849) 7 Hare 79.
[24] (1836) 3 Bing. (N.C.) 236.
[25] *Ibid*, at 249.
[26] *Ibid*, at 249.
[27] *Ibid*.
[28] [1924] 1 KB 461, at 466.

The analogy that counsel for the plaintiff in *Tassell* certainly then, would appear to have a solid grounding to it, and the general consensus of the early authority on the relationship of confidentiality between legal advisors and their clients would appear to support the existence of a duty of confidentiality.

In *Wilson* v. *Rastall*[29] the Court approved of the proposition that legal advisors, whether counsel, solicitors or attorneys, owed a duty of confidentiality to their client, with Buller J., stating that "[T]he nature of this kind of privilege is, that the attorney shall not be permitted to disclose, in any action, that which has been confidentially communicated to him".[30] Interestingly, Buller J., was also of the opinion that this professional privilege ought to extend to the relationship of doctor patient, and suggested that there was "much to be lamented that the law of privilege is not extended"[31] to the medical profession and information gained through the course of their professional business. In as much he was critical of the earlier case of *The Duchess of Kingston*[32] where a member of the medical profession, despite his objections, was compelled to divulge confidential information). The pro-confidentiality stance adopted by the Court in *Rastall*, must be appreciated in accordance with the (now commonplace) qualification that the privilege relates only to information gained through the course of the profession.[33] Thus, in *Walker* v. *Wildman*[34] it was determined that the privilege of solicitor and client extended to all communications for professional advice, but not to other matters (i.e. information not gained through the course of employment as a solicitor). This is supported through the case of *Bramwell* v. *Lucas*[35] where Abott C.J., delivering the judgment of the Court, stated that, "there is no doubt that it [the duty of confidentiality] is confined to...communications to

---

[29] 4 T.R. 753.
[30] *Ibid*, at 760.
[31] *Ibid.*
[32] 11 St. Tr. 243.
[33] In as much there is a clear correlation here with the approach of Bankes L.J., in *Tournier* itself, see post at page 20.
[34] (1821) 6 Madd. 47.
[35] (1824) 2 B & C 745.

the attorney in his character of attorney".[36] Clearly then, as these cases illustrate, the judiciary of the time were satisfied to the existence of a duty of confidentiality between a legal advisor and his client. The question then, is how did the Court in *Tassell* respond to the analogy between the banking and legal professions in respect of a duty of confidentiality between the professional and his client or customer?

Ultimately, the answer is rather brief, as the Court were distinctly unimpressed by the claim that a banker owes a duty of confidentiality to his customer, and that as such should not, in the circumstances of the case, disclose the account book to a third party.[37] Clearly, the argument by analogy made by counsel for the plaintiff was deemed to be unconvincing by the Court with Maule J., rather dismissively, suggesting that "[T]he probability is, that the second count (that regarding the divulgence of confidential material by the London & County Bank) is not sustainable".[38] It is however, unfortunate that the Court was ultimately not required to determine whether such a duty of confidentiality in fact existed as contended by counsel for the plaintiff. This is due to the fact that counsel agreed to abandon the count in respect of the breach of duty through disclosing the account book to the Baron De L'Isle. It would have certainly been of considerable interest had the Court been required to consider the argument raised by counsel, suggesting that a banker owes his customer a duty not to divulge confidential information. Indeed, this is hinted at in the comments of Williams J. who states, in relation to any possible duty of confidentiality owed by a banker to his customer, that, "I think the second count does not disclose a cause of action. But all difficulty as to that is removed by Mr Brown's concession that a verdict may be entered for the defendant as to that count".[39] Clearly then, Williams J. would appear to have been appreciative of the possible merits of

---

[36] *Ibid*, at 749.
[37] A position echoed by the judgment of Atkin L.J., in *Tournier*, where the usefulness of such comparisons was queried, with the Lord Justice stating that "[I] find little assistance from considering the implications that have been found by the Courts to arise from contracts in other occupations and professions". (*Tournier* [1924] 1 KB 461, at 485-486) The implication here being that the unique nature of each profession dictates an equally unique consideration of the obligation of secrecy.
[38] (1850) 9 CB 509, at 532.
[39] *Ibid*, at page 535.

the argument in favour of imposing a duty of confidentiality upon a bank in respect of a customer's dealings. Certainly, the 'difficulty' Williams J. referred to in his judgment was that of effectively imposing such a duty upon banks and their officials for a first time, without any precedent to rely upon. In as much he effectively pre-cursed the difficulties faced by Bankes L.J., and the Court of Appeal in *Tournier* as they too grappled with this 'difficult' area of banking law, which has received surprisingly little judicial consideration. Despite this recognition however, by Williams J., of the difficulties of the contention before the Court, it is likely however, given the generally unfavourable attitude of the Court to any duty of confidentiality between banker and customer that judgment would have been against any such duty existing, and in favour of the defendant officer of the Bank (had the Court been required to make any determination on this point).

The next reported case where the judiciary had to consider any duty of confidentiality between a banker and his customer was that of *Foster* v. *The Bank of London*[40] before Erle C.J., at Guildhall. The facts of Foster are particularly interesting, particularly if one considers the cautious phrasing of the statement of claim by counsel for the plaintiff in *Tassell* v. *Cooper* where it was conceded that a banker may properly, and without breach of duty, disclose the state of a customer's account where presented with a cheque on that account in respect of which, there are insufficient funds to meet the value of the cheque. The facts of *Foster*, briefly stated, were that the Bank of London disclosed the status of Foster's account to a third party, De Roo & Co., a fellow customer of the Bank, and tellingly, also a creditor of the plaintiff. De Roo & Co. presented a cheque of Foster's for payment, only to be informed by the defendant bank that there were insufficient funds available to meet the cheque. Upon pressing, De Roo & Co. discovered the amount of the deficit, which was insignificant in relation to the value of the cheque, and thus inquired as to whether, if they themselves paid money into the account of the plaintiff, whether they could draw on the cheque. Upon being informed that this would be possible, De Roo and & Co. paid the

[40] (1862) 3 F & F 214.

necessary sum of £104 into Foster's account, and the cheque was paid. The payment of this cheque left Foster unable to meet other claims in respect of his business, and he was, as a result, financially ruined. The claim was two fold, firstly, that the Bank of London wrongfully disclosed to a third party the state of Foster's account, and that secondly, the Bank rendered Foster false account statements.[41]

Counsel for the defence, sought to rely on *Tassell* v. *Cooper* to support his submission that there was "no evidence of a duty in a banker not to disclose the state of a customer's account".[42] Erle C.J., however, left the existence of any such duty of confidentiality to the jury, of whom he asked the following question: "[T]hat is, the jury are of the opinion that it is the duty of a banker in no way to disclose the state of his customer's account?".[43] The jury answered in the affirmative, and moreover, were in agreement with Erle C.J., who had suggested that in the present situation, namely where a bank is presented with a cheque in respect of which, there are insufficient assets available to meet the cheque, the bank ought to say merely "Not sufficient assets"[44] and reveal nothing more regarding the state of the customer's account. The contention by counsel for the defendant was that the Bank ought to be permitted to state, "not enough to meet it by such a sum".[45] This argument was rejected by both judge and jury.

Upon hearing the verdict of the jury in respect of the existence of a duty of confidentiality between a banker and his customer, Erle C.J., stated that "he was not aware of any law against that",[46] and consequently found in favour of the plaintiff.[47] It is unsurprising that Erle C.J., was somewhat cautious in the wording of this decision. The negative statement of 'not being aware' of any rule of law contrary to the finding of a duty of confidentiality between a banker and his customer is certainly indicative of the difficult and un-

[41] This second count need not be considered for the purposes of this thesis.
[42] *Op cit.*, above n. 40, at 216-217.
[43] *Ibid*, at 217.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*
[47] Interestingly, Erle C.J., granted leave to appeal, although no motion was ever made.

investigated nature of the particular area of law in question. Furthermore, it clearly acknowledges the position following *Tassell*, namely that the judiciary had not at that point determined that any such duty of confidentiality was applicable to the banker customer relationship. Nevertheless, Erle C.J., laid down the position that a banker owed a duty of confidentiality to his customers, and that a banker was not therefore, in any was, to disclose the status of a customer's account to a third party. The question is then, why, if a precedent was laid down in *Foster* v. *Bank of London* to the effect that a bank owes its customers a duty of confidentiality, is the decision in *Tournier* treated as the genesis of the banker's duty of confidentiality? The answer to this is the result of two interrelated factors, firstly, the unusual facts of the Foster case itself, and secondly the restrictive interpretation subsequent courts have imposed upon the judgment of Erle C.J. Both factors are readily apparent through the decision and reasoning of the Court of Exchequer in *Hardy* v. *Veasey*[48] where the defendant bank disclosed to a third party (a money lender) the fact that the plaintiff's account was overdrawn. The plaintiff contended that the bank, as part of the contract between himself and the defendants, agreed never to disclose information regarding the account, unless the bank had reasonable or proper justification for so doing. The defendants, in rather belt and braces fashion denied the count, and pleaded, firstly, that there was no such promise made by the Bank to the customer, that, secondly, even if such a promise was made, there was, in fact, no breach of it by the bank in the present case, and finally, the defendant sought leave and licence.

The facts, in so far as relevant and briefly stated, were that the plaintiff had a bank account with the defendant bank, in respect of which, the plaintiff was overdrawn. The bank manager was presented with cheques, in respect of which, there were insufficient funds to honour. Concerned, the bank manager consulted the plaintiff, who promised to credit his account that same day. On the strength of this promise, the bank manager paid cheques presented to him during that day, although unfortunately, whilst the plaintiff

---

[48] (1868) LR 3 Ex. 107.

did credit his account that day, the amount credited were still insufficient to honour the outstanding cheques. The bank manager then, without the consent of the plaintiff, communicated the state of the plaintiff's account to a third party, namely a local money lender named Mutton, with a view to obtaining financial assistance for the plaintiff. At first instance, before Byles J., the jury found in favour of the defendants. The plaintiff appealed on the grounds that Byles J., had misdirected the jury by informing the jury that the question they must ask themselves was "[W]hether the communication to Mutton of the state of the plaintiff's account was an officious and unjustifiable one" and that "[I]f it was made with a reasonable hope and an honest intention of getting assistance for the plaintiff, I should doubt whether the action is maintainable",[49] and also that the verdict was contrary to the evidence.

Ultimately, the Court upheld the first instance verdict, and unanimously held that there was no misdirection by Byles J., and that the verdict was entirely consistent with the evidence presented. Undoubtedly then, this decision was, from the point of view of banker customer confidentiality, if not quite a backward step, certainly an evasive manoeuvre by the Court of Exchequer. On the strict grounds of the appeal, the Court was not required to consider whether any legal duty of confidentiality was owed by a banker in respect of financial information acquired through his professional capacity, and the Court immediately sought to emphasise this point, and in turn avoid expressing any opinion as to whether such a duty does in fact, as a matter of law, exist. Kelly C.B., delivering the leading judgment opened by stating that:

> "We are not called on in this case to decide the question, whether a legal duty is imposed on bankers to keep reasonably secret the state of their customers' accounts; that is a question well worthy of consideration, and upon which I will express no opinion".[50]

---

[49] *Ibid*, at page 109.
[50] *Ibid*, at page 111.

Martin B., expressed similar apprehension in asserting that:

> "I am of the same opinion. I also should be sorry on the present occasion to pronounce an opinion, whether or not the law will imply a contract by a banker not to communicate the state of his customer's account except on reasonable and proper occasion".[51]

Clearly then, the Court was reluctant to consider the existence, or otherwise, of a duty of confidentiality between a banker and his customer. This avoidance is perhaps understandable if one considers, as previously noted, that the Court here did not, as a matter of law, have to consider the issue of any duty of confidentiality existing. The grounds of the appeal itself were such that the Court merely had to consider whether the trial judge had misdirected the jury (there was no misdirection in the opinion of the Court), and whether the verdict was sustainable by the facts of the matter; in the opinion of the Court the verdict was sustainable, "[T]here has been no misdirection and no wrong verdict".[52] The difficulty, however, with such an evasive stance was that the Court was referred, during the course of the appeal by counsel for the plaintiff, to consider the present matter in light of the authority of *Foster* v. *Bank of London*. How then did the Court in Hardy manage to avoid the apparent precedent laid down in the earlier decision of Erle C.J.? Ultimately, the view of the Court was that *Foster* was a case not necessarily concerned with any duty of confidentiality owed by a banker to a customer, but was rather, concerned with an instance of "an obvious conspiracy between the bank and one customer to give him an advantage over the other creditors of the plaintiff".[53] This line of argument was expanded upon, in particular, by Channell, B., who stated:

---

[51] *Ibid*, at 112.
[52] *Ibid*, at 113, *per* Martin B.
[53] *Ibid*, at 112, *per* Martin B.

> "The case cited of Foster v. Bank of London (citation omitted), seems correct; and if the observations of the chief justice are taken in connection with the facts of that case, there is no ground to complain of them, but they do not, I think, support the plaintiff's argument. It was not so much there the case of a disclosure of the customer's account, as of a trick, by which the bank conspired with one of the plaintiff's creditors to the prejudice of the rest; and the language of the chief justice is guarded, for he says emphatically that he knows of no law against the action being maintainable".[54]

The ability of the Court then, to interpret *Foster* and the comments of Erle C.J., in such a narrow manner is based on three interrelated contentions. Firstly, that the facts of *Foster* were somewhat unusual, and thus the decision of the Court must be restricted to its own unique factual context. Secondly, that the facts of *Foster* illustrate that the crux of the issue before Erle C.J., was not that of banking confidentiality and the imposition of a duty of confidentiality, but was rather that of collusion and conspiracy by the defendant bank and the creditor of the plaintiff. Thirdly, and finally, that the approach of Erle C.J., as revealed through the careful wording of his judgment, was inherently cautious, and that therefore, similar caution ought to be employed when considering the judgment itself.

It may be suggested that such an argument is not without force: Certainly, the facts of *Foster* were unusual, and that, as a result, necessitates restraint when attempting to apply the decision of Erle C.J., to a different factual scenario. Equally sustainable is the final argument, namely that Erle C.J., was somewhat cautious in delivering the judgment. The stating of the judgment in the negative is certainly revealing, and understandable, if one is again to consider the innovative argument in favour of imposing a duty of confidentiality in the banker customer relationship, and the uncharted nature of this area of law. The difficulty, however, arises through the second argument of Channell B., namely that the facts of *Foster* are not, necessarily,

---

[54] *Ibid*, at 113.

invoking any notion of breach of confidentiality, and are better explained through reference to the conspiracy between the Bank of London and the creditor of the plaintiff, who was undoubtedly keen to secure the monies lent to the plaintiff. Whilst there again is force in this interpretation,[55] it may be suggested however, that ultimately the case was pleaded, and consequently decided, on the ground of the disclosure by the defendant Bank of the state of Foster's account to a third party. In as much the decision and reasoning of Erle C.J., in *Foster* must be appreciated in light of this ground, and it is then, perhaps unhelpful for subsequent courts to interpret the decision in a contrary manner. This point, would appear to have been appreciated, if not quite fully acted upon, by Kelly C.B., in *Hardy* itself where it was suggested that:

> "[I]t is impossible to reconcile his [Erle C.J.'s] language in that case [*Foster* v. *Bank of London*] with a total absence of any such legal duty, for undoubtedly he there allowed an action to be maintained by a customer against his bankers which could not possibly have lain if no such obligation existed".[56]

Unfortunately however, Kelly C.B., neglected to continue with this line of contemplation, and returned to the narrow ambit of the appeal itself. Moreover, Martin B., was also inclined to offer limited consideration of the possibility of such a duty existing, and suggested that "[T]here may be such a duty, but I confess I should like to see some authority in its support. It is one thing to be under a moral duty to do a thing, another to be bound by a contract".[57] This would appear to be the very crux of the dilemma faced by the judiciary in this matter: Is any duty of confidentiality owed by a banker to his customers' merely a moral duty, or is it properly to have a legal and contractual grounding? It may be suggested that this difficulty is the consequence of the equitable origins of the general concept of

---

[55] It was suggested in the report of *Foster*, that the creditor in question, who was owed the sum of £600 and becoming increasingly agitated to obtain payment in respect of the debt, stated to the plaintiff, "You must not be surprised, then, at what we do; we cannot wait any longer", *Foster* v. *The Bank of London* ((1862) 3 F & F 214, at 215).
[56] (1868) LR 3 Ex. 107, at 111.
[57] *Ibid*, at 112.

confidentiality. The equitable and moral origins of confidentiality are revealed through the old Sixteenth Century rhyme:

> "These three give place in court of conscience,
> Fraud, accident and breach of confidence".[58]

As shall be seen subsequently, it will not be until the *Tournier* case in 1924, that dilemmas over the jurisdictional[59] basis[60] for any possible duty of confidentiality between a banker and his customer, shall be resolved.[61]

Certainly, the creativity illustrated by the Court of Exchequer in *Hardy* in skillfully avoiding any detailed analysis of confidentiality as it applies to the banker customer relationship, is an excellent indication of the difficulty and uncertainty prevalent in this area of banking law in the Nineteenth Century. One must consider also, that the ambit of the pleading by the plaintiff in *Hardy* in itself limited the area open to judicial consideration. The action complained of was that the bank disclosed the state of the plaintiff's account on an occasion where it was unreasonable, and improper to make such a disclosure, and that such a disclosure was in contravention of the (alleged) promise made to the plaintiff by the Bank of London not to disclose information relating to the plaintiff's bank account except on proper and reasonable occasion. Equally, the complaint raised in the appeal of the first instance verdict was that of whether the direction made by the judge to the jury adequately allowed the jury to consider whether the disclosure by the defendant Bank was justifiable (i.e. made on reasonable and proper occasion). Thus, it is understandable that the Court in *Hardy* felt unable to comment on the existence, or otherwise, of any duty of confidentiality owed by a banker to his customer, though appreciative that the area was one "well worthy of consideration".[62]

---

[58] Quoted by Maitland in Equity (Two Courses of Lectures) Cambridge University Press (1910) at 7.
[59] In the sense of equity as against the common law.
[60] For a detailed examination of the equitable origins of confidentiality, reference may be made to Reid, *Confidentiality and the Law*, London: Waterlow Publishers (1986), at 1 *et seq*; See also, Gurry, *Breach of Confidence*, Oxford: Clarendon Press (1984), at 36-46.
[61] See post, at 20-21.
[62] *Hardy*, (1868) LR 3 Ex. 107, at 111.

This discussion of the case law leading up to the landmark decision of the Court of Appeal in *Tournier* v. *National Provincial and Union Bank of England*[63] has illustrated the hitherto deeply unsatisfactory state of this important area of law. The confusion surrounding the possible duty of confidentiality owed by a banker to his customer is marked, as is the reluctance of the judiciary at the time to consider this crucial question. The prevailing judicial attitudes of the pre-*Tournier* era varied from, dismissive denial of such a duty of confidentiality,[64] to a hesitant acceptance of a jury's finding that a banker was not to disclose the state of a customer's account to a third party,[65] before arriving at an evasive position where the judiciary appreciated the dilemma, and raised difficult questions concerning banker customer confidentiality, but ultimately, declined to answer their own questions.[66] Indeed, with such attitudes prevailing, it would take a brave court indeed, to attempt to fully consider the existence and possible extent of the banker's duty of confidentiality. Fortunately for domestic banking law, such a court did indeed gain the opportunity to fully analyse this complex legal issue: The Court of Appeal in the *Toumier* case.[67] It is this decision that must now be addressed.

THE TOURNIER DECISION AND BANKER CUSTOMER CONFIDENTIALITY

As previously noted, the Court of Appeal in *Tournier* v. *National Provincial and Union Bank of England*[68] were called to determine whether the disclosure by the defendant bank constituted a breach of duty (of confidentiality) to the plaintiff. A majority of the Court of Appeal[69] determined

---

[63] [1924] 1 KB 461.
[64] Well illustrated by the Court in *Tassell* v. *Cooper* ((1850) 9 CB 509).
[65] Evidenced by *Foster* v. *Bank of London* (3 F&F 214), restrictively interpreted by the Exchequer Court in *Hardy v. Veasey* ((1868) LR 3 Ex. 107).
[66] *Hardy v. Veasey* ((1868) LR 3 Ex. 107).
[67] Bankes, Scrutton and Atkin LJJ.
[68] [1924] 1 KB 461.
[69] Scrutton L.J., dissented on this point, favouring a narrower formulation of the duty, suggesting that there was indeed a breach of duty, but not to the plaintiff, and any such breach of duty was confined to the drawer of the cheque, i.e. the bookmaker.

that such a disclosure did, indeed, constitute a breach of duty, irrespective of the fact that the information disclosed was obtained from the drawer of the cheque and not from the account of the plaintiff. Bankes L.J., delivering the lead judgment of the Court, although keen to restrict his observations to the particular facts of the matter before the Court,[70] suggested that:

> "The case of banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence. I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account".[71]

The crucial issue in the opinion of Bankes L.J., was whether the information divulged came to the attention of the banker in his 'character of banker'.[72] Thus, it was irrelevant that the information divulged in the present matter came to the Bank's knowledge not through the plaintiff, but rather from the drawer of the cheque. The branch manager "acquired the information...in his character as the plaintiff's banker" and was therefore liable of breach of the implied duty of confidentiality owed to the plaintiff, unless, of course, the Bank could establish that the disclosure fell within one of the exceptions enunciated by, in particular, Bankes L.J. Clearly, however, such recognition of a duty of confidentiality merely marks the beginning of the inquiry in that it leads to crucial questions, including, what is the proper basis for such a duty under English law? What information does the duty of confidentiality apply to? Is the duty of confidentiality an absolute one, or are certain exceptions permitted, and if so what are these exceptions? Fortunately, the Court of Appeal "shed a great deal of light",[73] on all of these questions, which were addressed by the Court.

---

[70] See, for example, his comments at 473 of the report.
[71] [1924] 1 KB 461, at 474.
[72] Using the expression of Gurney B., in *Davies* v. *Waters* (1842) 9 M&W 608, at 613, where it was queried whether "it could be doubted that this is a knowledge acquired in the character of professional adviser".
[73] To use the phrase of Silvertown, 'Banker's Duty of Confidentiality', [1988] Int'l. Bank. Law 72, at 72.

Turning first, to the issue which had historically vexed the judiciary, that of the nature and proper jurisdictional basis of the obligation of confidentiality. Bankes L.J., with reference to the earlier case previously discussed of *Hardy* v. *Veasey*[74], was of the opinion that the banker's duty of confidentiality was grounded not in equity as a moral duty, but rather arose as a legal duty stemming from the contract between banker and customer. He states emphatically that, "[A]t the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract".[75] Moreover, the Court of Appeal unanimously agreed that the argument raised by counsel for the plaintiff concerning the absolute nature of the duty of confidentiality was untenable. In as much, the observations of the trial judge were correct, with, for example, Scrutton L.J., stating that "[T]he judge directed the jury there was no such absolute contract, and I think he was correct".[76] Indeed, the permitted exceptions to this duty of confidentiality constitute the substantial emphasise of the judgment of Bankes L.J., whose words have since become an almost ever-present feature of any discussion of banker customer confidentiality in domestic courts. He suggested that:

> "...it is necessary in a case like the present to direct the jury what are the limits, and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer...On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer".[77]

The Court (and particularly Bankes L.J.) was then, clearly concerned to elaborate upon the direction given by the guidance offered by the trial judge, who, on this complex issue, merely informed the jury that they were to decide

---

[74] LR 3 Ex. 107.
[75] [1924] 1KB 461, at 471-472.
[76] *Ibid*, at page 479. On this point the Court of Appeal unanimously agreed with Bankes L.J., stating that "the duty is not absolute but qualified" (*Ibid*, at 472) and Atkin L.J., concurring at page 484 of the report: "[T]he learned judge, as I think quite rightly, ruled that there was no such absolute duty".
[77] *Ibid*, at 471-472.

whether the disclosure made to the plaintiff's employers was reasonable and proper. Whilst correct in denying the existence, as a matter of law, of any absolute duty of secrecy, the Court was critical of the above formulation given to the jury in respect of what was suggested to be a "very important question".[78] This formulation was taken from the words of Kelly C.B., and Martin B., in the earlier case of *Hardy* v. *Veasey*,[79] although Bankes L.J., quite properly believed that "the learned judge did not, in my opinion, sufficiently direct the jury".[80] The difficulty with the formulation proffered by the trial judge in the first instance decisions of both *Tournier* and *Hardy* is clear, and appreciated by Scrutton L.J., in his judgment, who states that "the learned judge, by some unfortunate oversight, omitted to give the jury any direction as to the standard by which reasonableness and propriety were to be considered".[81]

With these four "protected occasions"[82] raised then, the Court sought to expand further, and although Bankes L.J., cautiously advised that "[I]t is not possible to frame any exhaustive definition of the duty",[83] the Court successfully proffered various illustrations of the situations in which the duty of confidentiality was relaxed. As for the disclosures justified under the first head of qualifications, that of legal compulsion, Bankes L.J., himself suggested that where a banker was compelled to "obey an order under the Bankers' Books Evidence Act"[84] 1879, there would be no breach of duty on his part (under section 7 of the BBEA for example). In addition to this statutory based example, the Court also referred to common law authority for the proposition that a banker may disclose confidential information in a court of law. Scrutton L.J., states clearly that "[T]here is no privilege to abstain from answering in a Court of justice questions as to a customer's account",[85] relying on *Loyd* v.*Freshfield*.[86] The second head, that of public interest

78 *Ibid*, at 470.
79 LR 3 Ex. 107.
80 [1924] 1 KB 461, at 470.
81 *Ibid*, at 479.
82 *Per* Bankes L.J., at 475.
83 *Ibid*, at 472.
84 *Ibid*, at 473.. Hereafter, the BBEA
85 *Ibid*, at 479.
86 (1826) 2 C & P 325.

disclosures, is an excellent example of the balancing act that the court must perform in order to successfully protect and maintain both the rights of individuals (i.e. the private right that their sensitive financial information remains confidential) and the interests of the State (i.e. that such confidential information is divulged in order to safeguard the interests of the public). This is certainly a difficult balancing act, and is one which, the judiciary have grappled with in the years since the decision in *Tournier.* Indeed, this qualification is generally regarded as the most problematic to define.[87] Nevertheless, Bankes L.J., supports this exception through reference to the words of Lord Finlay in the House of Lords decision in *Weld-Blundell* v. *Stephens*[88] where the private duty of a banker to his customer must be subservient to a greater public need, as where "danger to the State or public duty may supersede the duty of agent to principal".[89] Although, generally the banker customer relationship is not one of agent and principal, the analogy remains valid for the banker's duty of confidentiality.

The third head of qualification enunciated by Bankes L.J., is the situation where the interests of the bank are such that disclosure is required. This then is a fairly narrow exception to the duty of confidentiality,[90] and is exemplified by Bankes L.J., as "where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft".[91] This is supported by Scrutton L.J., who states that "it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft".[92] The final qualification to the duty of confidentiality as postulated by Bankes L.J., is that where there is either implied or express consent by the customer to the disclosure. Clearly in such a situation, the banker would not be in breach of

[87] See Hapgood, *Paget's Law of Banking*, 12th edition, London: Sweet & Maxwell (2002), at 128-9. See also, generally, Chapters Two and Four, and in particular the discussion relating to the disclosure of financial information where money laundering is suspected (a situation which may legitimately fall under three of the heads of permitted exceptions).
[88] [1920] AC 956.
[89] *Ibid*, at 965.
[90] See for example the observations of Ellinger, Lomnicka and Hooley, *Modern Banking Law*, 3rd edition, Oxford: OUP (2002), at 155, and also those of Cranston, *Principles of Banking Law*, Oxford: OUP (1998), at 186-188.
[91] [1924] 1 KB 461, at 473.
[92] *Ibid*, at 481.

duty by making the disclosure. Bankes L.J., suggests that the "familiar instance of the last class is where the customer authorises a reference to his banker".[93]

One interesting question in relation to these exceptional circumstances is the issue of the proper effect of the qualifications. Essentially, there are two possible interpretations of the "four heads"[94] of qualification: Either the exceptional circumstances provide a justification for a breach of the duty of confidentiality by a banker, or alternatively, the qualifications describe exceptional circumstances when the duty of confidentiality between banker and customer does not exist, i.e. there is no need for a justification in the first place, as there will be no *duty to breach* in such circumstances. If one adopts the former position, namely that the effect of the qualifications is to justify or excuse a breach of confidentiality, the result is effectively the creation of a three part test: Firstly, was the respondent under a duty of confidentiality; secondly, did the respondent breach this duty, and thirdly, can the breach be justified by reference to one of the four heads of qualification listed in *Tournier*. This approach would necessitate a full consideration of the *duty* in addition to an analysis of the exceptions, and thus a fuller judicial consideration of the ambit of the banker's duty of confidentiality would arise. If the alternative approach was to be preferred, such considerations may be limited, as no three-part test would be required. Quite simply, if the qualifications represent exceptional circumstances in which the banker would not owe a customer any duty of confidentiality, once the court was satisfied that the matter did fall under one of the qualifications the matter would be concluded: If the banker was not under any duty in respect of the disclosure complained of, there is no need to consider the ambit and nature of the duty itself.

What then is the proper approach when analysing the effect of the qualifications to the banker's duty of confidentiality? Again there is judicial

---

[93] *Ibid*, at 473.
[94] To use the words of Bankes L.J., at 473 of the report.

disagreement on this issue. In *Barclays Bank plc* v. *Taylor*,[95] Donaldson M.R., stated that, "[T]he duty to maintain confidentiality is not all-embracing, subject to certain exceptions. It does not exist in four exceptional circumstances".[96]

In contrast to this, the judgment of Croom-Johnson L.J., again in the *Taylor* case, illustrates judicial reliance upon the alternative approach. Croom-Johnson L.J., said:

> "Faced with those orders [referring to orders made under the Police and Criminal Evidence Act 1984, s. 9], the banks complied with them, thereby necessarily breaching the duties of confidence which they owed to Mr and Mrs Taylor".[97]

So, according to the approach of Croom-Johnson L.J., there had been a breach of the banker's duty of confidentiality. He then continued, and addressed the point of whether the breach could be justified under the *Tournier* qualifications. He stated that:

> "The four circumstances in which a banker is *justified* [emphasis added] in breaking that duty are set out in *Tournier v. National and Provincial and Union Bank of England* [1924] 1KB 461, 473 in the judgment of Bankes L.J. The first is 'disclosure...under compulsion by law'. That means that, in complying with the orders under section 9, the banks were not in breach of that implied term in their contracts with Mr Taylor".[98]

Whilst the two sections quoted from the judgment of Croom-Johnson L.J., may appear, at least initially incoherent, and even contradictory, it may be suggested that they are not, provided that the framework within which Croom-Johnson L.J., was operating is appreciated. If one considers the

---

95 [1989] 1 WLR 1066.
96 *Ibid*, at 1074.
97 *Ibid*, at 1075.
98 *Ibid*.

three-part test postulated earlier, it is clear that the finding of a breach of the duty of confidentiality is only one step. It does not complete the investigation, and merely leads to a further element; the issue of justification, and whether the disclosure falls under one of the principles enunciated in the *Tournier* decision. Thus when Croom-Johnson L.J., states that the bank is "necessarily breaching the duties of confidence", the reference is to the situation whereby, *prima facie*, there is a breach, but a breach which may yet be justified through reference to the *Tournier* qualifications. In as much it may be suggested that the criticism levied upon Croom-Johnson L.J. by Toulson and Phipps[99] is unduly harsh and fails to appreciate the nature of the enquiry undertaken by Croom-Johnson L.J.

Nevertheless, the question remains, which of the two views on the proper effect of the *Tournier* qualifications is correct? In *El Jawhary* v. *Bank of Credit and Commerce International SA*[100] Sir Donald Nicholls V.C. analysed the banker's duty of confidentiality in terminology consistent with the interpretation offered by Lord Donaldson M.R., in *Barclays Bank* v. *Taylor* in stating that "[W]here the case is within one of the qualifications to the duty of confidence, the duty, ex hypothesi, does not exist".[101] Thus the qualifications operate as occasions whereby the banker's duty of confidentiality does not exist, and not as a means of justifying a breach of confidentiality: There can be no breach, because where one of the qualifications is applicable there is no duty. This approach is mirrored in academia, with Toulson and Phipps contending that "[T]he true effect of the qualifications is not to excuse a breach of duty, but to identify certain limits of the duty itself".[102] Thus it would seem settled that where the disclosure of confidential information falls within one of the four *Tournier* qualifications, the banker owes no duty of confidentiality to their customer, and that it would be incorrect to talk of the exceptions as justifying a breach of duty by a banker.[103]

---

99 See, for example, the observations in Toulson and Phipps, *Confidentiality*, London: Sweet & Maxwell (1996), at para. 14.02.

100 [1993] BCLC 396.

101 *Ibid*, at page 400.

102 *Op cit*, above, n. 99, at para. 14.02.

103 Although, note the approach of Goode, who refers to the "four cases in which disclosure is justified". RM Goode, 'The Banker's Duty of Confidentiality', [1989] *JBL* 269, at 269.

The above discussion then, illustrates the qualifications to a banker's duty of confidentiality, as laid down by the Court of Appeal in 1924. Perhaps a more difficult question, and again it is a question which the Court in *Tournier* addressed, is that of what is the scope of the duty of confidentiality? As Goode laments, "[I]t is unfortunate that in literature on banking law more attention is devoted to the exceptions to the duty of confidentiality than to the scope of the duty itself".[104] It is certainly noticeable, that discussions of the *Tournier* decision generally focus on the exceptions to the duty, rather than to the observations of the Court to the ambit of the duty itself. This is a view which, subsequent courts have been more than willing to adopt, neglecting consideration of the precise ambit of the duty of confidentiality. Moreover, this view is mirrored by academics, who, like their judicial counterparts prefer to concentrate their analysis on the ambit of the exceptions to the duty of confidentiality, rather than focusing upon the definition and substantive content of the duty itself.[105] It is worth emphasizing that Bankes L.J., even suggested that it was "more difficult to suggest what the limits of the duty are" than elaborate on the scope of the justifiable exceptions.[106] Certainly, the Court of Appeal was appreciative of the difficulties associated with an attempt to define the scope of duty, and thus it is perhaps unsurprising that negative definition, through an analysis of the qualifications to the duty, is so prevalent.

It is important to appreciate, as Bankes L.J., noted in the *Tournier* case, that it is not possible to frame any exhaustive definition of the banker's duty of confidentiality.[107] Indeed, Bankes L.J., was supported on this issue by Atkin L.J., who suggested that, "It is difficult to hit upon a formula which will define the maximum of the obligation which must necessarily be implied".[108] The difficulty though, it may be suggested, is not so much the definition of the duty imposed by the Court of Appeal in *Tournier*, which is ably defined

---

104 'The Banker's Duty of Confidentiality', [1989] *JBL* 269, at 270.
105 With the notable exception of Goode, as discussed above.
106 [1924] 1 KB 461 at 473.
107 See, for example, the comments at 472.
108 [1924] 1 KB 461 at 473.

without any substantial difficulty: As Bankes L.J., said, "[I]nformation gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualifications I have already referred to".[109] That would be a perfectly adequate definition of the duty, it is more the scope of the duty of confidentiality that poses difficulties to both the judiciary and legal academics.

However, Atkin L.J., suggested that the duty:

> "...clearly goes beyond the state of the account, that is, whether there is a debit or credit balance, and the amount of the balance. It must at least extend to all transactions that go through the account, and to the securities, if any given in respect of the account; and in respect of such matters it must, I think, extend beyond the period when the account is closed, or ceases to be an active account".[110]

Such sentiments were supported by Bankes L.J., who suggested that "the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself".[111] Moreover, and importantly for the facts of the present matter before him, Atkin L.J., continued to add:

> "I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers- for example with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customers".[112]

---

[109] *Ibid.*
[110] *Ibid*, at 485.
[111] *Ibid*, at 473.
[112] *Ibid*

The uncertainty surrounding the ambit of the banker's duty of confidentiality is revealed by the differing thoughts of the respective members of the Court of Appeal. In particular, as evident in the above passage from the judgment of Atkin L.J., a majority of the Court was of the opinion that the obligation included information gained from sources beyond merely that of the customer's account.[113] Thus, in *Tournier* itself, the duty extended to the disclosure of information gained through inquiries made of a fellow bank concerning the identity of the drawer of the cheque. In contrast to such an approach, Scrutton L.J., dissented on this point suggesting that:

> "It appears to me therefore, that we cannot imply an obligation to keep secret information about a customer derived not from that customer or account, but from the account of another customer. The second customer may complain, but not the first".[114]

The precise points on which Scrutton L.J., dissented has been the subject of academic dispute. In particular, the issue of whether the duty of confidentiality applies where the account has been closed has caused difficulty. In the Jack Report,[115] it is contended that Scrutton L.J., dissented from the majority opinion that the duty remained even regardless of any closure of the account. Scrutton L.J., states that the implied legal duty of confidentiality is of no application to "knowledge which the bank acquires before the relation of banker and customer was in contemplation, or after it ceased, or to knowledge derived from other sources during the continuance of the relation".[116] As Goode correctly notes then, the words of Scrutton L.J., on this point are not in fact in conflict with the stance of the majority on this point.[117] The distinction, which the Jack Committee would apparently appear to have neglected, is as between the confidentiality (or lack thereof) of information acquired after the closure of the account and the confidentiality of information gained during the lifetime of the banker customer relationship

---

[113] Bankes L.J., was of a similar disposition, see the observations at 473-474.
[114] [1924] 1 KB 461, at 482.
[115] *Banking Services: Law and Practice, Report by the Review Committee*, (Cmnd. 622 (1989)), at para. 5.03.
[116] [1924] 1 KB 461, at 481, emphasis added.
[117] 'The Banker's Duty of Confidentiality', [1989] *JBL* 269, at note 3.

after the closure of the account. The implied duty of confidentiality attaches only to the latter situation, as in the former situation, any information will not be acquired through the banker-customer relationship. As Bankes L.J., suggests. "...the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential".[118] It may be respectfully submitted that the contention by Silvertown in suggesting that Scrutton L.J., does not agree with the view that "the obligation to exercise confidentiality covers information acquired both before as well as after the date when the account was opened'" is incorrect.[119] As to the issue of confidentiality after the closure of the account, Silvertown would appear to make the identical mistake made by the Jack Committee. As to the issue of the duty of confidentiality applying to information acquired before the account being opened, Silvertown offers the following example:

> "Thus after the closure of a company's account, the bank is not at liberty to reveal to a third party the details of trading and profit and loss accounts and balance-sheets which were supplied by the company to the bank as a preliminary to opening an account".[120]

Again, it may be respectfully submitted that the judgment of Scrutton L.J., does not, as Silvertown contends, indicate that such an example is at odds with the observations of the Lord Justice. Indeed, Scrutton L.J., states that the duty of confidentiality does not apply to information obtained "before the relation of banker and customer was in contemplation".[121] It may be suggested that the example proffered by Silvertown is a prime example of what Scrutton L.J., would deem a time of the relationship of banker and customer being 'in contemplation'. Thus, in keeping with the majority of the Court of Appeal in *Tournier*, Scrutton L.J., would, it may be suggested, hold that the duty of confidentiality applied to the above scenario.

---

118 1924] 1 KB 461, at 473.
119 See, Silvertown, 'Banker's Duty of Confidentiality', [1988] Int'l. Bank. Law 72, at 73.
120 *Ibid.*
121 [1924] 1 KB 462, at 481.

CONCLUSIONS

It is readily apparent through the differing opinions of the Court in *Tournier*, that the scope of the implied duty of confidentiality is a particularly difficult area of banking law. Moreover, whilst the Twentieth Century development and maturity of this duty of confidentiality has resolved some of these dilemmas, as Goode noted in 1989, "there remain many uncertainties".[122] The following chapter shall consider this development of the banker's duty of confidentiality, as laid down in *Tournier*, through the Twentieth Century, and analyse the undoubted uncertainties that remain. At this juncture it is sufficient to state merely; that the decision of the Court in *Tournier* was certainly ground-breaking and, as shall be seen in the next Chapter, arguably forms the high-water mark of confidentiality as it applies to the banker customer relationship.

[122] 'The Banker's Duty of Confidentiality', [1989] *JBL* 269, at 270.

CHAPTER TWO

THE DEVELOPMENT OF THE QUALIFICATIONS TO THE BANKER'S DUTY OF CONFIDENTIALITY FOLLOWING THE DECISION OF THE COURT OF APPEAL IN *TOURNIER*

> "The last two decades have seen a torrent of new legislation, which has become a spate in the past few years, requiring or permitting bankers, in a wide range of specified situations, to disclose confidential information".
>
> Banking Services: Law and Practice, Cmnd., 622 (1989), at paragraph 5.07.

INTRODUCTION

It has already been noted, and indeed, lamented, that much of the academic (and judicial) analysis of the banker's duty of confidentiality has focused upon the scope of the exceptions to that duty. The previous Chapter has therefore investigated, *inter alia*, the actual nature of the duty of confidentiality, but it is clear that no analysis of banking confidentiality can be completed without a clear understanding of the exceptions to the duty. This issue will be the focus of this Chapter, as the development of the four heads of qualification as laid down in *Tournier* are traced and explored through the Twentieth Century. As shall be discussed, each of the qualifications has undergone considerable change in the years following *Tournier*, and it is necessary to analyse each in turn. It may be emphasised at this point however, that this Chapter will not investigate the development of the anti-money laundering regime within the United Kingdom, which, in light of the importance of this issue in the modern era, will be considered at length in Part Two of the thesis.

DISCLOSURE THROUGH COMPULSION AT LAW

The most significant inroads to the banker's duty of confidentiality, as shall be seen subsequently, have been made under the guise of the first qualification laid down under *Tournier*: Disclosure through compulsion at law. The qualification itself is the result of the nature of the banker's duty of confidentiality. As the duty of confidentiality is an implied contractual duty it is subject to the general law, and thus not enforceable where the general law compels disclosure.[1] This head of the qualifications is immediately distinct from the other three: Disclosure through *compulsion* at law. If the facts of the situation fall within this qualification, the bank has no option other than making the necessary disclosure. This is distinct from the others as they all allow the bank or banker discretion over whether or not to disclose. This is accurate even where there is consent, clearly simply because the bank has obtained the customer's consent to a particular disclosure it does not follow that the disclosure will in fact, be made. Obviously the likelihood of that disclosure being made is high, but the banker still has discretion over disclosures in such situations. This is not the case with the first *Tournier* qualification. This development to the obligation of confidentiality is particularly surprising if one considers the relatively narrow scope of the qualification in the 1920's. The example proffered by Bankes L.J., that of duty through the course of obeying the Bankers Books Evidence Act 1879 was almost the only one, the other being disclosures made by a banker in the capacity of witness in legal proceedings.[2] It would seem that the only other relevant statute in force at the time of the *Tournier* decision is that of the Extradition Act 1873, s. 5.[3]

The example given by Bankes L.J. in *Tournier*, i.e., disclosure under the BBEA 1879 is still applicable although as noted in Penn and Shea, "it is now

---

1 See the comments of Diplock L.J., in *Parry-Jones* v. *The Law Society* [1969] 1 Ch. 1, at 9.

2 An example of this would be the case noted in Chapter One, that of *Loyd* v. *Freshfield* (1826) 2 Car. & P. 325 at 329: "The witness applied to the Lord Chief Justice and said, that their orders were not to state what the balance of any customer was, except by the direction of the judge".

3 See the 'Jack Report', *Banking Services: Law and Practice*, Cmnd., 622 (1989), at para. 5.06.

only the first of many".[4] Indeed it is, and this section shall analyse the current situation of this qualification. It must be emphasised at this point however, that certain issues flowing from this qualification, including money laundering and proceeds of crime issues are omitted from the ambit of this Chapter. These issues which are of significant importance in the modern climate of banking regulation shall be dealt with subsequently (and independently) in the thesis.

Bankers' Books Evidence Act 1879

Turning first then to the illustration offered by Bankes L.J. in *Tournier*, that of disclosures required under the Bankers Books Evidence Act 1879.[5] The general aim of the Act was to allow bankers to produce the relevant banker's books and thus avoid being called to give verbal testimony in court. By virtue of section 3 of the BBEA, a copy of an entry in a banker's book is prima facie evidence of the entry in all legal proceedings. Under section 10 of the Act, the phrase 'legal proceedings' includes both civil and criminal proceedings in addition to inquiries where evidence may be given and arbitration.[6] Furthermore, under section 4 of the Act it must be established that the entry concerned formed part of an ordinary book of the bank, and also that the entry itself was made in the usual and ordinary course of the business. Following the case of *Idiot's Asylum* v. *Handysides*[7] records kept for only occasional reference do constitute part of the 'ordinary business' provided that they are held by the bank.

The term 'banker's books', as defined in the BBEA 1879, includes ledgers, day books, cash books, account books, in addition to "other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or

---

4 *The Law Relating to Domestic Banking*, London: Sweet and Maxwell (2000), at para. 4-009.
5 Hereafter the BBEA or the Act.
6 Note however, that following the decision of the Privy Council in *Douglas* v. *Pindling* [1996] 3 WLR 242, at 246, a Commission of Inquiry would not fall within the ambit of the BBEA.
7 (1906) 22 T.L.R. 573.

electronic data retrieval mechanism".[8] The pivotal element here then is that the record must be permanent, either in traditional means (i.e. writing) or through the use of modern technology (i.e. computer records). Thus in *Barker* v. *Wilson*[9] where the question arose in relation to an investigation of alleged theft, whether records stored on microfilm are 'banker's books' for these purposes, the Divisional Court adopted an essentially pragmatic stance.[10] Bridge L.J., sitting in the Divisional Court, and agreeing with the judgment of Caulfield J., stated that:

> "The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers, as we now understand it. So construing the definition of "bankers' books" and the phrase "an entry in a banker's book" it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm".[11]

It is clear however, that certain forms of documentation are not included within the definition of 'banker's books', including correspondence.[12] Also excluded from the definition are cheques and paying slips following the decision of the Court of Appeal in *Williams* v. *Barclays Bank plc.*[13] Also excluded from section 9(2) BBEA are bank mandates following the decision of the Court of Appeal in *DB Deniz Nakliyati TAS* v. *Yugopetrol.*[14]

---

[8] s. 9(2) (as amended by the Banking Act 1979 Sch. 6).

[9] [1980] 2 All ER 81.

[10] Note that this case was decided prior to the amendments concerning, in particular microfilm records, in the Banking Act 1979, Schedule 6 had taken legal effect. In the interests of completeness, the relevant provisions of Schedule 6 took effect from 19th February 1982.

[11] [1980] 2 All ER 81, at 83.

[12] See the decision of the Court of Appeal allowing an appeal from the Crown Court in *R.* v. *Dadson* [1983] 77 Cr. App. R. 91, where letters were held inadmissible in evidence, as they failed to meet the definition of 'banker's books' within the 1879 Act.

[13] [1988] QB 161, also known as *Williams* v. *Williams.* Note that this decision also resolves the uncertainty regarding the status of cheques under section 9(2) BBEA 1879 following the unwillingness of Caulfield J., to express an opinion on point in *Barker* v. *Wilson.*

[14] [1992] 1 All ER 205. See in particular, the observations at 207.

Section 7 of the BBEA 1879 provides that:

> "On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings".[15]

It is clear that this provision could have serious consequences for the notion of banker-customer confidentiality. It is unsurprising therefore that the judiciary will exercise their discretion over whether to grant an order under the provision carefully. This caution is exemplified by the case of *R.* v. *Grossman*[16] where Lord Denning M.R., giving the leading judgment of the Court of Appeal stated that:

> "It is important that the Court should respect the confidence of a bank account. Before the confidence is impugned, the judge ought to see how the balance comes down. He should consider whether the public interest in helping the prosecution outweighs the private interest in keeping a customer's account confidential. It is only when the public interest prevails that he should order inspection".[17]

The standard position then dictating whether an order will be granted under section 7 is clear. An order should not be granted in cases where there is no *prima facie* evidence supporting the claim(s) raised. Thus if the request for an order under section 7 is in reality, nothing more than a "fishing expedition"[18] in the sense of providing a cause of action, rather than supporting an existing cause, the order will not be granted. A good example of the converse situation, i.e. where a section 7 order is justified as there was evidence suggesting that the disclosure would support the cause of action is

[15] Note that the reference to judge has been interpreted to include for example a magistrate in criminal proceedings, *R.* v. *Kinghorn* [1908] 2 KB 949.
[16] (1981) 73 Cr.App.R. 302.
[17] *Ibid*, at 307.
[18] *R.* v. *Bono* (1913) 29 TLR 635, where an order was denied in the context of a libel case.

that of *Williams* v. *Summerfield*.[19] In *Williams* the Divisional Court granted an order compelling the disclosure of certain bank accounts held by employees of the Port of Bristol Authority on the basis that there was:

> "...a great deal of material to suggest that the defendants have received money which they ought not to have received, and the plea by the prosecutor that he could not determine who had received what, and precisely how the money had been handled, without an inspection of the bank accounts".[20]

Despite the Court deciding to grant the order under section 7, Lord Widgery C.J. was keen to impress upon the judgment a strong sense of caution. Such an order was not to be employed as "an instrument of oppression, which on its face it might very well be".[21] Furthermore, Lord Widgery C.J. also suggested that an order under section 7 had the ability to constitute a "very serious interference with the liberty of the subject" and could "be a gross invasion of privacy".[22] Thus his Lordship concluded that an order under section 7 "must only be made after the most careful thought and on the clearest grounds".[23]

Furthermore, there is a substantial body of case law supporting the notion that the order, if granted, should be drawn up in a detailed and indeed, restrictive manner. Any order must be made in respect of a closely defined period, relating to only relevant entries and should not be drafted in terms allowing disclosure beyond the purposes for which the order was sought. Thus in *Owen* v. *Sambrook*[24] where the defendant was charged under the Consumer Credit Act 1974 for carrying on a consumer credit business without a licence the order requiring the disclosure of the defendant's bank account was to be limited in time (for example, there ought to be no disclosure prior to the date of the initial charge as such information would

---

[19] [1972] 2 QB 512.
[20] *per* Lord Widgery C.J., at 519
[21] *Ibid.*
[22] *Ibid*, at 518.
[23] *Ibid.* In such sentiments his Lordship echoes those in *Arnott* v. *Hayes* (1887) 36 Ch. Div. 731.
[24] [1981] Crim. L.R. 329.

offer no evidence supporting the prosecution) and not to be used for ulterior purposes.[25]

The standard situation then is that section 7 orders can be granted authorising the disclosure of the defendant's financial information in both civil and criminal proceedings, including arbitration proceedings where there is sufficient evidence establishing a cause of action, and that that cause of action may be furthered or advanced through information disclosed under the order. It is clear however that section 7 can also be applied against third parties to the litigation, although the judiciary has illustrated that in these situations the general principle of caution will be applied with even greater rigour. In the *Grossman* case Lord Denning MR stated, with reference to civil proceedings, "[I]n exceptional circumstances such an order can be made against another person altogether – who is not a party – but caution must always be used before doing so".[26]

In addition to the broad impact of the BBEA 1879, there are many other instances where statute law compels disclosure of otherwise confidential financial information. Indeed, the Jack Committee Report[27] identified eighteen other (nineteen in total included the BBEA 1879) statutes that either allowed or compelled disclosure of confidential information. It is now proposed to analyse these various Acts of Parliament, although a detailed examination of each of the statutes would be beyond the constraints of this thesis.

---

25 See the comments of Birch, [1981] Crim. L.R. 329, at 329-330. Such sentiments have been consistently expressed, and reference may be made to the following cases: *Howard* v. *Beall* (1889) 23 QBD 1; *Perry* v. *Phosphor Bronze Co Ltd* (1894) 71 L.T. 854; *R.* v. *Nottingham Justices, ex p. Lynn* (1984) 79 Crim. App. Rep 234.
26 *Op cit*, above, n., 16, at 307. Lord Denning M.R., relied on earlier case law to this effect, including, the words of Lord Esher in *South Staffordshire Tramways Co* v. *Ebbsmith* [1895] 2 QB 669 at 675; the words of Atkin L.J., in *Waterhouse* v. *Barker* [1924] 2 KB 749 at 772; and also *Pollock* v. *Garle* [1898] 1 Ch. 1.
27 London: HMSO, Cmnd. 622 (1989).

Police and Criminal Evidence Act 1984

Under the Police and Criminal Evidence Act 1984 (hereafter PACE) the police are afforded considerable powers to investigate crime and indeed criminals. It is not necessary here to consider the generalities of the Statute, on which the reader may be referred to the authoritative work by Professor Zander.[28] Section 9 of the Act however, governs the issue of members of the police force gaining access to confidential material. The provision is limited to access to what is defined 'excluded' and special procedure' material. The term 'excluded' material is defined, narrowly, through section 11, which precludes confidential financial records from being afforded 'excluded' status. Section 11(1) lists three separate categories of information that are excluded and thus exempt from any production order or warrant unless the police could have obtained such a warrant prior to the 1984 Act coming into force. The three categories are i) personal records as defined in section 12; ii) samples of human tissue or tissue fluid taken for the purposes of either medical treatment or diagnosis and also iii) journalistic material as defined through section 13. Whilst the initial category perhaps seems, at least on first reading, to be of relevance to the relation of banker customer, the definition of personal records afforded through section 12 precludes any such excluded status. Under section 12 personal records are defined as meaning documents (or other records) which related to the subject's health (either mental or physical) or the spiritual guidance of the subject or finally, those records which relate to any assistance given to the subject by any voluntary organisation or individual who by reason of their office or occupation has responsibility for the subject's personal well being. Clearly then this specific definition prevents financial documents and material held under an obligation of confidentiality from being treated as excluded material under the Act.[29]

---

[28] *The Police and Criminal Evidence Act 1984*, London: Sweet & Maxwell, Fourth Edition (2003).

[29] For more on why the reference to excluded material is based on the welfare (physical, mental and spiritual) of the subject, see Zander, *The Police and Criminal Evidence Act 1984*, (2003) at pp. 60-61.

Such confidential financial records are however addressed in the 1984 Act as a form of what is referred to in the terminology of the Act, as 'special procedure material'. This is defined as meaning either "(a) material to which subsection (2) below applies; and (b) journalistic material, other than excluded material".[30] The crucial defining section then is that of section 14(2) which provides that information will be special procedure material for the purposes of the 1984 Act where it is possessed by a person who acquired or created the information in the course of any trade, business or profession[31] and holds that information subject to an express or implied undertaking of confidence.[32] Certainly then a banker holding information concerning a customer's financial affairs which is held subject to the implied undertaking of confidence as detailed by the Court of Appeal in *Tournier*, would satisfy this decision.

Under section 9 of the PACE the police can apply to a circuit judge for an order compelling the material specified to be produced.[33] The order will be considered at an *inter partes* hearing under paragraph 7 of Schedule 1, and the bank (or person named in the proposed order) can be represented. Schedule 1 of the PACE 1984 provides that a circuit judge may grant a production order where one of two sets of conditions have been met. The first of these sets is as follows:

> "(a) there are reasonable grounds for believing-(i) that a serious arrestable offence has been committed; (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application; (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and (iv) that the material is likely to be relevant evidence; (b) other

[30] s. 14(1).
[31] s. 14(2)(a).
[32] s. 14(2)(b)(i).
[33] In exceptional circumstances the judge may issue a search warrant in respect of the material sought following para. 12 of Sch. 1 to the PACE 1984.

> methods of obtaining the material-(i) have been tried without success; or (ii) have not been tried because it appeared that they were bound to fail; and (c) it is in the public interest, having regard-(i) to the benefit likely to accrue to the investigation if the material is obtained; and (ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given".

The second set of conditions is as follows:

> "...there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application; (b) but for section 9(2) above a search of the premises for that material could have been authorised by the issue of a warrant to a constable under an enactment other than this Schedule; and (c) the issue of such a warrant would have been appropriate".

Where either set of conditions has been satisfied the circuit judge may order that the person in possession of the material specified in the order must either, "produce it to a constable for him to take away" or alternatively, give a constable access to it, not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify".[34] Logic dictates then, and the Divisional Court has confirmed, in *R* v. *Central Criminal Court, ex parte Adegbesan and others*,[35] where the notification of the production orders were drafted without specifying the material of which production was sought, that the material in respect of which the order is sought must be specified in the order itself. In what Watkins L.J., labelled "brevity itself"[36] the police informed the applicants that "An application will be made at the Central Criminal Court at 10 am on Friday, 18th April, 1986 for an order under Schedule 1, Special Procedure, Police

[34] Para. 4, Sch. 1, PACE 1984.
[35] [1986] 1 WLR 1292.
[36] *Ibid*, at 1296.

and Criminal Evidence Act, 1984", and when pressed for more information on the issue, they replied "I am in receipt of your letter dated 16th April, 1986. Application for Production Orders will be made in respect of Special Procedure Material relying on the first set of Access Conditions. Information to support the application will be given at the Central Criminal Court by Detective Chief Inspector Atkins of this department".[37]

The rationale behind the brevity on the part of the police, namely the prevention of any material being destroyed, is both clear and not without some justification. However, the Divisional Court held that it was immaterial that this requirement of specification may lead to the destruction, for example, of the evidence or material itself, for that "is a risk which they must bear".[38] Provided then, that the necessary requirements of the order are complied with, it is clear that the order can compel the disclosure of a wide range of materials. In as much it is useful to compare this breadth with the relative precision of the BBEA 1879, which is limited to banker's books only. Under the PACE 1984 no such limitation device is employed, and thus any documents or material can be made the subject of a section 9 production and disclosure order. In *R* v. *Central Criminal Court, ex parte Adegbesan and others*, the special procedure material sought was described by Watkins L.J., as including "cash books, ledgers, bank paying-in books, correspondence and various other papers, among other things"[39] and such breadth was entirely legitimate.[40]

This provision has, perhaps unsurprisingly been used by the police to compel banker's to produce confidential financial material in respect of a customer's account. In *Barclays Bank plc* v. *Taylor*, *Trustee Savings Bank of Wales and Border Counties and another* v. *Taylor and another*,[41] the question arose as to whether the bank, when faced with an order made under section 9 of the PACE requiring disclosure of special procedure material is under any legal

[37] Reproduced in the case report at page 1297.
[38] *per* Watkins L.J., at 1298.
[39] *Ibid*, at 1297.
[40] The validity of the orders so drafted was, as noted above, negated by the failure of the police to inform the persons on whom the order was served the subject matter of the order.
[41] [1989] 1 WLR 1066.

obligation to inform the customer concerned of the disclosure. *Taylor* is concerned with a counter claim made against two banks, both of whom had complied with production and disclosure orders granted by a circuit judge under section 9 of the PACE 1984, and disclosed financial information of the parties. The appellants submitted firstly, that the banks concerned had breached their duty of confidentiality in making the disclosures, and that also, secondly, the banks were under an implied contractual obligation to inform the Mr and Mrs Taylor of the existence of the order. Lord Donaldson M.R., refused the appeal, and determined that the banks were not in breach of their contractual duty of confidentiality as they were compelled to disclose the information specified in the court order, and that such a disclosure fell within the first *Tournier* exception, i.e. compulsion at law. Furthermore, his Lordship was not convinced by the contention that the banks owed an implied obligation to Mr and Mrs Taylor to inform them of the order. Lord Donaldson M.R., delivering the leading judgment of the Court of Appeal, stated that whilst:

> "[t]here is no doubt that the banks were free to ignore the request not to inform Mr and Mrs Taylor of the application. However, I should have been surprised and disappointed if they had done so in the context of a criminal investigation unless they were under a legal duty to do so. 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".[42]

In as much his Lordship echoes, although in less powerful terminology the thoughts of Watkins L.J., in the earlier case of *R* v. *Crown Court at Leicester, ex parte Director of Public Prosecutions*[43] where it was stated that "[i]t seems almost inconceivable that Parliament in enacting this part of the Act could have contemplated that a suspected person should be made aware of this

[42] *Ibid*, at 1074.
[43] [1987] 1 WLR 1371.

essential part of the activities of the police in making their investigation into criminal activity".[44]

The thoughts of his Lordship have been proved to be accurate, and indeed if one considers the 'tipping off' offence in relation to the anti-money laundering regime, considered elsewhere in the thesis, certainly the best course of action for the banker to adopt is one of (perhaps ironically) secrecy.[45]

There is however a difficulty with the approach, if perhaps not the decision, of Lord Donaldson M.R. His Lordship stated that where one of the four *Tournier* qualifications applies, they serve not as a justification for the breach of duty of confidentiality, but rather illustrate situations where, the duty itself "does not exist".[46] In as much this has been approved both judicially and academically.[47] If one is to accept and indeed apply such an analysis to the production and disclosure provisions of PACE 1984 however the problem is clear.

Under section 14, material is only defined as being 'special procedure material' where the material is held under "an express or implied undertaking of confidentiality". Thus under section 9, such material can be made the subject of a production order by a circuit judge. If however, where one of the *Tournier* qualifications applies, the duty of confidentiality does not exist, the material is not held under an implied undertaking or express undertaking of confidentiality.[48] Therefore it follows that the requirements of section 14 are not met, and thus, the material in question is not special procedure material under the PACE 1984, and consequently, section 9 is inapplicable to such material. Under such an analysis then, a section 9 production and disclosure order could never be granted where the material sought falls within one of the four *Tournier* qualifications.

---

[44] *Ibid*, at 1374.
[45] The consequences of this situation on the banker customer relationship is considered in Chapter Four.
[46] *Op* cit, above, n., 41, at 1074. *Cf.* Croom-Johnson L.J., on this point at 1075-1077.
[47] See the consideration of this issue in Chapter One.
[48] Since any express provisions will generally replicate the position under *Tournier*.

Thus consequently, police in such a situation would be forced to rely on section 8 PACE 1984, under which they can apply to a magistrates court (as opposed to applying to a circuit judge for a section 9 order) for a warrant to enter and search premises for evidence of serious arrestable offences. Thus, the police would not be able to apply for a production and disclosure order, and would be limited to seeking a warrant so that they may themselves enter and search premises in order to gather the material required. Furthermore, such a warrant would not be compelling the bank, for example, to disclose confidential financial information regarding a particular customer. It would appear then that the bank could not voluntarily disclose the information sought by the police under the first *Tournier* qualification. Thus if they were unable to disclose in reliance upon one of the other *Tournier* qualifications, they would, it may be suggested, be in breach of the duty of confidentiality if they were to disclose confidential information to the police. Presumably in such a situation any disclosure by the bank would be deemed as being in the public interest.[49]

The Insolvency Act 1986

Again this Statute is not of specific application to the banking sector, although if one considers the general nature of the legislation, i.e. the situation where a company enters into liquidation, it is clear that financial institutions and banks in particular are going to play an important role in assisting the liquidator or trustee in their business of realising the assets of the company.[50]

The provision, which has the most potential for compelling banks to disclose confidential financial information, is that of section 236. Under this section an officeholder (for example the liquidator) may apply to the court in order for the court to summon to appear before it (in a private hearing) *any* person

---

[49] Assisting the police with an investigation into serious crime would be within the public interest, see the following discussion on this qualification to the banker's duty of confidentiality.
[50] On the Insolvency Act 1986 generally see further Dennis and Fox, *The New Law of Insolvency: Insolvency Act 1986 to the Enterprise Act 2002*, London: The Law Society, (2003); and Keay and Walton, *Insolvency Law: Corporate and Personal*, London: Longman (2003).

who is either an officer of the company, has in their possession property belonging to the company (or is indebted to the company) or most broadly, any person who the court "thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company".[51] The provision then has general application to those both inside and outside of the company, and as such it is clear that this "powerful weapon"[52] may be 'fired' upon bankers. Furthermore any person who may be ordered to appear in this private session may also be required by the court to produce "any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection [(2)(a-c)]".[53] This represents therefore, a broad investigative tool,[54] with the reasoning behind these vast powers being well put by Buckley J., in *Re Rolls Razor Ltd.*[55] who said that (in relation to essentially identical powers in section 268 of the Companies Act 1948):

> "The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible and with as much expedition as possible, to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the

[51] s. 236(2)(c).
[52] Wadsley and Penn, *Penn and Shea: The Law Relating to Domestic Banking*, (2000), at para. 24-060.
[53] s. 236(3).
[54] See for example the thoughts of Gibson L.J., in *Re British & Commonwealth Holdings Plc (No's. 1 and 2)* [1992] Ch. 342.
[55] [1968] 3 All E.R. 698.

facts surrounding any such possible claim. Normally, it seems to me, the court should seek to assist the liquidator, be he a liquidator in a compulsory winding up or a voluntary one, to carry out his duties in that way".[56]

Gibson L.J., also noted *Re British & Commonwealth Holdings Plc (No's. 1 and 2)*,[57] that whilst this power has the ability to oppress the person against whom the order is requested, this risk is to be controlled and indeed minimalised judicially, through a balancing exercise. His Lordship suggested that this balancing exercise ought to make reference certain factors, including, the status of the person in respect of which the order is to be granted. Thus it follows that an outsider of the company will be protected to a higher degree than an officer of the company. It would appear however, that this in reality will result in the court being less willing to compel the outsider, for example a banker, to attend court personally. The banker would however still be compelled to produce the requested documentary evidence as this is generally accepted to be less oppressive.[58] Consequently, it may be contended that the ultimate impact upon the notion of banker customer confidentiality remains the same (i.e. whilst the mode of disclosure may differ, the disclosure of confidential material will still proceed).

The Criminal Justice Act 1987

Similarly broad powers compelling disclosure of financial information can be found in the Criminal Justice Act 1987. Under section 2 of the CJA 1987 the Director of the Serious Fraud Office (SFO) is empowered to obtain the disclosure of documents when investigating a serious or complex fraud. Under section 2(2) the Director may when investigating such a fraud:

---

56 *Ibid*, at 700. These sentiments have been consistently approved, see for example the comments of Slade J. in *Re Castle New Homes Ltd.* [1979] 1 W.L.R. 1075, at 1086 and the specific approval of the Court of Appeal in *Re Esal (Commodities) Ltd.* [1989] B.C.L.C. 59, at 64.

57 [1992] Ch. 342, at 372.

58 See, *per* Sir Nicolas Browne-Wilkinson VC, in *Cloverbay Ltd. (Joint Administrators) v. Bank of* Credit and Commerce International S.A, [1991] Ch. 90, at 103.

> "...by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith".[59]

Furthermore, under section 3(3) the Director is also able to:

> "...by notice in writing require the person under investigation or any other person to produce at [such place as may be specified in the notice and either forthwith or at such time as may be so specified] any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified [description] which appear to him so to relate".[60]

Again then, these are serious powers of disclosure and clearly have the ability to irreparably harm the underpinnings of the banker customer relationship (see post on this issue). There is, it should be noted however, albeit limited, relief for the disclosure of confidential information acquired through certain specified relationships, one of which, is that of banker-customer. By virtue of section 2(10), in order for a banker to disclose confidential information pertaining to a customer, the customer must consent to the disclosure.[61] If however, the customer refuses to offer such consent, the Director (or a person designated by the Director) must authorise the disclosure.[62]

The Companies Act 1985

Part XIV of the Companies Act 1985 governs the investigation of companies and also the requisition of documents in the course of such an investigation.

---

[59] As amended by the Criminal Justice Act 1988, s 170(1), Sch. 15, para. 113.
[60] Also as amended by the Criminal Justice Act 1988, s 170(1), Sch. 15, para. 113.
[61] s. 2(10)(a).
[62] s. 2(10)(b).

The power of inspectors[63] to compel the production and disclosure of documentation[64] is defined through section 434. Section 434(1) states that:

> "When inspectors are appointed under section 431 or 432, it is the duty of all officers and agents of the company, and of all officers and agents of any other body corporate whose affairs are investigated under section 433(1)--
> (a) to produce to the inspectors all [documents] of or relating to the company or, as the case may be, the other body corporate which are in their custody or power,
> (b) to attend before the inspectors when required to do so, and
> (c) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give."

It is clear that this section is of application to bankers. Indeed section 434(4) states that the reference to 'officers or agents' includes past or present officers or agents, and crucially that, the term agents in this context includes the company's "bankers and solicitors". This power however, is further reinforced by virtue of section 434(2) where the inspector may compel the production and disclosure of any document which is in the possession of any other person where it is believed that the document in question will be relevant to the investigation.

The powers afforded to the inspector however are not limitless. Indeed, section 452(1A) states that section 434 does not require a person:

> "to disclose information or produce documents in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless-
> (a) the person to whom the obligation of confidence is owed is the company or other body corporate under investigation,

[63] These inspectors may be appointed under either s. 431 or s. 432 and are appointed in both instances by the Secretary of State.
[64] The term document is defined in broad terms, see s. 434(6).

(b) the person to whom the obligation of confidence is owed consents to the disclosure or production, or

(c) the making of the requirement is authorised by the Secretary of State".[65]

It is readily apparent however, that like the counter part provision in the Criminal Justice Act 1987, these limitations do not prohibit the disclosure of confidential information by a banker to the inspector and instead raise only certain obstacles which must be satisfied if the disclosure is to be compelled. Thus the Act states that a banker may be compelled to comply with a request of the inspector, even where the documents requested are not directly concerned with the financial dealings or status of the company being investigated, provided that the Secretary of State authorises the request for disclosure.

Perhaps unsurprisingly, the common law has sought to limit the ambit of the section, and thus it is established that whilst there is the possibility of strongly penal sanctions for failing to comply with a request from an inspector,[66] the inspector(s) cannot make demands which are unreasonable, either in respect of the time required to comply or any other expenditure.[67]

It should be noted also at this point, that there are other provisions in the Companies Act 1985 which may require a banker to disclose hitherto confidential information. It is not possible to consider these provisions at this point but see, for example, the broad powers of disclosure laid down under section 721(2) through which an order may be granted to assist an investigation into a criminal offence committed by an officer of the company relating to the management of the company.

---

[65] As inserted by the Companies Act 1989.

[66] See s. 436.

[67] See for example the thoughts of Sir Richard Scott VC in *Re an inquiry into Mirror Group Newspapers plc* [2000] Ch. 194.

The Taxes Management Act 1970

There are also powers compelling disclosure within the Taxes Management Act 1970. Whilst the thrust of the Act is directed at obtaining information from the individual themselves, there are, unsurprisingly provisions compelling any other person (i.e. a bank) to disclose such information as necessary where the Inland Revenue suspect that a tax payer has failed to meet the requisite tax liability. Thus section 20(3) states that:

> "...an inspector may, for the purpose of enquiring into the tax liability of any person ("the taxpayer"), by notice in writing require any [other person] to deliver to the inspector or, if the person to whom the notice is given so elects, to make available for inspection by a named officer of the Board, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability".[68]

The information which may be disclosed by virtue of this provision is again drafted in broad terms, although there are certain procedural requirements in place to safe guard the correct use of the provision. Thus under section 20(7) and section 20(3) notice is not to be granted without the authorisation of the Board[69] and the consent of a Commissioner.[70] Such consent is only to be given where the Commissioner is "satisfied that in all the circumstances the inspector is justified in proceeding".[71]

---

[68] As amended by the Finance Act 1989, s. 142(d).
[69] 'Board' being defined in s. 118(1) as meaning the Commissioners of Inland Revenue.
[70] ss. 20(7) and 20(7)(a) respectively.
[71] s. 20(7)(b). See also the provisions contained within ss. 13; 17 24 of the Taxes Management Act 1970 and the disclosure provisions under the Income and Corporation Taxes Act 1988, s. 745.

The Consumer Credit Act 1974

Powers of production are also laid down by the Consumer Credit Act 1974.[72] Under the CCA 1974, an officer of an enforcement authority[73] may require "any person carrying on, or employed in connection with, a business to produce any books or documents relating to it".[74] The office of the enforcement authority must have reasonable cause to suspect that a breach of a CCA 1974 provision has been committed, and furthermore must be "duly authorised".[75] The trade or business referred to in section 162 need not be the suspected trade or business, and thus the provision is of application to, for example bankers and accountants.[76] It is interesting that whilst provision is made preventing the disclosure of material covered by legal professional privilege, no similar exception has been drafted in respect of legal obligations of confidentiality.[77]

Financial Services Act 1986

Under section 177 of the FSA 1986, the Secretary of State may appoint an inspector to investigate suspected instances of insider dealing offences with a view to establishing whether there has in fact been an offence committed. Under section 177(3),[78] where the inspector(s) believe that *any* person is able to offer information regarding the offence being investigated, they may require that person to "produce to them any documents in his possession or under his control which appear to them to be relevant to the investigation". There is however (limited) protection for a banker under this provision with section 177(8) stating that:

---

[72] Generally on the CCA 1974, see Goode, *Consumer Credit Law and Practice* London: Butterworths (2001), Part 1C; Macleod, *Consumer Sales Law*, London: Cavendish (2002), Chapter 5.
[73] This is defined in s. 161 and following the Enterprise Act 2002, s. 278, Sch. 25, para. 6, now includes the Office of Fair Trading.
[74] s. 162(1)(b).
[75] s. 162(1) as laid down in s. 162(3) i.e., an order has been granted by a justice of the peace after taking into consideration the validity of the request as against the requirements listed in s. 162(3)(a) and (b).
[76] Macleod, *Consumer Sales Law*, (2002), at para. 28.05.
[77] See further on this provision, the decision of the Chancery Division in the case of *Dudley Metropolitan Borough Council* v. *Debenhams plc* (1995) Tr. LR 182; and Macleod, *'Consumer Sales Law'*, (2002), Chapter 28.
[78] As amended by the Criminal Justice Act 1993, s. 79(13), Sch. 5, Part I, para. 9.

> "A person shall not under this section be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless-
> (a) the person to whom the obligation of confidence is owed consents to the disclosure or production, or
> (b) the making of the requirement was authorised by the Secretary of State".

Clearly then, in the absence of the specific customer's consent, authorisation for the demand for production must be sought and obtained from the Secretary of State. In as much this statute is similar in substance and form to the equivalent provisions in the Companies Act 1985.

Financial Services and Markets Act 2000

Under Part XI of the Financial Services and Markets Act 2000 the Financial Services Authority is afforded certain powers to investigate into any area within the ambit of the Authority.[79] The crucial provision in relation to the banker's duty of confidentiality is that of section 175 which provides that:

> "(1) If the Authority or an investigator has power under this Part to require a person to produce a document but it appears that the document is in the possession of a third person, that power may be exercised in relation to the third person.
> (2) If a document is produced in response to a requirement imposed under this Part, the person to whom it is produced may--
> (a) take copies or extracts from the document; or
> (b) require the person producing the document, or any relevant person, to provide an explanation of the document".

[79] See generally on these powers under the 2000 Act, Blair (General Ed.), *Blackstone's Guide to the Financial Services and Markets Act 2000*, London: Blackstone Press Ltd, (2001), Chapter 13.

The power referred to in section 175(1) is that laid down under section 165, which allows the Financial Services Authority to compel an 'authorised person'[80] through a written notice, to disclose specified material. Thus, under section 175, the Authority may require a banker to divulge confidential information, which is deemed necessary in order for the Authority to fulfil its duties under the Act.

Note however, that certain protection is afforded to information held in confidence by virtue of the banker customer relationship. Such material may only be disclosed where one of four specified conditions is satisfied. Thus a banker is compelled to disclose confidential information where one or more of the following conditions apply:

(a) The person of whom disclosure has been requested, is themselves the person under investigation (or a member of the same group as the person in respect of which the investigation is being conducted);
(b) The person to whom the duty of confidentiality is owed is the person under investigation, or a member of that person's group;
(c) The person to whom the duty of confidentiality is owed consents to the disclosure;
(d) The disclosure of the document has been specifically authorised by the investigating authority.[81]

The information which, may be requested by the FSA is defined in broad terms: Section 175 refers to the disclosure of 'documents', which is defined for the purposes of the Act in section 417(1). This section makes clear that this includes information recorded in any form whether legible or otherwise. Thus the disclosure is not limited to certain information, such as bankers' books for example, and provided that the information is relevant to the

[80] The term 'authorised person' is defined through s. 31(2).
[81] s. 175(5).

functions of the FSA under the Act,[82] it would appear that any documents could be compulsorily disclosed under this provision.

Miscellaneous Statutes

Whilst it is not possible to consider the following statutory provisions, which may compel the disclosure of confidential information, in the interests of completeness, the reader's attention may be drawn to the following pieces of legislation all of which provide for the disclosure of confidential information:

- Trade Descriptions Act 1968, section 28(1)(b) (this follows a similar line to the provision in the CCA 1974 previously discussed);
- Building Societies Act 1986, section 52, as amended;
- Mental Health Act 1983, Part VII.

The Report of the Jack Committee on disclosure through compulsion under law:

The Jack Committee Report,[83] whilst appreciative of the public interest of compelling disclosure of confidential financial information through statute, were concerned by the massive growth of this qualification to the banker's duty of confidentiality. Indeed, it was this notion of 'cumulative growth' that gave the greatest cause for concern in the view of the Committee.[84]

The Committee noted that:

> "The last two decades have seen a torrent of new legislation, which has become a spate in the past few years, requiring or permitting bankers, in a wide range of specified situations, to disclose confidential information".[85]

---

[82] There are four statutory objectives, laid down in s. 2(2): Market confidence; public awareness; consumer protection; and the reduction of financial crime.
[83] London: HMSO, Cmnd. 622 (1989).
[84] *Ibid*, at para. 5.08.
[85] *Ibid*, at para. 5.07.

Given the thorough research made in the course of preparing the report,[86] and the discussion in this section of the current statutes, which compel or allow disclosure of confidential information, such a conclusion can hardly be avoided. The scope of the 'compulsion under law' qualification changed unrecognisably through the course of the Twentieth Century and also in the years that have followed.[87] Certainly the growth in the sheer number of statutes requiring the disclosure of otherwise confidential financial information has changed, and moreover continues to change, the very nature and basis of the banker-customer relationship. As the Committee observed, these statutes "constitute a serious inroad into the whole principle of customer confidentiality as conceived at the time of Tournier".[88]

The Jack Committee recommended that, "all existing statutory exemptions from the duty of confidentiality should be consolidated" through new legislation.[89] The rationale behind such a move was explained in the Report as being that of clarification and certainty through the creation of a "secure framework of restraint".[90] Certainly codification of both the principle of confidentiality and the qualifications there to would achieve this. What it would not achieve, and this was appreciated by the Committee, is the security of what remains of the principle of confidentiality. Clearly there is nothing able to prevent the expansion of the compulsion under law qualification through subsequent "piecemeal legislation".[91] Such pessimism resulted in the "earnest appeal" forwarded to the Government "not to extend these statutory exceptions further, without taking into account of the consequences for the banker-customer relationships".[92]

---

[86] The Committee identified some nineteen statutes, which made provision with regard the disclosure of confidential information, for the full list see Appendix Q to the Report.
[87] The Committee referred to the "sea-change in the significance of exception (a) [compulsion under law], see Cmnd. 622, (1989), para. 5.09.
[88] *Op cit*, above, n., 81, at para. 5.08.
[89] *Op cit*, above, n., 81, at para. 5.40.
[90] *Ibid*, at para. 5.48.
[91] *Ibid*.
[92] *Ibid*.

It is clear however that current Government, whilst obviously considering whether the public interest in compelling disclosure of confidential information justifies the making of further inroads into the banker's duty of confidentiality, has consistently introduced new legislation that compels the disclosure of confidential information by bankers under this qualification. The earlier discussion has already considered the impact of the Financial Services and Markets Act 2000 on this issue, and perhaps the most serious inroad of all arrived in 2003 when the Proceeds of Crime Act 2002 came into legal effect.[93] It would appear then that the current Government has adopted a similar stance to that of the Government of 1990, when faced by the recommendations of the Jack Committee. As Wadsley and Penn have noted, the Government:

> "...did not accept the Committee's view that there had been a "massive" erosion of the duty- the statutory exceptions had been enacted only after the most careful consideration of all the implications".[94]

The growth of the compulsion under law qualification as illustrated throughout the preceding discussion raises important and indeed, difficult questions for the scope of the duty of confidentiality itself. Certainly the negative impact upon the banker-customer relationship cannot be ignored. The difficulty has been well put by Mr Boris Johnson M.P., whom in replying to the suggestion that all a professional need do to avoid any criminal liability under the Proceeds of Crime Act 2002, is make the required disclosure, suggested that:

> "How can an accountant [for example] have a professional relationship with his client if he goes around sneaking...[H]ow can that relationship be possible if the accountant is sneaking to all and sundry about his private transactions with his clients?".[95]

---

[93] The Proceeds of Crime Act 2002 will be considered in detail in Chapter Four.
[94] *Penn and Shea: The Law Relating to Domestic Banking*, (2000) at para. 4-053.
[95] Hansard, HC Debs, Col. 983, 17th January 2002.

This initially appears to be somewhat undeniable. Any professional relationship is based upon the idea of trust and confidentiality, and it is clear that such fundamental principles are being undermined by the disclosure compelled under the legislation previously outlined. The difficulty, however, is ensuring that the correct balance may be maintained between upholding the virtue of such a relationship (and the idea of confidentiality upon which it is based) and the important public policy aims of the legislation requiring disclosure. Certainly there are very powerful public policy arguments in favour of compelling a banker to disclose confidential information where the disclosure is necessary to fight serious crime, and combat money laundering. It is questionable however whether the correct balance between these competing interests has been struck at present. The provisions authorising disclosure of confidential information contained within other statutes, such as the Consumer Credit Act 1974, or the Trade Descriptions Act 1968 clearly have much less of a public interests basis than the equivalent disclosure provisions in, for example, the Proceeds of Crime Act 2002. It is perhaps difficult to maintain then, that essentially identical disclosure requirements across these statutes is justifiable as being in the public interest. In as much it may be suggested that at present the correct balance between the competing interests involved has not been adequately provided for, and that as a consequence the duty of confidentiality has been diminished considerably.

DISCLOSURE IN THE PUBLIC INTEREST

The second of the four qualifications to a banker's duty of confidentiality as enunciated in the decision of the Court of Appeal in *Tournier* is that of disclosures made in the public interest. In *Tournier* itself Bankes L.J., suggested that examples of this kind were plentiful, and relied upon the words of Lord Finlay in the case of *Weld-Blundell* v. *Stephens*,[96] to summarise this head of the qualifications. Lord Finlay stated that, in certain

---

[96] [1920] AC 956.

situations "danger to the State or public may supersede the duty of the agent to his principal".[97] Bankes L.J., was supported in this sentiment, albeit in more general terminology by Atkin L.J., who thought that the banker's obligation of confidentiality was subject to the qualification that confidential information could be disclosed to the extent reasonably necessary to protect the public.[98] In similarly general terms, Scrutton L.J., stated that a bank could disclose confidential information where it was necessary to "prevent frauds or crimes".[99]

In the years following the *Tournier* decision, the court has been required to consider this qualification to the banker's duty of confidentiality. One useful example of this is the case of *Price Waterhouse (a firm)* v. *BCCI Holdings (Luxembourg) SA and others*[100] where Price Waterhouse applied to the court for advice as to whether they may disclose confidential information concerning their customer the Bank of Credit and Commerce International (BCCI) to the Bingham Inquiry.[101] The Bingham Inquiry however, crucially, was a non-statutory inquiry and thus had no statutory power to compel disclosure. As a consequence, the proposed disclosure fell outside of the first *Tournier* exception, i.e., it was not compelled under the law. Although it must be noted that the case was concerned with the ability of accountants to disclose confidential information, it may be suggested that the decision of Millett J., is of much relevance and indeed importance, to the duty of confidentiality as between a banker and their customer.

Millett J., suggested that in determining whether Price Waterhouse could safely disclose the confidential information to the inquiry, that a balancing exercise must be undertaken attempting to reconcile the competing public interests involved. As Millett J., noted "[T]here is a strong public interest in the maintenance of the duty of confidentiality",[102] and furthermore, this public

---

[97] *Ibid*, at 965.
[98] [1924] 1 KB 461, at 486.
[99] *Ibid*, at 481.
[100] [1992] BCLC 583.
[101] The Bingham Inquiry being afforded the task of investigating the failure of the BCCI, and the performance of the Bank of England in supervising the failed bank.
[102] [1992] BCLC 583, at 597

interest has been specifically noted in relation to the relationship between banker and customer.[103] Nevertheless, there were, in Millet J.'s opinion, factors which must be considered in favour of allowing the disclosure. In the present matter there were two inter-related arguments supporting disclosure. Firstly "the public interest in the effective supervision of authorised banking institutions", and secondly, "the public interest in ensuring that an inquiry into the adequacy of such supervision should have access to all relevant material".[104] Ultimately, Millet J., determined that the balance in this case, lay in favour of disclosure, this despite the fact that the inquiry could have been set up on a statutory footing under the Tribunals of Inquiry and Evidence Act 1921. A decisive factor operative on Millet J., was that:

> "There is an important public interest in the effective regulation and supervision of authorised banking institutions and the protection of depositors. This has been recognised by Parliament by the enactment of the Banking Act itself".[105]

Millet J., was also swayed by the fact that parliament has itself "chosen to accord greater weight to that public interest than to the maintenance of confidentiality including banking confidentiality".[106]

This is clearly then an important case on the scope of the public interest qualification to the banker's duty of confidentiality, although it is interesting to note that it would appear that Millet J., erred when approving a passage taken from *Paget's Law of Banking.* The passage, reflecting upon the words of Bankes L.J., in *Tournier* stated that, "The giving of information to the police for instance in regard to a customer suspected of a crime, would be unwarranted".[107]

---

[103] *Ibid*, at 598.
[104] *Ibid*.
[105] *Ibid*, at 601.
[106] *Ibid*.
[107] The passage itself may be found at page 256 of the 10th edition, and is repeated verbatim in the 11th edition of the work, at page 122, and again in the 12th Edition, at page 129.

On a closer reading of the words of Bankes L.J., however, it becomes apparent that Bankes LJ was not considering the scope of the public interest qualification. Bankes L.J., stated that:

> "I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account. To take a simple illustration. A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank, because he knows that the person about whom he wants information is a customer of the bank. The police officer is asked why he wants the information. He replies, because the customer is charged with a series of frauds. Is the banker entitled to publish that information? Surely not. He acquired the information in his character of banker".[108]

The explanation then was made in relation to whether information acquired by a banker outside of the account of a customer was included within the duty of confidentiality. As Toulson and Phipps rightly point out the point Bankes L.J., was making here was that a banker would not be entitled to disclose "information which he gained about his customer *from* the police that the customer was charged with a series of frauds".[109]

A similar approach to that taken by Millet J., in the *Price Waterhouse* case (i.e. the need to balance the competing public interests involved), has recently been adopted in the specific relation of banker-customer by the Chancery Division. In *Pharaon and others v Bank of Credit and Commerce International SA (in liquidation)*[110] Rattee J., held that the public interest involved in disclosing confidential information held by a banker outweighed the public interest supporting confidentiality. He said that:

> "However, on balance, I am satisfied that the public interest in making the documents relating to the alleged fraud in the acquisition of CCAH

[108] [1924] 1 KB 461, at page 474.
[109] *Confidentiality*, London: Sweet & Maxwell, (1996), at para. 14-08, emphasis in original. Nevertheless it appears that the error has been repeated in Ellinger et al, *Modern Banking Law*, (2002), at 152.
[110] [1998] 4 All ER 455.

shares by BCCI available in the US proceedings does outweigh the public interest in preserving confidentiality as to those documents, provided that disclosure goes no further than is reasonably necessary to achieve the purpose of that public interest in disclosure".[111]

Indeed, it is notable that even though the disclosure was sought for the "purposes of private litigation"[112] the public interest still favoured disclosure rather than the retention (or protection) of confidentiality.

Certainly then, this head of the *Tournier* qualifications to the duty of confidentiality can have serious consequences for the traditional understanding of the principle of confidentiality. This is something that is often overlooked, as the emphasis naturally falls upon the impact of the statutory measures compelling or authorising disclosure. Given the nature and indeed impact of the statutory provisions this is perhaps unsurprising, although the detrimental effect that this, the second *Tournier* qualification, can, and it may be suggested does have, on the concept of banking confidentiality ought not to be forgotten.[113]

The Report of the Jack Committee on disclosure in the public interest

The Jack Committee[114] raised serious concerns regarding the use of the public interest qualification to divulge confidential information. The concerns of the Committee focused on two separate issues. Firstly, the Committee contended that the general qualification provided by this head of the *Tournier* principles was irrelevant in the modern climate of the banker customer relationship. Disclosure in the public interest was, the Committee suggested, a residual qualification designed to "catch those items which have not yet been codified" disclosures in respect of which could not be made under the

[111] *Ibid*, at 465.
[112] To use the words of Rattee J., at page 464.
[113] Other instances where this qualification has been used to allow the disclosure of confidential information include *Douglas* v. *Pindling* [1996] AC 890, PC. See also the observations of Staughton J., in *Libyan Arab Foreign Bank* v. *Bankers Trust Co.* [1989] QB 728.
[114] London: HMSO, Cmnd. 622 (1989).

first *Tournier* qualification.[115] The need for such a 'spill-over' category was the result of the rarity of situations which would be governed as a disclosure under the compulsion at law (remember that only two such statutes existed at the time of the decision in *Tournier*). Thus, the Committee argued:

> "This sea-change in the significance of exception (a) also puts a new complexion on exception (b). If banks are already under so many specific obligations to disclose in the public interest, disclosure on the generalised basis of exception (b) will require a very special justification".[116]

Furthermore, the Committee also raised concerns regarding the general nature of the qualification itself, which the Committee contended possessed "uncertainty of application".[117] It is certainly undeniable that the qualification is inherently vague, indeed one commentator has gone so far as suggesting, it may be contended quite rightly, that this qualification is the most difficult of the *Tournier* qualifications to define.[118]

That aside, the benefit of this vagueness is that the qualification is also inherently flexible. This flexibility allows the court to determine whether or not the public interest in favour of disclosure ought to override the public (and private) interest in upholding confidentiality. The case law on point would appear to suggest that the judiciary are appreciative of this flexibility, and indeed, the qualification has been used to disclose confidential information in the public interest where it appears to be right and proper to disclose such information. The presence of this case law would also appear to reduce the validity of the Committee's arguments on the first issue of concern. Clearly, the judiciary have found situations where whilst there is no legal compulsion for disclosure, on the balance of the competing public interests in question, the disclosure of confidential information is necessary. Indeed, the case of

---

[115] *Ibid*, at para. 5.06.
[116] *Ibid*, at para. 5.09.
[117] *Ibid*, at para. 5.30.
[118] Hapgood, *Paget's Law of Banking* 12th edition, (2002), at 128-129.

Price Waterhouse (a firm) v. *BCCI Holdings (Luxembourg) SA and others*[119] previously considered, provides an excellent example of such a scenario. It may also be suggested that this qualification provides the strongest justification for the disclosure of financial information with the aim of promoting responsible lending, and reducing the level of over-indebtedness.

Nevertheless, the Committee recommended that the qualification permitting disclosure in the public interest be deleted. The Government however, did not support this position, and ultimately refused to withdraw the qualification. As the White Paper in response to the Jack Report makes clear, the Government felt that the discretion afforded through the qualification as to whether or not to disclose confidential information was advantageous.[120] It should be pointed out also, that the Banking Code of Practice, against the recommendations of the Jack Report, also makes reference to disclosure within the public interest.[121]

DISCLOSURE IN THE INTERESTS OF THE BANK

As noted in the discussion of the *Tournier* decision in the previous Chapter, it is both established and accepted that a bank may disclose confidential financial information where their interests require such a disclosure. The common example of this scenario, and indeed that proffered by Bankes L.J., in *Tournier*, is the situation where the bank is suing for an overdraft.[122] Clearly, in such a situation the bank has to disclose information related to the account, including the balance of the account and obviously, the amount owed by the customer. Atkin L.J., offered a broader illustration, and suggested that the scope of the 'interests of the bank' exception extends to any disclosure "reasonably necessary for the protection of the bank's

---

[119] [1992] BCLC 583.
[120] London: HMSO Cmnd. 1026 (1990), at para. 2.15.
[121] The Banking Code of Practice, at para. 11.1.
[122] [1924] 1 KB 461 at 473. The identical situation was also forwarded by Scrutton L.J., see page 481 of the report.

interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer".[123]

It is readily apparent that there has been only minimal common law consideration of this head of the *Tournier* qualifications. Indeed, there are only two authorities since 1924 directly concerning disclosures made as being in the best interests of the bank. A particularly difficult case on this issue is that of *Sunderland* v. *Barclays Bank Ltd.*[124] The facts, stated simply, are as follows: The defendant Bank refused to honour cheques drawn on it by a married woman. There were two separate reasons for this refusal. The primary reason was that there were insufficient funds in the account to meet the cheques issued. The secondary reason however, was that the Bank were aware that the some of the cheques were drawn to meet the plaintiff's gambling debts. Upon discovering that the cheques had been dishonoured, the woman through the course of a telephone conversation asked her husband to make enquiries of the Bank. The husband did so, and was informed by the branch manager that the cheques were drawn in favour of gambling establishments. The wife brought an action against the Bank in respect of breach of confidentiality. Du Parcq L.J., was unimpressed with the claim for damages and felt able to deny the application on two grounds. Firstly, the disclosure was necessary as being in the Bank's own interests, and secondly, in any event, the woman had impliedly consented to the disclosure through instructing her husband to investigate the issue of the dishonoured cheques.

Whilst this decision has been considered without criticism[125] it is at best "marginal"[126] and there is a strong argument to support the conclusion that it was incorrectly decided. Clearly it was necessary as in the best interests of the Bank to explain their reasons for dishonouring the cheque. That much is, in light of the *Tournier* decision, incontrovertible. However, the (confidential) information disclosed by the Bank to the plaintiff's husband was, it may be

---

[123] *Ibid*, at 486.
[124] (1938) 5 LDAB 163.
[125] See for example Toulson and Phipps, *Confidentiality*, (1996), at paras. 14.09 and 14.10.
[126] In the words of Ellinger et al. *Modern Banking Law*, (2002), at 154.

suggested, beyond that which could be deemed reasonably necessary. The Bank, in protecting its interests, needed only to inform the husband that the cheques were dishonoured due to insufficient funds being available. This, it may be contended is the scope of the qualification as enunciated by their Lordships in *Tournier*, and narrow as that undoubtedly is, the qualification does not extend, as Du Parcq L.J., held, to the disclosure that the cheques were drawn to meet gambling debts. Indeed, the factual similarities between this case and that of *Tournier* are telling: It will no doubt be recalled that in *Tournier* the bank manager was in breach of his duty of confidentiality to disclose Tournier's gambling behaviour. It may be suggested then that the breadth with which Du Parcq L.J., framed the 'interests of the bank' qualification is too wide, and inconsistent with the judgments of their Lordships in *Tournier*.

The second instance where the courts have been compelled to consider the limited qualification of disclosure in the best interests of the bank is that of *El Jawhary* v *Bank of Credit and Commerce International*.[127] In this case an action was brought by the liquidators of the BCCI to vary the terms of an earlier injunction preventing BCCI from disclosing financial information concerning their customers in breach of their duty of confidentiality. The bank sought to vary the terms of this injunction so as to allow disclosures of such information where it was in the best interests of the bank to do so. Although Sir Donald Nicholls VC, sitting alone in the Chancery Division, allowed the variation as sought on the grounds that the plaintiffs had failed to establish that there was "a real risk that the liquidators may breach the duty of confidentiality",[128] it is clear that the judgment served as a cautionary note to the liquidators. Indeed Sir Donald Nicholls VC emphasised that the amendment to the scope of the injunctions was not to be interpreted as judicial approval of disclosure made in accordance with the variation:

> "Implicit in what I have said so far is something I should state explicitly, so there is no room for misunderstanding the future.

---

[127] [1993] BCLC 396.
[128] *Ibid*, at 398.

Amendment to the scope of the injunctions will not relieve the liquidators from any obligation of confidentiality resting on BCCI in the absence of the restrictions imposed by the injunctions. Accordingly, variation of the injunctions is not to be read as a decision by the court that the liquidators can properly make disclosures to the persons or for the purposes mentioned in the variation. Whether they can is dependant upon the nature of the particular information, the person to whom it is proposed to be disclosed and the particular purpose for which disclosure is being made".[129]

The point Sir Donald Nicholls VC makes is clear: The liquidators of the BCCI before any disclosure of confidential information is made in the course of their "exceedingly complex operation"[130] need to establish that the disclosure "falls clearly within the circumstances in which the information can properly be disclosed without breaching the bank's duty of confidentiality".[131] Moreover, Sir Donald Nicholls VC added that "[I]f there is room for serious doubt or argument, the liquidators must raise the matter with the relevant plaintiff and seek consent or apply to the court for directions".[132]

The position of disclosure made in the best interests of the bank then has changed relatively little in the years following the Court of Appeal decision in 1924. It follows from the common law, and in particular, from *Tournier* itself and the judgment of Atkin L.J., that a bank may disclose confidential information only where such a disclosure is reasonably necessary for the protection of the bank's interests. Furthermore, it would appear that caution is required should a bank be considering disclosing such information, and that, following *El Jawhary* an application to the court for judicial guidance would, in non-definitive situations, be the more desirable course of action. It is perhaps unclear whether this qualification to the banker's duty of confidentiality extends, as Du Parcq L.J., laid down in the *Sunderland* case, to essentially private matters, such as the protection of the bank's reputation

[129] *Ibid*, at 399-400
[130] *Ibid*, at 399.
[131] *Ibid*.
[132] *Ibid*.

or whether a narrower formulation is to be preferred, only allowing such disclosures in the course of either raising or defending legal proceedings. Academic opinion is divided on this issue; compare for example the differing views of Lomnicka et al,[133] with those of Penn and Shea.[134] Also of note is the judgment of Chadwick L.J., in *Christofi* v. *Barclays Bank plc*[135] where his Lordship contended that the disclosure in that case would also have been justifiable on the grounds of the disclosure being in the best interests of the bank, as failure to do so would have damaged the reputation of the bank itself. It must be appreciated however that the comments of Chadwick L.J., on this matter were said by way of *obiter*, although it is certainly an interesting, and as yet, unresolved, question: Precisely how far does this qualification extend?

It may be suggested that the application of the 'interests of the bank' qualification as applied by Du Parcq L.J., in the *Sunderland* case is beyond that considered by the Court of Appeal in *Tournier*, where the bench were unanimous in confining the qualification to disclosures made through legal proceedings. The idea that the qualification could be relied upon by a bank in order to protect its commercial reputation in a purely private context is certainly increasing the scope of the qualification itself. This is not to suggest however that such broadening is not without justification. Clearly a bank's commercial well being is dependant upon the strength of its commercial reputation. It follows therefore that it would be reasonably necessary in the best interests of a bank to take steps, i.e. disclose confidential information, to protect itself from attacks upon its commercial reputation. As the judgment of Du Parcq L.J., in the *Sunderland* case has not been judicially considered, and thus remains a tenet of the common law on this issue, it is, as a point of law valid. As a matter of policy however, it is perhaps questionable whether a bank should be able to protect its reputation from a private attack through the disclosure of confidential financial information.

---

133 *Modern Banking Law*, (2002), at 154-155.
134 *The Law Relating to Domestic Banking*, (2000) at 166.
135 [1999] 2 All ER (Comm.) 417, at 425-426.

The Report of the Jack Committee on disclosures in the best interest of the bank

Whilst there is a noticeable dearth of judicial authority on the ambit of this qualification to the banker's duty of confidentiality, it has been the subject of much academic and indeed political debate. In particular, the Jack Committee Report highlighted two specific areas of concern with the state of banking practices in the mid to late 1980's. The first primary concern enunciated by the Committee was that of disclosing confidential information to other companies within the same group. Secondly, the Committee also had strong reservations over the possible disclosure of confidential financial information to credit reference agencies. The observations and recommendations of the Jack Committee on the proper scope of the 'interests of the bank' qualification to the duty of confidentiality shall now be addressed.

The overriding point which must be appreciated here, as with the banker's duty of confidentiality generally, is that the commercial context in which the banking industry operates has changed considerably since the foundations of confidentiality between banker a customer were laid down in 1924. Consequently, the nature and practices of the industry itself has changed. As the Jack Committee itself noted, "[E]xception (c) [where the interests of the bank require disclosure] presumably offered few problems of interpretation in simpler world of the 1920's".[136] Indeed, the Committee contended that there were "likely to have been few calls on banks to disclose confidential information about a customer...except in the case of litigation cited by the Appeal Judges [in the *Tournier* case]".[137] Whilst the common law on point has remained essentially static, the banking industry upon which the common law rules are to govern has evolved considerably. The effect of this, is readily apparent in two scenarios, both of which concerned the Committee. Firstly, there was a "growing perception" on the part of banks that they were entitled, under the *Tournier* provisions to pass confidential

---

136 London: HMSO, Cmnd. 622 (1989), at para. 5.11.
137 *Ibid.*

information between companies within their own group.[138] The rationale behind such disclosures is relatively straightforward: The passing of confidential financial information was required in order to protect both themselves and other companies within the group from defaulting customers. Such disclosures however are problematic. In particular, are such disclosures justifiable as being reasonably necessary in the best interests of the bank where the disclosure is to a banking subsidiary within the same group?

The position of the Jack Committee on this issue is clear: Where the disclosure is to another bank within the same company, and is for the sole purpose of protecting the bank against loss sustained through the provision of normal banking services, this is acceptable as being in the best interests of the bank.[139] This conclusion is, it may be suggested, heavily based on commercial efficacy and whilst this is certainly accurate, it is perhaps troublesome. The difficulty arises through the Court of Appeal decision in *Bank of Tokyo* v. *Karoon*[140] where it was determined that, for the purposes of confidentiality, each subsidiary within the group must be regarded as a separate corporate identity. Thus if Bank A discloses confidential information to Subsidiary Bank B (a member of the same corporate group as Bank A) Bank A must establish (ignoring issues of implied consent to such a disclosure which has been considered previously) that the disclosure was reasonably necessary in the interests of Bank A. If they cannot do so, they will be in breach of the duty of confidentiality as laid down in *Tournier*.

Now, certainly in the above example, the disclosure would be in the best interests of Subsidiary Bank B on the basis that it would allow the subsidiary to make an informed decision as to the likelihood of accepting a high-risk customer, i.e. a customer who is likely to default. If however, the principle laid down by the Court of Appeal in *Karoon* is followed, and Bank A and B are separate corporate identities, the disclosure would not be reasonably

138 *Ibid*, at para. 5.12.
139 *Ibid*, at para. 5.31.
140 [1987] AC 45.

necessary in the interests of Bank A. The disclosure could not have been made in the interests of protecting Bank A from a defaulting customer. On the contrary, the disclosure would have been made in the in order to protect Bank B from the possibility of a defaulting customer. Thus it is non-sensical for Bank A in this scenario to claim that the disclosure would fall under the third *Tournier* qualification if Bank A and B are separate corporate identities.

Of course the difficulty with such an analysis is clear: As the Jack Committee observed, the notion that wholly-owned subsidiaries are separate corporate identities from the main company is "artificial".[141] Nevertheless, the dilemma is clear and reveals one difficulty of attempting to apply a duty of confidentiality, which was laid down to deal with a now antiquated concept of the banking industry. In as much there is considerable force in the recommendation by the Jack Committee that the *Tournier* qualifications be amended (so as to be more reflective of the modern nature of banks) and codified in statute. On this specific issue, the Jack Committee concluded that the law would be strengthened by limiting the scope of the qualification (through legislation) to three distinct scenarios:

- Disclosure made in the event of legal action to which the bank is party;
- Disclosure between banking companies within the same group, provided that the disclosure is reasonably necessary for the specific purpose of protecting the bank and its subsidiaries against loss in relation to the provision of normal banking services;
- Disclosure as is necessary for the sale of either the bank itself or a substantial element of the bank's undertaking.[142]

Thus, the Committee suggested that disclosures outside of these specific circumstances ought to constitute a breach of the obligation of confidentiality, thus a disclosure by a bank to a non-banking subsidiary within the same commercial group (such as estate agents or insurance providers) would not

[141] See in particular, the observations at para. 5.31 of the Jack Report (Cmnd. 622 (1989)).
[142] Cmnd. 622 (1989), at para. 5.42.

be permitted as in the best interests of the bank. Furthermore, the disclosure of confidential information by a bank to a banking subsidiary for marketing purposes would, in the opinion of the Committee, also fail to be in the best interests of the bank, and again would also constitute a breach of the duty of confidentiality. It is interesting that the Committee omitted to consider whether or not a disclosure made to protect the commercial reputation of the bank from a private attack would be in the best interests of the bank, and thus not a breach of the bank's duty of confidentiality.[143] Certainly, such a disclosure would not, it may be suggested, fall within the circumstances listed in detail in the Committee Report, and thus would constitute a breach of confidentiality under the recommendations of the Committee. Irrespective of this, it is unfortunate that the Government were unconvinced as to the appropriateness of such measures, and ultimately failed to adopt the conclusions of the Committee.[144]

The Banking Code of Practice on disclosures in the best interest of the bank

This issue has however been considered in the Banking Code of Practice, which followed the Jack Committee Report.[145] This voluntary Code extends to (domestic) personal customers, although note however, that a similar Code of Practice for business' has recently been created, see further, <http://www.bankingcode.org.uk/home.htm>.[146]

---

143 i.e., whether Du Parcq LJ was correct in his application of the third *Tournier* exception in *Sunderland* v. *Barclays Bank Ltd.* (1938) 5 LDAB 163.

144 See the Government's response to the conclusions of the Jack Committee Report, in the White Paper, *Banking Services: Law and Practice* Cmnd. 1026 (1990).

145 The first Banking Code was initiated in 1991, and is subject to a bi-yearly review.

146 Note also, that the confidentiality provision (Para. 11.1) in each Code is identical of banks, building societies and credit card companies etc (for a list of the various companies covered) and provides standards of good practice for the companies which subscribe to the Code (para. 1.1) A complete list of the subscribers is available from the Banking Code Standards Board, and is available on-line, see <http://www.bankingcode.org.uk/supportlist.htm>. The subscribers constitute some "99% of the total market place" (<http://www.bankingcode.org.uk/whodoessupportthecode.htm>). Indeed, at the time of writing, only twelve applicable companies do not subscribe to the Code, and these companies are 'named and shamed' at <http://www.bankingcode.org.uk/whodoesnt.htm>. Interestingly, however, this list does include some immediately recognisable names within the sector, including Liverpool Victoria Banking Services; Marks and Spencer Financial Services (application pending, as of 25th September 2005), and also the Post Office, negotiations ongoing as of 25th September 2005).

The Banking Code is currently in its sixth edition.[147] The Banking Code does clarify the position of the industry on inter-company disclosures of information, and at least in part, adopts the recommendations of the Jack Committee Report. The sixth edition of the Code provides that the subscribers to the Code will not use the third *Tournier* exception to legally disclose personal information[148] to any other persons, whether or not they are a member of the same commercial group, for the marketing purposes. It is of course questionable whether the courts would accept any argument that disclosure to another company for marketing purposes would not be in breach of the duty of confidentiality, and the impact in practice of this assurance is perhaps limited. However, the clarification provided by this provision is ultimately to be welcomed.

Other than emphasising that subscribers are bound by the duty of confidentiality as laid down in *Tournier* no other principles or examples are laid down. Thus, no mention is made to the issue of disclosures made to non-banking subsidiaries within the subscriber's group for non-marketing purposes (which the Jack Committee recommended be prohibited in the absence of express consent). With this issue as yet unresolved it may be suggested that the safest course of action for a bank wishing to make such disclosures is to obtain the consent of the relevant customer prior to making the disclosure.

The second difficulty enunciated by the Jack Committee in relation to the scope of the 'interests of the bank' qualification under *Tournier* is the disclosure of confidential information to credit reference agencies.[149] It is interesting to note that there is a lack of clear authority, either judicial or otherwise, indicating under which of the *Tournier* qualifications this practice would fall. As the Jack Committee noted, the practice could fall under the second, third or fourth *Tournier* qualifications. The Committee decided to

---

[147] The current edition came into effect on 1st March 2003.

[148] Described as "information about you or your accounts", para. 11.1.

[149] The issue of credit reference agencies has received much extra judicial consideration, and reference may be made to the *Crowther Report on Consumer Credit* Cmnd. 4596 (1971); the *Younger Report on Privacy*, Cmnd. 5012 (1972) and the *Lindop Report on Data Protection*, Cmnd. 7341 (1978).

deal with the issue as falling under the 'best interests of the bank' qualification, although this has been criticised as requiring a broader application of the qualification than the common law dictates.[150]

Credit reference agencies may be defined as "a person carrying on a business comprising the furnishing of persons with information relevant to the financial standing of individuals, being information collected by the agency for that purpose".[151] The information gathered by such agencies is used, *inter alia*, by banks in order to assess the credit worthiness of prospective or continuing customers. The difficulty here however, is not the use of such information by banks, but is rather the provision of financial information to credit reference agencies by the banks, as it is this situation which offers potential breaches of confidentiality.[152] This practice may itself be sub-divided into two distinct categories: Firstly there is the disclosure of 'black information", that is information concerning a defaulting customer, and 'white information' which is information concerning a customer who is not in default. The Jack Committee considered both situations.

As to the issue of the disclosure of 'black information', the Committee contended that a further qualification should be added to those enunciated in *Tournier*. This new qualification will " permit disclosure to a credit reference agency where there has been a break down in the banker-customer relationship arising through customer default".[153] Furthermore, the Committee offered a precise definition of what 'default' in such a context means. The Committee suggested that 'default' ought to refer to the situation where the customer has provided no satisfactory response to a formal demand for repayment, within 28 days of receiving such a demand.[154] Again the Government refuted the need for such measures, and declined to introduce the proposed reform in their White Paper. That is not to say that the suggestions of the Jack Committee have not been implemented in any

150 See further on this Ellinger et al, *Modern Banking Law*, (2002), at 156.
151 s. 145(8) Consumer Credit Act 1974.
152 On the origins of this practice see the Jack Committee Report, para. 5.18.
153 Cmnd. 622, (1989), at paras. 5.12 and 5.37.
154 *Ibid*, at para 5.45.

form. Indeed, again the Banking Code of Practice has adopted the reform forwarded by the Committee. The Code provides that subscribing companies may disclose information to credit reference agencies where a customer has fallen behind with repayments of a debt, the amount of which is not in dispute and the customer has failed to make satisfactory proposals to the subscriber in respect of the repayment of the amount owed.[155] Moreover, under paragraph 13.7 the subscriber will give the defaulting customer a minimum of 28 days notice prior to disclosing the information to a credit reference agency.

Wadsley and Penn however are right in stating that the "real problem...arises out of the disclosure of 'white information'" to credit reference agencies.[156] Certainly the Jack Committee were both concerned and dismayed at the possibility of white information being disclosed to credit reference agencies without the express consent of the customer.[157] Certainly the argument in support of such disclosures is strong,[158] and the force of the argument has only increased in the following years as the level of overindebtedness rises substantially.[159] Whilst there is an undoubted public policy argument supporting such disclosures, there is, it may be suggested (and this was a critical factor for the Jack Committee) a strong public policy argument in favour of protecting and maintaining the principle of banking confidentiality. As the Jack Committee noted:

> "The principle of confidentiality applied to a customer's private financial affairs is placed by the common law tradition at the heart of the banker-customer relationship. It is a tradition which should be respected and, when under threat, emphasised the more strongly,

---

155 The Banking Code of Practice, at para. 13.6.

156 *Penn and Shea: The Law Relating to Domestic Banking*, (2000), at para. 4-066.

157 London: HMSO, Cmnd. 622 (1989), at para. 5.34.

158 Indeed, in 1989 the Committee sympathised with the argument, see further para. 5.34 (Cmnd. 622 (1989)).

159 See further the recent *First Report of the Task Force on Tackling Overindebtedness*, (July 2001) and the follow up Second Report of the *Task Force on Tackling Overindebtedness* (January 2003)(both of which are available online at <http://www.dti.gov.uk/ccp/topics1/overindebtedness.htm>) contends that the disclosure of white (and black) information promotes responsible lending and is necessary to prevent further increases in the levels of overindebtedness.

because its roots go deeper than the business of banking: it has to do with the kind of society in which we want to live".[160]

The issue then is one of balancing the competing public interests at stake.[161] Indeed such an analysis would support the contention that the issue of disclosing white (and indeed black) financial information ought properly to be considered under the second *Tournier* exception, that is where the public interest requires disclosure.[162] It is perhaps curious then, that the Jack Committee themselves advocated the abolition of this qualification.[163] What is clear is that the Government were in agreement with the Jack Committee on this issue, as the White Paper stated that 'white' credit information ought to be disclosed only where the customer's express consent has been obtained. Furthermore the White Paper suggested that such a provision ought to be included in the (as of then only proposed) Code of Practice, and indeed it was ultimately included.[164] The current sixth edition of the Code states that only 'black' information will be disclosed to credit reference agencies without express consent, and that 'white' credit information will only be disclosed with such express consent.[165]

CONSENT TO DISCLOSURE BY CUSTOMER

It will be remembered from the discussion in the previous chapter, that the fourth, and final qualification to the banker's duty of confidentiality as enunciated by Bankes L.J., in *Tournier*, was that of consent. Thus where a customer consents to a disclosure of confidential information there is no breach of the duty of confidentiality. It is this qualification that shall be considered in the following discussion.

---

[160] London: HMSO, Cmnd. 622 (1989), at para. 5.26.
[161] A similar sentiment has been expressed judicially in the recent case of *Pharaon* v. *Bank of Credit and Commerce International SA (in liquidation)* [1998] 4 All ER 455. See the observations of Rattee J. on this point.
[162] See Ellinger et al, *Modern Banking Law* (2002), on this point where a similar conclusion is reached. See also, Howells, 'Data Protection, Confidentiality, Unfair Terms, Consumer Protection and Credit Reference Agencies', [1995] *JBL* 343, at 349.
[163] London: HMSO, Cmnd. 622 (1989).
[164] Although it was omitted from the first edition.
[165] This is the effect of para. 13.6 when read in conjunction with para. 13.8.

It is clear that this qualification to the banker's duty of confidentiality is relatively straightforward, at least with regard to the simple situation where the customer has given the bank express consent to the information being disclosed to a third party. As Judge L.J., noted in *Turner* v. *The Royal Bank of Scotland*, "[E]xpress consent presents no problem...[I]f...the bank's confidentiality is waived for the purpose for which the consent was given".[166] The situation is a little more troublesome where the disclosing bank raises an argument based upon implied consent to a disclosure of confidential information.

One specific area in which this notion of implied consent has created difficulty is that of the banker's reference (or alternatively, opinion). Given the difficulties revealed through the development of the common law duty of confidentiality owed by a banker to a customer,[167] it is particularly interesting to note that this concept of the banker's reference was the primary example offered by Bankes L.J., as being illustrative of this head of the qualifications. Moreover, Bankes L.J., went as far as to state that " [T]he familiar instance of the last class is where the customer authorizes a reference to his banker".[168] In such a situation the customer is plainly authorising the reference, and is as such impliedly consenting to the banker's opinion as and when it is offered. Such examples of implied consent to disclosure are not problematic, indeed, this has been noted by the judiciary, see for example the observations of Judge L.J., in the *Turner* case.[169] Nevertheless difficulties remain outstanding: The problem is the issue of where the implied consent doctrine is employed to justify the disclosure of confidential information, in situations where the customer may not, and indeed, is actually unlikely to have any knowledge of the reference or of the disclosure. This difficulty is readily apparent, and indeed was the central issue in the case of *Turner* v. *The Royal Bank of Scotland*.[170]

---

166 [1999] 2 All ER (Comm.) 664, at 671-672.
167 See, for example, the following discussion of the *Turner* case.
168 [1924] 1 KB 461, at 473.
169 "Implied consent too should normally be straightforward. Thus in an example given in *Tournier*, if a customer gives the name of the bank as an institution which may be approached for a reference, he is plainly consenting to the bank's subsequent response", at 671-672 of the Report.
170 [1999] 2 All ER (Comm.) 664.

The facts of Turner were relatively straightforward. Turner opened both a business account and also a personal account with the Royal Bank of Scotland. During the period 1986 to 1989 the Bank responded to a total of eight status enquiries (the term status enquiry refers to the situation whereby an enquiry is made as to the creditworthiness of the individual) by another bank. All of the enquiries were answered in terms unfavourable to Turner, and in responding the Royal Bank of Scotland made use of information gained through their status as Mr Turner's bankers. Whilst the Bank did not disclose specific information concerning the status of Mr Turner's account(s) it is clear that in responding to the various status enquiries it did make use of confidential financial information stemming from Mr Turner's bank accounts.

In response to one enquiry the Bank stated that "from the figures available to us, his resources would appear to be fully committed at present".[171] Sir Richard Scott VC helpfully explained in his leading judgment of the Court of Appeal, this response was a generic response offered by the Bank in accordance with a glossary, and "[A]ccording to the glossary "fully committed" means that the individual's accounts are "at limit or overdrawn and most or all assets pledged in security"".[172] Moreover, in another response, the Bank stated emphatically "we are not in a position to speak for this enquiry".[173] Again, as explained by Sir Richard Scott VC in his judgment, this essentially, informs the enquirer that they should proceed with extreme caution. These then were clearly unfavourable responses, and whilst not directly disclosing confidential information, the enquiring Bank were informed, at least indirectly, of the (troubled) status of Mr Turner's bank accounts. Certainly, Sir Richard Scott VC was of this opinion, and said that:

> "It may be that in some cases a status enquiry could be answered by a bank without any use being made of confidential information. In the present case, however, the Bank's responses to the National

[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*

> Westminster Bank's status enquiries were plainly based on the Bank's knowledge of the state of Mr Turner's accounts and the manner in which Mr Turner had conducted those accounts".[174]

In 1995 Turner commenced County Court proceedings against the Royal Bank of Scotland for, *inter alia*, breach of contract by the Bank in disclosing confidential information when responding to the status enquiries outlined above. As a defence to this claim, the Bank claimed that there was express, or alternatively implied consent, to the disclosure made through the references. The Bank also contended that the references constituted an ordinary, everyday activity of banking commerce, and as such were innocuous and justifiable. At first instance, it was held that the responses to the status enquiries constituted a breach of the implied duty of confidentiality as laid down in the *Tournier* decision.

The issue before the Court of Appeal was concentrated upon that of implied consent.[175] The question then, as Scott VC puts it is this:

> "...does the banking practice on which the Bank relies justify imputing to Mr Turner an implied consent to the bank using information that would otherwise be confidential in order to give banks references about his creditworthiness".[176]

This then, as the Court of Appeal observed, depended upon whether a general practice of the banking industry could be contractually binding upon a customer irrespective of whether the customer is in fact aware of the practice. Under what Scott VC deemed "traditional principles"[177] of contract law, if such trade or industry practices are to take binding contractual effect as an implied term of the contract, they must be "notorious, certain and

---

[174] *Ibid*, at 667.
[175] It would seem from the report of the Court of Appeal hearing that the Bank abandoned any defence based on actual consent, and accepted that Turner had not expressly authorised the disclosures made in the references.
[176] [1999] 2 All ER (Comm.) 664, at 668.
[177] *Ibid*, at 670.

reasonable and not contrary to law".[178] The Court, and in particular Scott VC remained unconvinced as to the Bank's argument on this crucial point, and ultimately dismissed the Bank's argument that the practice of giving references without express consent was sufficiently notorious to be incorporated into the banker customer contract as an implied term.

Scott VC stated that:

> "How can the bankers' practice on which the Bank relies be regarded as notorious? It is not to the point that all banks may have known of it. The question is whether it was also notorious among the customers, the ordinary members of the public who open accounts with banks. There is no evidence whatever that in that sense this banking practice was notorious. Mr Turner did not know of it. Ordinary banking customers do not read Paget or any other banking text books. There was no evidence of any banking literature, prepared for the purpose of persuading individuals to open accounts with banks, that drew attention to the practice. There was no evidence of any documents put before customers, when opening an account with banks, that drew attention to it".[179]

This then, would have been sufficient to reject the argument based upon implied consent. However, clearly unimpressed by the actions of the Bank, Scott VC also added that:

> "As I have said, the evidence in this case disclosed a policy on the part of the Bank that customers should, if possible, be kept unaware of the practice. The law holds a person contractually bound by an established usage even if he does not know of it. But it cannot become an established usage unless it is notorious. How can a

[178] *Chitty on Contract*, 27th Edition, Vol. 1, London: Sweet & Maxwell, para. 13-014, a paragraph relied upon by Scott VC in his judgment in the case. See further on the issue of implied terms and custom or usage, Treitel, *The Law of Contract*, London: Sweet & Maxwell, 11th Edition (2003).
[179] [1999] 2 All ER (Comm.) 664, at 670.

> banking practice be notorious if the existence of the practice is kept from customers?"[180]

This logic is entirely consistent with the established principles of contract law previously mentioned and upon which the decision was based. Both Scott VC and the Court of Appeal were hostile to the attempt by the banking industry to effectively side step the strong principle of confidentiality as enunciated by the Court of Appeal in the *Tournier* case through agreeing to an industry practice without the knowledge of their customers, and then attempting to justify the breach of confidentiality through reference to a trade custom. Whilst, the lack of notoriety rendered any argument invalid, and as such the Royal Bank of Scotland was liable for the breach of their duty of confidentiality in disclosing, without authority, confidential financial information which they gained through their position as Mr Turner's bankers, the judgment of Scott VC went further than this and emphasized the unfair and unreasonable nature of this practice. Scott VC contended that any banking practice or custom which effectively deprives customers of their legal rights (i.e. the right to confidentiality in respect of their banking affairs) could be effective only where the customer had expressly assented to the practice. Scott VC stated that:

> "The proposition that banks can agree among themselves upon a banking practice and put the practice into effect without the knowledge of their customers and then claim that, because the practice is common to all banks, it is binding upon their customers is, in my judgment, unacceptable. There is some authority supporting that reaction".[181]

The authority to which Scott VC refers to, and relies upon is that of *Barclays Bank plc v Bank of England*[182] where an argument was based upon trade practice defeating a statutory right in respect of rights owed to the drawer of

---

[180] *Ibid.*
[181] *Ibid.*
[182] [1985] 1 All ER 385.

a cheque. Bingham J, as he was then, was unconvinced, and rejected the argument. In doing so, he suggested that if "the drawer loses that right as the result of a private agreement made between the banks for their own convenience, the very strongest proof of his knowledge and assent would be needed".[183]

It is interesting to note that by the time the issue reached the Court of Appeal, the accepted industry practice, and moreover, the general practice of the defendant Bank to 'unilaterally dispense'[184] with the need for customers consent had evolved away from precisely the type of tactics which the Bank sought to defend in the Court of Appeal. As Scott VC noted, "[T]he issue, though important to the parties in this case, has been somewhat overtaken by events".[185] After 1994 the Royal Bank of Scotland ceased to provide banker's references without first obtaining the written consent of the customer concerned. This, as the Court of Appeal appreciated, was the direct result of the creation of the Banking Code of Practice.[186] Before considering the Banking Code of Practice, it is necessary to consider the origins of the Code. Essentially the formulation and creation of the Code of Practice represents the banking sector's acceptance (albeit perhaps only in principle) of the Banking Services: Law and Practice report laid before Parliament in 1989. The Review Committee, which had a broad remit in the area of banking services detailed the importance of the principle of confidentiality as it applied between banker and customer and devoted an entire chapter to this issue.

The Report of the Jack Committee on consent

The Jack Committee raised concerns over the use of implied consent to authorise the disclosure of confidential financial information. In paragraph 5.33 of the Report, the Committee suggested that:

---

183 *Ibid*, at 391.
184 See the judgment of Judge L.J., in the *Turner* case.
185 [1999] 2 All ER (Comm.) 664, at 666.
186 A voluntary code of conduct applicable to personal customers of banks within England and Wales, see the previous discussion of the Code of Practice, at page 72 *et seq*.

"...disclosure by the implied consent of the customer can no longer be justified in any circumstances, and that in this respect the Tournier rule needs to be changed".[187]

As such, the Committee recommended that the qualification under the *Tournier* decision be amended, so as to permit those disclosures expressly permitted by the customer concerned. Furthermore, the Committee felt that this express consent ought only to be effective when in writing,[188] with the purpose of the consent specified[189] and where the consent was granted without any pressure being put upon the customer.[190] The rationale of the Committee in recommending that disclosure through implied consent be deleted is clear. The Committee expressed concern over the use of this vague notion, particularly as banks, "under the spur of competition, may rely more than perhaps they ought on implied consent".[191]

Ultimately, the Government were not persuaded that a statutory codification of the duty of confidentiality and the *Tournier* qualifications (as updated by the Jack Committee) was necessary and opted instead to instigate a voluntary Code of Practice.[192]

The Banking Code of Practice on consent

The Banking Code of Practice states that, where a bank is asked to provide a banker's reference, it will only do so with the express consent of the customer in respect of whom the reference was sought.[193] It is also interesting to note that, clearly in an effort to educate the general public as to the practice of banker's references, it defines the phrase 'banker's reference'

---

187 London: HMSO, Cmnd. 622, (1989), at para. 5.33.
188 This requirement if effected would reduce the difficulties created on this issue through the growth of telephone banking, see further, Penn and Shea: The Law Relating to Domestic Banking, at para. 4-068.
189 Cmnd. 622, (1989), at para. 5.43.
190 Indeed, the Committee suggested that this issue should be governed by a standard of best practice, see para. 5.44 (Cmnd. 622 (1989)).
191 Cmnd. 622 (1989), at para. 5.33.
192 See the White Paper, *Banking Services: Law and Practice*, Cmnd. 1026, (1990).
193 The Banking Code of Practice, para. 11.2.

in a glossary section located at the end of the Code itself. In paragraph 11.2 it is clear that the Code actually exceeds the position recommended by the Jack Committee. The Jack Committee suggested that whilst generally consent ought to be express, on the limited issue of banker's references this standard should be lowered to what it described as a "tacit" form of consent.[194] This, the Committee explained, necessitated that the customer had been instructed as follows: The customer should be made aware of the purpose of the reference requested, and also informed that they were free to consent to (or deny) the request, but that consent would be presumed where upon the expiry of a reasonable amount of time, consent had not been expressly denied.

CONCLUSIONS

This Chapter has analysed the development of the banker's duty of confidentiality through the Twentieth Century. It is clear that this was a time of considerable change in many areas of the duty of confidentiality, including the actual scope and nature of the duty, together with specific issues through changes in banking practice, including the growth of credit facilities and, consequently, the birth of credit reference agencies. Certainly the greatest impact however, was made through the development of the qualifications to the banker's duty of confidentiality, and specifically the statutory inroads into the scope of the first *Tournier* exception: Compulsion at law. The position of the Jack Committee on this point has already been considered, and need not be repeated here, but it is clear that the scope of the duty had been restricted from that laid down by the Court of Appeal in the *Tournier* decision. Without doubt however, this development has been sustained in recent times through one key statutory regime: That against money laundering, and this important issue shall be considered at length in Chapter Four. The focus of the next Chapter is however, an investigation into the possible implications for banking confidentiality of the banker's status as a fiduciary, i.e., the non-contractual basis of banking confidentiality.

---

[194] London: HMSO, Cmnd. 622 (1989), at para. 5.43.

CHAPTER THREE

FIDUCIARY OBLIGATIONS AND BANKING CONFIDENTIALITY

"...wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs".

Westdeutsche Landesbank v Islington LBC [1996] AC 669, *per* Lord Browne-Wilkinson

INTRODUCTION

The previous Chapters have considered the contractual nature of banking confidentiality in England and Wales. It should not be ignored at this point however, that an obligation of confidentiality can arise out of non-contractual dealings, and in particular that equitable principles also require, on occasion, a respect for confidential information. Indeed, the origins of a legal duty of confidentiality in a general sense appeared through equity, and in particular, through the use of fiduciaries and fiduciary obligations. Whilst it must be appreciated that the primary focus of this thesis is upon the contractual nature of banking confidentiality, after all, the banker customer relationship is, for the most part, one based firmly in contract, the equitable obligations of bankers in respect of confidential information must also be considered. As shall be seen in this Chapter, the position of the banker as a fiduciary in respect of their customer(s), or indeed, prospective customers[1] brings with it, certain fiduciary duties, one of which is confidentiality. Prior to investigating

[1] See the interesting case of *Woods* v. *Martins Bank Ltd*, [1959] 1 QB 55, approved by the Privy Council *in Mutual Life and Citizen's Assurance Co. Ltd.* v. *Evatt* [1971] AC 793, at 805.

such considerations however, it is necessary to look somewhat more generally and consider both the role of the bank as a fiduciary, and firstly, the role of equity in commerce generally. As is considered in the section that follows, the relationship between equity and associated principles and commercial matters has not always been a happy one.

EQUITY AND COMMERCE

The role, and indeed, even presence, of equity in commerce is a matter of considerable controversy. That there is a clear tension between equitable principles and the contract dominated commercial sphere is undeniable. At a foundational level, commercial dealings are based upon concepts of self-interest and certainty as between the contracting parties, neither of which are generally reconcilable with equitable notions of fair dealing and good conscience. It is not surprising therefore, that the commercial actors have forcefully voiced a desire to ensure that equity is kept out of the commercial world. The rationale behind such aims is relatively simplistic, and suggests that commercial contracts require certainty so that the contracting parties may have confidence in the legal treatment of their dealings. The difficulty with allowing equitable principles to resolve contractual disputes, it is argued, is that such confidence is eroded through the flexibility and discretion afforded to the judiciary in resolving the dispute in accordance with equitable principles. Moreover, the wide remedial scope which equity affords the judiciary is regarded with considerable apprehension by the commercial world. The application of concepts such as constructive trust liability, equitable tracing and equitable damages to commercial parties is viewed with distrust and suspicion, and as such there is a strong opposition to equity within commerce.

The traditional stance of resistance[2] to the infiltration of equity into commercial dealings has been the subject of considerable judicial deliberation in both the contemporary and historical periods. As Lord

[2] See for example, Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World', 110 LQR (1994) 238.

Browne-Wilkinson has recently noted in *Westdeutsche Landesbank v Islington LBC*, "wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs".[3]

Such modern warnings of the difficulties associated with the interaction of equity and commerce are prevalent throughout the history of English commercial law. Lord Justice Bramwell raised essentially identical concerns in *New Zealand & Australian Land Co. v Watson*:

> "Now, I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial transaction turned into a trustee with all the troubles that attend that relation".[4]

Such concerns mirror those enunciated by Lord Selborne LC in the earlier case of *Barnes v. Addy* regarding the issue of constructive notice and the commercial world.[5] Interestingly, this issue of the application of constructive notice to commercial players was also of considerable concern to Lindley LJ in *Manchester Trust v Furness*[6], who commented that the possibility of such doctrines applying to commercial transactions has been subject to "repeated protests",[7] and that, furthermore, such protests were "founded on perfect good sense".[8] The observations of the judiciary at that time are useful, and in particular, the words of Bramwell L.J., are most revealing, neatly summing up the prevalent approaches and attitudes of the era.[9] Clearly, the judiciary was at best uncomfortable, and at worst plainly suspicious of the suitability of

---

3 [1996] AC 669, at 704.
4 (1881) 7 QBD 374 at 382.
5 (1874) 9 Ch. App. 244, at 251.
6 [1895] 2 QB 539.
7 *Ibid*, at 545.
8 *Ibid*.
9 Also of note are the concerns of Atkin L.J., in *re Wait* [1927] 1 Ch. 606, and particularly the comments at 639-640.

equitable principles governing commercial transactions; no doubt influenced by the clear divide between the Courts of Chancery and those of common law. Whilst the Judicature Act 1873 removed this divide, in a practical sense, if not perhaps, intellectually, this distrust of equity as it operates within commercial matters continued, and indeed continues to this day, although as this chapter shall subsequently consider, the extent to which such views are still prevalent is a question of standpoint. Leggatt L.J., in *Westdeutsche Landesbank v Islington LBC*[10] and citing his earlier judgment in *Scandinavian Trading v Flota Ecuatoriana*[11] was unconvinced that (equitable) discretionary remedies were appropriate for commercial transactions:

> "...tempting though it may be to follow the path which Lloyd J was inclined to follow in the *Afovos*, we do not feel that it would be right to do so. The policy which favours certainty in commercial transactions is so antipathetic to the form of equitable intervention invoked by the charterers in the present case that we do not think it would be right to extend that jurisdiction to relieve time charterers from the consequences of withdrawal".[12]

Again the standard concerns remain unchanged: The fluid nature of equity and the discretionary remedies afforded to the judiciary in equity are disparate to the operational requirements of commercial transactions, namely certainty. As Millett L.J., has commented, extra-judicially, "businessmen need speed and certainty; [and] these do not permit a detailed and leisurely examination of the parties' conduct".[13] The difficulty however, is that it is now both unhelpful and untenable to suggest that equity has no place in commercial dealings. That is clearly not the case, for as Millett LJ puts it, "equity's place in the law of commerce, long resisted by commercial lawyers, can no longer be denied".[14] Indeed, it cannot be denied, despite the oft-repeated concerns regarding the impact of equity upon commerce, it is

[10] [1996] AC 669.
[11] [1983] 2 WLR 248.
[12] *Ibid*, at 259.
[13] 'Equity's Place in the Law of Commerce', (1998) LQR 214, at 214.
[14] *Ibid*.

clear that, as Mason noted in 1994, both the doctrines and the remedies associated with equity and the Courts of Chancery:

> "...have extended beyond the old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint...Equitable doctrines and reliefs have penetrated the citadels of business and commerce long thought, at least by common lawyers, to be immune from the intrusion of such principles".[15]

Despite the oft-stated concerns and warnings however, the influx of equity into the commercial sphere is marked, and has itself been subject to academic consideration (see for example the breadth of academic research into the impact of equity upon the role of company directors). One equitable concept, which has transgressed the realms of equity and commerce, is that of the fiduciary relationship. Whether rightly or wrongly, this notion of fiduciary responsibility has proven to be the "spearhead" of equity's intrusion into commerce and commercial.[16] It is now accepted that various individuals, including agents and directors are fiduciaries and consequently, may be subjected to more rigorous standards of behaviour than under their contractual or tortious (where relevant) duties. Such factors are usually cited for justification of the imposition of fiduciary standards upon commercial relations. With the ever-increasing growth within the realm of the commercial sector, "there has never been a greater need to impose on those who engage in commerce the high standards of conduct which equity demands".[17] The very nature of commerce, where antagonistic relations[18] are common place, and profit margins authoritative, it may be argued, dictates that such exacting standards of loyalty, fidelity and responsibility are necessary in order to ensure that the standard commercial ideals of "success, self-interest, wealth, winning and not getting caught" are

---

[15] Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World', 110 LQR (1994) 238, at page 238.
[16] *Ibid*, at 245.
[17] Millet, 'Equity's Place in the Law of Commerce', (1998) LQR 214, at 216.
[18] See Bean, *Fiduciary Obligations and Joint Ventures*, Oxford: Clarendon Press (1995), at page 50 for an informed discussion of this concept.

successfully tempered.[19] Allied to this is the changing nature of the commercial world, with the increasing development of the advisory role played by commercial entities, financial advisory groups being an excellent illustration of this. When one considers this changing nature of commerce, combined with the proliferation of such advisory roles, it is perhaps easier to see the force behind the relevance of fiduciary law within the commercial sector. Despite this however, the tension remains, although the central difficulty has shifted away from notions of equity interfering with commercial law to one of whether a commercial relationship can ever be constructed so as to give rise to fiduciary obligations. The argument now centres, as Bean suggests, on the fact that "in commercial transactions the fiduciary element is usually missing, not because the transaction is commercial", but because each party to the contract shall be maximising their own interests in the fulfilment of the contract.[20]

The controversy is the result of fiduciary duties expanding even further into commercial relationships, where the parties concerned are, and furthermore are expected to be, in a relationship of self-interest. The applicability of fiduciary obligations to persons such as agents and directors is clearly grounded upon the notion that in both cases they are expected to use their discretion for the benefit and advancement of their principal or shareholders respectively. The fundamental theory based dilemma with the application of fiduciary duties to commercial relationships is simply that generally, commerce is not dominated by ideas of selflessness and unabated loyalty, core notions to fiduciary law. Indeed, the converse of this sentiment would be a more accurate reflection. In the commercial arena, profit margins are paramount, and as such parties to a commercial relationship are generally to be expected to further their own economic best interests. Thus, prima facie, one would certainly be forgiven for assuming that fiduciary obligations would be an infrequent visitor to commercial dealings. As shall be seen, however, this is not necessarily the case. This theme shall be continued with regards the controversy over the insertion of fiduciary duties upon the banker-

[19] Sacks, *The Politics of Hope* (1997) at 179.
[20] *Op cit*, above n. 18, at 49.

customer relationship. However, it is the issue of fiduciaries in commerce that should now be addressed.

FIDUCIARIES IN COMMERCE

It is undeniable that fiduciary law is becoming increasingly significant within the commercial sector generally. The development of fiduciary relationships and duties as between financial and commercial players has been the subject of much academic debate, and this is something which shall be addressed in this chapter. It is interesting to note at the outset however, that, despite much academic and judicial soul searching, there is no universally accepted definition of the word 'fiduciary'. As Mason notes, "the quest for a precise definition which identifies the characteristics of the fiduciary relationship...continues without evident sign of success".[21] In as much Mason is justified in suggesting that the idea of fiduciary relationship is a concept in search of a principle.

Certainly, limited guidance on this fundamental question may be drawn from the recent Law Commission report, *Fiduciary Duties and Regulatory Rules*[22], which offered the following explanation:

> "Broadly speaking, a fiduciary relationship is one in which a person undertakes to act on behalf or for the benefit of another, often as an intermediary with a discretion or power which affects the interests of the other who depends on the fiduciary for information and advice".

Nevertheless, the term is certainly elusive, and does not avail itself of any considerable definitional precision. This is not, in itself, surprising for as Clayton points out, "the concept of fiduciary is a fluid and flexible one, being a creature of equity".[23] Whilst this then simply begs the crucial question, namely, who is a fiduciary, it is clear that the search for a universally

[21] *Op cit*, n. 15, at 246.
[22] London: HMSO, Consultation Paper No. 124, (1995).
[23] 'Banks as Fiduciaries: The UK Position', (1992) *J.I.B.L*, 7(8) 315 at 315.

applicable definition of 'fiduciary' is a futile exercise, being doomed to failure. As Sealy puts it:

> "The word "fiduciary"...is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply...the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied".[24]

Certainly then, the fluidity of this idea of 'fiduciaries' is of paramount importance, and it is, as a result, impossible to compose a concrete definition of precisely who may be a fiduciary. Moreover, as Sealy contends, merely because a person is labelled a fiduciary, this too, is of little assistance, as it merely signifies the beginning of a further inquiry, namely that of discovering which fiduciary principles are applicable to that specific individual.[25] Such a conclusion has received judicial support. In particular, Lord Mustill, sitting on the Privy Council in *Re Goldcorp Exchange Ltd*[26], suggested that merely labelling a person as a fiduciary was meaningless. He continued to quote with approval the comments Frankfurter J., in *SEC v Chenery Corp*[27]:

> "To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"[28]

Such an inquiry, moving away from a purely definitional investigation is certainly a more purposeful charge, and heeds the warning of Fletcher

---

[24] 'Fiduciary Relationships', *CLJ* [1962] 69 at 73, emphasis in original.
[25] *Ibid*, see comments at 72-74.
[26] [1994] 2 All ER 806.
[27] (1943) 318 US 80.
[28] *Ibid*, at 85-6.

Moulton L.J., against trusting to "verbal formulae".[29] Indeed he surmises the situation well in suggesting that:

> "Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of fiduciary relation must be such that it justifies the interference".[30]

Such sentiments have received recent judicial approval, notably through Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd*,[31] who sought to emphasise the fluid nature of fiduciary duties, in observing that such a term was "dangerous", as it leads to the (mistaken) assumption that "all fiduciaries owe the same duties in all circumstances".[32] His Lordship concludes simply, by stating that "this is not the case".[33]

The overriding point, which must be appreciated with such an inquiry, is simply that it is the presence of fiduciary obligations which *triggers* any finding of fiduciary status. This crucial notion was emphasised by Finn in his seminal work on fiduciary law and duties, *Fiduciary Obligations*[34], where Finn stated that "a fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to fiduciary obligations that he is a fiduciary".[35] Thus, in order to gain insight into the concept of fiduciary relationships, it is necessary to accept the imprecise nature of the term 'fiduciary', and consider the various categories, or as Sealy puts it, "classes".[36] Such a step will allow for the obligations attached to a fiduciary

---

[29] *Re Coomber, Coomber v Coomber* [1911] 1 Ch. 723 at 728.
[30] *Ibid.*
[31] [1995] 2 AC 145.
[32] *Ibid*, at 206.
[33] *Ibid.* Indeed, if this position were inaccurate, it would suggest that the search for a universal, all embracing definition of 'fiduciary' was, both entirely possible, and also entirely valid. Clearly, such a position is untenable and naïve in equal measure.
[34] Sydney: The Law Book Company (1977).
[35] *Ibid*, at 2.
[36] *Op cit*, above, n. 24.

to be analysed, and consequently, this will shed a more penetrating light upon fiduciary relationships and fiduciary duties.

Sealy proposed four categories of fiduciary relationships, each turning on the functions of the fiduciary concerned.[37] These categories may be outlined thus:

i. those who control property belonging to another;
ii. those who act on another's behalf;
iii. fiduciaries in the sense on *Keech v Sandford;*
iv. situations where undue influence is presumed.

Before considering these classes, it is worth emphasizing a couple of key points. Firstly, these classes were not designed to be finite, indeed Sealy himself even commented on the possibility of a fifth class of fiduciary relationship, namely those concerning confidential information. Furthermore, it has been judicially noted that the possible categories of fiduciary relationships are far from ascertained, with Slade J., stating that such categories should not "be regarded as falling into a limited number of straight-jackets or as being necessarily closed".[38] Secondly, it is important to appreciate that these classes of fiduciary relationships, were not intended to be mutually exclusive, and merely represent the more discernable shades of the spectrum. Thus, as we shall see, a fiduciary may well fall under more than one of the four general categories, and equally, a person who may properly be described as a 'fiduciary' in one sense may not be a 'fiduciary' in another sense.

The first class of fiduciary relationship as favoured by Sealy is that where a person holds property on behalf of another. This encompasses the situation where the holder has legal title to the property, or merely has power over the property. This first class then, includes solicitors, agents, directors and partners, all of which are established examples of fiduciary relationships.

---

[37] *Ibid.*
[38] *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, at 398.

This category is clearly highly analogous to that of a trust, and the obligations of a trustee, and reflects the clear link between the two concepts. Certainly a fiduciary within this class is required to keep the property concerned separate from his own.

The second class of fiduciary relationship is that where a person is obliged to act on another's behalf. Thus "whenever the plaintiff entrusts to the defendant a job to be performed",[39] the court may find a fiduciary relationship, and thus, not allow the defendant to act on his own behalf. As Bean emphasises, if the purpose of the undertaking is limited, then the duties which flow from the fiduciary relationship will be similarly curbed.[40] Generally, class one fiduciaries will also be class two fiduciaries, as those who have control over another's property will have the corresponding duty to act on that other person's behalf. Thus again partners would fall under this class of fiduciary relationship, being required to act in the communal interests of the partnership. The most obvious obligation under this category is that of the prohibition against action motivated through self-interest. Clearly the fiduciary in this sense must act in the interests of the beneficiary, and not to further his own causes.

Related to this category is that of Sealy's third category, that of the rule in *Keech v. Sandford*[41], whereby, a fiduciary may not make a profit (or more strictly, an unauthorised profit something which Millett L.J., has, quite properly emphasised in a non-judicial capacity[42] and retain it for himself, such profits being held for the beneficiary. It has been argued that this class is more accurately defined as a facet of the rule prohibiting conflicts of interest, and that it is not, in a technical sense, a distinct category.[43] It is not necessary at the present moment to consider this issue further, although it is the view of the author that such a contention is accurate: It would appear that

[39] *Reading v. R* [1949] K.B. 232, at 236.
[40] Bean, *Fiduciary Obligations and Joint Ventures* (1995), at 39.
[41] (1726) Sel. Cas. Ch. 61.
[42] Millett, 'Equity's Place in the Law of Commerce', (1998) *LQR* 214, at 216.
[43] See Bean, *Fiduciary Obligations and Joint Ventures*, (1995), at 40.

this class, based upon *Keech v Sandford* is best placed as a practical example of the no conflicts rule.

The final category enunciated by Sealy is that of undue influence. There is, in certain relationships, a rebuttable presumption that a particular transaction or contract has been motivated through undue influence, and such relationships, such as solicitor and client and medical advisor and patient, are traditionally labelled fiduciary relationships.[44] If this presumption is not rebutted, or if there is actual undue influence present, the contract is voidable at the option of the 'entrustor'.[45] The modern relationship between the doctrine of undue influence and fiduciary relations is currently uncertain. In *CIBC Mortgages plc* v. *Pitt*,[46] Lord Browne-Wilkinson suggested that the relationship between these two concepts was perhaps in need of reassessment in the future,[47] although interestingly, Sealy, in 1962, was clearly of the opinion that undue influence and fiduciary relations were separate.[48] This is, it may be suggested the more prevalent view in the legal world at the present time, and is certainly consistent with the approach evident through the cases of *Woods* v. *Martins Bank Ltd*[49] and *National Westminster Bank* v. *Morgan*.[50] This is despite interesting arguments attempting to establish undue influence as a species of fiduciary (see for example the approach adopted by Bean, where it is contended that undue influence is concerned primarily with control over a person.[51] Thus, the dominant person also controls the subordinate's property, and consequently undue influence may be regarded as an "indirect form of Category 1",[52] referring to Sealy's conception of fiduciary relations through the control over

---

[44] The leading case on the modern day doctrine of undue influence is that of *Barclays Bank plc* v. *O'Brian* ([1994] 1 AC 180) and in particular the judgment of Lord Browne-Wilkinson.
[45] A term penned by Frankel, (71 *Cal. L. Rev.* (1983) 795, at 800, n. 17) to refer to the "other party" in any fiduciary relation in order to avoid the imprecision of relying upon the term 'beneficiary' for example, which is not accurate for fiduciaries outside of a trust arrangement.
[46] [1993] 4 All ER 433.
[47] *Ibid*, at 439-440.
[48] Stating that "it is probably correct, in modern law, to distinguish between these two ground for the avoidance of contracts", citations omitted from original, Sealy, 'Fiduciary Relationships' [1962] *CLJ* 69, at 74.
[49] [1959] 1 Q.B. 55.
[50] [1985] AC 686.
[51] *Fiduciary Obligations and Joint Ventures, op cit*, n. 43.
[52] *Ibid*, at 4.

another's property. Such an argument is not without force, but it is inconsistent with the accepted approach of the modern legal era.

With this consideration of fiduciary relationships complete then, the next question is simply what does being labelled a fiduciary *actually* entail as a consequence? In other words, what are the duties of a fiduciary? This, like the definition of fiduciary, is a matter which has received considerable attention, although in brief terms it may be suggested that fiduciary duties revolve around varying conceptions of the no-conflicts rule. This is particularly through the writings of Finn who suggested that a fiduciary may be subject to the following duties:

i. not to obtain an unauthorised benefit from the property held under the relationship;
ii. not to be in a situation of conflict between personal interests and the fiduciary obligation;
iii. not to be in a situation of conflict between differing duties;
iv. not to inflict harm upon an employer's business;
v. not to use undue influence;
vi. not to take accretions;
vii. not to misuse confidential information;
viii. not to abuse the fiduciary position by using superior knowledge gained through managing a property, to purchase the property.[53]

The defining notion then, behind fiduciary relationships, as evident through these separate (a term used for convenience, although the demarcation between the various fiduciary duties is clearly indistinct) postulations of fiduciary duties is that of 'selflessness'. The fiduciary bears a duty of loyalty to the beneficiary, and must promote their interests above his own. Thus, the Law Commission in its Consultation Paper, *Fiduciary Duties and Regulatory Rules*,[54] suggested that a fiduciary is under a duty not to:

[53] *Fiduciary Obligations* (1977), at 78-81.
[54] Consultation Paper No. 124 (1992), at para. 2.4.9.

i. have a conflict of interest;
ii. make unauthorised profit;
iii. have conflict between loyalties;
iv. abuse confidential information.

It is interesting to note that this concept of abusing confidential information is repeatedly regarded as being a fiduciary duty or obligation. This is of great significance, particularly to the ambit of this thesis, and to any possible impact upon the banker-customer relationship. Indeed, the nature of the requirement of confidentiality between banks and their customers is something which will be considered shortly. It is necessary at this point however, to consider the extent to which a banker may be subject to fiduciary obligations in relation to a customer in a more general sense.

It is clear that, ordinarily, the relationship of banker-customer is not fiduciary in nature. It is generally, a relationship of debtor-creditor (or, of course vice versa) governed primarily, through principles of contract law.[55] Beyond this opening however, there is great uncertainty as to the possibility of fiduciary obligations flowing from the banker-customer relationship. This statement in itself raises an important point: It is clear that there is a distinction between a fiduciary relationship, such as previously discussed, and fiduciary duties. The nebulous nature of 'fiduciary relationships' and the relationship between such relationship and the fiduciary obligations and duties that may arise as a result of the fiduciary relationship have already been considered. It is clear that each fiduciary relationship will consist of certain fiduciary duties, thus whilst each fiduciary relationship will have similar underlying themes, the specific fiduciary obligations may not be identical in each relationship. Allied to this issue, is the fact that certain relationships, which are not fiduciary *per se*, may well consist of individual fiduciary duties. That is to say that, whilst certain aspects of the relationship may well be properly described as fiduciary, the relationship taken as a whole may not be so described.[56] As Bean rightly emphasizes, "where the relationship is only fiduciary in respect

[55] See, for example, *Foley* v. *Hill* (1848) 2 H.L. Cas. 28.
[56] *Cf* Clayton, 'Banks as Fiduciaries: The UK Position', (1992) *JIBL* 315 at 317.

of a particular matter, it is apt not to refer to it as a fiduciary relationship, but as a fiduciary duty".[57]

This is important: Clearly the banker-customer relationship is not fiduciary in nature, but furthermore, the mere fact that the banker may stand as a fiduciary in some respects, does not in itself create a fiduciary relationship. At most, it merely gives rise to fiduciary duties. The crucial question therefore, is when may a banker be found to owe fiduciary duties to his customer? Before considering this issue, one further point must be appreciated, and that is the motivation operative upon a claimant seeking to argue breach of fiduciary duties. At a basic level there are perhaps two general factors which motivate any quest for sustaining a claim for breach of fiduciary duties. Firstly there may be remedial advantages of couching a claim in terms of breach of fiduciary duty. As McCormack points out, establishing that the defendant is a fiduciary may result in obtaining forms of consequential relief that would not be available without the breach of fiduciary duty.[58] This is illustrated ably through the first instance decision of Hobhouse J., in *Westdeutsche Landesbank Girozentrale v Islington LBC*[59] where the finding of fiduciary duties resulted in the defendants being liable to pay compound interest on monies received under an ultra vires contract. If there were no such fiduciary obligations, and it should be emphasised that the House of Lords determined there were not in respect of returning money paid under an ultra vires contract, then the claimants would be able to aleive themselves only of personal remedies. This would have resulted in only simple interest being payable. In addition to this, a breach of fiduciary obligation enables the recovery of any misappropriated funds. Under a non-fiduciary related claim, such as for breach of contract, such assets are not recoverable, and the claimant is reduced to a claim for damages. Moreover, under the common law, tests of remoteness of damage must be satisfied for damages to be awarded. In equity, there is no such concept, and all losses

[57] Bean, *Fiduciary Obligations and Joint Ventures*, (1995) at 36.
[58] Fiduciaries in a Changing Commercial Climate', *Comp. Law.* (1997) 18(2) 38, at 39.
[59] [1994] 4 All ER 890.

that arise from the breach of fiduciary duty are recoverable.[60] Clearly, then as a matter of legal principle, the finding of fiduciary duties can have a serious impact upon the nature and extent of any remedies available to a claimant.

Fiduciary law and banks

The starting point then, is that the basis of the relationship between a banker and his customer is contractual. Equally, if the central pillar of fiduciary relations is 'selflessness', it is immediately apparent that this causes difficulty for any finding of fiduciary duties between banker and customer: Banks are not charitable institutions (something explicitly recognized by the judiciary, see for example the observations of Dunn L.J., in *National Westminster Bank plc v Morgan*[61] and operate as a business concern. It is difficult therefore to suggest that the bank ought to put their customer's interests ahead of their own. Manifestly, the standard position is quite the opposite: Generally the bank, operating as a commercial unit and with the aim of profit generation, will act to further its own commercial interests and not be expected to advance the interests of their customers ahead of their own. As Curtis notes, in respect of the American position, "a profit minded institution such as a bank could not protect its own best interests while under a fiduciary duty to act for the benefit of the customer-giving priority to the customer's best interests".[62]

Despite this however, it has been illustrated that the judiciary is willing, in certain limited circumstances to superimpose fiduciary obligations upon a contractual relationship. Moreover, the courts have, again in rather limited situations, been willing to hold bankers liable for breach of fiduciary duty, overcoming the apparent difficulties of the bank as a 'self-interest' based institution. Before analyzing the approach of the United Kingdom courts

[60] Allied to this is the issue of limitation periods: Unlike tortious, contractual or trust based claims, a claim for breach of fiduciary duty is not restricted by the Limitation Act 1980, and by virtue of s. 23 of the LA 1980, the applicable period of limitation is governed by the substantive claim itself.
[61] [1985] AC 686.
[62] 'The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationships', 20 Loy. L. Rev. (1987) 795, at 799.

however, it is proposed to consider the previous academic debate on the imposition of fiduciary duties as between banker and customer.

Finn, who has written widely on this area, suggests that there are three distinctive situations where it is possible, due to the manner of the banks dealings with a customer (or, of course, a customer's guarantor), for a bank to find itself in a fiduciary relationship.[63] It is submitted that the use of 'fiduciary relationship' in this context refers merely to the existence of fiduciary duties, rather than a fiduciary relationship *per se*. Of course, as previously discussed, the banker customer relationship is not a fiduciary relationship in the strict sense of the term. Finn argues that there are three distinct situations where such fiduciary duties may be imposed. Firstly, where the course of the relationship gives rise to an expectation that advice will be given, regardless of the bank's interests, and this may in turn, lead to fiduciary obligations. Secondly, where the bank has created the expectation that it will advise in the best interests of the customer in a matter because its own interests in that matter are nominal, formal or technical, again fiduciary obligations may be imposed. Thirdly, where the bank creates the expectation that it will advise in the customer's best interests, despite the presumption that in such matters the bank will advise in its own best interests, there may be fiduciary obligations operative upon the bank.[64] Clearly the rationale conjoining these categories is simply that in each case, the bank's interests will, as Finn puts it, "be an operative consideration in the advice expected or given".[65] Such advice giving situations are undoubtedly open to the imposition of fiduciary obligations: Again the concept of selflessness is readily apparent, and provided that the presumption of self interest on the part of the bank is rebutted, clearly such situations could lead to fiduciary duties. This is however, it may be suggested, a narrow view of fiduciary duties owed by a bank to its customer. The controversy in imposing fiduciary duties between banks and customers is easily apparent through a broader outlook on where such duties may arise. Clayton, for example,

---

[63] See for example, Finn, 'Fiduciary Law and the Modern Commercial World' in McKendrick (ed.) *Commercial Aspects of Trusts and Fiduciary Obligations*, Oxford: Clarendon Press, (1992).
[64] *Ibid*, at 11-12.
[65] *Ibid*, at 12.

broadly speaking, suggests that fiduciary duties may be imposed upon a bank in a more extensive manner.[66] Clayton contends that there are four exceptional circumstances where a banker may become a fiduciary:

i. Where it receives or transfers funds of its customer;
ii. Where it gives advice to its customer and is a position of conflict (of either interest or duty);
iii. Where the bank is in a special relationship with its customer or has confidential information about its customer, and is in a position of conflict of duty or interest;
iv. Where a bank makes a mistaken payment to another.[67]

It is readily apparent that the second 'exceptional circumstance' is essentially a broad re-categorisation of those enunciated by Finn. The three strands of advice giving bankers offered by Finn, elaborates on this simple formulation by Clayton. Again it is easier to see the fiduciary possibilities in such a situation, as the presumption of antagonistic self-interest is more readily rebuttable. It is equally clear that the crucial element however is not the element of advice giving. As both Finn and Clayton emphasise, more than this is required if fiduciary duties are to be imposed upon the banker. If a bank merely advises a customer, it may be suggested that Clayton is correct in contending that the bank may only be liable to the customer for negligence. What is needed for the finding of fiduciary duties is the idea of conflict between the interests of the bank and those of the customer. This pivotal requirement is well illustrated through the judgment of Salmon J in *Woods v. Martins Bank Ltd*,[68] where the branch manager of Martins Bank advised the plaintiff to invest in a particular company. The plaintiff suffered heavy financial losses through this investment. The key issue however, was that the company the plaintiff was advised to invest in was also a customer with Martins Bank, and moreover, the company was a known failing customer of the Bank, with a substantial overdraft. Furthermore, the head

---

[66] Clayton, 'Banks as Fiduciaries: The UK Position', (1992) *JIBL* 315.
[67] *Ibid*, at 316.
[68] [1959] 1 Q.B. 55.

office of the Bank was pressing the branch manager to obtain repayment of the overdraft facility. Salmon J found in favour of the plaintiff, in holding that the Bank was in breach of fiduciary duty, and consequently, liable for the loss. The facts of the Martins Bank case are clearly exceptional, and the actions and interests of the branch manager were manifestly in conflict with the interests of the plaintiff, who was evidently unaware of the business relationship between the bank and the company the branch manager advised him to invest in. The branch manager should certainly have informed the plaintiff of this conflict of interest, or even declined to advise the customer as to investment opportunities with the failing company at all.[69] The consequence of failing to make a full disclosure to the plaintiff was the finding of fiduciary obligations, which the bank had failed to satisfy.

The decision in *Martins Bank*, and the reasoning behind Salmon J's conclusion is a clear and stark warning to banking institutions that the judiciary is willing to impose fiduciary obligations upon them in respect of their dealings with their customers. The impact of the decision however on banks may be limited in two distinct ways. Firstly, clearly the decision of Salmon J was based heavily on the special facts of the matter before him, and it is unlikely that such a blatant conflict of interest will be a regular visitor to the courts. Secondly, it is clear that the case also represents an example of undue influence, and importantly, the House of Lords adopted this view in the recent case of *National Westminster Bank* v. *Morgan*[70] and sought to downplay the findings of Salmon J in relation to the fiduciary obligations owed by Martins Bank to the investing customer. Such an interpretation is certainly valid, and brings with it certain important, and related, consequences. Firstly, it illustrates on a general level, that the United Kingdom judiciary is uneasy with the application of fiduciary law to commerce, and will seek to ground decisions so as to avoid breach of fiduciary duty being the exclusive factor. Secondly, and allied to the first observation, it supports the prevalent view of the judiciary that undue influence is not to be regarded as a species of fiduciary duty. In as much

[69] Certainly Salmon J was of this opinion, see the comments at 59-60.
[70] [1985] AC 686.

there is a clear divergence between academia and practice: The view of Finn, in particular in relation to this matter has already been considered, yet the overriding view of the courts is that undue influence is a separate and distinctive legal concept from that of fiduciary obligations. As Clayton puts it, "the decision of the House of Lords in ...Morgan has focused attention away from fiduciary duties to that of undue influence".[71] Indeed it does, and despite the absence of any direct criticism of the applicability of fiduciary obligations in such circumstances, it is clear that their Lordships were uncomfortable with the earlier decisions, and keen to avoid the need to consider fiduciary issues through the use of undue influence alone. Indeed an essentially similar approach is evident through the case of *Barclays Bank plc v Khaira*[72] which again dealt with similar facts as an instance of undue influence alone. This is not the place to offer an opinion on such matters, but it is clear that the position taken by the judiciary offers little assistance to a customer arguing that their bank has breached a fiduciary duty, and continues the difficulty such parties have in succeeding in a claim for breach of fiduciary duty against their bank.

The major significance of Clayton's analysis derives not from this recapitulation of the advice giving bank as a fiduciary, but rather in the allied situations where too, it is argued, the banker may find himself bound by fiduciary obligations in relation to his customer, and it is to this that we must turn. Clayton suggests that a banker owes fiduciary obligations to a customer regarding the transfer and receipt of funds. This flows from the decision of *Barclays Bank plc v Quincecare Ltd and Unichem Ltd*[73] where Steyn J, as he was then, held that when the bank transferred funds on the instructions of Quincecare, to a third party, the bank was an agent, of Quincecare, and as a result, owed fiduciary duties to the company. This category of fiduciary obligations between banker and customer again is relatively straightforward, being founded on the established law of agents as fiduciaries. Similarly to all agents, they owe their principal duties of loyalty

[71] 'Banks as Fiduciaries: The UK Position', (1992) *JIBL* 315, at 320.
[72] [1993] 1 FLR 343.
[73] [1992] 4 All ER 363.

and selflessness, in the sense of avoiding conflict of interest. Furthermore, as Clayton says, "it is difficult to see what additional obligations are imposed in this regard, since the agent already owes duties of skill and care because of his contractual position".[74]

The third exceptional situation where a banker may be found to owe fiduciary duties to his customer suggested by Clayton, and one which is of most significance in the context of this thesis, is that of confidential information. It is contended that there are three sub-situations where "a bank may be considered to be a fiduciary because of confidential information that the bank possess".[75] Firstly, where a banker misuses confidential information given to him by his customer. Secondly, where a banker derives financial advantage through the use of such confidential information gained from his customer, and thirdly, where the banker is in a special relationship of trust and confidence with his customer. These are particularly bold contentions, particularly when, as Clayton admits, "there is a lack of UK authority in this area".[76] There certainly is a dearth of judicial guidance regarding the relationship between confidentiality and fiduciary duties, and this is perhaps surprising, given the willingness with which counsel have argued the existence of fiduciary duties with regard to other aspects of the banker customer relationship. Whilst, the issue of confidentiality will invariably be dealt with by the judiciary as a matter of contract law,[77] it is perhaps curious that so few claimants have attempted to avail themselves of any equitable remedies in these circumstances. Where issues of confidentiality and any possible relationship with fiduciary duties have been considered, once again the United Kingdom judiciary has been somewhat reticent over any possible correlation between the two concepts. Indeed, in *Cornish v Midland Bank plc*[78], Kerr L.J., (relying heavily on the comments of Sachs L.J., in his decision in *Lloyds Bank Ltd v Bundy*[79]) suggested, *obiter*, that "there would

---

[74] 'Banks as Fiduciaries: The UK Position', (1992) *JIBL* 315, at 317.
[75] *Ibid*, at 317.
[76] *Ibid*.
[77] Indeed, the development of the implied contractual term of confidentiality has already been analysed the previous Chapter.
[78] [1985] 3 All ER 513.
[79] [1975] QB 326.

generally be no question of any fiduciary relationship on the ground that the transactions had crossed the line into the area of confidentiality".[80] This then, would not appear to offer much support for any imposition of fiduciary duties on a banker by virtue of confidential information possessed through his capacity as a banker. Clayton, however, suggests that the observations of Kerr L.J., support the view that "for a fiduciary relationship to be created between banker and customer there must be some misuse of confidential information received by the banker".[81] The remarks of Kerr L.J., are certainly open to interpretation, but it may be respectfully submitted, that they provide minimal support for the conclusions drawn by Clayton in this context. One possible interpretation is that Kerr L.J., has employed the term 'fiduciary relationship" in a rightly narrow manner, emphasising the distinction between fiduciary relationships *per se*, and fiduciary duties. It has already been noted that there is, or certainly ought to be, a distinction between the two concepts, and that it does not necessarily follow that a fiduciary relationship follows from any imposition of fiduciary duties or obligations. Therefore, to return to the words of Kerr L.J., it may be suggested that the reference to fiduciary relationship refers to the exclusion of any fiduciary relationship arising between banker and customer simply through the possession of confidential information. Thus, it follows that such situations *may* lead to fiduciary obligations in respect of that confidential information with Kerr L.J., making no mention of the possibility (or otherwise) of such an outcome. What is clear however, is that without further judicial guidance, it is of minimal purpose to attempt to predict what the future approach of the United Kingdom judiciary may be. That would undoubtedly be a poor exercise of crystal ball gazing. Whilst bearing this in mind, one cautious observation may be forwarded: It has previously been demonstrated that the judiciary are uneasy with any application of fiduciary obligations within a commercial context. Whilst such an attitude prevails then, it is certainly improbable that the judiciary will take the bold step of imposing fiduciary obligations upon bankers in respect merely of confidential information held by bankers concerning their customers.

---

[80] *Op cit*, above, n. 78, at 522.
[81] 'Banks as Fiduciaries: The UK Position', (1992) *JIBL* 315, at 316.

Not of course, that such pessimism has prevented academic consideration of the possibility of fiduciary duties existing by virtue of confidentiality. Indeed, Sealy sums up the possibilities neatly in saying that:

> "There is possibly a fifth sense in which the word "fiduciary" might be used, in relation to the obligation of bankers, doctors, solicitors and others not to divulge confidential information. The authorities differ on the question whether the disclosure by A of information concerning B is properly regarded as a breach of fiduciary obligation; modern cases are usually based on contract express or implied".[82]

The dilemma is threefold in nature. Firstly, and most boldly, is there a fiduciary obligation created purely through disclosing confidential information? Secondly, if not is there a fiduciary obligation created through the misuse of confidential information? Thirdly, is there no fiduciary obligation whatsoever in relation to confidential information, unless of course the circumstances surrounding the breach of confidence is such, so as to breach another established fiduciary obligation. Given the absence of any clear authority on the issue of confidentiality as a fiduciary obligation, it is possible only to draw certain tentative conclusions at this time. It is clear however, that confidentiality *is* a fiduciary obligation in the sense that a fiduciary is not allowed to benefit from the misuse of confidential information to another party. This much is incontrovertible, and is reflected through earlier authority, including *Regal (Hastings) Ltd.* V. *Gulliver*[83] concerning the use of confidential information belonging to his entrustor for his own profit, and *Beaumont* v. *Boultbee*[84] regarding the sale of confidential information by a fiduciary. If a fiduciary does misuse confidential information in this manner, he must account to his entrustor. However, this is merely a facet of an already accepted category of fiduciary, and is easily explained through existing fiduciary principles. The real issue is whether or not fiduciary

---

[82] Sealy, 'Fiduciary Relationships', [1962] *CLJ* 69, at 74.
[83] [1942] 1 All ER 378.
[84] (1802) 7 Ves. 599.

obligations may accrue merely through the passing of confidential information from the prospective entrustor to the prospective fiduciary, and whether any subsequent unauthorised disclosure by the fiduciary constitutes a breach of fiduciary obligation. The difficulty essentially is that there is no United Kingdom authority on this specific point: Breaches of this nature concerning confidential information are, as Sealy noted in 1962, dealt with as a matter of "contract, express or implied, and the remedy sought is damages, or damages and an injunction".[85] If such a fiduciary obligation could be superimposed upon the traditional, contract orientated, conception of confidentiality between a bank and its clients, this would clearly have a major impact upon the banking industry. The availability of equitable remedies, as against a bank in breach of fiduciary obligation, would represent an attractive option for any aggrieved customer, and is something which the banking sector is surely keen to avoid.

CONCLUSIONS

It remains to be decided by the domestic courts as to whether confidentiality can be upheld through the device of fiduciary obligations. It may be suggested however, that any such development is unlikely to be forthcoming, particularly if one considers the sceptical attitude of the United Kingdom judiciary towards the application of equity, and of course, fiduciary obligations, to the commercial world. This is reinforced by the judicial tendency to avoid, wherever possible, any discussion or consideration of any possible application of fiduciary law to commerce. This is exemplified through the retrospective consideration of the *Bundy* case by the House of Lords in *Morgan* where the court sought to emphasise the issue of undue influence in a concerted effort to minimize the influence of any fiduciary based arguments.

It would appear therefore, at least at this point in time that there is little currency in any argument of confidentiality as between banker and customer

[85] Sealy, 'Fiduciary Relationships', [1962] CLJ 69, at 74, n. 20.

being grounded in equity through the principles of fiduciary relations. It may be suggested however that this is primarily down to two practical factors rather than any bar in legal principle: Firstly, the hesitant attitude of the judiciary to such fiduciary based arguments and secondly the strong development throughout the Twentieth Century of the contractual obligation of confidentiality between banker and customer. Again, in practical terms, this has led to instances where the court is required to consider non-contractual bases of confidentiality between banker and customer being rare occurrences, with any legal disputes over confidentiality falling squarely into the recognized principles of contract law.

PART TWO: CURRENT ISSUES IN BANKING CONFIDENTIALITY

CHAPTER FOUR

THE DUTY TO REPORT UNDER THE MONEY LAUNDERING LEGISLATION WITHIN THE UNITED KINGDOM

"How can an accountant [for example] have a professional relationship with his client if he goes around sneaking...[H]ow can that relationship be possible if the accountant is sneaking to all and sundry about his private transactions with his clients?"

Mr Boris Johnson M.P., Hansard, HC Debs, Col. 983, 17th January 2002.

INTRODUCTION: MONEY LAUNDERING AND BANKING CONFIDENTIALITY

Whilst then, Chapter Two has analysed the general scope of the four exceptions to the banker's duty of confidentiality as laid down in the *Tournier* case, and illustrated that serious inroads have been made into the traditional notion of banking confidentiality it is clear that one issue in particular has drastically altered the nature of banker customer confidentiality: money laundering. Given the radical impact of the legislative response to the process of money laundering it is appropriate to consider this area of banking law in detail. It is therefore, necessary to consider the legislative battle against money laundering separately from any general consideration of the

established exceptions to the banker's duty of confidentiality. Indeed, it is the banker's duty to disclose (and indeed, breach their customer's confidence) under the reporting regime within the United Kingdom that is the focus of this Chapter.

Clearly, the first matter which must be addressed is one of definition: what is money laundering? At least initially, the matter may appear uncomplicated, certainly if one considers the general aim of criminal activity. The goal of most, if not quite all, criminal activity is the generation of money. The adage that crime does not pay is, unfortunately somewhat erroneous. The reality is that crime does indeed pay, and has the potential to pay handsomely at that. The dilemma, from a criminal viewpoint, is how to gain access to these illicit income streams without drawing attention to the illicit sources of the funds themselves. From such a standpoint then, money laundering is, effectively an ancillary crime. It is, simply, the process by which criminals cleanse the fruits of their criminal labours. As Lilley has remarked:

> "Laundering is the method by which all proceeds of crime are integrated into the banking systems and business environments of the world...[T]his is the process whereby the identity of dirty money that is the proceeds of crime and the real ownership of these assets is transformed so that the proceeds appear to originate from a legitimate source".[1]

Clearly, then the process of money laundering is of critical importance to a profit minded criminal. It is only by disguising or concealing the criminal nature of criminal funds that such funds can be utilized. Furthermore, a similar need is operative with non-profit based criminal activity such as terrorism. Terrorist groups, both in terms of activities and also infrastructure are dependent upon money. This money, often itself the proceeds of crime, must have the appearance of legitimacy if it is to be 'successfully' utilized by the terrorist group. The process of money laundering allows criminals to

[1] Lilley, *Dirty Dealing- The Untold Truth about Global Money Laundering*, (2000) London: Kogan Page, at 6.

successfully change the form of the illicit funds, whilst retaining actual control over the funds and also concealing both the origin and ownership of the funds. Once completed, the criminal is able to safely utilize the funds, which are now befitted with the appearance of legitimacy.[2]

Whilst the actual methods of money laundering are as diverse[3] as they are complex[4], it is generally accepted, that all specific methods of laundering money follow a three stage model focusing upon the *placement* of the criminal funds, the *layering* of these funds and finally the *integration* of the criminal funds into a financial system whereby it is merged with the legitimate funds of that financial system.[5]

Clearly then, the task of combating both money laundering and the activities of money launderers is a difficult one, and importantly one which is unlikely to ever be won. The aim is to hinder such practices as far as it is reasonably possible, thus making money laundering as burdensome as possible with greater risks, from the criminal's perspective, of detection. As Bosworth-Davies has noted:

> "It would require a counsel of perfection to require banks and financial institutions to institute a regulatory regime which would ensure that the phenomenon of money laundering was extinguished forever from commercial life".[6]

---

[2] One of the more ironic methods of money laundering came to the fore in 2002 where criminal proceeds were actually laundered through the Inland Revenue. The process, alarming for both its simplicity and ingenuity, worked through setting up front companies, overpay tax using illicit funds, only to then claim the overpaid tax back. The Inland Revenue would then repay in the form of a cheque, thus changing the form of the funds, and also, crucially giving the complete appearance of legitimacy. See Ward, *Bulwarks in the Fight Against Crime*, Estates Gazette, 21 February 2004.

[3] Indeed, Alldridge suggests that there are "an infinite number of mechanisms whereby money, commonly is laundered", *Money Laundering Law*, Oxford: Hart 2003, at 3, relying upon the observations of the FATF, *Report on Money Laundering Typologies*, Paris: OECD (2000) at page 4.

[4] It is certainly accurate to suggest that the various methods of laundering money are "innumerable, diverse, complex, subtle and secret", US Department of State, *International Narcotics Control Strategy Report*, 1988, at 46.

[5] For a more detailed consideration of this three stage model see the discussion in Gilmore, *Dirty Money - The Evolution of Money Laundering Countermeasures*, 1999 2nd ed, Council of Europe Publishing, at pages 30-31.

[6] 'CJA 1993: Money Laundering', 15(2) *Comp. Law.* (1994), 56, at 56. Furthermore, any legislative or regulatory regime which was successful in *preventing* money laundering would, it may be suggested, render lawful activities equally impossible, or at least untenable. The issue then, is one of balance between the need for successful

Nevertheless, increasing concern regarding the threat posed by the practice of money laundering, both in the United Kingdom and throughout the (economically) developed world has resulted in considerable legislative and regulatory action in order to prevent misuse of financial systems. This action, as shall be considered subsequently, has significantly affected the banker's duty of confidentiality. However, in order to fully appreciate and understand recent developments in this area of banking confidentiality, it is necessary to consider the genesis and evolution of the reporting regime within the United Kingdom.

It would be unnecessarily repetitious to detail the substantive money laundering offences at this point as much academic time has been spent on such provisions, and the discussion which follows will deal solely with the reporting regime. By way of reference however, the relevant substantive offences of money laundering currently in effect within the United Kingdom may be listed thus:

- Assisting another to retain the benefit of the relevant criminal act;
- Acquisition, possession or use of the proceeds of the relevant criminal act;
- Concealment or transfer of the criminal proceeds to avoid prosecution or a confiscation order and;
- Tipping off.[7]

It is the historical development of the reporting regime however, that shall now be addressed.

---

commercial activity, aided by domestic and international financial systems and the need to prevent the misuse and abuse of these systems by money launderers.

[7] For a particularly useful consideration of these substantive offences reference may be made to Bosworth-Davies, *The Impact of International Money Laundering Legislation*, (1997), Chapter 2.

THE EARLY LEGISLATION

The threat posed by the process of money laundering has long been recognised under domestic law. Indeed, the fight against money laundering began in earnest[8] with the Drug Trafficking Offences Act 1986 (henceforth the 1986 Act), which introduced the criminal offence of laundering the proceeds of drug trafficking, complemented through a "comprehensive confiscation regime to deprive drug traffickers of the fruits of their criminal career".[9] In this initial guise however, the role played by professionals in preventing the financial system from being exploited by drug traffickers was merely peripheral in nature. The 1986 Act[10] contained provisions allowing for disclosure to the relevant authorities,[11] but it did this through what swiftly became labelled 'defensive' or 'subsequent disclosures'.[12] This refers to the idea that a disclosure to the National Criminal Intelligence Service (NCIS) affords the discloser immunity from any criminal action subsequently instigated, clearly of great personal significance to the discloser (who may possibly continue to act on behalf of their client, perhaps even under the direction of the authorities). This defence is worthy of further consideration. It is explicitly stated that such a disclosure may be made following the completion of the suspect transaction, provided that the disclosure is made as soon as reasonably practicable and is made of the discloser's volition. Essentially, the defence refers to the situation where the person concludes a transaction which he subsequently becomes suspicious of, provided that the retrospective disclosure is made as soon as reasonably practicable and on his own initiative he will be guilty of no offence. Bosworth-Davies explains the defence memorably in reminding those affected by the legislation that:

---

[8] Prior to the enactment of the 1986 Act any such money laundering activities could be prosecuted under the ambit of the Theft Acts, through for example, the offence of handling stolen goods under the Theft Act 1968, s. 22.

[9] McCormack, 'Money Laundering and Banking Secrecy', 16(1) *Comp. Law.* (1995) 6, at 6. It would be beyond the scope of this article to consider the impact (or lack thereof) of the confiscation regime.

[10] The relevant provisions 1986 Act, as repealed by the Criminal Justice Act 1993, was subsequently re-enacted in identical terms by Part 3 of the Drug Trafficking Act 1994.

[11] Although the legislative terminology refers to disclosure to a "constable", this in practice is something of a misnomer, and in reality refers to the NCIS.

[12] For an interesting discussion of this concept of 'subsequent disclosure' reference may be made to McCormack, above n. 9, at 7.

> "It will be no use attempting to rely on the defence by making the disclosure when confronted with officers from a financial investigation unit, armed with a production order, and deciding then that disclosure is the better part of valour."[13]

Nevertheless, McCormack contends that this concept of subsequent disclosure is "somewhat strange."[14] In as much this is correct. It is perhaps difficult to appreciate the logic behind allowing such a defence *following* the offence being committed. In the instance of a subsequent disclosure it is entirely possible, and indeed even perhaps probable, that at the time of the disclosure, the disclosee has completed both the actus reus and mens rea necessary for a successful conviction, the mens rea required, of course, being the nebulous idea of suspicion. Whilst it may be accepted that by precluding such disclosures, important intelligence will probably remain uncovered, as if the disclosure would raise the possibility of criminal charges being conducted against the discloser, there would be no incentive for the disclosure to be made, it still allows for the process of money laundering to occur. This difficulty is compounded through the related defence also expressly provided, where the (would be) discloser intends to make a disclosure, but has reasonable grounds for omitting to do so. Precisely what the term 'reasonable grounds' refers to in this context is wholly uncertain.[15]

This reporting scheme was essentially duplicated through the enactment of the Criminal Justice Act 1988, although a crucial step was taken through the enactment of the Criminal Justice Act 1993 which substantially amended both the 1986 and 1988 Acts in relation to both the substantive criminal offences of money laundering and also as regards the reporting requirements placed upon those who have suspicion or knowledge of drug money laundering through the course of their employment.

---

[13] *Op* cit, above n. 6, at 57.
[14] *Op* cit, above n. 9, at 7.
[15] See the following discussion of this issue in relation to the Proceeds of Crime Act 2002, and the defence of reasonable excuse for omitting to make the required disclosure.

The Criminal Justice Act 1993

The Criminal Justice Act 1993 (henceforth, the 1993 Act) represented a significant milestone in the offensive against the misuse of the financial system through money laundering. The 1993 Act, together with the associated Regulations that were released soon thereafter, implemented the 1991 European Directive[16] through the amendment of pre-existing legislation.[17] Fundamentally, the 1993 Act introduced the concept of mandatory reporting: Where, through the course of his trade, profession, business or employment, a person knows or suspects that another person is engaged in drug money laundering, and he is under a legal duty to report his knowledge or suspicions to a constable.[18] The use of the term 'person' is particularly striking, emphasizing, as it does, that the offence may be committed by a person in the natural sense of the term: The offence is not limited to financial organizations, and Brown[19] is correct to note that this is reinforced by the criminal sanctions imposed for non-compliance. Failure to report knowledge or suspicion of drug money laundering, ignoring for the moment the various defences available, constitutes a criminal offence, punishable by virtue of s. 26B(11) DTOA 1986 by imprisonment for up to five years and an unlimited fine, where tried on indictment.[20] This was clearly then a major development in the fight against money laundering, and a clear change of direction from the earlier legislation which, made references merely to defensive reporting as a preventative measure on the part of the professional.

The first point to appreciate is that the offence of failing to disclose knowledge or suspicion of money laundering is strictly limited to knowledge

---

[16] Indeed it is clear that the CJA 1993 actually exceeds the requirements imposed under the 1991 Directive, see for example the commentary in Brown, 'Money Laundering: A European and U.K. Perspective', 12(8) *J.I.B.L.* (1997) 307.

[17] Perhaps greater clarification would have been achieved through the enactment of one consolidating piece of legislation? Indeed, the Proceeds of Crime Act 2002 has introduced such a legislative scheme, see the subsequent discussion.

[18] s. 26B DTOA 1986, as inserted by CJA 1993, s. 18.

[19] *Op* cit, above, n. 16, at 308.

[20] In accordance with s. 26B (11)(a), where the non-disclosure is tried summarily, the maximum penalty is a term of imprisonment not exceeding 6 months, and a fine not exceeding the statutory maximum.

or suspicion of drug money laundering, and does not extend to cover 'all-crime' money laundering. This appears, at least initially to be relatively straightforward. Such an assumption would be inaccurate however. Firstly it is clear that on a practical level, the restriction of the duty to report to drug related money laundering is ineffective. It may be queried precisely how one determines the precise (criminal) origin of the dubious funds in question. This dilemma is compounded if one considers that the professional who seeks to question the source of the funds with the client runs the risk of 'tipping-off' the client: This is no small matter, considering the severe penal sanctions associated with such an offence. The end result therefore, is that the professional would, in reality, have been pressurised into making disclosures regarding any suspicious transaction, which are mandatory in all but name, regardless of any suspicions the professional may have as to the source of the funds.[21]

The CJA 1993 replicates the defensive reporting elements contained within the previous legislation, and it is a defence to each of the substantial money laundering offences to make a disclosure to a constable either prior to the prohibited act (provided that the act is done with the consent of the constable), or even following the prohibited act, where the disclosure is made as soon thereafter as is reasonably possible (and of course, of his own volition). There is also a reproduction of the reasonable excuse defence, which again remained undefined in the legislation. The substantive money laundering offences also permit the defence of what may colloquially be described as 'reporting up the line'. Essentially this refers to the situation where an employee, whose suspicions have been aroused or has knowledge in connection with money laundering, reports such information "up the managerial chain of command"[22] to the appropriate person in accordance with the procedures established by the financial institution for such occurrences. This defence avoids certain practical difficulties, apparent within the previous legislation whereby reporting was required by each

[21] It is also surely ludicrous to contend that a professional would plead, as a defence to a charge of failing to disclose suspicions of drug money laundering, that he knew the illicit funds derived from some other criminal enterprise, and was therefore under no duty to report.

[22] McCormack, 'Money Laundering and Banking Secrecy', 16(1) *Comp. Law.* (1995) 6, at 9.

employee, with any failure to report leaving the possibility of criminal charges available. This situation resulted in numerous difficulties, not least the risk of liability of the bank, to a customer where an employee made an unjustified report. Moreover, on a practical level, suspicious behaviour by a customer in one branch of a bank could possibly, be explained by employees within another branch with greater knowledge of the customer's financial affairs. The requirement of internal reports both as a defence to criminal charges and also as a requirement under the 1993 Money Laundering Regulations circumvents this eventuality by acting as a screen for those reports which are not in fact, suspicious.[23] This is naturally desirable as it both serves to reduce the risk of unhelpful reports of legitimate transactions to the NCIS whilst also protecting the bank from suits by disgruntled lawful customers who have been subjected to over-zealous disclosures.

The Money Laundering Regulations 1993

The Criminal Justice Act 1993 was supplemented by the Money Laundering Regulations, made under the European Communities Act 1972, and again is designed to fulfill the United Kingdom's obligations under the 1991 EC Money Laundering Directive.[24] These regulations compelled financial and credit institutions covered by the Regulations[25] to put into place systems to detect and deter money laundering. The gateway provision of the Regulations is Regulation 4, which defines the scope of the activities falling under the ambit of the Regulations. The key term here is 'relevant financial business', which is defined in the following terms:

---

[23] Although of course, given the low standard of mens rea for a report to be justified, i.e. mere suspicion, the effectiveness of the screen is surely questionable? This issue shall be considered subsequently.

[24] For a comprehensive examination of the 1991 EC Directive, see Ewing, 'The EC Money Laundering Directive: An Update', 7(3) *J.I.B.L.* (1992) 54; and the predecessor to this article, also by Ewing, 'The Draft EEC Money Laundering Directive: An Overview', 6(4) *J.I.B.L.* (1991) 139.

[25] Detailed under Regulation 4: The term 'relevant financial business' is the gateway of the Regulations, and is defined broadly, correlating with the equivalent gateway in the Proceeds of Crime Act 2002, see post on this issue. Since altered by the Money Laundering Regulations 2001, so as to incorporate the activities of a bureau de change, see Reg. 3, which makes a series of minor amendments to the 1993 Regulations. The Regulations, for the most part, came into legal effect on 12 November, 2001.

"(a) deposit-taking business carried on by a person who is for the time being authorised under the Banking Act 1987;

(b) acceptance by a building society of deposits made by any person (including the raising of money from members of the society by the issue of shares);

(c) business of the National Savings Bank;

(d) business carried on by a credit union within the meaning of the Credit Unions Act 1979 or the Credit Unions (Northern Ireland) Order 1985;

(e) any home regulated activity carried on by a European institution in respect of which the requirements of paragraph 1 of Schedule 2 to the Banking Coordination (Second Council Directive) Regulations 1992 have been complied with;

(f) investment business within the meaning of the Financial Services Act 1986;

(g) any activity carried on for the purpose of raising money authorised to be raised under the National Loans Act 1968 under the auspices of the Director of National Savings;

(h) any of the activities in points 1 to 12, or 14, of the Annex to the Second Banking Coordination Directive (the text of which is, for convenience of reference, set out in the Schedule to these Regulations), other than an activity falling within sub-paragraphs (a) to (g) above;

(i) insurance business carried on by a person who has received official authorisation pursuant to Article 6 or 27 of the First Life Directive."

It is not proposed to go into the generalities of the Regulations in any great detail, and the remainder of this section will focus on the main obligations in respect of reporting and training requirements. In the interests of completeness however, the Regulations impose obligations in the following key areas:

- Systems and training to prevent money laundering;
- The establishment of identification procedures;
- Record keeping procedures;
- Internal reporting procedures.

By virtue of Regulation 5, all institutions covered by the ambit of the Regulations were compelled to establish and maintain internal measures to prevent money laundering, and to provide employees with sufficient training to comply with their legal obligations. As Regulation 5(2)(a) makes clear, failure to comply with these requirements is a criminal offence, punishable on indictment by two years imprisonment or an unlimited fine or, of course, both.[26] A breach of this Regulation is then, no small matter, and again raises issues of the draconian nature of the money laundering provisions. It was no doubt believed that the Regulations had to be reinforced by severe penalties[27] in order to enforce compliance by financial institutions, particularly considering the onerous nature of the responsibilities being imposed on such institutions.[28]

Regulation 5 certainly placed a substantial burden upon financial institutions:[29] Such institutions must be able to show that employees are aware of the relevant law, including the criminal offences under the statutory framework, and of their own responsibilities and duties under the Regulations. Employers must also provide specific training for those employees who are directly involved with customer accounts so that they may discharge their legal obligations adequately. Moreover, such training must, by virtue of the wording in Regulation 5(1)(b), be continuous. Thus a one-off training day or course is insufficient training to comply with the Regulations, and more continuous training is required. Furthermore, in

[26] Where the offence is tried summarily, the maximum penalty is a fine not exceeding the statutory maximum, in accordance with Reg. 5(2)(b).
[27] And indeed the full force of the criminal law, something which is unusual in itself.
[28] Bosworth-Davies and Saltmarsh are right to emphasise that "these requirements place a heavy burden on the shoulders of financial institutions", *Money Laundering: A Practical Guide to the New Legislation* (1994), at 145.
[29] The Banking Ombudsman has deemed the requirements under this legislation as "onerous" in the 1994/5 Annual Report, OBO A.R., 1994/5, at para. 13.2.

accordance with Regulation 5(3), the Court may[30] take into account any relevant supervisory guidance issued. Thus, as a bare minimum, the financial institutions covered under the ambit of the Regulations should, upon the risk of penal sanctions, ensure that their training systems are up to the standard laid down in any such guidance. Accepting the reality that such guidance often takes the form of 'examples of good practice', the net effect is to raise the standards of training (and also therefore of detection) in relation to money laundering. This is, in itself an entirely noble aim, but the vast burden it places upon the financial sector may be queried. As Bosworth-Davies and Saltmarsh wrote shortly after the enactment of the 1993 Regulations, "these provisions are more all-embracing than might at first appear and will almost certainly cause all sorts of difficulties for practitioners in the future".[31] Writing with the benefit of hindsight, whilst such concerns were, and indeed still are, justifiable, it would appear that a clear majority of those institutions affected by the 1993 Regulations are circumventing such onerous requirements through the option of simply *ignoring* them entirely.[32]

Regulation 14 required the instigation and maintenance of internal reporting procedures. Regulation 14 requires that a person be assigned the function within a financial institution whereby they are to receive internal reports of suspicious transactions.[33] The function of the appropriate person was to then assimilate the information which led to the suspicion (or of course knowledge) of money laundering, before determining whether the information contained in the report does in fact, give rise to such knowledge or suspicion. Naturally therefore the appointed individual must have reasonable access to any pertinent material, including internal accounting systems and documentation. If the appointed person does concur with the author of the

---

[30] Note the use of the term 'may', as opposed to 'must' in the similar provision of the PCA 2002, and also in the Money Laundering Regulations 2003.
[31] Above n. 28, at 145.
[32] Something considered subsequently.
[33] This crucial role has been referred to under numerous labels, including those of 'Authorised Person', 'Compliance Officer' and 'Money Laundering Compliance Officer', and, perhaps most memorably, even as "prisoners in waiting", by Mr Monty Raphael during a presentation made at a Butterworths Tolley Conference, entitled '*The Proceeds of Crime Act: How it will work in practice*', London, 10th February 2003. For an excellent discussion of the requirements of such a role, reference may be made to Foster, 'Developments in Accountability for the Money Laundering Reporting Officer in the United Kingdom', 3(3) *J. Int'l Fin. Mkt.* (2001) 113.

initial report, it is the responsibility of the appointed person to make the necessary report to the NCIS.

Clearly then, the Money Laundering Regulation 1993 represented an important development within the United Kingdom anti-money laundering regime. Great emphasis was, and indeed, is still, placed upon the ability of the suspicions based reporting regime as a source of vital intelligence, but this requirement of an Money Laundering Officer within a financial organisation is clearly intended to operate as a form of quality control, dispensing with reports which do not warrant a further external report. Given the draconian penalties associated with arriving at an incorrect decision in this area, the qualitative judgment of the appointed person must be impeccably tuned if he is to avoid criminal proceedings, and it is perhaps surprising that there are applicants willing to assume such a precarious role.

THE CURRENT LEGISLATIVE AND REGULATORY ANTI-MONEY LAUNDERING REGIME:[34]

The Proceeds of Crime Act 2002[35]

With this brief overview of the historical development of the domestic anti-money laundering regime completed, it is appropriate to address the recently enacted Proceeds of Crime Act 2002 (henceforth the 2002 Act) which, represents an important development in the legislative initiative combating money laundering, as it is distinct in both form and substance from the relevant legislation which proceeded it.[36] Whilst the substantive offences of money laundering are not the central focus of the Chapter, it is necessary in

[34] For an informed overview of the anti-money laundering regime, see Radmore and Morris, 'Anti-Money Laundering – A Challenge Explored', *Compliance Monitor*, August 2003.

[35] The constraints of this thesis are such that a consideration of the parallel regime, that under the Terrorism Act 2000, and associated provisions is not possible. This issue will be the subject of future research.

[36] Part 7 of the 2002 Act came into force on 24th Febrauary 2003. For a general overview of the Act, reference may be made to Biggs, Farrell and Padfield, *The Proceeds of Crime Act 2002*, Butterworths (2002); Kirk, Gumpert, Bojarski, *The Proceeds of Crime Act 2002*, Jordans (2003). For an overview of Part 7 of the Act, reference may be made to Booth, 'Solicitors and Money Laundering Part One: new law- new dangers', *New Law Journal*, 28th February 2003; Booth, 'Solicitors and Money Laundering Part Two: risk, responsibility and compliance', *New Law Journal*, 7th March 2003.

order to fully appreciate the duty to report suspicions of money laundering, to briefly consider the substantive money laundering offences.

The 2002 Act lays down various money laundering offences, with a striking combination of both the usual suspects from previous legislation and also, crucially, new offences. The relevant provisions concerning the banker's duty of confidentiality, and money laundering generally are located in Part 7 of the Act. The significance of the legislation to this field of banking law is such that it is intended to discuss the more pertinent provisions (including the substantive money laundering offences), prior to considering the implications for the 'suspicions based reporting regime' and the banker's duty of confidentiality in the United Kingdom in greater depth.

It has been noted, and indeed lamented, that the United Kingdom model of combating money laundering has developed in something of an incremental and ad hoc manner. Indeed, this is accurate. The present statutory framework regarding money laundering, has developed into an intricate patchwork of legislation which when taken as a whole, and appreciating the differences between the legislation which apply to different circumstances, form the legislative framework. Whilst Savla is justified in criticising this mélange,[37] it may be suggested that this simply reflects social and political realities operative at the time. Thus, initially money laundering legislation was for many years restricted to the proceeds of drug-trafficking, not simply to draw artificial boundaries and demarcate between the various sources of criminal profit, although this is the obvious criticism, but simply to reflect the particular issue that was at the fore front of the socio-political thinking at that specific time. However, as Fisher and Bewsey explain, "it soon came to be appreciated by Western governments that money laundering legislation had a useful role to play in curbing other forms of organized crime [besides merely drug-trafficking]".[38]

[37] *Money Laundering and Financial Intermediaries* (2001), at 30.
[38] 'Laundering the Proceeds of Fiscal Crime', 15(1) *J.I.B.L.* (2000) 11, at 11.

Whilst the development of the duty to report in relation to this notion of 'all-crime' money laundering is certainly the next logical progression for domestic law, the PCA 2002 represents a significant change in this respect, and marks the culmination of increasing international concern over money laundering as a practice, regardless of the specific criminal offence from which the funds being laundered are derived.[39] Not only does the 2002 Act duplicate the effect of the CJA 1993 in continuing the universal criminal offence of money laundering, it also creates a mandatory reporting of such universal money laundering; something hitherto resisted by Parliament. This issue will be addressed shortly, but first it is worth highlighting the other dominant feature of the Act. The PCA 2002 is truly universal in nature for not only does it encompass universal mandatory reporting, it also has the unique effect of drawing all the relevant offences of money laundering under a single, unifying statute. The previous incremental system has been replaced, almost in its entirety by a complete legislative framework aimed at reducing the ability of criminals to engage the financial system to launder their illicit gains.

The seven offences which apply in England and Wales as a result of the PCA 2002[40] are:

- concealing, disguising, converting, transferring or removing from the United Kingdom, criminal property;
- entering into, or becoming concerned with an arrangement which facilitates the acquisition, retention, use or control of criminal property;
- acquiring, using or having possession of criminal property;
- the disclosure of information prejudicial to an investigation, i.e. 'tipping off'.

[39] It is worth noting that, in any respect, such a move would have been compelled under the Second European Money Laundering Directive (2001/97/EC), which was adopted by the European Parliament and the Council on 4th December 2001. Member States were obliged to implement the Directive by 15th June 2003, although the United Kingdom was somewhat tardy in implementing the necessary changes. The Directive was fulfilled through the Proceeds of Crime Act 2002 and the Money Laundering Regulations, discussed subsequently.
[40] As amended by the Serious Organised Crime and Police Act 2005.

- failing to disclose knowledge or suspicion of money laundering, which came to his attention through the course of a business in the regulated sector;
- failing to disclose knowledge or suspicion of money laundering, which came to his attention by virtue of his position as the nominated officer in the regulated sector;
- failing to disclose knowledge or suspicion of money laundering where the offender is another nominated officer.

Concealing etc criminal property[41]

This offence, detailed in s. 327 of the 2002 Act is committed by any person who either conceals[42], disguises[43], converts[44], transfers[45] or removes from the United Kingdom[46] criminal property. The striking feature of s. 327 is the vastly broad scope of the offences covered by the section, and indeed the continuation of the expansive definitions of the offences[47]. The section will catch those engaged in both money laundering type activities per se, that is concealing or disguising criminal property, but also to what may be thought of as standard banking practices, such as transfers, conversions and also sending funds abroad through wire transfers. The section in effect replaces and combines two offences from the earlier legislation, those of concealing or disguising criminal proceeds and converting or removing from the jurisdiction criminal proceeds for the purposes of avoiding a prosecution for a money laundering offence or in order to avoid an enforcement order, and either concealing, disguising, converting or transferring criminal proceeds

---

[41] See the recent decision of the Court of Appeal in *R.* v *Harmer* ([2005] 2 Cr. App. R. 2) as applied in *R.* v *Ali (Liaquat)* ([2005] EWCA Crim 87) which consider the issue of proving that property represents the proceeds of crime. See further on this issue, Rees and Ormerod, 'Money Laundering: Conspiracy To Convert Or Transfer Property With Reasonable Grounds For Belief That Property Represented Proceeds Of Crime', Crim. L.R. 2005, June, 482.
[42] By virtue of s. 327 (1)(a).
[43] By virtue of s. 327 (1)(b).
[44] By virtue of s. 327 (1)(c).
[45] By virtue of s. 327 (1)(d).
[46] By virtue of s. 327 (1)(e).
[47] See for example, the broad definition of precisely what constitutes concealing or disguising under s. 327 (3). Note however, that the ambit of the section has been limited slightly by the amendments introduced by the Serious Organised Crime and Police Act 2005, which has introduced threshold amount of £250, s.103 introducing section 327(2)(C) into the PCA 2002.

with the knowledge or reasonable suspicion that the funds were criminally derived.[48]

The first offence detailed in the earlier legislation, namely that containing the purposive element of avoiding criminal prosecutions or confiscation orders, and the second offence, namely that containing objective mens rea before the person may be convicted of the concealing etc offence, have been amalgamated. In reincarnating these offences however, Parliament has made certain crucial alterations, specifically that neither the objective mens rea, i.e. the reasonable grounds for knowledge or suspicion of money laundering, nor the purposive element have survived. The offence of concealing etc criminal property is now committed solely through actually concealing, disguising, converting, transferring or removing from the United Kingdom, criminal property, provided that the person cannot avail himself of one of the statutory defences. There is a necessary element of mens rea however, as in order for the property to be criminal, not only must the property, in fact be criminal by virtue of s. 340 (3)(a), the alleged offender must know or suspect that the property is criminal.[49]

The other crucial addition to this offence is the insertion of statutory defences. Under the equivalent offence within the previous legislation, there were no statutory defences available.[50] This was presumably the result of the view taken in Parliament that the offence could not be committed unwittingly due to the purposive element of the first offence, and the objective mens rea of the second,[51] and it may be suggested that this is an accurate position. The insertion of a series of statutory defences in the 2002 Act therefore should not come as any great surprise. The breadth of the offence itself, coupled with the absence of any purposive or mental element surely warrants the insertion of the defences, which may be listed thus:

[48] Both of which were inserted into the CJA 1988 by the CJA 1993 s. 31.
[49] This is the effect of s. 340 (3)(b).
[50] See for example the concealing or transferring offence under the Criminal Justice Act 1988 s. 93C, as inserted by the Criminal Justice Act 1993 s. 31.
[51] Hansard, H.L. Debs, 3 December 1992, vol. 540, col. 1492 in relation to the relevant provision of the Drug Trafficking Bill (as it was then). For a discussion of this point the reader may be directed to Savla, *Money Laundering and Financial Intermediaries* (2001), at 31-32.

- where an authorized disclosure is made;[52]
- where the person intended to make such a disclosure but has a reasonable excuse for failing to do so;[53]
- where the act is done in fulfilment of a function he has relating to any legislative provision concerning criminal conduct or benefit there from.[54]

It is worth dwelling on the second statutory defence, which, it may be suggested is somewhat curious. The 2002 Act expressly states that where the person intended to make the necessary disclosure, but failed to do so, he will not be guilty of an offence under this provision provided that he has a reasonable excuse for his failure to report. This defence is not in itself novel, being available as a defence to certain offences connected with money laundering in the earlier legislation,[55] although even in its previous guises (which were essentially identical in approach) this defence was subjected to substantial criticism. As Morrison has somewhat sardonically commented, "[I]t is a good defence if one can prove a reasonable excuse for not having made such a report".[56] Indeed it would be, and it is problematic to even contemplate a situation where the court would entertain such a defence if one considers the importance placed upon such disclosures. As the term has yet to be considered in earnest by the Court, the parameters of this interesting defence remain untested. Would it, for example include factors such as personal illness, or circumstances such as bereavement?[57] Would it include elements of duress, or would such issues be confined to mitigation? How is the term 'reasonable' to be interpreted? The provision clearly raises more questions than it answers. It will be interesting to

---

[52] By virtue of s. 327(2)(a), and is unproblematic referring, as it does, to the situation whereby a disclosure will not to be taken to breach any legal rule which would otherwise restrict that disclosure.
[53] By virtue of s. 327(2)(b).
[54] By virtue of s. 327(2)(c).
[55] Although it is a new development in relation to this *specific* offence.
[56] Morrison, 'Money Laundering Legislation In The UK', (1995) *International Banking and Financial Law*, 14(1), Supp. ML, 3, at 5.
[57] These factors were considered during the Parliamentary debates on the Proceeds of Crime Act 2002. Even more incredible was the discussion regarding the issue of whether 'having a bad day' would constitute a reasonable excuse! Hansard, HC Debs, Col. 1108, 22nd January 2002.

consider the provision in light of any judicial observations, and as noted in the Standing Committee debates of the Proceeds of Crime Bill, it is something for the judiciary to determine.[58] Nevertheless, however, the defence has been incorporated into the 2002 Act, and thus remains a legal possibility, even if perhaps a practical fiction.

Entering into, or becoming concerned with an arrangement which facilitates the acquisition, retention, use or control of criminal property[59]

This offence may be committed by any person who enters into, or becomes concerned with an arrangement which he knows or may suspect assists in the acquisition, retention, use or control of criminal property by or on behalf of another person. It is, essentially, a reworking of the previous offence relating to entering into arrangements whereby the process of money laundering is facilitated.[60] It is a striking feature of the 2002 Act generally that the offences are drafted in the broadest terms possible. This is particularly obvious throughout the drafting of section 328, which adopts the vast latitude afforded to prosecutors under the earlier legislation. It is clear that a person need not have a specific or direct link with the money laundering activity (which would fall under the 'enters into' element of the actus reus). As Bosworth-Davies has noted, "the secondary phrase, 'or is otherwise concerned in' connotes a remoter element of activity".[61] Whilst this observation was made in respect of section 93A CJA 1988, it is still of equal relevance to the section 328 offence which contains a similar 'secondary phrase', that of becomes concerned in. It is notable that the preceding offence sought to offer a list of the various methods through which criminal conduct (this is now criminal property under the 2002 Act) is facilitated. In relation to all-crime money laundering offence, the CJA 1988 section 93A(1)(a) provides that facilitation may be through 'concealment,

---

[58] Hansard, HC Debs, Col. 1114, 22nd January 2002.

[59] See the recent decision of the Court of Appeal in *Bowman* v. *Fels* ([2005] 2 Cr. App. R. 19) on the relationship between s. 328 PCA 2002 and legal professional privilege.

[60] In relation to drug money laundering, the applicable offence may be found in DTA 1994 s. 50; In relation to the laundering of general criminal funds, the applicable offence may be found in CJA 1988 s. 93A, as inserted by CJA 1993 s. 29.

[61] *Op* cit, above, n. 7, at 23.

removal from jurisdiction, transfer to nominees or otherwise'. This reference to 'otherwise' is important and indicates that, as Bosworth-Davies correctly observes, "the forms of facilitation envisaged by the Parliamentary draughtsmen are limitless".[62] Indeed it is stated so regularly, that it is scarcely worth repeating, that the forms and methods of money laundering are limited only by the imagination and ingenuity of the launderer himself. This was obviously something still troubling Parliament as it attempted to draft the 2002 Act, for the section now refers to facilitation 'by whatever means'. If the intention of the Parliamentary draughtsmen to effectively future-proof this offence was not clear through the earlier legislation, it is absolutely evident through the 2002 Act: The plausible boundaries of this offence are limitless.[63]

Acquisition, use and possession of criminal property

This offence is a re-working of the established offence, detailed in the earlier legislation, of acquisition, possession or use of the proceeds of criminal conduct.[64] The offence applies to any person who acquires, possesses or uses criminal property without providing adequate consideration. Again, the only necessary mens rea is that in relation to the criminal property.[65] The section also specifies that a person acquires, uses or possesses the criminal property for inadequate consideration where the value of the consideration is significantly less than the value of the acquisition, use, or possession.[66] Furthermore, the Act is explicit in preventing the provision of goods or services with the knowledge or suspicion that such provision is to assist criminal activities from constituting consideration.[67] The offence then is

[62] *Op* cit, above, n. 7, at 24.
[63] Although, any person prosecuted under this section will perhaps be comforted by the re-appearance of the statutory defences available under the s. 327 offence. Note again, the introduction of the concept of 'threshold amounts', currently £250, by s.103(3), of the Serious Organised Crime and Police Act 2005, which has introduced s.328(5) and s.339A into the PCA 2002.
[64] In relation, for example, to the general criminal money laundering offence introduced to meet the United Kingdom's obligations under Article 1 European Directive on Money Laundering, the offence is detailed under the CJA 1988 s. 93(B), as inserted by the CJA 1993 s. 30.
[65] S. 340(3).
[66] S. 329(3)(a) as regards acquisition and s. 329(3)(b) for the use or possession offence.
[67] By virtue of s. 329 (3)(c).

relatively straightforward[68] and is designed to prevent the criminal from disposing his illicit gains to others. Again the standard statutory defences are present, namely that there will be no offence where an authorised disclosure is made, or where there is reasonable excuse for the failure to make such a disclosure.[69]

Disclosures of information prejudicial to an investigation

The solitary remaining offence under Part 7 of the 2002 Act is that of tipping-off, where a professional makes "a disclosure which is likely to prejudice a money laundering investigation being undertaken by law enforcement agencies."[70] It is not proposed to consider this offence in any great detail as the recent case law on the difficulties that the offence of tipping-off may create for professionals, and indeed the academic commentaries on such issues ably consider the offence.[71] It is however worth emphasizing that where the person does not know or suspect that the disclosure was likely to be prejudicial, he does not commit an offence. Likewise, there will be no offence where the discloser is a law enforcement officer going about his official duty, nor where legal privilege may be invoked by the discloser.[72] As with it's predecessors, the tipping-off offences under section 53 of the Drug Trafficking Act 1994 and section 93(D) Criminal Justice Act 1988, the offence is punishable, in accordance with section 334(2), by where tried summarily,

[68] Although reference may be made to an interesting discussion of the possible impact of the offence in relation to the payment of legal fees, Hansard, HC Debs, Cols. 1055-1056, 22nd January 2002.
[69] Once again, note the insertion of the threshold amount of £250 into this provision through s. 103(4) of the Serious Organised Crime and Police Act 2005, which has created new ss. 329(2C) and 339 of the PCA 2002.
[70] As defined by the Government in the *Publication of Draft Clauses Document*, which may be found at <http://www.archive.official-documents.co.uk/document/cm50/5066/5066-11.htm>.
[71] The dilemma created by this offence are well illustrated by the cases of *C* v. *S* [1999] 2 All E.R. 343, and *Governor and Company of the Bank of Scotland* v. *A Ltd and others* [2001] 1 W.L.R. 751. See Chan, 'Banks Caught in the Middle', 22(8) *Comp. Law.* (2001) 245; Wadsley, ' Banks in a Bind: The Implications of the Money Laundering Legislation', 16(5) *J.I.B.L.* (2001) 125. See also, the case of *P* v. *P* [2003] EWCH Fam. 2260; and Caldwell, *White Collar Crime*, The Lawyer, 8th March 2004. It would appear that this issue will be a source of much litigation in the coming years, with the recent decision of Laddie J., in *Squirrell Ltd* v. *National Westminster Bank Plc* ([2005] 2 All E.R. 784) where the bank maintained that they were unable to lift a block, or discuss the matter with the customer due to the provisions of the PCA 2002 (ss. 328 and 333). Laddie J., stated that "I have some sympathy for parties in Squirrell's position", at para. 7 of the judgment. Despite, such sympathy, Laddie J., concluded that "In my view the course adopted by Natwest was unimpeachable. It did precisely what this legislation intended it to do. In the circumstances there can be no question of me ordering it to operate the account in accordance with Squirrell's instructions. To do so would be to require it to commit a criminal offence", at para. 21 of the judgment.
[72] By virtue of s. 333(2). The legal exemption is limited through the need to satisfy the requirements of s. 333(3).

imprisonment not exceeding a term of 6 months and a fine not exceeding the statutory maximum. If the offence is tried on indictment, it is punishable by an unlimited fine and imprisonment for a maximum of 5 years.

Failure to disclose in the regulated sector

Under section 330 of the 2002 Act a person commits an offence where, through the course of his business in the regulated sector, he knows or suspects that another person is engaged in money laundering, and he fails to make the required disclosure as soon as reasonably practicable. This is a particularly important offence for those professionals who have dealings with the regulated sector, and of course, clearly has serious consequences upon the banker customer relationship. The failure to report suspicions or knowledge of money laundering is punishable, in accordance with section 334(2)(b), on indictment, by a maximum of five years imprisonment and an unlimited fine.[73] The first crucial issue to highlight, is that it creates, a universal "all-crime"[74] duty to disclose knowledge or suspicion of money laundering; something hitherto limited to the laundering of drug trafficking or terrorist funds. Whilst this is commendable as a point of law, as it does close the gap left by the earlier legislation as regards non trafficking or terrorist funds, it is debatable whether the creation of this new disclosure offence is necessary in practical terms. Although the Working Group on Confiscation, in its Third Report considered that the absence of an all-crime money laundering reporting duty left a "gap in the United Kingdom's anti-money laundering defences",[75] it is perhaps difficult to support the proposition that this omission had any practical impact on the disclosure practices of financial professionals. It is likely when one considers the severely penal nature of failing to disclose knowledge or suspicion of trafficking or terrorist money

[73] If the offence is tried summarily, the maximum penalty under s. 334(2)(a) is that of six months imprisonment, and a fine not exceeding the statutory maximum. To date there have been no successful prosecutions for failing to disclose suspicions of money laundering under the Proceeds of Crime Act 2002. Note however, the conviction of solicitor Jonathan Duff in 2002 for six months for failing to report suspicions of (drug) money laundering (under the old anti-money laundering regime). See further *Duff* v. *Law Society* ([2004] EWHC 419) and *R.* v. *Jonathan Michael Duff* ([2003] 1 Cr. App. R. (S.) 88).

[74] To use the terminology favoured by the Working Group on Confiscation in their Third Report, *Criminal Assets*, November 1998.

[75] *Ibid*, at para. 3.4.

laundering under the old legislative patchwork, that the financial professional would disclose regardless of the source of the criminal funds. On a purely practical level, it is unrealistic to suggest that the professional would know the source of the criminal funds (and even more unlikely when one considers, as previously discussed, the nature of the tipping-off offence, that they would attempt to discover the source of the funds).

The offence was originally structured on a tri-partite basis, but this has been amended by the Serious Organised Crime and Police Act 2005,[76] which has introduced a fourth requirement; all the requirements are needed for a conviction under this section. Firstly, the person must know or suspect, or have reasonable grounds for knowing or suspecting that another person is engaged in money laundering. Secondly, the information upon which his knowledge or suspicion is based, or which gives him reasonable grounds for such knowledge or suspicion, must have come to him through the course of a business in the regulated sector. Thirdly, he must fail to make the necessary disclosure as soon as reasonably practicable after the information has come to his attention. The additional requirement introduced by the Serious and Organised Crime and Police Act 2005 is the person under the section 330 obligation knows the identity of the person concerned, or the whereabouts of the laundered property, or where the information which would have to be disclosed would uncover, or assist to uncover the identity of the person, or whereabouts of the laundered property.[77] It is worth dwelling a little on each requirement.[78]

---

[76] One major impact of the Act for the purposes of this thesis is that it creates, by virtue of s.1, a new body, the Serious Organised Crime Agency (SOCA) which not only takes over the role of the NCIS and the NCS, but also serves to disband those bodies upon incorporation. Consequently, disclosures must be made to SOCA, and not NCIS, following the incorporation of the new Agency. This date is as yet unknown, but is likely to be sometime in mid-2006. Note that, where applicable, references within the thesis to NCIS should be amended to SOCA following the establishment (and coming into effect) of the new Agency.

[77] This is the effect of s.104 SOCPA 2005, which inserts, *inter alia*, a new s. 330(3A) into the PCA 2002. This provision came into effect on July 1st 2005, through the Serious Organised Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) Order 2005/1521, Art 3 (1) (c). s. 104 SOCPA 2005 requires disclosures to be made to the newly created Agency, the SOCA. As to date, the Agency is not in effect, references within this Part to SOCA, are to be construed as references to NCIS, this being the effect of Serious Organised Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) Order 2005/1521, Art 3 (4).

[78] The newly inserted condition however need not be considered further at this point. It is difficult to envisage a situation where a bank would not satisfy one of the numerous limbs of s. 330(3A), certainly in any event where the Know Your Customer principles under the Money Laundering Regulations 2003 are complied with.

The first condition appears at first glance to be essentially identical to that required under the earlier reporting obligations, being based, as it is on knowledge or suspicion and thus creating a duty to report mere suspicions of money laundering. Indeed, this is the effect of s. 330(2)(a). This requirement caused uproar even when enacted initially[79], particularly as the suspicion was defined in purely subjective terms, with no requirement of reasonable grounds to have suspicion. Thus once a professional had doubts concerning the validity of the client, such suspicion was sufficient to necessitate a report to the relevant person. Concerns were raised over the erosion of the confidential nature of the professional-client relationship[80], and on a more practical level on the onerous nature of requiring, with the full force of the criminal law, disclosure with such minimal justification. The absence of any reasonable grounds with regard to the suspicion was also of grave concern to the Standing Committee debating the Proceeds of Crime Bill, particularly if one considers the penal sanctions attached to the offence.[81] Indeed an amendment was tabled to alter the element of mens rea so as to refer to knowledge or suspicion on reasonable grounds, although the amendment was ultimately rejected.

However, the incorporation of negligence based liability for non-disclosure through section 330(2)(b), is somewhat controversial. This is clearly a major departure from the previous statutory framework, which omit to punish merely negligent non-disclosures, and this is something which every professional covered by the 2002 Act must take note of. The inclusion of negligence for the basis of criminal liability under this section, is clearly designed to prevent the defence of, to use the Scottish tale, the sinner who was about to be consigned to the flames by God. The sinner said "Lord, Lord, we didnae ken", to which God replied, "well, ye ken noo."[82] The negligence test prevents professionals operating within the regulated sector,

---

[79] See the following discussion regarding the widespread criticism of this reliance upon suspicion.

[80] See Radmore, 'Money Laundering Prevention: Effect of the New Law on Solicitors', 16(5) *Comp. Law.* (1995)155, on this point. This important issue is also considered in detail subsequently.

[81] See, for example, Hansard, HC Debs, Cols. 981-982, 17th January 2002.

[82] A point raised during the Standing Committee Debates on the Bill, Hansard, HC Debs, Col. 1008, 17th January 2002.

from claiming ignorance of any suspicion (or of course knowledge regarding a money laundering transaction) as a defence in circumstances where the reasonably competent professional would have been put on alert by the transaction in question. During the passage of the Bill through Parliament there was, as would be expected, much consideration of the suitability of such a negligence based test.[83] It may be suggested that whilst allowing for penal sanctions, and indeed severe penal sanctions for negligent non-disclosures may perhaps operate in something of a draconian manner, rightly or otherwise, it certainly serves as a clear statement of intent by the Government in its fight against money laundering.[84] It also forces those businesses in the regulated sector to constantly re-evaluate the systems and training procedures currently in place, and query whether they are up to the required standard. This introduction of negligence into the criminal law is, it may be contended, the result of the mixed reception given to the 1993 Regulations as regarding training and reporting procedures. It is generally accepted that the firms which have actively sought to follow the spirit of the Regulations have compelled their employees to attend training sessions on the detection of suspicious transactions, and as such it is this select group of firms which account for the vast majority of the reports made.[85] There are still many firms however who do not report transactions which are suspicious simply for the reason that the attitude of self-regulation prevails and employees neither receive nor consider themselves needy of such crucial training.

Support for this view is, somewhat unfortunately, bountiful. The NCIS has reported that only 126 of the approximately 500 deposit-taking institutions have reported suspicious transactions, with some 78 per cent of the reports made by the banking sector being disclosed by only 10 banks.[86] Clear evidence then, that the standards alluded to under the suspicions based

[83] See for example the discussion in Hansard, HC Debs, Col. 1089, 22nd January 2002.
[84] A point emphatically appreciated by the Standing Committee in its debates upon the Bill, as the "desire to instil terror into those who handle money because of the possible penalties and consequences of doing so". Hansard, HC Debs, Col. 974, 17th January 2002.
[85] See the comprehensive study undertaken by Bosworth-Davies on this issue, *The Impact of International Money Laundering Legislation*, (1997), chapters 6 and 7.
[86] NCIS Service Plan, 2000-2001, at 10.

reporting regime are being ignored by a clear majority of the financial institutions: that many financial institutions are ignoring their obligations to report suspicious transactions was emphasised by the FSA in a press release concerning General Abacha. A staggering total of 23 banks were discovered to have held accounts linked to the former President of Nigeria, all of which, had flaws in their money laundering procedures, and had not followed industry guidance.[87] Certainly, such evidence is disappointing given the importance placed upon the disclosure system to the prevention of money laundering,[88] and in particular, the gathering of important intelligence. It is perhaps not altogether surprising that this new head of liability has been introduced to encourage, if not compel, regulated firms to alter their attitudes towards training in the detection of suspicious transactions.[89]

The second requirement under the tripartite basis of the non-disclosure offence is that the information which causes the person to know or suspect that another person is engaged in money laundering, must come to his attention through the course of a business in the regulated sector. This, naturally, depends on the definition afforded to the term 'regulated sector'. This issue is addressed in Schedule 9[90], and it should come as no surprise that it is defined in particularly broad terms, and is not limited to credit and finance institutions. It is convenient to define 'regulated sector' in negative terms, with Schedule 9, Paragraph 3 providing that:

[87] FSA Press Release, March 8, 2001.

[88] Such co-operative institutions are "an important source of valuable information", *C v. S* [1999] 2 All E.R. 343 at 345.

[89] This theme is further reinforced through the statutory defence available under s. 330(7).

[90] As amended by The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003 (SI 2003/3074) which inserted paragraphs (g) and (h) into the definition of excluded activities. Also of note, was the broadening of the scope of the regulated sector under the Act, which, in order to meet the requirements of the Second European Money Laundering Directive, was amended to include, *inter alia*, estate agents, casinos, taxation advisers, trust formation or management services and high value goods dealers. There is then a correlation here between the regulated sector for the purposes of the PCA 2002 and the definition of a relevant business under the Money Laundering Regulations 2003.

"A business is not in the regulated sector to the extent that it engages in any of the following activities-

(a) the issue of withdrawable share capital within the limit set by section 6 of the Industrial and Provident Societies Act 1965 (c. 12) by a society registered under that Act;
(b) the acceptance of deposits from the public within the limit set by section 7(3) of that Act by such a society;
(c) the issue of withdrawable share capital within the limit set by section 6 of the Industrial and Provident Societies Act (Northern Ireland) 1969 (c. 24 (N.I.)) by a society registered under that Act;
(d) the acceptance of deposits from the public within the limit set by section 7(3) of that Act by such a society;
(e) activities carried on by the Bank of England;
(f) any activity in respect of which an exemption order under section 38 of the Financial Services and Markets Act 2000 (c. 8) has effect if it is carried on by a person who is for the time being specified in the order or falls within a class of persons so specified;
(g) the regulated activities of arranging deals in investments or advising on investments, in so far as the investment consists of rights under a regulated mortgage contract;
(h) the regulated activities of dealing in investments as agent, arranging deals in investments, managing investments or advising on investments, in so far as the investment consists of rights under, or any right to or interest in, a contract of insurance which is not a qualifying contract of insurance."

Given the width therefore of precisely what constitutes a business within the regulated sector, it is clear that the role of many professionals, including for example bankers, accountants and members of the legal profession will fall under the duty to disclose requirements of this section, and failure to comply will result in criminal, and indeed heavily penal, consequences.

The third requirement under the structure of section 330 is that the person fails to make the required disclosure as soon as is reasonably practicable after the information comes to his attention. Precisely what is meant by the term 'required disclosure' is clarified through section 330(5) which defines 'required disclosure' in terms which essentially refer to 'reporting up the line',[91] i.e. the person must make a disclosure to a nominated officer (refined through section 330(9) so as referring to the person appointed to receive and handle money laundering disclosures in the discloser's company) or alternatively to any person authorised to receive such disclosures by the Director General of the NCIS.

As to the necessity of the disclosure being made as soon as it is reasonably practicable it is clear that it is a brave professional indeed who would procrastinate over whether, and when to make the required disclosure, once suspicion had been aroused. This is particularly when one considers that there is no threshold element dictating when a disclosure should be made. On a strict interpretation of the provision, the merest suspicion as to the legality of the funds[92] is sufficient to compel disclosure, and it is unlikely that the court would look favourably upon the professional who failed to make the necessary disclosure after any significant period of time, which in the context of money laundering intelligence, could well refer to any disclosure not made within a matter days.

In keeping with the previous offences, there is a series of statutory defences, and again the issue of having reasonable excuse for failing to disclose is present. The second statutory defence available is strictly limited to the legal profession and is couched in similar terms to the equivalent offence of non-disclosure in relation to laundering the proceeds of drug trafficking in the DTA 1994. There will be no offence committed where the person is a professional legal adviser, and the information or other matter which causes

[91] The concept of 'reporting up the line' has been considered previously, and therefore need not be repeated here.

[92] Indeed the Act originally required disclosure where there was the merest suspicion to the slightest of funds with a proposed amendment inserting a financial threshold beneath which a transaction need not be reported, being abandoned. Such a threshold amount (presently £250) has now been introduced through the SOCPA.

him to either know or suspect money laundering came to him in privileged circumstances.[93].

There is a further statutory defence that is highly instructive as to the general approach and stance adopted by the legislative and regulatory framework within the United Kingdom. Under section 330(7), it is a defence to establish that the person (who should have disclosed) neither knew nor suspected that another person was engaged in money laundering and had not been provided with the required training by his employer. This is a particularly interesting defence being available where the person is charged with the section 330(2)(b) offence, namely the situation whereby the professional has reasonable grounds for either knowledge or suspicion of money laundering and by virtue of the omission of the training necessary to detect possible money laundering vehicles, fails to disclose as required. This is therefore allowing, for example, a junior employee[94] of a company operating in the regulated sector, to avoid personal criminal liability under this section. It is only available where the employee has not received the necessary training from his employer, and therefore serves as a reminder to those institutions within the regulated sector that the legislative framework under which they operate is geared to revolve around the disclosure of information concerning money laundering, and this is something which is, in turn, dependant upon the training that they provide to their employees to detect suspect transactions and clients. The insertion of this defence will certainly encourage, if not compel, such companies to re-evaluate their internal training procedures and to ensure that their obligations under the Money Laundering Regulations are met. Certainly, where this defence is pleaded successfully by an employee, criminal investigations will commence under

---

[93] This defence is elaborated through s. 330(10), and a more detailed consideration of the extent of this defence is not within the ambit of the thesis. For some interesting observations on this defence, reference may be made to the Standing Committee debating the Proceeds of Crime Bill, Hansard, HC Debs, Cols. 1010-1014, 17th January 2002. See also, Wadsley, 'Professionals as Policemen', *Conv. and Prop. Lawyer*, (1994) 275, at 281, who is critical of the assistance offered by this defence: "...the protection afforded to solicitors and their clients...is not helpful...[S]olicitors will still be bound to report any case where they suspect money laundering, because the information will have been communicated with a view to furthering a criminal purpose if the suspicion was correct".

[94] Indeed the case of a junior employee facing criminal sanctions for negligently failing to disclose was of grave concern to the Standing Committee in their debates on the Bill who concluded that it would ultimately be a matter for determination by the Crown Prosecution Service, Hansard, HC Debs, Cols.1108-1114, 22nd January 2002.

the Regulations, and it is almost certain that the regulated institution responsible for the training of the person who failed to disclose will face criminal sanctions for non-compliance with the Money Laundering Regulations. Moreover, it may also be contended that where an individual employed by such an institution is prosecuted under section 330, the great likelihood is that their defence counsel will raise a plea of insufficient/non-existent training. Whilst the defence is one of good intentions, it may be suggested that it may well be open to misuse by defence counsel eager to allow the defendant to escape the draconian sanctions imposed by section 334 by shifting the blame onto the institution.[95]

The final issue of note in relation to the section 330 offence of non-disclosure is the reference to guidance issued by a supervisory, or other appropriate body, being approved by the Treasury and published in an approved manner, as appropriate in its opinion to bring the guidance to the attention of those persons likely to be affected by it. The Court *must* consider such guidance in determining whether the person committed an offence. The inclusion of this sub-section again emphasises the liability for merely negligent non-disclosures. In ascertaining whether the failure to disclose by the professional was indeed negligent the Court must consider the standards adopted generally by the industry as to whether the reasonably prudent professional would have been alerted as to the dubious nature of the funds in question. It is against such standards that the individual professional must, and will be judged.

Under section 334, a failure to report as required is punishable by, where tried summarily, imprisonment for a term not exceeding 6 months, and a fine not exceeding the statutory maximum. Where the offence is tried on

[95] Perhaps one pre-emptive response to the possibility of such a defence succeeding, is that those institutions within the regulated sector shall be somewhat less tardy in keeping detailed records of staff training in relation to the detection of suspicious transactions. This role, it may be suggested, is most likely to fall under the remit of the nominated officer, and it is likely that records ought to be compiled on both a policy basis (that is the training policies of that institution generally), and also on an individual basis (that is the actual training received by each employee specifically, including the date received, not to mention the duration and specific nature of the training so received).

indictment, the offence is punishable by imprisonment for a maximum of 5 years, and an unlimited fine.

Failure to disclose: Nominated officers

This provision is essentially a re-working of the section 330 offence with specific application to nominated officers in the regulated sector. This therefore refers to the individual whose role it is to receive internal 'reporting up the line' disclosures, (i.e. the appropriate person under Reg. 7 of the 2003 Money Laundering Regulations, see post.) and decides whether there are sufficient grounds to warrant a disclosure to the NCIS. Again the offence may, by virtue of section 331(2)(b) be committed negligently, although this is perhaps less troublesome than the liability for negligence under the section 330 offence on the grounds that it is the purpose of the nominated officer to determine whether or not a disclosure to the NCIS should be made. It is perhaps then less objectionable to impose a negligence based head of liability upon such a figure, who by virtue of their elevated, and as previously noted important role both with the individual financial institution, and also within the system of preventing money laundering generally, one would expect to show due diligence and reasonable care in the fulfillment of their functions.

It is therefore interesting to note that the ever-present defence of reasonable excuse is once again available. This inclusion of this defence throughout Part 7 is troublesome generally, but the specific inclusion of the defence in relation to nominated officers who fail to make the necessary disclosure is even more astonishing. One really would have to delve into the realms of fantasy surely, before the Court would entertain this defence from the very person whose function it is to consider the internal reports and then either make a further report to the NCIS or determine that there is, in fact, no basis for such a report. As with the corresponding provision in the section 330 offence however, the precise parameters of this defence will have to await judicial consideration.

The Money Laundering Regulations 2003

The provisions of the Proceeds of Crime Act 2002 are supported by the Money Laundering Regulations 2003[96], which have revoked both the 1993 and 2001 Money Laundering Regulations. The Regulatory Impact Assessment[97] explains that the aim of the 2003 Regulations are two-fold. Firstly, the Regulations were necessary to implement the requirements of Directive 2001/97/EC of the European Parliament and of the Council on prevention of the use of the financial system for the purpose of money laundering (the Second EC Money Laundering Directive). Secondly, the Money Laundering Regulations 2003 were implemented in order to "consolidate, clarify, and update" the Money Laundering Regulations 1993.

The key change brought about by the Second European Money Laundering Directive, and implemented domestically by the 2003 Regulations is the continuation of the trend towards broadening the scope of professionals regulated by the money laundering regime. Regulation 2 defines a relevant business in the following terms:

> "(a) the regulated activity of -
> (i) accepting deposits;
> (ii) effecting or carrying out contracts of long-term insurance when carried on by a person who has received official authorisation pursuant to Article 4 or 51 of the Life Assurance Consolidation Directive;
> (iii) dealing in investments as principal or as agent;
> (iv) arranging deals in investments;
> (v) managing investments;
> (vi) safeguarding and administering investments;
> (vii) sending dematerialised instructions;
> (viii) establishing (and taking other steps in relation to) collective investment schemes;
> (ix) advising on investments; or

96 SI 2003 No. 3075.
97 Available online from <http://www.hm-treasury.gov.uk/>.

(x) issuing electronic money

(b) the activities of the National Savings Bank;

(c) any activity carried on for the purpose of raising money authorised to be raised under the National Loans Act 1968 under the auspices of the Director of Savings;

(d) the business of operating a bureau de change, transmitting money (or any representation of monetary value) by any means or cashing cheques which are made payable to customers;

(e) any of the activities in points 1 to 12 or 14 of Annex 1 to the Banking Consolidation Directive (which activities are, for convenience, set out in Schedule 1 to these Regulations) when carried on by way of business, ignoring an activity falling within any of sub-paragraphs (a) to (d);

(f) estate agency work;

(g) operating a casino by way of business;

(h) the activities of a person appointed to act as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986 or Article 3 of the Insolvency (Northern Ireland) Order 1989;

(i) the provision by way of business of advice about the tax affairs of another person by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual;

(j) the provision by way of business of accountancy services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual;

(k) the provision by way of business of audit services by a person who is eligible for appointment as a company auditor under section 25 of the Companies Act 1989 or Article 28 of the Companies (Northern Ireland) Order 1990;

(l) the provision by way of business of legal services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual and which involves participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise by acting for, or on behalf of, a client in any such transaction);

(m) the provision by way of business of services in relation to the

formation, operation or management of a company or a trust; or

(n) the activity of dealing in goods of any description by way of business (including dealing as an auctioneer) whenever a transaction involves accepting a total cash payment of 15,000 euro or more."

This then is certainly an all-encompassing definition of a 'relevant business'. The key points to note in this definition are however rather more succinct. The Regulations now apply, *inter alia*, to the business of operating a bureau de change[98], estate agency, operating a casino, providers of taxation advice, trust management, legal services and interestingly, dealers in high value goods. This latter category is particularly notable given the clear demarcation between the traditional idea of financial services and the broad concept of a high value dealer, which essentially refers to a dealer of any goods where the dealer accepts a total cash payment of €15 000 or more. Thus the Money Laundering Regulations 2003 may feasibly apply to various businesses, including auction houses[99], motor dealerships, jewellers, antique dealers.

What is clearly striking here is the increased breadth of businesses covered under the ambit of the 2003 Regulations. This is particularly noticeable when compared to the equivalent definition within the 1993 Money Laundering Regulations which focuses on what are essentially financial and credit businesses. The inclusion of businesses such as estate agency, casinos, and high value dealers is indicative of a development in both policy and practice at a European level. As Corker notes, the aim of the Second European Money Laundering Directive is to "end the tradition of anti-money laundering regulation being confined to businesses who conduct mainstream financial services".[100]

Certainly, as a matter of policy it is clear that at a political level any attempt in

---

[98] This was in fact achieved under the Money Laundering Regulations 2001, and has been repeated in the 2003 version.

[99] For an excellent discussion of the Regulations as they affect auctioneers, see Murphy, 'Keep It Clean', Estates Gazette, 15th Novermber 2003.

[100] Corker, 'Money Laundering: tread warily (but not too warily)', New Law Journal, 13th February 2004.

the early nineteen nineties to initiate an anti-money laundering program on such broad grounds, with such broad scope was politically untenable. Moreover, on a practical level it is clear that as the sophistication of the anti money laundering program increased, and the level of regulation within the financial sector expanded, the money launderers shifted their focus away from these areas, and into markets which had less stringent (or even non-existent) money laundering controls. Examples of such markets would clearly be casinos, estate agents, and more generally, dealers in high value goods. Equally, the role of bureau de change facilities, from a money laundering perspective represent an invaluable resource, allowing for both the changing in form of illicit funds and also giving the appearance of legitimacy. Thus, in the continuing fight against money laundering, the need for increased regulation over such businesses outside the normal understanding of the financial sector is both clear and pressing.

The key Regulations applicable to a banker are essentially identical to those found under the 1993 Money Laundering Regulations. Bankers, and indeed any person who operates a relevant business, are legally compelled to establish procedures for the identification of customers[101] (the KYC principle), the keeping of records regarding business transactions[102] and also for the internal reporting of suspicions of money laundering.[103] Under Regulation 7 of the 2003 Regulations any business covered under the ambit of the Regulations must initiate an internal reporting structure. Under paragraph (a) of Regulation 7 every 'relevant business' must employ a "nominated officer". The function of a nominated officer is to receive disclosures by colleagues regarding suspicion (or actual knowledge) of money laundering activities. Paragraphs (c) and (d) of Regulation 7 expand on this role and state that:

[101] Reg. 4.
[102] Reg. 6.
[103] Reg. 7.

"(c) where a disclosure is made to the nominated officer, he must consider it in the light of any relevant information which is available to A and determine whether it gives rise to such knowledge or suspicion or such reasonable grounds for knowledge or suspicion; and

(d) where the nominated officer does so determine, the information or other matter must be disclosed to a person authorised for the purposes of these Regulations by the Director General of the National Criminal Intelligence Service".

Of course, such an obligation is also levied upon every member of the regulated organization who *must* disclose suspicions of money laundering to either the NCIS or the nominated officer.[104]

This then essentially replicates the suspicion based reporting regime under Part 7 of the Proceeds of Crime Act 2002 whereby those persons under the ambit of the Regulations must disclose (even) suspicions of money laundering to the NCIS or, where applicable to the relevant nominated officer.

As with the earlier Regulations, the penalties for non-compliance with the Money Laundering Regulations 2003 are severe. Under Regulation 3, where convicted on indictment the punishment is an unlimited fine, and up to two years imprisonment. Where on summary conviction, the penalty is reduced to a fine not exceeding the statutory maximum. It remains to be seen whether these criminal sanctions will be put to use in the coming years, particularly considering the reticence of the affected companies (or at least a portion thereof) in complying with the previous reincarnations of the Regulations. It should be pointed out however, that recently the Financial Services Authority has proactively punished those businesses failing to meet the requirements of their Money Laundering Rules.[105] In December 2002 the Royal Bank of Scotland was fined £750 000 for failing to properly implement

[104] Such is the effect of para. (b) of Reg. 7.

[105] It is not proposed to go into the substantive elements of these Rules, although it may be said that they mirror the requirements laid down under the Money Laundering Regulations.

customer identification systems.[106] In August 2003 the Northern Bank was fined £1 250 000 for inadequate customer identification procedures. The size of fine was no doubt reflective of the fact that Northern Bank had previously identified weaknesses in their customer identification systems, yet had failed to rectify them.[107]

In December 2003, Abbey National plc was fined £2 000 000 for failing to "ensure that suspicious activity reports were promptly considered and reported to the National Criminal Intelligence Service and to identify customers adequately".[108] In January 2004, the Bank of Scotland plc was fined £1 250 000 for inadequate customer identification procedures.[109] More recently, in April 2004, the London branch of the Raiffeisen Zentralbank Österreich Bank was fined £150 000 for failing to update their anti-money laundering manual with respect to, again, the customer identification requirements.[110] This then is certainly a clear statement of intent towards those firms covered by the anti-money laundering regime, that the punitive powers of the regime will be used against those firms who fail to meet the required standards.

One interesting change initiated by the 2003 Regulations is the use by the courts of guidance issued by supervisory authorities. Under Regulation 5(3) of the 1993 Regulations when determining whether there has been a breach of the Regulations, the Court *may* consider guidance issued by a supervisory body, where the guidance has been approved by the Treasury. This is clearly in contradiction to the similar provision of the Proceeds of Crime Act 2002 which provides that the court *must* consider guidance issued by a supervisory authority and approved by the Treasury. It is perhaps unsurprising therefore, that the Money Laundering Regulations 2003 mirror the wording of the PCA 2002, rather than duplicating the optional powers enacted under the 1993 Regulations. Thus, for both the purposes of the

---

[106] The press release made by the FSA is available online, at <http://www.fsa.gov.uk/pubs/press/2002/123.html>
[107] See the FSA press release, available online, at < http://www.fsa.gov.uk/pubs/press/2003/084.html>.
[108] Taken from the FSA press release, available online, at <http://www.fsa.gov.uk/pubs/press/2003/132.html. For a commentary on this action by the FSA, see Wood, *The Lawyer*, Opinion, 16th February 2004.
[109] See the FSA press release, available online, at < http://www.fsa.gov.uk/pubs/press/2004/001.html>.
[110] See the FSA press release, available online, at < http://www.fsa.gov.uk/pubs/press/2004/035.html>.

Proceeds of Crime Act 2002, and the Money Laundering Regulations 2003 the court is under a legal obligation to consider such guidance when determining whether the relevant provisions have been complied with.[111]

THE IMPACT OF THE ANTI-MONEY LAUNDERING REGIME

This overview of the Proceeds of Crime Act 2002 together with the Money Laundering Regulations 2003, has emphasized the reliance upon the "professional as policemen"[112] and the importance of the disclosure of *suspicions* to the NCIS. As Ward points out, professionals in the regulated sector (or of course, concerned in a relevant business) are legally obliged to "fight the good fight".[113] The remainder of this Chapter will consider the impact of the regime, focusing particularly upon the difficulties associated with the meaning of 'suspicion' and constant erosion of the relationship of trust and confidentiality between a professional and client.[114]

Suspicion as the basis for the United Kingdom reporting regime

The "pivotal concept"[115] of suspicion as it relates to the money laundering legislation has established itself as a deep rooted cause for concern amongst both legal academics and the professionals covered by the legislation. It barely needs to be repeated that suspicion is a nebulous (and indeed subjective) state of mind, and as Feldman correctly emphasisies, suspicion is a "far less assured state of mind than either knowledge or belief".[116] Certainly there has been a healthy, and indeed heated[117] debate even amongst commentators on the money laundering provisions as to precisely what level of mens rea is required before the duty to report bites. The

---

[111] The need for duplicity was appreciated by the Government prior to the enactment of the 2003 Regulations. See, for example, the Regulatory Impact Assessment, *op cit*, above, n. 97.

[112] To use the phrase coined by Wadsley, above n. 82. Unsurprisingly, professionals are, it would seem, rather unhappy with this situation. Nicholas Miller, quoted in Robins, *I Spy*, The Lawyer, 1st March 2004, stated that "I resent enormously being forced against my will to act like a member of the Stasi and shop my own client".

[113] Ward, *Bulwarks in the Fight against Crime*, Estates Gazette, 21 February 2004.

[114] By way of an introduction to the issues raised, reference may be made to Cole, 8(4) *J.I.B.L.* (1993) 129.

[115] Above n. 38, at 16.

[116] *Criminal Confiscation Orders: The New Law* (1988), at para. 3.09

[117] See the observations of Bosworth-Davies, *op* cit, above, n. 6, at 56.

traditional position is stated simply by Mitchell, Taylor and Talbot who contend that the term must be given its ordinary, literal meaning.[118]

The Oxford English Dictionary defines suspicion as:

> "(1) the feeling or state of mind of one who suspects: imagination or conjecture of the existence of something evil or wrong without proof, apprehension of guilt or fault on slight grounds or without clear evidence ...
> (2) Imagination of something (not necessarily evil) as possible or likely; a slight belief or idea of something, or that something is the case: a surmise; a faint notion; an inkling ...
> (3) Surmise of something future; expectation ...
> (4) A slight or faint trace, very small amount, hint, suggestion (of something)".

As Fisher and Bewsey rightly emphasise then, this literal definition:

> "...places the threshold rather low, since it contemplates the forming of suspicion where a person has only an inkling or merely a faint notion or surmise that a person has been engaged in criminal conduct or benefited from the proceeds of criminal conduct".[119]

Such an interpretation is also favoured by Smith, who asks the question, "[W]hen is a suspicion a suspicion?"[120] Certainly if the courts do indeed adopt a literal interpretation of 'suspicion' Smith is correct in concluding that the answer is 'always': Part 7 of the Proceeds of Crime Act 2002 and Regulation 7 of the Money Laundering Regulations 2003 "require even the most irrational and baseless suspicions, *if actually held*, to be reported".[121] The point here then is that the suspicion be formed by the discloser, and any

---

[118] Mitchell, Taylor and Talbot, *Confiscation and the Proceeds of Crime* (1997), at 186.
[119] *Op* cit, above n. 38, at 17.
[120] Smith, 'Proceed with caution- laundering regulations at work', *NLJ*, 14th May, 2004.
[121] *Ibid*, emphasis added.

consideration as to the merits or basis for the suspicion is irrelevant (although this will presumably be assessed by the nominated officer).

There is a school of thought however, that suggests that such inklings or speculations are not sufficient to fall within the reporting requirements. Brown is particularly forthright on this issue stating that:

> "...in a criminal statute, carrying a potentially serious sentence of imprisonment, what is required is some real suspicion, going beyond an inkling, fleeting thought or fleeting doubt all of which are surely de minimis".[122]

Whilst this is perhaps accurate on a pragmatic level (and moreover it may be contended, entirely sensible), it may be suggested that inklings of doubt or mere speculations are to be reported under the strict wording of the provision.[123] Whilst it may well be true to suggest that no prosecution would be brought against a professional who failed to report such a low level of suspicion, this is entirely different to there being no legal basis for liability in such a situation. This is supported by the overriding idea behind the creation of the suspicions based reporting scheme, namely, reports by those most likely to come across possible instances of money laundering who are under the legal duty to report such suspicions so that the authorities may gather as much evidence as possible. In this, it is clear that the reporting system in the United Kingdom, has been successful, as the constant increase in the quantity of disclosures made to the NCIS demonstrates.

Academic debate aside, it is clear that the concept of suspicion still retains its position as a cornerstone of the money laundering provisions under the anti-money laundering regime and, moreover, it is still a term which nimbly defies precise identification in practical terms. This is, in itself worrying, after all, simplification was one of the Government's objectives with the enactment of

---

[122] *Op* cit, above n. 16, at 309.
[123] Such a conclusion is supported by Bosworth-Davies and Saltmarsh, *op* cit, above, n. 28, at 189-190.

the PCA 2002.[124] Furthermore, one must query the insistence on the reporting of mere suspicions, as opposed to, for example, suspicion based on reasonable grounds as is the accepted norm in criminal statutes.[125] Such an amendment was tabled during the Parliamentary debates on the Proceeds of Crime Bill and concerns were raised regarding the breadth of the duty as applicable with such a minimal standard of mens rea, with Mr Grieve, M.P., stating that:

> "Yes it is [tyrannical], because it leaves people in a state of massive uncertainty about where they stand, whereas normal tests in English law, knowledge and belief, are well established and make sense to the ordinary lay person and the person dealing with the matter."[126]

This is certainly accurate, and ably sums up the fears held by many regarding the reliance upon suspicion as a trigger for compulsory reporting requirements. The difficulty however, is two-fold. Firstly, as was pointed out in the Standing Committee debate, all that the professional need do to avoid any such possibility of criminal sanctions, is to make the necessary report,[127] although such an approach raises serious questions of the confidential nature of a professional-client relationship.[128] Secondly, the effect of setting the trigger at such a low level is to increase the number of disclosures made. The consequence of this, is that the NCIS is able to gather substantially more intelligence than it would if the trigger were placed at, for example, suspicion on objectively reasonable grounds.[129] The Government rejected drafting the Bill with the requirement of reasonable grounds as a threshold, before suspicions must be reported on the reasoning that, "one of the aims of the legislation is to require the exercise of greater caution in handling

---

[124] As enunciated by the Government in the *Publication of Draft Clauses Document*, which may be found at <http://www.archive.official-documents.co.uk/document/cm50/5066/5066-02.htm>.
[125] See for example the various provisions of the PACE 1984, which require objective justification for suspicion.
[126] Hansard, HC Debs, Col. 982, 17th January 2002.
[127] See Hansard, HC Debs, Col. 983, 17th January 2002.
[128] Something to be considered shortly.
[129] Although, of course, the quality of the intelligence gathered through such means, is an entirely different matter.

suspicious transactions" the standard should be one of suspicion alone.[130] It may be suggested that to move to a more restrictive level of mens rea would be inconsistent with the development of the legislative framework combating money laundering within the United Kingdom. Moreover, it would be inconsistent with the general approach of both the PCA 2002 and the 2003 Regulations. To impose a higher threshold before a disclosure to the authorities may be legally compelled would be counter-productive to the suspicions based reporting regime,[131] as it would have the obvious effect of limiting the number of reports made to the NCIS, and would, as a consequence, limit the amount of intelligence gathered by the NCIS in the fight against money laundering.

Thus, the pre-emptive response by the Government to the unavoidable consequence of this approach, namely the increase in the number of reports, is that, it is preferable that "all laundering activity be reported for possible investigation by law enforcement given the importance it attaches to money laundering".[132]

It is worth noting that in a recent report into the suspicious activity reporting (SAR) regime, it was estimated that the number of reports made to NCIS in 2003 would reach the 100 000 mark.[133] In 2002, the figure was 63 000, which was itself, an increase of 200% on the number of reports made in 2001.[134] This trend then is, whilst not unsurprising, perhaps worrying on a number of counts.

Firstly, whilst it must be accepted that in setting the trigger for mandatory disclosures at such a low threshold, the flow of intelligence to the NCIS is increased, consequently, there must be doubts as to the actual quality of such disclosures for intelligence purposes where the threshold is placed so

---

130 As stated in the *Publication of Draft Clauses Document*, which may be found at <http://www.archive.official-documents.co.uk/document/cm50/5066/5066-11.htm>.

131 At least as it is perceived by the Government and the NCIS.

132 *Op cit*, above, n. 130.

133 *The KPMG Report on the Review of the Regime for handling Suspicious Activity Reports*, July 2003, at para. 2.3.3.

134 For an overview of the report, see *Butterworths Money Laundering Law*, News, August 2003.

low. Whilst the internal reporting system required under the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 *should* remove any blatantly unfounded reports, it is clear that it does not necessarily follow that all reports of suspicious persons are, in fact suspicious by virtue of the fact that the client is engaged in money laundering. Moreover, if the sheer number of reports increases, so too must the quantity of 'red herrings', where the employee was justified to report his suspicion, but in fact the client was engaged in a perfectly legal transaction. It may therefore be queried if the increased number of reports expected by the Government following the enactment of the 2002 Act is not counter-productive, diverting the NCIS from more substantiated instances of money laundering.[135]

Secondly, the estimated figure of 100 000 SAR's being made in 2003[136] is likely to increase in future years. It must be remembered that the relevant provisions of the Proceeds of Crime Act 2002 only came into effect on 24th February 2003, whilst the equivalent date for the Money Laundering Regulations 2003 was 1st March 2004.[137] Given the expansive nature of these enactments, it is surely unavoidable that the numbers of disclosures made will increase. Moreover, it is entirely possible that the quantity of reports made will increase sharply over the coming years, and this again is problematic on numerous counts. Certainly, an increase in disclosures made to NCIS will continue to strain the resources of the NCIS. Secondly, any increase will serve to exaggerate the problem of 'red herrings' already considered. Finally, any increase in disclosures will exacerbate the erosion of confidentiality in professional relationships.

---

135 An important related issue is whether the NCIS is sufficiently resourced to adequately deal with the unavoidable increase in the number of disclosures made. Crucially, it is not yet clear whether the Government in tends to increase the funding available to the NCIS, although it may be suggested that such additional funding is absolutely necessary if the NCIS is to operate properly considering the ever increasing number of disclosures being made. An interesting question is whether information technology software can alleviate this very real difficulty. Certainly such packages are not without potential, and no doubt the development of packages such as the *Search Space® Anti-Money Laundering Solution*, shall be vigorously monitored (not to mention the results of the NCIS *Money-Web* pilot scheme).

136 The estimate was drawn from the reports received in the first three months of 2003, where some 21 433 reports were made.

137 By virtue of Regulation 2(1), the general date of implementation was 1st March with certain other provisions not coming into legal effect until 14th January 2005.

Clearly, the anti-money laundering regime within the United Kingdom has radically altered the nature of professional confidentiality. This is particularly true as regards the implied contractual duty of confidentiality between banker and customer. It is this issue that shall now be considered.

Certainly there is conflict between the use of suspicion as the trigger for mandatory reporting and the damaging effect such a regime has upon the professional relationship between, a professional and his client. Mr Boris Johnson M.P., in replying to the suggestion that all a professional need do to avoid any criminal liability is make the necessary disclosure, made during the Parliamentary debates on the Bill, articulates this tension ably in stating:

> "How can an accountant [for example] have a professional relationship with his client if he goes around sneaking...[H]ow can that relationship be possible if the accountant is sneaking to all and sundry about his private transactions with his clients?"[138]

This initially appears to be somewhat undeniable. Any professional relationship, and certainly the banker customer relationship, is based upon the idea of trust and confidentiality, and it is clear that these fundamental principles are being undermined by these stringent reporting requirements. The difficulty, however, is once again the necessity for the correct balance to be struck between upholding the virtue of such a relationship and the important public policy aims of the legislation. The importance of inhibiting money laundering is undeniable, and if one considers that the 2002 Act is restricted to those engaging in the regulated sector, and not to the wider public in general, one must consider whether an adequate balance has been met between conflicting interests. There is, unsurprisingly, no easy answer to such a question. It is a personal matter of taste and preference, and whilst the Government's favoured approach of 'leave no stone unturned' has a certain logic, there is certainly a justification for the requirement of reasonable grounds for suspicion to be inserted into the s. 330(2)(a) offence.

[138] Hansard, HC Debs, Col. 983, 17th January 2002.

It is true that the insertion of suspicion on reasonable grounds as opposed to mere suspicion in the subjective sense would not negate the possibility of such 'red herrings' entirely, but it would certainly reduce the number of unjustified reports made to the NCIS. This would in turn result in the NCIS gaining more valuable intelligence, although inevitably in reduced quantities.

CONCLUSIONS

This Chapter has analysed the development of the United Kingdom's anti-money laundering regime. Throughout the development of this regime two features are particularly noticeable. Firstly, the constant expansion of the regime, driven through European initiatives, in both breadth and substance[139]. Secondly, the ever increasing emphasis on regulated professionals being at the centre of this regime, through the suspicion based reporting requirements.[140] It is this second feature which has had the most impact upon the traditional notion of confidentiality between banker and customer. The legal obligation to report even suspicions of money laundering to the NCIS has drastically altered the nature of the relationship between banker and customer. However, it is worth pointing out that the erosion of the principle of confidentiality under the money laundering regime is, at least as a matter of principle, consistent with the four exceptions as enunciated in *Tournier*. The provisions of the spearhead legislation, the Proceeds of Crime Act 2002 compelling the disclosure of confidential information under the anti-money laundering regime certainly sits squarely within the 'compulsion under law' exception. The difficulty is that the nature of the requirements under the regime, together with the sheer quantity of disclosures being made changes the nature of the implied term of confidentiality as laid down in *Tournier*. Effectively, the obligations compelling a banker to disclose sensitive and indeed, confidential

[139] The expansion seems to be continuing unabated, with for example, the recent Third European Money Laundering Directive, (Directive 2004/0137).

[140] This position is reinforced by the strong penal sanctions attached to failing to make the required disclosure. Whilst at present no banker has personally been imprisoned for failing to report suspicions of money laundering, it should be pointed out that Jonathan Duff, a solicitor, was imprisoned for six months for failing to disclose suspicions of money laundering. See Myint, 'Solicitors Beware: Money Laundering after R v. Duff', *Journal of International Trust and Corporate Planning*, April 2003.

information to the NCIS are such that the very nature of the duty of confidentiality has been altered, or rather eroded, beyond all recognition from that understood in 1924. Indeed, the growth of the disclosure provisions of the anti-money laundering regime even in the past fifteen years is such that the duty of confidentiality between banker and customer from that era, is unrecognizable to that which is in place today.

It must be appreciated however, that the fight against money laundering is a vital one. Money laundering poses a serious threat to civilized society in terms of both allowing criminals to reap the rewards of their crimes, and also in terms of the devaluing and de-stabilising impact it has upon both domestic and international financial markets. There is clearly a great public interest in combating, as effectively as possible, the activities of money launderers. As Antoine states, "[C]ombatting money laundering must continue to be a priority".[141] Indeed, it must. The question is whether the essentially private interest in banking confidentiality has been adequately balanced with the public interest in impeding the activities of money launderers. The issue is one of whether a satisfactory balance has been struck between the need to protect private (individual) rights whilst ensuring that the public interest is similarly protected. Again, this is essentially a matter of personal preference and taste, although it is perhaps worth re-emphasising the stance of the Jack Committee on this question.

Even in 1989, the *Report of the Committee on Banking Services,*[142] whilst appreciative that there are strong arguments in favour of disclosure and transparency within the financial sector (particularly to facilitate the fight against money laundering), expressed concern at the pace and direction in which this area of banking law was moving. The Jack Committee suggested that the balance between the preservation of private rights and disclosure in the public interest had moved too far in the direction of disclosure, and was therefore failing to adequately protect individual rights.

---

[141] Antoine, *Confidentiality in Offshore Financial Law*, Oxford: OUP, (2002), at para. 6110.
[142] *Banking Services: Law and Practice*, London: HMSO, Cmnd. 622 (1989).

This concern must surely be even more justified following the implementation of the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003, and indeed it may be questioned whether a satisfactory balance has been laid down, or whether the current anti-money laundering regime has gone too far in favour of disclosure at the expense of banking confidentiality. Either way, what must be emphasised is that, as Antoine, points out, "money-laundering fears cannot mean...a complete dismantling of confidentiality in financial affairs, whether offshore or onshore".[143]

Indeed it cannot, and although the fight against money laundering is continuing apace, it must not be forgotten that the United Kingdom is now in the Human Rights Act age. It is then useful to analyse the balance struck between these competing public and private interests on human rights grounds, in order to ascertain whether the balance between the need for anti-money laundering provisions and the banker's duty of confidentiality has been satisfactorily established. Such conflict will be considered shortly, but first it is useful to consider a second regime which is very much linked to the anti-money laundering system, and has the ability to impact quite dramatically upon banking confidentiality: The Criminal Confiscation system.

[143] *Op cit*, above, n. 141, at para. 6.111.

CHAPTER FIVE

BANKING CONFIDENTIALITY, MONEY LAUNDERING AND CONFISCATION

"Since 1986, the UK has had extensive powers to confiscate criminal assets. The aims of the laws are clear and wide-ranging: to deprive offenders of the proceeds of their crimes. Yet there are anomalies in the legal regime, which has developed in a piecemeal fashion. And there are significant deficiencies in the use of legislative provisions".

Performance and Innovation Unit Report, *Recovering the Proceeds of Crime*, paragraph 1.5.

INTRODUCTION

It hardly need be restated that the climate within which the banker customer relationship operates is under-going substantial change. The previous Chapters have illustrated that the modern banking industry is very different to that which was in effect at the time of the Tournier decision: Moreover, Chapter Four has considered the part played by the development of the anti-money laundering regime within this development. Certainly, the very nature of the banker's duty of confidentiality has been altered through this general movement away from the traditional understanding of the banker customer relationship. The focus of this Chapter continues on such a general theme: Just as the radical impact of the anti-money laundering regime upon banking confidentiality must be considered, so to must a parallel regime, which like its counter-part, has undergone substantial change in recent years, that of the confiscation and asset recovery regime.

The impact of this confiscation regime on banking confidentiality, and of course professional confidentiality in a more general sense is clear: The key to a successful confiscation system (and also therefore to a successful anti-

money laundering scheme) is financial investigation. Indeed, so much was appreciated by the PIU Report drawn up immediately prior to the enactment of the Proceeds of Crime Act 2002, which stated that "effective asset recovery cannot work without effective financial investigation".[1] There are then two central themes forwarded in this Chapter: The new confiscation regime and secondly, the dependence of that regime on financial investigation and the consequent impact upon banking confidentiality. Before considering the new confiscation regime however, it is valuable to consider the confiscation legislation, which preceded the Proceeds of Crime Act 2002, as this will allow the recent developments to be traced, and consequently illustrate the impact of the recent developments upon the traditional concept of banking confidentiality.

THE DEVELOPMENT OF ASSET RECOVERY IN DOMESTIC LAW

The development of confiscation began in earnest in 1986 with the Drug Trafficking Offences Act, which was based in part upon the Report of the Hodgson Committee. The Hodgson Committee supported the development of the law in this area so that "criminal courts should have the power to order the confiscation of proceeds of an offence of which the defendant has been convicted or asked to be taken into consideration".[2] The Drug Trafficking Offences Act 1986 laid down, for the first time in domestic law, a system of confiscation of assets following a conviction for a drug trafficking offence. The key issue for the Court in applying this system was, as Biggs, Farrell and Padfield note, essentially an "accounting exercise".[3] Firstly, the Court must assess the benefit gained by the criminal through the criminal actions, i.e. assessing the extent of the criminal proceeds. This approach then, is based on the definition of 'benefit', which was laid down in section 1(3). Under section 1(3), the person concerned was deemed to have benefited from drug trafficking if he "received any payment or reward in connection with drug

[1] PIU Report, *Recovering the Proceeds of Crime,* at para. 3.21

[2] *Profits of Crime and their Recovery* [Hodgson Committee Report] London: HMSO, (1984), at 74. The Hodgson Report was the consequence of the decision of the House of Lords in *R.* v. *Cuthbertson* [1981] AC 470, in which it was laid down that s. 27 of the Misuse of Drugs Act 1971 did not allow for the confiscation of profits gained through the drug trade.

[3] *The Proceeds of Crime Act 2002,* London: Butterworths (2003), at para. 1.20.

trafficking". Allied to this definition of benefit were certain assumptions, which the court was permitted to rely upon.[4] The statutory assumptions were laid down in section 2, and stated that property which was held, or had the appearance of being held, by the defendant since the conviction, or received by him in the six years prior to the commencement of criminal proceedings against him, constituted the proceeds of drug trafficking. Under section 2, the court was also permitted to assume that any expenditure by the defendant within that six year period were made through the proceeds of drug trafficking.

The second stage of this exercise, closely related to the first stage, dictated that the Court was to ascertain the value of any property which was subsequently used to satisfy any proceeding court order, i.e., to ascertain the amount to be recovered.[5] Generally, this amount was to be the amount of the benefit gained through the drug trafficking and ascertained through the first stage of inquiry. If however, the court determined that the amount that might be realized under section 4(2) was lower than the amount of the benefit, the confiscation order would obviously be drawn in respect of that lower amount. Moreover, it was for the defendant to establish to the court that the amount which might be realizable was lower than the courts assessment of the benefit made through drug trafficking.

The 1986 Act commenced a series of legislation which refined and developed the confiscation regime, with perhaps the most important development being the Criminal Justice Act 1988 which expanded the confiscation provisions of the 1986 Act to all (indictable) non-drug related offences, and certain specified summary offences. The development of the statutory confiscation provisions was considered by the PIU Report in the following table:

---

[4] Note permitted rather than any mandatory set of assumptions regarding the definition of 'benefit'. Indeed, the assumptions were not to be followed where the use of them might lead to a serious risk of injustice.

[5] To use the terminology of the Act itself under s. 4(1).

YEAR	STATUTE	PROVISIONS
1986	Drug Trafficking Offences Act (DTOA)	Confiscation provisions for drug trafficking offences and first drug money laundering offence
1988	Criminal Justice Act 1988 (CJA 1988)	Confiscation provisions for all non-drug indictable offences and specified summary offences
1990	Criminal Justice (International Co-operation) Act	Mutual legal assistance, further drug money laundering offences and drug cash seizure on import or export
1993	Criminal Justice Act (CJA 1993)	(Other forms of) money laundering offences and enhancements to all crime confiscation provisions
1994	Drug Trafficking Act (DTA)	Consolidating the drug provisions and removing mandatory confiscation
1994	Criminal Justice and Public Order Act	Bringing forward the date from which CJA 1993 confiscation provisions apply
1995	Proceeds of Crime Act (PCA)	Further alignment of all crime confiscation provisions with DTA 1994; notably use of assumptions (see 4.10) in crime lifestyle cases
1995	Proceeds of Crime (Scotland) Act	
1996	Proceeds of Crime (NI) Order	
1998	Crime and Disorder Act	Amendment to CJA for confiscation orders on committal for sentence

As with the anti-money laundering regime then, this table illustrates the complexity of the confiscation regime, created in part through the patchwork, *ad hoc* nature of the developments to the confiscation regime. Again, similarly to the money laundering provisions within the Proceeds of Crime Act 2002, one of the primary advantages offered by the 2002 Act is the simplification, and conglomeration of the numerous statutory provisions into one single Act of Parliament. It is clear then that certain features of the earlier confiscation regime can briefly be emphasized prior to considering the current provisions laid down within the Proceeds of Crime Act 2002.

Firstly, the system was, although initially restricted to drug trafficking gains, developed so as to include all indictable crimes. Perhaps the most important feature of the previous confiscation regime is that it operated on a conviction led basis. Thus confiscation proceedings may commence following the conviction of the defendant for one of the relevant offences. Thus, the predicate offence here, for example drug trafficking, must be established in a criminal court, to a criminal standard of proof, i.e., beyond all reasonable doubt. This is an important point to note in the context of the new system under the Proceeds of Crime Act 2002, and particularly under the new form of action laid down under Part 5, namely civil recovery.

CONFISCATION AND ASSET RECOVERY UNDER THE PROCEEDS OF CRIME ACT 2002

The Proceeds of Crime Act 2002 was based, in part, upon the PIU Report which preceded the draft Proceeds of Crime Bill. The PIU Report in investigating the then system of confiscation, concluded that a new Act was necessary for a number of reasons. The PIU Report stated that:

> "Since 1986, the UK has had extensive powers to confiscate criminal assets. The aims of the laws are clear and wide-ranging: to deprive offenders of the proceeds of their crimes. Yet there are anomalies in the legal regime, which has developed in a piecemeal fashion. And there

are significant deficiencies in the use of legislative provisions".[6]

Thus, on two fundamental points the confiscation regime was found to be failing. Firstly, the use of the legislative provisions was found to be deficient, and secondly, the actual system itself was found to be flawed. Allied to this state of affairs was the issue of actual collection rates when confiscation orders were made. The Report concluded that:

> "In the last five years, confiscation orders have been raised in an average of only 20 per cent of drugs cases in which they were available, and in a mere 0.3 per cent of other crime cases. The collection rate is running at an average of 40 per cent or less of the amounts ordered by the courts to be seized. Specially tasked law enforcement officers struggle to investigate the financial aspects of crime to support this effort, but their effectiveness is limited by their numbers and modest training".[7]

There were then, serious difficulties surrounding the confiscation regime as developed from the Drug Trafficking Offences Act 1986. As a consequence of this Report the government announced its intention to publish a draft Proceeds of Crime Bill, in order to "deprive criminals of their assets". Moreover, the Government stated that "[J]ustice demands that we should stop criminals profiting from their crimes.....[W]e will ensure that powers to deprive criminals of their assets are used more extensively".[8]

The extent to which the Proceeds of Crime Act will be successful in implementing the government's intentions will not be known for some time. What is clear however, is that the Act introduces numerous (new) concepts all designed to assist the effectiveness of the confiscation regime, and deprive criminals of their assets. The main changes, as regards this aim of the Proceeds of Crime Act 2002 are as follows:

---

[6] PIU Report, *Recovering the Proceeds of Crime*, at para. 1.5.
[7] PIU Report, *Recovering the Proceeds of Crime*, at para. 1.6.
[8] *Criminal Justice: The Way Ahead*, London: HMSO, Cmnd. 5074 (2001).

- The creation of the Assets Recovery Agency;
- The consolidation and reinforcement of earlier confiscation legislation;
- The creation of provisions for civil recovery of the proceeds of crime;
- Consolidates pre-existing powers of investigation, and creates new mechanisms for the collation of financial information to assist confiscation investigations.

Prior to considering the extent of the new criminal confiscation regime, it is beneficial to briefly consider the Assets Recovery Agency detailed in Part 1 of the Act.

The Assets Recovery Agency[9] is central to the effective operation of the asset recovery and confiscation program initiated by the government. The Agency, a non-Ministerial Department, is headed by a new office holder, the Director who is appointed by the Secretary of State. Section 2 outlines the functions and role of this new office holder. Section 2(1) lays down the general responsibility of the position, which is to use the powers of the office in a manner "best calculated to contribute to the reduction of crime". Whilst this is a broad ambit, the power is controlled in some sense by the Director having to act with regard to any guidance offered by the Secretary of State under section 2(5) and also, in compliance with his current annual plan under section 2(2)(b).[10] Under section 2(3), the Director is empowered to conduct any investigations appropriate to the exercise of his functions.

CONFISCATION UNDER THE PROCEEDS OF CRIME ACT 2002

The new confiscation regime is laid down in Part 2 of the Act, and as noted earlier seeks to unify the previous statutory quilt applicable to this area of law. The fundamental issue of in what circumstances a confiscation order may be made is laid down in section 6. Section 6 provides that:

---

[9] The PIU Report recommended the creation of such a body, although under the name of the 'National Confiscation Agency', see generally, PIU Report, *Recovering the Proceeds of Crime*.
[10] Under Schedule 1, the annual plan must be approved by the Secretary of State.

"(1) The Crown Court must proceed under this section if the following two conditions are satisfied.

(2) The first condition is that a defendant falls within any of the following paragraphs--

(a) he is convicted of an offence or offences in proceedings before the Crown Court;

(b) he is committed to the Crown Court for sentence in respect of an offence or offences under section 3, 4 or 6 of the Sentencing Act;

(c) he is committed to the Crown Court in respect of an offence or offences under section 70 below (committal with a view to a confiscation order being considered).

(3) The second condition is that--

(a) the prosecutor or the Director asks the court to proceed under this section, or

(b) the court believes it is appropriate for it to do so."

Thus section 6 makes it clear that confiscation orders can only be made in the Crown Court[11] following any conviction[12], and where the Director of the ARA or the prosecutor requests the Crown Court to initiate confiscation proceedings. Note that this is a mandatory requirement of confiscation proceedings: Where the two requirements are satisfied under section 6 are satisfied, the Crown Court must apply the confiscation powers of Part 2, and has no discretion in this matter.[13]

Section 6 also determines the approach of the Crown Court once confiscation proceedings have commenced. Section 6(4) dictates that:

[11] Replacing the previous situation whereby the Magistrates' Court had a (limited) power to make a confiscation order.

[12] Where the conviction is in the Magistrates' Court, the confiscation order can be made only where the defendant is committed to the Crown Court for sentencing (s. 6(2)(b)), or where committed to the Crown Court for sentence and confiscation (s. 6(2)(c))

[13] This mandatory nature of the confiscation regime, drew heavy criticism throughout the Bill's passage through Parliament, with many Members arguing for a "judicial discretion" in deciding whether to proceed with a confiscation hearing, see for example, the position of Mr Grieve MP, HC Debs., 18th July 2002, col. 488.

"(4) The court must proceed as follows--

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct."

The first step then is for the court to determine whether the defendant has a 'criminal lifestyle'. The term 'criminal lifestyle' is defined in section 75 of the Act as where, and only where one of three conditions is satisfied. Firstly, if the offence(s) is specified in Schedule 2[14], or if the offence(s) constitutes part of a course of criminal activity or where the offence(s) "is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence". Whilst the reliance upon the term 'criminal lifestyle' has faced severe criticism on the basis that law abiding people can live with the stereotypical trappings of criminal activity, without actually committing any criminal offences whatsoever, it is perhaps difficult to see any practical implications of this criticism, given the specific definition afforded to 'criminal lifestyle' within section 75.[15]

Assuming the court is satisfied that the defendant has a criminal lifestyle in accordance with section 75, the next stage of the proceedings is to consider whether the defendant has benefited from his general criminal conduct.[16] Section 76 defines 'criminal conduct' and also 'general criminal conduct'. Criminal conduct is defined as conduct which constitutes a criminal offence in England or Wales[17], and general criminal conduct is defined as being all of the defendant's criminal conduct, irrespective of the date at which it

---

[14] Sch. 2, headed 'Lifestyle Offences', specifies numerous offences which need not be mentioned at this point, beyond to state that the offences are grouped into the following general themes: Drug Trafficking; Money Laundering; Terrorism; People Trafficking; Arms Trafficking; Counterfeiting; Intellectual Property; Pimps and Brothels; Blackmail and the inchoate equivalents of the listed offences.

[15] See for example, the comments of Biggs, Farrell and Padfield in *The Proceeds of Crime Act 2002*, London: Butterworths, (2003), at paragraph 3.7.

[16] s. 6(4)(b).

[17] Or would constitute a criminal offence, had the conduct occurred in England or Wales.

occurred. If the Court determines that the defendant does not have a criminal lifestyle under section 75, the court must then proceed to consider whether the defendant has benefited from the specific criminal conduct, i.e., whether the defendant benefited from the offence for which he was convicted of.[18]

Assuming then, that the court is satisfied, on the balance of probabilities, that the defendant has benefited from his criminal conduct (whether general criminal conduct or particular criminal conduct) the court must determine the recoverable amount, and make a confiscation order in respect of that amount.[19]

The next issue for thee court then, is how to calculate the 'recoverable amount'. This issue is dealt with in section 7 of the Act, which lays down the general premise that the "recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned". Where however, the defendant can demonstrate that the available amount is less than the benefit arrived at by the court, the recoverable amount is either the available amount, or where the recoverable amount is nil, a nominal amount.[20]

CIVIL RECOVERY UNDER THE PROCEEDS OF CRIME ACT 2002

Whilst the powers of confiscation under Part 2 of the Act are wide reaching, the more controversial area of the Act is contained within Part 5: Civil Recovery of the Proceeds etc. of Unlawful Conduct, which, *inter alia*, creates an entirely new right of action (albeit reserved for use by the enforcement authority). The criticism essentially focuses upon the idea that the use of a civil action to pursue what is, to many, properly regarded as a criminal matter is both wrong in principle, and dangerous from a civil liberty point of view.

---

[18] See s. 76(3).
[19] See ss. 4(5)(a) and 4(5)(b) respectively.
[20] ss. 7(2)(a) and 7(2)(b).

The difficulties were well surmised by Justice, in their Briefing for the Second Reading of the Proceeds of Crime Bill in the House of Lords:

> "The action for civil recovery under Part 5 is problematic, in using the form of a civil action, in which the standard of proof is the balance of probabilities, to allow a state agency with extensive investigatory powers to seek a punitive order for forfeiture of assets. There is the risk that, in practice, this mechanism could undermine the safeguards of the criminal law, through the use of the more flexible civil procedures".[21]

Section 240(1) establishes the two aims of Part 5: The first aim, which is a new right of action, enables the Director of the ARA to bring civil proceedings in the High Court to recover property which either represents or is, obtained through unlawful recovery. The second aim, which replaces similar provisions from the Drug Trafficking Act 1994, enables cash, which is or represents property obtained through unlawful conduct to be forfeited in civil proceedings in the Magistrates' Court.

Section 241 defines what is meant by 'unlawful conduct'. Section 241 states that:

> "(1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.
> (2) Conduct which--
> (a) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and
> (b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part,
> is also unlawful conduct."

Moreover, under section 241(3) the issue of unlawful conduct having

[21] Available online at <http://www.justice.org.uk/images/pdfs/POC%20HL%202nd%20reading.pdf> at para.16.

occurred is to be determined by the judge on the balance of probabilities. Thus the Director of the ARA must establish on the balance of probabilities, that the relevant property is the proceeds of unlawful conduct, or in the case of cash forfeiture, that a person intended to use the cash in unlawful conduct.

Section 242 defines another central term of this Part of the Act, 'property obtained through unlawful conduct'. Section 242 states that:

> ("1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.
>
> (2) In deciding whether any property was obtained through unlawful conduct--
>
> (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,
>
> (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

This then, is a particularly broad definition, and covers a number of different situations. The primary target of the definition is to catch persons who obtain property through either criminal conduct, or in return for such conduct. Moreover, section 242(2)(b) ensures that it is not necessary for the authorities to establish that the property was obtained through a particular type of criminal conduct, e.g., money laundering. Provided that it can be established that the property was obtained though criminal conduct in a general sense, the definition provided in section 242 will be met.

FINANCIAL INVESTIGATION AND CONFISCATION

Perhaps the most important constituent to any confiscation regime is the system of financial investigation which precedes confiscation. It is this financial intelligence that facilitates confiscation of criminal assets and as

such this area was the subject of much consideration prior to the drafting of the Proceeds of Crime Bill. Certainly, with regard to the ambit of this thesis, the investigative powers laid down under the Proceeds of Crime Act 2002 are of considerable importance.

Part 8 of the Act deals with investigations and is of application to both criminal confiscation, civil recovery and the money laundering offences previously considered. It is immediately apparent that the powers conferred by Part 8 are extensive in nature, made up of both pre-existing procedures for information collection and also, importantly, new procedures which place the banking sector under yet further obligations in relation to the disclosure of customer information. Briefly stated, the different mechanisms detailed under Part 8 of the Act are:

- Production Orders;
- Search and Seizure warrants;
- Disclosure Orders;
- Customer Information Orders; and
- Account Monitoring Orders.

Each of these procedures shall now be examined, before considering the implications of these mechanisms upon banking confidentiality.

Production Orders

By virtue of section 345 an appropriate officer may apply to the court[22] for a production order which requires the person specified in the order to produce the material, again specified within the order. In essence, similar powers existed under the previous regime, including the powers under section 93 H of the Criminal Justice Act 1988, and under section 55 of the Drug Trafficking Act 1994. The first point to note is the application of this power to all of the

[22] ss. 343 and 344 specify that with regard a confiscation investigation (or a money laundering investigation), the terms judge and court respectively, refer to the Crown Court. With regard to civil recovery investigations the terms are defined, again by ss. 343 and 344, to refer to the High Court.

different investigations specified under section 341, namely confiscation investigations, civil recovery investigations and money laundering investigations.

Section 346 details the specific requirements before a judge may grant the production order, and states that:

> "There must be reasonable grounds for suspecting that--
> (a) in the case of a confiscation investigation, the person the application for the order specifies as being subject to the investigation has benefited from his criminal conduct;
> (b) in the case of a civil recovery investigation, the property the application for the order specifies as being subject to the investigation is recoverable property or associated property;
> (c) in the case of a money laundering investigation, the person the application for the order specifies as being subject to the investigation has committed a money laundering offence".[23]

Thus the key feature of this is the concept of suspicion, although supported by the presence of reasonable grounds for the forming of that suspicion. Thus the provision, as was the case with its predecessors, may not be employed in the course of a 'fishing expedition'. This concept however, is not the only issue that a judge must satisfy themselves with before granting a production order. Under section 346(3), there must also be reasonable grounds for "believing that the person the application specifies as appearing to be in possession or control of the material so specified is in possession or control of it". Moreover, in accordance with section 346(4), there must be reasonable grounds for believing that the material detailed within the production order would be "of a substantial value"[24] to the investigation. The final requirement detailed in section 346 is that there must be reasonable grounds for believing that it would be in the public interest for the material to

[23] s. 346(2).
[24] s. 346(4).

be produced. This public interest requirement is to be determined according to:

> "(a) the benefit likely to accrue to the investigation if the material is obtained;
> (b) the circumstances under which the person the application specifies as appearing to be in possession or control of the material holds it".[25]

This then essentially requires the judge to engage in a balancing exercise before deciding whether to grant the production order or reject the application. The first criterion listed in paragraph (a) above is relatively straightforward, and involves consideration of the possible gains, in terms of the investigation, from the granting of the production order. Clearly, the more significant the material sought, the more likely that the order will be granted. What could pose difficulties is the slightly nebulous issue raised in paragraph (b). This, at face value, would involve the judge to consider the circumstances behind the possession of the material sought within the production. Thus presumably if the material sought was held in the context of a professional relationship, the judge would have to be satisfied that the likely benefit to the investigation of granting the production order justifies the breach of any professional obligation of confidentiality. Moreover, again, presumably, material held in such a context would be the subject of a higher threshold than material that is in the possession of a lay person.[26]

It remains to be seen in coming years what attitude the judiciary adopt towards this newly introduced public interest test. Given the importance of the test as a measure to prevent unjustified intrusions into private lives of individuals, and the possible consequences for professional relationships of confidentiality, it is hoped that the judiciary employ the test in a material manner, and actively consider not only the check list of requirements within section 346, but also the balancing exercise required by that section also.

---

[25] s. 346(5).
[26] It is interesting to note that such a public interest requirement was present in neither the earlier versions of this provisions within previous legislation, nor in the draft Bill that preceded the Proceeds of Crime Act.

Search and Seizure Warrants

Part 8 of the Proceeds of Crime Act also makes provision for search and seizure warrants in a manner similar to the warrants obtained under the Police and Criminal Evidence Act 1984.[27] Given the ambit of this Chapter a detailed consideration of these warrants is not necessary, other than to say that by virtue of section 352, an appropriate officer[28] may apply to a judge in order to gain a search and seizure warrant which authorises an appropriate person[29] to enter and search the premises specified within the order, and to remove and retain any material discovered which is likely to be of substantial benefit to the investigation. The warrants are generally subordinate to production orders, i.e., a production order must be sought, granted and ignored, or unavailable before any application for a search and seizure warrant may be made under section 352.[30]

Disclosure Orders

Disclosure Orders are detailed in section 357(1), which states that a "judge may, on application made to him by the Director, make a disclosure order if he is satisfied that each of the requirements for the making of the order is fulfilled". This then, whilst essentially similar to the methods of financial investigation previously considered under the Proceeds of Crime Act, is distinct in one fundamental way. The application for a disclosure order can only be made by the Director of the Assets Recovery Agency.[31] The rationale behind this restriction on the deployment of disclosure orders is clear and was acknowledged by the government in the explanatory notes to the Proceeds of Crime Act 2002. The notes state that, "[O]wing to the

---

[27] On this, see generally, Zander, *The Police and Criminal Evidence Act 1984*, (2003).
[28] Previously defined, above, n. 22.
[29] Defined by s. 352(5) as a constable or customs officer where the warrant is sought in pursuance of a confiscation or money laundering investigation, or a named member of staff of the ARA in respect of a civil recovery investigation.
[30] See s. 352(6).
[31] See s. 1 on the creation of the ARA and the Director thereof, and s. 2 on the functions of the Director generally. The current Director the Agency is Jane Earl, who was appointed to the position by the Secretary of State on November 5th 2002.

necessarily invasive nature of the disclosure order, it is thought appropriate to limit the order's use to the Director".[32] Furthermore, section 357(3) emphasises that the application for a disclosure order may only be made in respect of investigations being conducted by the Director, i.e., the powers cannot be used by the Director on behalf of other parties, such as law enforcement agencies. This then again, is an acknowledgement by the government of the extensive nature of a disclosure order and the intrusive nature thereof. Quite how effective the limitation will be in practice remains unclear, if one considers that a law enforcement agency wishing to employ a disclosure order are not prohibited from merely transferring responsibility for the investigation over to the Director, who can then, in compliance with section 357 apply for the order. Of course, this is unlikely to occur on any substantial scale given the obvious resource constraints on the Director in such a position, but nevertheless there remains the possibility that the restrictions laid down in section 357 may be circumvented.

These restrictions however are to be welcomed if one considers the extent of the disclosure order once granted by the judge. Section 357(4) outlines the ambit of the order, and does so in extensive terms. The subsection states that:

> "A disclosure order is an order authorising the Director to give to any person the Director considers has relevant information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following--
> (a) answer questions, either at a time specified in the notice or at once, at a place so specified;
> (b) provide information specified in the notice, by a time and in a manner so specified;

[32] Explanatory Notes to Proceeds Of Crime Act 2002, available online at <http://www.opsi.gov.uk/acts/en2002/2002en29.htm>, at para. 516.

> (c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified."

Thus the disclosure order is a particularly intrusive means of furthering an investigation into either civil recovery or criminal confiscation. The order can be made in respect of any person, in respect of any relevant information in any manner whether that be to attend an interview, produce original documents or simply to provide information specified within the order. This breadth is furthered if one considers the definition afforded to the concept of 'relevant information'. Under section 357(5), relevant information is defined as any information which the Director considers to be relevant to the investigation. Once granted then, the powers available under a disclosure order are vast. Consequently, this places considerable importance on the criteria which must be satisfied before any such order may be grated by a judge. This issue is expanded in section 358, which states that:

> "(2) There must be reasonable grounds for suspecting that--
> (a) in the case of a confiscation investigation, the person specified in the application for the order has benefited from his criminal conduct;
> (b) in the case of a civil recovery investigation, the property specified in the application for the order is recoverable property or associated property.
> (3) There must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought.
> (4) There must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained".

The issues raised in section 358(2) are relatively straightforward any merely involve an objective assessment of the facts which give rise to the suspicion

of either the benefit of criminal conduct or, alternatively, that the property is recoverable or associated material. The key issue here, from the point of view of this Chapter is the safeguards listed in sections 358(3) and 358(4). Both have been discussed previously, so there is no need to repeat the earlier discussion, other than to make one observation peculiar to the mechanism of disclosure orders. Given the intrusive nature of the order in question, and the breadth of powers it affords the Director, it is to be hoped that the safeguards detailed in sections 358(3) and 358(4) will be given particular importance and indeed effect, by the judiciary in determining whether to grant the disclosure order. This is particularly important in the context of disclosure orders, and the judges will need to ensure that there is an identifiable and justifiable requirement for the granting of such an order, as against, for example an order which is less intrusive, such as a standard production order. For the time being these issues remain theoretical, and the first judicial consideration(s) of disclosure orders is awaited with interest.

Customer Information Orders

One mechanism peculiar to the financial sector which may be employed in the course of an investigation is that of a customer information order, which is detailed in section 363. Such an order is available in all investigations to which Part 8 of the Act applies.[33] Section 363(1) states that:

> "A judge may, on an application made to him by an appropriate officer, make a customer information order if he is satisfied that each of the requirements for the making of the order is fulfilled".

This is a new concept to the confiscation and asset recovery regime within domestic law and immediately raises certain important questions, including, who is an 'appropriate officer'; what is the definition of 'customer information'; and what are the requirements for the making of such an order?

[33] i.e., money laundering investigations, criminal confiscation investigations and civil recovery investigations.

Clearly this section has serious implications for banking confidentiality, thus it is important to define the scope and ambit of a customer information order. Thus the term 'appropriate officer' is important, as it provides an initial limit on the exercise of the powers contained within such an order. The term itself varies in definition according to what type of investigation the order is applied for. In the context of a confiscation investigation, an appropriate office is defined by section 378(1) as meaning either, the Director of the ARA, an accredited financial investigator[34], a constable or a customs officer. In the context of a civil recovery investigation, only the Director of the ARA is an appropriate officer under section 378(2). Consequently, the use of 'appropriate officer' serves to immediately restrict the use of customer information orders to a defined list of personnel. It should be noted however, that with regard confiscation investigations, the group of persons who are 'appropriate officers', and are consequently able to apply to the Crown Court for a customer information order is broad, including, as it does, customs officials and constables.

The next key issue then is quite what the scope of the order is to be. This is dependant upon the definition afforded to the phrase 'customer information'. This key definition is considered in section 364, which makes a distinction between accounts held by an individual[35], and accounts held by a company or similar corporate vehicle.[36] With regard accounts held in a non-corporate capacity, customer information is defined in the following terms:

> "(a) the account number or numbers;
> (b) the person's full name;
> (c) his date of birth;
> (d) his most recent address and any previous addresses;
> (e) the date or dates on which he began to hold the account or accounts and, if he has ceased to hold the account or any of the accounts, the date or dates on which he did so;

[34] The term accredited financial investigator is defined in s. 3(5) and explained through s. 3.
[35] Or held by the individual under investigation and another, i.e. a joint account. See s. 364(1).
[36] ss. 364(1)(a) and 364(1)(b) respectively.

(f) such evidence of his identity as was obtained by the financial institution under or for the purposes of any legislation relating to money laundering;

(g) the full name, date of birth and most recent address, and any previous addresses, of any person who holds, or has held, an account at the financial institution jointly with him;

(h) the account number or numbers of any other account or accounts held at the financial institution to which he is a signatory and details of the person holding the other account or accounts".

Whilst this is, at present, an exhaustive list, it is notable that in accordance with sections 364(4) and 459(6) the Secretary of State may amend the list of 'customer information', either by removing certain issues, or, as is more probable given the general trend in this area, through extending the application of 'customer information' so as to include new factors. It is clear, nevertheless, from the current list of issues defining customer information, that essentially the key theme of a customer information order is to gather general information regarding the person being investigated, in terms of identification and location, both of the individual concerned and also of any accounts held. What the customer information order is not intended to assist with is the actual tracking of funds, or indeed the amounts concerned, as far as any confiscation proceedings are concerned. In as much, it is likely that these customer information orders will be deployed as a precursor to account monitoring orders, which shall be considered shortly.

Nevertheless, the powers extending within this order are far reaching, and involve the release of personal details held by financial institutions under the contractual obligation of confidentiality. It is not surprising therefore, that again there are certain important requirements which must be satisfied before a judge will grant a customer information order. These requirements are listed under section 365 which replicates the key themes raised under the other forms of investigation under Part 8. Consequently, both the public interest test, already considered, re-appears, as does the issue of whether

the information sought is likely to be of substantial value to the investigation in respect of which the order is sought.

Account Monitoring Orders

The final mechanism of investigation under the Proceeds of Crime Act 2002 is that of the account monitoring order which is detailed in section 370. This, like the customer information order considered above is available to 'appropriate officers', who may apply to the court for an account monitoring order, which if granted, compels the financial institution detailed in the order to provide specified information in relation to an account held by the customer (or of course property in relation to a civil recovery investigation) under investigation. The Explanatory Notes suggest that one typical application of this order would be to compel the financial institution to provide details of all transactions passing through an account, or provided a statement in respect of an account over a set period of time.[37] The period stated within an account monitoring order may not exceed 90 days, in accordance with section 370(7).

As with all of the different forms of order under Part 8 of the Proceeds of Crime Act, there are both procedural requirements upon the party wishing to apply for the account monitoring order and also safeguards present for the judge to consider when determining whether such an order can be legitimately granted. Sections 370(2) and 370(3) outline the procedural requirements, and as such the application for an account monitoring order must state that either the person specified in the application is subject to a confiscation or money laundering investigation, or in the case of a civil recovery investigation, the property specified in the application is the subject of such an investigation, and that the person specified within the application appears to hold the property. Moreover, under section 370(3), the application must in addition state that the order is sought for the purposes of the investigation, and must detail the institution concerned, and the account

[37] *Explanatory Notes to Proceeds Of Crime Act 2002*, at para. 525.

information required.

This last point is important, as obviously a key issue in respect of this type of order is to what customer information it may attach. This issue is dealt with in sections 370(4) and 370(5), which state that:

> "(4) Account information is information relating to an account or accounts held at the financial institution specified in the application by the person so specified (whether solely or jointly with another).
> (5) The application for an account monitoring order may specify information relating to--
> a) all accounts held by the person specified in the application for the order at the financial institution so specified,
> (b) a particular description, or particular descriptions, of accounts so held, or
> (c) a particular account, or particular accounts, so held".

This definition then is rather limited in assessing the ambit of the order. Section 370(4) merely states that account information is that information which is specified within the application for the account monitoring order itself, without defining any perimeters to the information which may be sought from institutions. The issue is slightly refined through a close reading of section 370(5), although it may be suggested that the actual limits of precisely what information may be requested within an order is not precisely drafted. Section 370(5) specifies that the application can specify *information relating to* all accounts held by the person detailed in the application, or relating to a description of account(s) held by person at the institution specified, or information relating to a specific account held at that institution. Presumably, these account monitoring orders will be employed, as contended by the Government in the Explanatory Notes, essentially to provide information regarding the standing of an account held by a person subject to an investigation or to track flows of cash in and out of the account

specified.[38] The precise ambit of term 'account information' however, is a matter of interpretation for the courts over the coming years. Quite how broad a definition they will afford to the term in the absence of any clear guidance from within the Act remains to seen.

Section 371 details the requirements which must be complied with prior to the grant of a account monitoring order. The section is drafted in terms similar to those requirements for the other forms of order within Part 8 of the Proceeds of Crime Act. Again the public interest test is employed in order to compel the judge to consider whether the order is justifiable in light of the possible benefit to the investigation were the order to be granted.

THE IMPACT UPON BANKING CONFIDENTIALITY

The impact upon the traditional concept of banking confidentiality by Part 7 of the Proceeds of Crime Act 2002 and the new anti-money laundering regime has already been considered. What is clear however, is that in addition to Part 7 of the Act, Parts 2, 5 and 8 of the Proceeds of Crime Act 2002 also have considerable relevance to banking confidentiality as traditionally understood. The reformed confiscation regime together with the radical civil recovery regime, as considered previously, depend upon the system and mechanisms of financial investigation as developed through Part 8 of the Act. In turn, these forms of financial investigation raise serious issues of professional confidentiality in a generic sense, and also for banking confidentiality in a narrower sense.

It should of course, not be forgotten that the provisions of the Proceeds of Crime Act 2002 are in line with the perimeters of banking confidentiality as laid down in the *Tournier* case. The difficulty here is not that the developments are in anyway contrary to the decision of the Court of Appeal, more that the legislative developments have radically altered the understanding of the banker's duty of confidentiality. The ultimate impact of

---

[38] *Ibid.*

the intrusive investigative powers laid down within Part 8 of the Act compel banks to provide the requested information irrespective of the duty of confidentiality owed to customers. That is not, of course, to suggest that these extensive powers cannot be justified when viewed against the policy goals these provisions are designed to achieve. There can be no doubt that the legislative fight against serious crime, and those engaged in such activity is a valid one. The threat posed to society by serious crime is clear and need not be re-stated here. The issue is whether these provisions maintain a reasonable balance between protecting confidentiality and the rights of innocent citizens as against the need to combat crime. Prior to considering this issue it is beneficial to reconsider the extensive investigative powers provided within Part 8 of the Proceeds of Crime Act 2002.

TYPE OF ORDER	AVAILABLE TO	IMPACT
PRODUCTION	Appropriate Officer	Must give appropriate officer access to or possession of material likely to be of substantial value to investigation
SEARCH AND SEIZURE	Appropriate Officer	Allows access to premises specified in warrant and to seize and retain material on such premises which is likely to be of substantial value to investigation
DISCLOSURE	Director of the ARA	Compels any person to either attend questioning; provide information requested or produce documents requested which the Director believes are relevant to the investigation
CUSTOMER INFORMATION	Appropriate Officer	Requires financial institutions generally or specific institutions to provide information held on identity and whereabouts of specified customer
ACCOUNT MONITORING	Appropriate Officer	Requires financial institutions generally or specific institutions to provide information held on either a specific account(s) or all accounts held at institution by named person over a maximum time frame of 90 days

The above table illustrates the breadth of the investigatory powers either created or extended by Part 8 of the Proceeds of Crime Act 2002. The most pertinent powers for the purposes of banking confidentiality are clearly the disclosure orders; customer information orders and the account monitoring orders. Certainly all of these orders have the potential to override banking confidentiality. Indeed, the Act itself makes this clear with each of the orders being subject to a provision on the disclosure of information. The section, which is reproduced for each of the variations, states that "[A]n account monitoring order [for example] has effect in spite of any restriction on the disclosure of information [however imposed].[39] Thus the Act specifically provides for the disclosure of confidential information, by for example, a bank, regardless of any obligation of confidentiality owed by the bank to the customer concerned.

Of course, given that the provisions of the Proceeds of Crime Act fall within the *Tournier* qualifications to the duty of confidentiality, there would be no breach of the implied duty of confidentiality in any event. The provision would apply however, if the information disclosed was subject to an express term of confidentiality. As noted previously then, the issue is one of whether these investigatory powers represent a reasonable balance between the need to deter criminals from their criminal activities through confiscation and forfeiture provisions and the need to uphold and protect banking confidentiality. In determining this it is important to appreciate that whilst these investigatory powers have the ability to override banking confidentiality, there are various provisions within the Act designed to ensure that the powers of investigation are used in a justifiable manner.

The key to the operation in practice of these investigatory powers is likely to be the public interest test which is included in all of the different forms of orders. There are essentially two safeguards, reproduced for each order, which are designed to ensure that the investigatory powers are used legitimately. The provisions state that firstly:

[39] s. 374 in respect of account monitoring orders, ss. 368 and 361(6) respectively for customer information orders and disclosure orders.

> "There must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought."

Moreover, the provision also requires that:

> "There must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained".[40]

It is clear that both provisions detailed above were included primarily to compel the judge to explicitly consider the policy issues at stake in such investigations. Even if the various procedural requirements for the making of an order are met, if the application for, say, an account monitoring order is disproportionate, the judge ought, under the above provisions decline the application. Thus if for example, the order is requesting information which is unlikely to be of substantial benefit to the investigation, the application for the order would surely fail under the first safeguard above.

The second safeguard, the 'public interest test' is specifically requiring the judge to consider and indeed balance possibly competing interests regarding the making of an order under Part 8. Whilst there will always be an element of public interest in the making of an order to assist the investigation, this safeguard requires the judge to go beyond merely identifying a public interest requiring the making of the order. The judge must also consider any public interest arguments supporting the denial of the application for the order. It may be suggested that one such issue on that point would be the nature of the disclosure that would have to be made were any order to be granted. Consequently, information held in the course of a professional relationship, such as between banker and customer, ought to be afforded more deference than information not held in the course of such a relationship.

---

[40] See for example, s. 346(4) in respect of production orders, or s. 358(3) in respect of disclosure orders.

Such a test is not unknown to the judiciary. Indeed, such tests have been considered in the specific context of the bank customer relationship. Chapter Two considered the development of the *Tournier* qualifications to the banker's duty of confidentiality and it will be recalled that litigation under the second qualification, disclosure in the public interest, have required the judiciary to engage in a similar balancing exercise that they will have to make in relation to Part 8 of the Proceeds of Crime Act. Given the lack of any judicial authority on the approach of the judiciary to Part 8 and the public interest test as it applies to investigatory powers, it is beneficial to reconsider the approach adopted in relation to disclosure in the public interest under *Tournier.*

The leading case on this issue is that of *Price Waterhouse (a firm)* v. *BCCI Holdings (Luxembourg) SA and others*[41] where Price Waterhouse applied to the court for advice as to whether they may disclose confidential information concerning their customer the Bank of Credit and Commerce International (BCCI) to the Bingham Inquiry.[42]

Millet J., suggested that in determining whether Price Waterhouse could safely disclose the confidential information to the inquiry, that a balancing exercise must be undertaken attempting to reconcile the competing public interests involved. As Millet J., noted "[T]here is a strong public interest in the maintenance of the duty of confidentiality",[43] and furthermore, this public interest has been specifically noted in relation to the relationship between banker and customer. Nevertheless, there were, in Millet J.'s opinion, factors, which must be considered in favour of allowing the disclosure. In the present matter there were two inter-related arguments supporting disclosure. Firstly "the public interest in the effective supervision of authorised banking institutions", and secondly, "the public interest in ensuring that an inquiry into

[41] [1992] BCLC 583.
[42] The Bingham Inquiry being afforded the task of investigating the failure of the BCCI, and the performance of the Bank of England in supervising the failed bank.
[43] *Op cit.* above, n., 36, at 597.

the adequacy of such supervision should have access to all relevant material".[44]

A decisive factor operative on Millet J., was that:

> "There is an important public interest in the effective regulation and supervision of authorised banking institutions and the protection of depositors. This has been recognised by Parliament by the enactment of the Banking Act itself".[45]

Millet J., was also swayed by the fact that parliament has itself "chosen to accord greater weight to that public interest than to the maintenance of confidentiality including banking confidentiality'.[46]

A similar approach was adopted by Rattee J., in *Pharaon and others* v. *Bank of Credit and Commerce International SA (in liquidation)*[47] where it was held that the public interest involved in disclosing confidential information held by a banker outweighed the public interest supporting confidentiality. Rattee J., stated that:

> "However, on balance, I am satisfied that the public interest in making the documents relating to the alleged fraud in the acquisition of CCAH shares by BCCI available in the US proceedings does outweigh the public interest in preserving confidentiality as to those documents, provided that disclosure goes no further than is reasonably necessary to achieve the purpose of that public interest in disclosure".[48]

What is important from these decisions for the purposes of the present inquiry is to appreciate the approach adopted by Millet J., and Rattee J., respectively. Both, in conducting a public interest test recognized the

---

[44] *Op cit*, above, n., 36, at 598.
[45] *Op cit*, above, n., 36, at 601.
[46] *Ibid.*
[47] [1998] 4 All ER 455.
[48] *Ibid*, at 465.

competing interests involved and sought to find the proper, justifiable balance between them. It may be submitted that a similarly measured approach will be required under the relevant provisions of the PCA 2002.

CONCLUSIONS

The investigative powers laid down under the PCA 2002 are clearly wide ranging and have the potential to have a serious impact upon banking confidentiality, and indeed, upon privacy in a more general sense. Much will depend upon future litigation and upon the approach of the judiciary to their role under the public interest test. The difficulty with a public interest test in the context of Part 8 of the Proceeds of Crime Act 2002 is that the temptation is to give too greater deference to the authorities in their confiscation and recovery investigations, at the expense of balancing the public interest against the importance of upholding banking confidentiality. Ultimately, until there is litigation on point it is impossible to ascertain precisely what the approach of the courts is likely to be in how the public interest test is conducted. The danger however is clear: If banking confidentiality is not given the proper weight it accords in such an inquiry, the concept of banking confidentiality will (effectively) be a irrelevance to the authorities in the course of their investigations. Given the intrusive nature of, and the risk posed by customer information orders and account monitoring orders in particular, it is hoped that the court will not adopt a deferential attitude in these matters, and will actively ensure that any orders made which compel the disclosure of information by a bank are made only after fully considering the implications for banking confidentiality and the nature of the banker customer relationship generally.

CHAPTER SIX

BANKING CONFIDENTIALITY AND HUMAN RIGHTS

"money-laundering fears cannot mean…a complete dismantling of confidentiality in financial affairs, whether offshore or onshore".

Antoine, *Confidentiality in Offshore Financial Law*, Oxford University Press 2002, at para. 6.111

INTRODUCTION

It has long been recognised that the banker's duty of confidentiality is a qualified duty arising out of the contractual relationship between a banker and their customer. As such this qualified right will, in certain circumstances, quite properly be displaced in favour of the disclosure of confidential financial information. As Chapter Two has illustrated however, the encroachment upon the traditional concept of banking confidentiality has progressed at pace throughout the Twentieth Century and indeed, beyond. The difficulty with the extent of these encroachments is whether they properly balance the need for disclosure and transparency within the banking sector with the inherent importance of protecting banking confidentiality. Certainly the encroachments considered in Chapters Two and Four are not without merit, and it is only proper that banking confidentiality should yield in certain situations. One clear example of this is that considered in Chapter Four, namely, in order to detect, and prevent as far as is possible, money laundering.

The threat posed by the activity of money laundering, and indeed the activities of money launderers is clear. Equally clear is the threat posed to banking confidentiality (and moreover, professional confidentiality generally)

by the domestic anti-money laundering regime as considered in the previous Chapter. What is immediately apparent is that there are two conflicting, perhaps irreconcilable, demands at play. The need to combat money laundering is undeniable and there is clearly a strong public policy argument in favour of restricting money laundering. The need to uphold banking confidentiality is, it may be contended, also valid, yet is often neglected in political, judicial and academic deliberations.

Even in 1989 concerns were raised over the nature of the erosion of banking confidentiality and questions posed regarding the state of the balance which had been made between the situations where disclosure was favoured over confidentiality. The Jack Report suggested that:

> "If confidence is to be preserved, the customer's entitlement to privacy and confidentiality must be reemphasised in a way that ensures it is given the weight it deserves, when it has to be balanced against other legitimate interests".[1]

In the modern era of banking confidentiality, it is clear that the finding of an appropriate balance between conflicting interests within a democratic society is an important issue, and is one which now has greater legal significance with the passing of the Human Rights Act 1998. This Chapter will consider the human rights aspects of banking confidentiality and analyse whether banking confidentiality can be reinforced and protected through reference to human rights principles.

THE HUMAN RIGHTS ACT 1998

The incorporation of the European Convention on Human Rights into domestic law in October 2000 heralded a new era of human rights protection in the United Kingdom. Although the Convention had been both signed[2] and

---

[1] *Banking Services: Law and Practice*, Cmnd. 622, (1989), at para. 5.27.
[2] November 1950.

ratified[3] by the United Kingdom (and thus gave rise to legal obligations in international law) it did not give rise to any rights enforceable by the domestic courts. As Lord Oliver noted in *JH Rayner Ltd v Department of Trade*[4] "[A] treaty is not part of English law unless and until it has been incorporated into the law by legislation". The Human Rights Act represents the incorporation, albeit somewhat overdue, of the European Convention on Human Rights into English law.

The Human Rights Act 1998 has three main mechanisms through which human rights are protected. Firstly, there is an interpretive obligation, namely that all primary and secondary legislation must be read and given effect in such a way so as to be consistent with the Convention rights. Secondly, where this interpretive obligation cannot be fulfilled, certain courts are permitted to make a declaration of compatibility. Thirdly, there is an obligation placed upon public authorities to comply with the Convention rights. These mechanisms will each be analysed with reference to banking confidentiality, with a specific emphasis upon the relevant provisions of the domestic anti-money laundering regime, which have, as previously noted, made the most serious inroads into banking confidentiality as traditionally understood.

Banking Confidentiality the Human Rights Act 1998

Whilst there has been considerable academic consideration of the impact of the Human Rights Act upon the commercial sphere of activity, there has been no academic analysis of the possible impact of the Act upon banking confidentiality. This Chapter investigates the relationship between banking confidentiality and the Human Rights Act 1998.

Furthermore, there has been much academic consideration of the compatibility (or otherwise) of confiscation and civil recovery, yet surprisingly

---

3 March 1951.

4 [1990] 2 AC 418, at 500.

little analysis of the compatibility of Part 7 with the Human Rights Act 1998.[5] Moreover, to date there has been no academic consideration of the relationship between banking confidentiality, the duty to disclose suspicions or knowledge of money laundering and the Human Rights Act 1998. This unwillingness to fully consider the rights based arguments raised by Part 7 of the Proceeds of Crime Act is revealed by the comments of the Joint Select Committee on Human Rights, who stated, in their Report into the Proceeds of Crime Bill that:

> "Part 7 of the Bill continues existing requirements and authorizations for the disclosure of information in connection with money laundering. In our view, Part 7 of the Bill contains adequate safeguards to provide effective protection against violating the right to respect for private life and correspondence under Article 8 of the ECHR".[6]

This paragraph formed the entirety of the Committee's thoughts on the relationship between the Human Rights Act and Part 7 of the Proceeds of Crime Act. Moreover, it is, it may be respectfully submitted, somewhat lacking in substance, as this Chapter intends to illustrate. Whilst the Committee are probably correct to state that on the whole the likelihood of a successful Human Rights Act based challenge to Part 7 are slim, it may be suggested that there are certain provisions which are troublesome from a human rights standpoint.

Indeed, it would appear, at least at the outset, that there are numerous Human Rights Act claims to consider in this context. Possible Human Rights Act arguments include:

- Whether Part 7 of the Proceeds of Crime Act 2002 can be interpreted in a manner consistent with Article 8 of the HRA 1998;
- Whether the Money Laundering Regulations can be interpreted in a manner consistent with Article 8 of the HRA 1998;

[5] See for example, Kennedy, 'Justifying the civil recovery of criminal proceeds', (2005) *Comp. Law.*, 26(5) 137.
[6] Third Report of Session 2001-2002, HL 37;HC 372, at para. 47.

- Whether the NCIS, as a public authority under the HRA 1998, is acting in a manner compatible with the HRA 1998;
- Whether the FSA, as a public authority under the HRA 1998, is acting in a manner compatible with the HRA 1998;
- Whether the Banks themselves may be considered a public authority, and therefore under the requirement to act in a manner compatible with the HRA 1998; and
- Whether the status of the court as a public authority may be of any assistance in upholding banking confidentiality on HRA 1998 grounds.

The various merits of each of these possible arguments shall be analysed.

The interpretative obligations under the Human Rights Act 1998

Section 3 of the Human Rights Act 1998 states that primary and secondary legislation, whether enacted pre or post the Human Rights Act 1998, must, as far as reasonably possible, be read and given effect in a way which is compatible with the Convention rights".[7] The White Paper preceding the Human Rights Bill, stated that legislation was to be interpreted "so as to uphold the Convention rights unless the legislation itself is so incompatible with the Convention that it is impossible to do so".[8]

If one considers the number of statutes which compel the disclosure of confidential information by a bank in respect of their customers, it is clear that this interpretative obligation is of considerable relevance to banking confidentiality. On the specific issue of the anti-money laundering regime and banking confidentiality it is clear that both Part 7 of the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 must, so far as reasonably possible, be read and given effect in a manner compatible with the European Convention on Human Rights. The first issue which must be addressed is whether issues of banking confidentiality fall within a Convention right? Clearly, if they do not fall within the ambit of any of the

---

[7] s. 3(1).
[8] Rights Brought Home, London: HMSO, Cmnd. 3782, (1997) para. 2.7.

Convention rights, then the Human Rights Act will be of no assistance in any attempt to uphold banking confidentiality, or in any reassessment of the balance between the need for disclosure as weighed against the benefit to be gained through protecting banking confidentiality.

Section 1 of the HRA 1998 expands on the notion of Convention rights by stating that the term 'Convention rights' means the rights and fundamental freedoms laid down in "Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First protocol, Articles 1 to 2 of the Convention, as read with Articles 16 to 18 of the Convention". It would be beyond the scope of the thesis to analyse this definition beyond, of course, to note that it clearly includes the right to private and family life (Article 8) which, it may be suggested is the most pertinent Convention right for this inquiry.

Article 8 of the European Convention on Human Rights

Article 8 would initially appear then to be the most relevant Convention right relevant to banking confidentiality, and provides as follows:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 8 then follows the standard ECHR formula with regard to qualified rights. The first paragraph outlines the rights to be protected, whilst the second paragraph qualifies the rights provided by prescribing circumstances where a public authority may lawfully interfere with the rights concerned. Article 8 is generally analysed in the following terms:

1. Does the subject matter fall within the scope of Article 8?
2. If yes, has there been an interference with the Convention right by a public authority?
3. If there was such an interference, was it in accordance with the law?
4. If the interference was in accordance with the law, did it pursue a legitimate aim?
5. If the interference was pursuing a legitimate aim, was it necessary in a democratic society?[9]

The aim of Article 8 therefore is to protect individuals (and indeed, it would appear companies, see post) from unjustified interferences with their Article 8 rights.[10]

The first point which must be addressed therefore is whether confidentiality, and more specifically, banking confidentiality, falls within the ambit of Article 8, the right to respect for private and family life. It is clear from Article 8(1) that four distinct areas are covered by Article 8: i) private life, ii) family life, iii) the home and iv) correspondence. The remainder of this section shall consider the notion of 'private life' under Article 8.

Private life under the ECHR

Even the briefest of surveys into the Strasbourg case law regarding 'private life' reveals that this is a term which successfully eludes exhaustive definition. What is clear however, is that the Strasbourg concept of private life is a far reaching creation, and is regarded as going beyond simply the right to privacy. In *Niemietz* v *Germany*[11] the Court suggested that:

> "...it would be too restrictive to limit the notion (of private life) to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not

[9] See further on this approach, Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention*, London: Sweet & Maxwell (2000), at 265.
[10] This important role was recognised by the Court in *Marckx* v. *Belgium* (1979) 2 EHRR, 330, para. 31.
[11] (1992) 16 EHRR 97, para. 29.

encompassed within that circle. Respect for private life *must* also comprise to a certain degree the right to establish and develop relations with other human beings".

As Grosz, Beatson and Duffy rightly state therefore, the notion of 'private life' has been afforded "an extensive meaning".[12] The consequence of this breadth is that the limits of the idea of 'private life' are unknown. Certainly however, there are limits to what may properly fall under 'private life'. In the case of *Bruggerman and Scheuten* v. *Germany*[13] the Commission noted that:

> "...there are limits to the personal sphere. Whilst a large proportion of the law existing in a given state has some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do, not all of those can be considered to constitute an interference with private life in the sense of Article 8".

The breadth of the issues raised by Article 8 is evident through the appraisal of Article 8 by Velu, in which the following issues are deemed to from elements of the areas in which Article 8 will be engaged:

- Protection of an individual's physical and mental inviolability;
- Protection against attacks on an individual's honour or reputation;
- Protection against the unauthorised use of an individual's name and identity;
- Protection of an individual against harassment;
- Protection against the disclosure of information where the information is covered under a professional duty of confidentiality.[14]

The above certainly succeeds in illustrating the scope of the protection possible under Article 8. Moreover, the last category identified by Velu is of

---

[12] *Op cit*, above, n. 9, at para. C8-12.
[13] (1981) 3 EHRR 244, para. 56.
[14] Quoted in, Merrills and Robertson, *Human Rights in Europe: A study of the European Convention on Human Rights*, Manchester: Manchester University Press, 4th Ed. (2001), at 138.

particular interest to the purposes of this Chapter. Clearly, information held by a banker in respect of their customer(s) is held under the professional obligation of secrecy, that is the implied contractual duty of confidentiality as understood in the *Tournier* case and considered in previous Chapters. Thus, if one follows Velu's appraisal there is no reason, as a matter of legal principle, why banking confidentiality cannot succeed in engaging, at least *prima facie*, Article 8.

The difficulty here however, is that the precise limits of the ambit of Article 8 are unknown. Furthermore, there are no recorded cases on the specific issue of banking confidentiality and the right to respect for private life under either the Human Rights Act 1998 or the European Convention. Given the width of the concept of private life however, it would seem to be uncontroversial to state that banking confidentiality would, *prima facie*, succeed in engaging Article 8.[15]

Furthermore, this is supported, albeit indirectly, by analogy with other examples of Strasbourg jurisprudence concerning Article 8. There are two areas of possible assistance, in which the European Court of Human Rights has considered the ambit of Article 8: Medical confidentiality and where public authorities collect, store and disseminate personal information. The jurisprudence of both of these areas is of relevance to banker-customer confidentiality and shall now be considered.

Personal Information and Public Authorities under Article 8

There is a growing band of Strasbourg jurisprudence on the issue of personal data, and in particular, upon the issue of data collection and retention. It is fundamentally clear that the collection and storage of personal data concerning an individual does amount to an interference within the

[15] Such a conclusion was also reached by Pattenden with respect to the broader concept of personal information protected by professional secrecy. See Pattenden, *The Law of Professional-Client Confidentiality*, Oxford: OUP (2003) at para. 3.03.

meaning of Article 8(1). So much was accepted by the Court in the case of *Leander* v. *Sweden*[16], which concerned a register of persons who were deemed by the authorities to constitute a security risk. The Court stated, unequivocally, that:

> "Both the storing and the release of such information, which were coupled with a refusal to allow Mr. Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8".[17]

This sentiment was reinforced by the Court in the case of *Gaskill* v. *United Kingdom*[18] where the contention that records held by the local authority in respect of a boy who had spent his formative years in foster care were not within the ambit of Article 8(1) was rejected. The Court stated, again in unanimous terms, that "[T]he records contained in the file undoubtedly do relate to Mr Gaskill's "private and family life" in such a way that the question of his access thereto falls within the ambit of Article 8".[19]

This band of jurisprudence, whilst of course, not of direct relevance to banking confidentiality, or even professional confidentiality in a broader sense, does serve to establish one key point, namely that *prima facie*, there is no reason as a matter of law why the collection of financial data regarding a person could not fall within this band of authority and as a consequence, also fall under the (broad) application of Article 8(1). It may be suggested that the collection of financial information regarding a person, whether for the purposes of preventing financial crime, or for other purposes would fall within Article 8(1), and as such the collection of such financial information must be justified in accordance with the principles laid down within Article 8(2).

---

[16] Case No., 10/1985/96/144.
[17] *Ibid*, at para. 48.
[18] Case No., 2/1988/146/200.
[19] *Ibid*, at para. 37.

A further area of interest for the purposes of banking confidentiality and Article 8(1) is the approach of the European Court of Human Rights on issues of medical confidentiality. Again, there is a sizeable band of jurisprudence on such issues, and the Court has, on numerous occasions, re-iterated the importance of upholding medical confidentiality. In the important case of *Z* v. *Finland*[20] the Court suggested that:

> "the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general".[21]

It cannot be emphasized too strongly of course, that the concept of medical confidentiality is fundamentally different from the idea of banking confidentiality. It would be unsustainable to suggest that banking confidentiality ought to be granted the same level of protection within human rights law as medical confidentiality. That accepted, it is clear that there are certain parallels between these two conceptions of confidentiality. In essence, both obligations of confidentiality are qualified obligations stemming, at least historically from ethical as opposed to legal considerations. Both forms of confidentiality are grounded in concepts such as loyalty and professional integrity and honour. Indeed, in general terms both medical and banking confidentiality have now, as a matter of law, gone beyond this ethical basis and have their legal foundations within the law of contract.[22]

---

[20] (1997) 25 EHRR 371.
[21] *Ibid*, at para.95.
[22] At least in respect to 'private' patients.

If one considers the similarities between these two forms of professional confidentiality, and analyses the above thoughts of the European Court of Human Rights from a banking confidentiality standpoint, it is clear that the issues raised by the Court are of equally valid application to the concept of banking confidentiality. It may be contended that the vast majority of bank customers would firmly believe that the confidentiality of their financial records was vitally important to their sense of privacy (to echo the terminology used in *Z* v. *Finland*[23]). Equally, the upholding of banking confidentiality is paramount to the customer's confidence in the banking profession. Certainly, the consequences of any disclosure of sensitive medical information may be more telling than the disclosure of sensitive financial information, but the point remains that there are, in the view of the author, parallels between the two concepts of professional confidentiality.

Moreover, if one accepts these similarities, it may be suggested that it is unlikely that the Court would reject the idea of banking confidentiality falling within the ambit of Article 8. Just as medical confidentiality falls within Article 8, so too, one would imagine must banking confidentiality, although the obvious differences between the two will be reflected in the respective justifications under Article 8(2).

Banking Confidentiality and Article 8(2)

It may then be suggested without any great controversy that banking confidentiality does, *prima facie*, engage Article 8(1). The next issue which must be addressed is that of Article 8(2), which lays down certain situations where any infringement with Article 8(1) may be justified. Article 8(2) states that:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is

[23] (1997) 25 EHRR 371.

necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

This provision thus lays down various requirements, which must be established by the public authority in order for any interference with an individual's Article 8(1) rights to be justified. As any infringement with such an individual's Article 8(1) rights is *prima facie* unlawful, the failure on the part of the public authority to meet the requirements of Article 8(2) results in a breach of the authority's legal obligations under the Human Rights Act. Given the clear importance of Article 8(2) therefore, it is beneficial to consider the requirements at length.

Accordance with the law

The principle of legality is a common feature within the approach of the European Convention on Human Rights and seeks to ensure that any interference with Convention rights are grounded in law. In the specific context of Article 8(2), the principle of legality is incorporated through the use of the phrase 'in accordance with the law'. Without such a basis, the interference cannot be sufficient to fall within Article 8(2). Quite what the principle of legality requires was considered in the important case of *Sunday Times* v *UK*[24] where it was suggested that there were three elements to the principle. Firstly, the principle of legality required the legal basis for any restriction upon Convention rights to be identified and established. However, the Court emphasised that this alone would be insufficient to satisfy the principle of legality, which also necessitates two other features to be established. The second element is a logical consequence of the first and requires that the law which infringes upon Convention rights must be accessible to those affected by it. Thirdly, this rule must be sufficiently clear so as to allow citizens to avoid breaking the law. Clearly, absolute certainty

[24] (1979-80) 2 EHRR 245.

in law is an unobtainable ideal, and the European Court of Human Rights has appreciated this situation. In the *Sunday Times* v *UK* it was noted that:

> "Those consequences need not be foreseeable with absolute certainty; experience shows this to be unattainable ... whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".[25]

For the purposes of this Chapter it is not necessary to dwell any further on this issue. It is clear that Part 7 of the Proceeds of Crime Act 2002 is compliant with the principle of legality. Clearly legislation is sufficiently grounded in law to satisfy the first element of the principle. Equally, Part 7 of the Act is clearly accessible to the general public and of sufficient certainty to satisfy the third element of the principle as considered in the *Sunday Times case*. Clearly then, thus far Part 7 of the PCA 2002 is consistent with the permitted interferences to private life under Article 8(2). Moreover, it is clear from Strasbourg jurisprudence that delegated legislation, such as the Money Laundering Regulations 2003, and also provisions of the common law, such as the *Tournier* qualifications are sufficient to constitute a legal basis for any restrictions on Convention rights.[26] Furthermore, in both cases of delegated legislation and provisions of the common law which require the disclosure of confidential financial information, it is clear that the second and third requirements of the principle of legality are met also. It is also worth pointing out that the accessibility requirements are satisfied even where an individual affected by the provision requires legal consultation.[27]

---

[25] *Ibid*, at para. 49.
[26] See *Barthold* v. *Germany* (1985) 7 EHRR 383 in respect of delegated legislation and *Sunday Times* v. *United Kingdom* (1979-80) 2 EHRR 245 in respect of the common law.
[27] *Sunday Times* v. *United Kingdom* (1979-80) 2 EHRR 245.

Legitimate aim

The next issue for consideration then is whether any interference with Convention rights was made with a legitimate aim. This is again a fairly straightforward issue for the purposes of this Chapter. In the context of Article 8(2), there are only six legitimate aims. As previously noted, this list is exhaustive and should the offending authority be unable to establish that the interference was made in pursuance of one of the stated aims, the interference will constitute a breach of the individual's Convention right. The only legitimate aims may be listed thus:

- National security;
- Public safety;
- Economic well-being of the country;
- Prevention of disorder or crime;
- Protection of health or morals; and
- The protection of the rights and freedoms of others.

The obvious consequence of this exhaustive list is that if the Government is unable to establish that the interference complained of was in the pursuit of one of the six listed aims, then the interference shall not be legitimate, and there will be a breach of the claimant's Convention rights. Nevertheless, these legitimate aims are drafted in broad terms, and it is clear that the various encroachments into banking confidentiality whether through legislative means or through the common law, would succeed in falling within the ambit of one of the legitimate aims under Article 8(2). Certainly, the fact that Part 7 of the Proceeds of Crime Act 2002 is in pursuit of a legitimate aim cannot be disputed: Without any controversy it may be stated that the fight against money laundering would certainly fall under both the legitimate aims of protecting the economic well-being of the country and obviously the prevention of crime.

Necessary in a democratic society

Precisely what is required by the inclusion of the phrase 'necessary in a democratic society' is an issue which the European Court of Human Rights has considered on numerous occasions. As such, it is now a fairly clear concept with a settled meaning. A recent restatement of the requirements may be found in the judgment in the case of *Chassagnou and others* v. *France*[28] where the Court stated that:

> "The Court reiterates that in assessing the necessity of a given measure a number of principles must be observed. The term "necessary" does not have the flexibility of such expressions as "useful" or "desirable". In addition, pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Lastly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued".[29]

The approach of the Court, as enunciated above, reveals certain key elements which must be established if the particular interference is to be deemed necessary in a democratic society. The first principle is that the use of the word 'necessary' is both deliberate and important indicating as it does, that it is not synonymous with desirable or useful, and that the justification or need for the interference must go beyond what is merely beneficial. As has been noted by the Court, the use of the adjective 'necessary' requires the establishment of a pressing social need.[30] Moreover, the need for any interference with the Article 8(1) Convention right to be necessary in a democratic society also introduces the principle of proportionality into the

[28] App. Nos. 25088/94. 28331/95 and 28443/95, judgment of April 29, 1999.
[29] *Ibid*, at para. 112.
[30] Rekvenyi v. *Hungary*, App. No. 25390/94, judgment of May 20, 1999 at para. 42.

assessment of the interference. As illustrated by the approach of the Court as noted above, proportionality is a key mechanism employed to ensure that democracy, in the sense of pluralism, tolerance and broadmindedness, is upheld and that any permitted interference with a Convention right is justified.

Proportionality

It would appear from the above discussion then that the key issue with regard the compatibility of the various encroachments into banking confidentiality with the HRA 1998 is the issue of proportionality. Even where the interference with Article 8 rights satisfies all of the criteria considered above, if the interference is deeded to be lacking in proportionality, the interference shall be unlawful, i.e. contrary to Article 8(1) and *not* falling within Article 8(2).[31] The issue of proportionality then is a key principle within the Human Rights Act 1998, both in a general sense and also with specific regard to the content of this Chapter. It is then, beneficial to consider this fundamental principle in detail.

If one adopts the stance that inherent within the entire Convention is the idea of balancing conflicting aims and interests, and indeed conflicting rights, it is clear that the principle of proportionality is at the centre of the quest for this balance. In *Brown* v *Stott*, Lord Steyn commented:

> "... a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights." [32]

[31] It would be beyond the scope of the thesis to offer a full analysis of the basis of the principle of proportionality. Interestingly, the principle is pivotal to the approach of the European Court of Human Rights, this despite the term not appearing in the Convention itself.
[32] [2001] 2 W.L.R 817.

Certainly then, the doctrine of proportionality is central to the notion of achieving a 'fair balance' between the interests of the community and the interests of the individual which is, it may be suggested, a theme which prevails throughout the whole of the Convention. It is troublesome therefore to realise that the principle of proportionality does not lend itself well to any great definitional certainty. As Sydney Kentridge Q.C. points out in a recent paper, the most difficult challenge facing the judiciary following the introduction of the Human Rights Act 1998 will be to develop an effective principle of proportionality.[33]

This is undoubtedly accurate; whilst the English judiciary has had experienced this principle through the application of disputes concerning European Community law, and in other more limited circumstances,[34] it would perhaps not be unfair to suggest that to the mainstay of the judiciary, the principle is still a dangerous and foreign concept.[35] This is troublesome for as Singh has stated, "proportionality provides the link between declaring rights as aspirations and making them effective in reality".[36] Under the Human Rights Act however, and specifically section 2, which compels the domestic judiciary to consider the jurisprudence of the European Court of Human Rights, they will no longer be able to avoid the concept.[37]

Given the importance of proportionality then, it is beneficial to analyse the Strasbourg concept of proportionality before considering how the domestic courts have interpreted the principle. Only after such investigations have been completed will it be possible to consider whether the money laundering regime within the United Kingdom is compatible with Article 8, and the Human Rights Act 1998.

---

[33] 'The Incorporation of the European Convention on Human Rights', in *Constitutional Reform in the United Kingdom*, Oxford: Hart Publishing 1998, at 70.

[34] Generally through the application of the Wednesbury principle, such as the implicit use of the 'least restrictive means' test as evident in *Hall and Company Ltd. v. Shoreham-by-Sea U.D.C.* [1964] 1 W.L.R. 240.

[35] As suggested by Millett J. in *Allied Dunbar (Frank Weisinger) Ltd. v. Frank Weisinger*, November 17, 1987 *The Times Law Reports* at 44. The contention is ultimately rejected by Jowell and Lester in 'Proportionality: Neither Novel nor Dangerous', in Jowell and Oliver (eds.) *New Directions in Judicial Review*, London: Stevens & Sons, 1988, at 51.

[36] 'The Future of Human Rights in the United Kingdom', Oxford: Hart Publishing 1997, at 43.

[37] It may be suggested that the cynicism of Wong in 'Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality', [2000] P.L. 92, at pages 95-96, on this point has been proven to be unfounded.

Proportionality in Strasbourg

Although the term 'proportionality' does not appear anywhere within the text of the Convention, it has long been a key principle in the jurisprudence of the European Court of Human Rights.[38] In *Handyside* v *United Kingdom* the Court suggested that democratic society was based upon ideals of tolerance, pluralism and broad-mindedness. On such a footing, any interference cannot be said to be 'necessary in a democratic society' unless it was "proportionate to the legitimate aim pursued".[39] As such, the principle of proportionality was firmly established in the context of Articles 8-11.[40]

It may be contended that, in terms of defining the principle of proportionality, the most purposeful approach is to draw certain key sub-principles which play important roles within any review of proportionality. Those sub-principles may be listed thus:

- Whether the interference goes beyond the minimum necessary to achieve the stated objective, i.e. least restrictive means issues;
- Whether safeguards against abuse exist;
- Whether 'relevant and sufficient' reasons have been advanced to support the measure;
- Whether the interference destroys the essence of the Convention right concerned;
- Whether the interference is rationally connected to the legitimate aim pursued.

That then is the Strasbourg concept of proportionality. It is useful however to consider the domestic courts understanding, and indeed application, of the principle of proportionality. It may be emphasised, even at this point

[38] See Starmer, *European Human Rights Law*, Legal Action Group 1999, at para. 4.37, who suggests that proportionality is the "defining characteristic of the Strasbourg approach to the protection of human rights".
[39] (1979-80) 1 EHRR 737, at para. 49.
[40] These Convention rights all follow the approach previously considered in the context of Art. 8.

however that the European Court of Human Rights' jurisprudence on the principle of proportionality must be taken into account under s. 2(1) of the Human Rights Act 1998.[41]

Proportionality in England and Wales

Although still in its infancy, the domestic case law on the principle of proportionality is substantial. Perhaps the leading case is that of *R. (Daly)* v. *The Secretary State for the Home Department*,[42] a decision which draws substantially from the earlier decision of the Privy Council in *Brown* v. *Stott*.[43] In *Daly* the applicant challenged the blanket policy regarding the searching of prisoners' cells in prison introduced by the Secretary of State for the Home Department. In finding that the blanket nature of the prohibition offending against the principle of proportionality, Lord Steyn is keen to distinguish between proportionality under the Convention and the earlier common law position. He states that:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v. Ministry of Defence, Ex parte Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights".[44]

This explicit appreciation of the distinctions between the two forms of judicial review is useful, and not to be underestimated. By demarcating fully between the doctrine of proportionality and the previous common law

[41] Of course, it hardly needs stating that decisions of the ECtHR are not binding on any domestic court. That said section 2(1) does create a strong presumption that Strasbourg decisions on point will be followed by domestic courts.
[42] [2001] 2 W.L.R. 1622.
[43] *Brown v Stott (Procurator Fiscal, Dunfermline) and another* [2001] 2 All ER 97.
[44] *Ibid*, at para. 27.

position the House of Lords has strengthened the protection afforded to individual human rights. It has ensured that the test of proportionality is not misconstrued or diluted by some reference to the decision being within reasonable perimeters, and that public authorities must comply with a much stricter, intensive review. Lord Steyn states simply that "the intensity of the review is somewhat greater under the proportionality approach"[45] and that:

> "the intensity of the review...is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued".[46]

The House of Lords ultimately adopted the three stage test as favoured by the Privy Council in *De Freitas*[47]:

(1) is the legislative objective is sufficiently important to justify limiting a fundamental right;
(2) are the measures designed to meet the legislative objective rationally connected to it;
(3) are the means used to impair the right or freedom no more than is necessary to accomplish the objective.[48]

It is clear that in approving such a formulation the House of Lords are drawing from a wide range of sources for guidance as to the proper boundaries of the principle. Again, it is clear that the court favours the 'least restrictive alternative' approach in a proportionality-based test, which has been discussed previously. It is notable that the court also seek to rely on the 'sufficiently important' aspect of the test, as practiced widely in both

---

[45] *Ibid.*
[46] *Ibid.*
[47] *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and others* [1999] A.C. 69.
[48] This test was also heavily influential on the approach adopted by the House of Lords in *R v. A (No. 2)* [2001] 2 W.L.R. 1546, and has recently been followed by the House of Lords in *R. (on the application of Pretty) v. D.P.P.* [2001] 3 W.L.R. 1598; *R. v. Rezvi* [2002] 2 W.L.R. 235.

ECHR and Canadian jurisprudence. Indeed, given the importance of this aspect under Convention jurisprudence, where it is regularly emphasized that only a pressing social need can ever justify, or possibly justify, an interference with a fundamental right, it is surely correct that any test of proportionality employed under the Human Rights Act 1998 refers to such a fundamental requirement. The remaining aspect of the test formulated in *De Freitas*, and supported by their Lordships in the present case is that of 'suitability', which is again prevalent throughout Canadian jurisprudence, and interestingly, also in the law of the European Community. It may be suggested that, in constructing an effective principle of proportionality under the Human Rights Act the judiciary would prefer not to start with a clean slate, but would rather draw from the jurisdictions in which, they have had previous experience in grappling with the proportionality principle. Hence, there is a definite reliance upon Community law and Convention jurisprudence, and to a lesser degree, the jurisprudence under the Canadian Charter of Rights.

Daly therefore establishes that public authorities must now show that the 'scales of proportionality'[49] have been balanced properly (as the Home Secretary could not in *Daly*) in that:

1. the legislative objective was sufficiently important to justify limiting a fundamental right;
2. the measures designed to meet the legislative objective are rationally connected to it; and
3. the means used to impair the fundamental right are no more than is absolutely necessary to achieve the objective.

It is interesting to note the approach of Pattenden on the issue of proportionality. Pattenden, in her valuable monograph *The Law of Professional-Client Confidentiality* contends that the following issues will all

[49] See the language of Walker L.J., in *LRT and another v. Mayor of London and another*, decision of 24 August 2001, at para. 50, unreported, text available on LEXIS.

be of interest to a domestic court engaging in questions of proportionality under the Human Rights Act 1998:

- whether the interference goes beyond the minimum necessary to achieve the stated objective;
- availability of the information from another source;
- whether the decision-making process is procedurally unfair;
- safeguards against abuse of power to compel disclosure and misuse of information that has been compelled;
- availability of a remedy if professional confidentiality is unjustifiably infringed;
- reason for the interference – courts are more deferential to claims of interference on grounds of national security than the pursuit of some other public interests, for instance tax collection;
- effect, if any, on freedom of expression, particularly media freedom;
- extent to which the information is disseminated;
- measures that interfere with confidential communications with lawyers require particularly compelling justification;
- the financial burden of disclosure on the professional;
- sensitivity of the information and the impact of its disclosure on the client.[50]

Part 7 of the PCA 2002 and proportionality

The issue then is precisely where does the previous discussion leave the anti-money laundering regime within the United Kingdom? Given the infancy of the provisions and the understandable dearth of judicial consideration of the issues this is not an easy question to answer. This is certainly unsatisfactory for the question is an important one and one which warrants both judicial consideration and indeed further academic analysis.

[50] Oxford: OUP (2003), at para. 3.21.

Nevertheless, even at this (early) stage, it is apparent that there is a question mark over whether the Part 7 of the PCA 2002 is proportionate. Essentially the difficulty is this: In situations where there clearly is substantial money laundering activities being carried out, it is clear that any infringement of the privacy related rights under Article 8(1) would constitute a proportionate response. Thus the disclosure of confidential banking information where there is an objective basis for having suspicions of money laundering activities would, it may be suggested, not offend any principle of proportionality. Thus in such a situation there would be no conflict between the Proceeds of Crime Act 2002 and the relevant provisions of the Human Rights Act 1998.

The key difficulty is where, for example, those Article 8 rights are infringed in respect of entirely subjective suspicions of 'money laundering'. It will be remembered from Chapter Four, that the PCA 2002 favoured a 'leave no stone unturned' approach to the disclosure of suspicions of money laundering. Consequently, although considered as a possible amendment, as a matter of law, there need be no objective basis for suspicions honestly held. The trigger for disclosures under Part 7 of the Act is suspicion, and not suspicion on reasonable grounds. This approach may leave the relevant provisions of the PCA 2002 open to challenge on human rights grounds. Whilst the legitimacy of the aims pursued cannot be questioned, the approach adopted in pursuit of those aims may contravene the principle of proportionality. This, it may be contended is a consequence of the blanket approach adopted by the disclosure provisions of the Proceeds of Crime Act 2002 and there is a substantial body of Strasbourg authorities where such blanket provisions have been deemed to contravene the European Convention.[51] The difficulty here from a proportionality standpoint, is whether the interference goes beyond what is necessary to achieve the legitimate aim pursued. With the blanket approach of reporting enacted through the Proceeds of Crime Act 2002 it may be queried whether the interference does go beyond the minimum necessary to combat money

[51] See for example, the decision of the Court in *Campbell* v. *United Kingdom* (1993) 15 EHRR 137. The key issue is whether the legitimate aim can be fulfilled in a less restrictive manner.

laundering. The difficulty here is that there is an argument for suggesting that the minimum necessary to pursue the legitimate aim would be to compel disclosure of suspicions held on reasonable grounds, i.e. where there is an objective basis for the formation of suspicion regarding a particular customer/transaction.

It is of course ultimately an issue for the judiciary to resolve, but it may be contended that there is a certain tension here between the duty to report within Part 7 of the PCA 2002 and the principle of proportionality.

There are however, remaining proportionality related difficulties flowing from the approach adopted by the Proceeds of Crime Act 2002. Given the broad definition of money laundering, and indeed criminal property, certain matters whilst not necessarily trivial, fall under the ambit of Part 7 of the PCA 2002. Whether the compelled disclosure of confidential financial information can be considered proportionate in such situations is, it may be contended, doubtful. Certainly, the decision by the Government to omit any financial threshold from the disclosure provisions of the Proceeds of Crime Act may cause difficulty under the proportionality inquiry as considered above.

Take for example, the following hypothetical situation. A, a lady who works part time and whom, two years ago took on extra shifts here and there in order to bolster her income, is going through a divorce. Her husband, out of anger at the collapse of the marriage informs his lawyer of this extra income, some £2000 which was taken on a cash in hand basis and not taxed at all. The lawyer following the strict letter of the law within Part 7, passes this information on to the NCIS in a disclosure. NCIS follow up the report and compel disclosure of A's bank records for the relevant time period. The bank, following the letter of law, disclose the necessary financial information.

Certainly in the above situation A is guilty of a money laundering offence under the PCA 2002. The broad definition of criminal property together with the width of the substantive offences and the low financial threshold of £250

as introduced into the substantive offences under the SOCPA 2005[52] are clear on that point. Equally clear is that Article 8(1) would be engaged: As previously discussed the disclosing of confidential information falls within the right to respect for privacy. Moreover, there would be no doubt over the legitimacy of the aim pursued, nor over the legality of the disclosure. The pertinent question however, is whether the disclosure and thus the interference with A's right to privacy would be proportionate?

Again there is no authority, direct or otherwise on point, but it may be cautiously suggested that the interference may not be proportionate, and would therefore contravene the Human Rights Act 1998. In reality the offence committed was one of tax evasion, which ought to be afforded less weight than a money laundering offence *per se*. Moreover, the amount concerned was small, being only £2000.[53] If one views the principle of proportionality as being essentially the mechanism through which competing interests are balanced, it is clear that there is difficulty in deeming the disclosure of confidential information to be proportionate to the need of claiming unpaid income tax on £2000. This however, does ultimately depend on the weight to which you attach the various interests, and thus proportionality is inherently flexible and nebulous. As a consequence it would be unwise to attempt to predetermine the approach of the judiciary on this issue. All that can be suggested with any certainty at this point is that interesting, and indeed difficult times lie ahead for the judiciary who will, it seems fairly likely, have to answer these questions and balance the competing interests in the near future.

It was noted in Chapter Four that the Government had developed a 'leave no stone unturned' approach to the disclosure of suspicions of money laundering. Aside from the difficulties this approach causes which have already been considered, it may be suggested that the approach also leaves the door open for successful claims grounded in the Human Rights Act 1998.

---

[52] s. 103. See discussion of this at page 122 *et seq*.

[53] Note, small, but still above the threshold amount for the substantive money laundering offences, as inserted by the SOCPA 2005, s. 103.

By rejecting any financial threshold greater than £250 and insisting, as a matter of law, that every suspicion, once formed, must be disclosed to the NCIS, there may be situations where this infringement of Article 8(1) may not be proportionate.

Incompatibility

The question remains therefore, whether section 330 of the Proceeds of Crime Act can be interpreted and given effect in a manner compatible with Article 8 of the European Convention. The above discussion has established that banking confidentiality may fall within Article 8(1), although there is no Strasbourg authority directly supportive of this. Furthermore, it has established that whilst the reasons for infringing this Article 8(1) right are legitimate under Article 8(2), the broad application and impact of section 330 in practice may cause difficulties in satisfying the requirement of proportionality. In as much it is clear that there is no direct textual incompatibility between Article 8 and section 330. This, it may be suggested, is no great surprise, as direct textual incompatibility would generally only be evident where the relevant Convention right is absolute, i.e. unqualified. As Article 8 is a qualified right, the absence of direct textual incompatibility is unsurprising. As Grosz, Beatson and Duffy have noted:

> "Where the Convention right in question is qualified (for example, Article 6's exceptions to the right to a public hearing and interference with the right to privacy authorised by Article 8(2)), a comparison of the texts is less likely to indicate contradiction. *In such cases the contradiction may arise from the operation of the U.K. statute*"[54]

If one considers the operation of section 330 it is, as considered above, entirely possible that the provision may, in certain circumstances offend the principle of proportionality, as required under Article 8(2). The question

[54] *Human Rights: The 1998 Act and the European Convention*, London: Sweet & Maxwell (2000), at para. 3.18. (emphasis added)

therefore is precisely what interpretation will the courts give to section 330, or more precisely, can the judiciary when interpreting this provision, do so in a manner which is compatible with the rights protected under Article 8? Clearly, section 3(1) places the courts under an obligation to strive to find an interpretation which is consistent with both the language used within the legislative provision and also with the European Convention.

In the words of the Lord Chancellor:

> "We want the courts to strive to find an interpretation of the legislation which is consistent with Convention rights as far as the language of the legislation allows and only in the last resort to conclude that the legislation is simply incompatible with them".[55]

The question is therefore, precisely how far the courts are willing to move beyond the current principles of statutory interpretation in order to ensure legislative compatibility with the Human Rights Act. In this regard, the White Paper, *Rights Brought Home: The Human Rights Bill* is instructive. It suggested that the new rule of interpretation succeeds in going:

> "...far beyond the present rule which enables the court to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless legislation itself is so clearly incompatible with the Convention that it is impossible to do so".[56]

Thus it follows that the court may search for 'possible' meanings in order to ensure compatibility, provided that the meaning of the provision is not strained to produce "implausible or incredible"[57] meanings. This of course raises, essentially, more questions than it answers. Ultimately, it waits to be seen quite what the approach of the court, when faced with legislation which

---

[55] HL Debs., col. 535, 18 November 1997.
[56] Cmnd. 3782, (1997), at para. 2.7.
[57] In the words of the Home Secretary, HC Debs., cols. 421-422, 3 June 1998.

may be incompatible with the Convention due to the operation of the statute, will be to the interpretation of that statute. If one again uses the example of s. 330 of the Proceeds of Crime Act, if the court determines that the disclosure of confidential information on a mere suspicion of money laundering does offend the principle of proportionality, which as has been argued is a distinct possibility given the lack of objective basis for making such a disclosure coupled with the omission from the provision of any financial threshold, it is uncertain to what lengths the court will go to (or more accurately, are legally permitted to go to) to ensure compatibility.

One possibility is that the courts may interpret section 330 as requiring suspicion on reasonable grounds, as is the accepted norm within criminal statutes. Such an interpretation, it may be suggested is less likely to offend the principle of proportionality and would in the author's opinion represent a better balance between the importance of banking confidentiality as weighted against the need for the infringement in the first place, i.e. to detect money laundering and money launderers. Nevertheless, whether the court would feel confident in interpreting the provision in this manner is a valid question. This is particularly so if one remembers that such an amendment was tabled during the passage of the Proceeds of Crime Bill and was ultimately rejected.[58] If one assumes then, that the intention of parliament here was to compel disclosure even where the suspicion has no objective basis, then surely even the new interpretive rule cannot read the provision with an objective requirement added. Surely this must be the case notwithstanding the statement of compatibility given under section 19 of the Human Rights Act in respect of the provisions of the Proceeds of Crime Bill.

The Impact of Incompatibility with the Human Rights Act 1998

If one accepts the premise that there is at least the possibility of Part 7 PCA disclosures being incompatible with the Convention rights protected under

---

[58] See the discussion in Chapter Four, especially pages 147 to 154. The question of whether such a factor would be relevant from a legal standpoint is an interesting one, although a consideration of this would be beyond the constraints of this thesis.

the Human Rights Act 1998, most likely due to a lack of proportionality under Article 8(2) it follows that the court may issue a declaration of incompatibility.

It must be realised that the courts, even when faced with legislation which cannot be interpreted consistently with the Human Rights Act have no ability to strike out the offending legislation. The only outcome in such situations is to issue a declaration of incompatibility under section 4 of the HRA 1998. Moreover, by virtue of section 4(5), this power is only exercisable by certain courts, namely, the House of Lords, the Privy Council, the Court of Appeal and the High Court. The effect of any declaration of incompatibility is made clear through section 4(6) which states that a declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given". Furthermore, it is not binding on the parties to the proceedings in which the declaration was made. Effectively then, as a matter of law, a declaration of incompatibility has no impact whatsoever. Thus the government is not compelled by the declaration of incompatibility to amend the legislation so as to remove the incompatibility. The basis for this is obvious. If the declaration did invalidate the relevant provisions of the offending legislation, this would clearly offend against the principle of parliamentary sovereignty. As the Lord Chancellor noted at the time:

> "...we expect that the Government and Parliament will in all cases almost certainly be prompted to change the law following a declaration. However, we think it is preferable, in order to underpin parliamentary sovereignty, to leave this on a discretionary basis".[59]

Thus if a court determines that a piece of legislation is incompatible with the Human Rights Act, they may[60] make a declaration of that incompatibility, and if made, this effectively serves as a notice to the Government that the piece of legislation in respect of which the declaration was made needs revisiting

[59] Hansard, H.L. Debs., November 27, 1997, col. 1139.
[60] Note the use within the Act of the term 'may' as opposed to 'must'. The courts therefore have the discretion over whether or not to make a declaration of incompatibility.

and indeed amending in order for it to be compatible with the Human Rights Act.

Thus if a court determines that the disclosure provisions of the Proceeds of Crime Act 2002 are incompatible with the right to privacy under Article 8 due to a lack of proportionality the court may issue a declaration of incompatibility. The question then would be whether the Government would seek to amend Part 7 of the PCA in order to comply with the Human Rights Act 1998. This again, is a troublesome question to answer. In Chapter Four the importance of the PCA 2002 to the Government's anti-money laundering regime was considered. It will be recalled that the approach of the Act on issues of financial thresholds and the broad definitions of the substantive offences were considered during the passage of the Bill through Parliament, and ultimately any amendments limiting the scope of the Act, or watering down the provisions was rejected. It is unlikely then, it may be argued that the Government would be quick to alter Part 7 of the Proceeds of Crime Act following any declaration of incompatibility. This is of course, notwithstanding the possible consequences of this reticence at a supranational level, i.e., in the European Court of Human Rights.

THE HUMAN RIGHTS ACT 1998 AND PUBLIC AUTHORITIES

It will be recalled from the initial discussion of the Human Rights Act 1998 that the interpretative obligation under which the judiciary is bound, is not the sole mechanism through which the Human Rights Act operates. The Act imposes obligations upon any public authorities to comply with the provisions of the Act and is a key mechanism of the Human Rights Act 1998. The issue of public authorities is expanded through section 6. Under section 6(1) it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The key issue then is which bodies constitute a public authority for the purposes of the Human Rights Act? Whilst no exhaustive list is proffered, section 6(3) states as follows:

> "In this section 'public authority' includes:
>
> (a) a court or tribunal, and
>
> (b) any person of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

This then is clearly a broad, and indeed open-ended definition of a public authority.[61] Equally clear is that such broad application was intended by Parliament. During the passage of the Bill through Parliament, the Lord Chancellor stated that:

> "In developing our proposals in Clause 6 we have opted for a wide-ranging definition of public authority. We have created a correspondingly wide liability. That is because we want to provide as much protection as possible for the rights of the individual against misuse of power by the state..."[62]

This definition of public authority leads to the need to distinguish between three separate categories under section 6. The first category is those bodies which may be deemed 'obvious public authorities', where all of the functions of the authority are public in nature. At the opposite end of this public authority spectrum are bodies which fulfil no functions of a public nature. Clearly the obligations under section 6 are of no application to such bodies. The middle ground then is taken up by what are generally referred to as 'hybrid public authorities'[63], which are bodies which fulfil functions of both a private and a public nature.

When considering the above it is immediately clear that certain bodies relevant to the purposes of this Chapter are undoubtedly to be regarded as

---

[61] The Lord Chancellor described the approach as constituting "a wide interpretation", *Hansard*, H.L. Vol. 584, col. 1262.

[62] *Hansard*, H.L., November 24, 1997, col.808.

[63] Although note the criticism of this terminology by the Joint Select Committee on Human Rights who favour the term 'functional public authority', *The Meaning of Public Authority under the Human Rights Act*, Seventh Report of Session 2003-2004, HL Paper 39, at 10.

public authorities within the meaning of 'obvious public authorities'.[64] The most pertinent public authorities in this sphere of banking regulation would be the National Criminal Intelligence Service and the Financial Services Authority. On this basis it would appear that, *prima facie,* both the NCIS and the FSA need to act in a manner compatible with the Human Rights Act 1998. Thus, when conducting investigations into suspicious activity reports under the Proceeds of Crime Act 2002 (in the case of the NCIS) or when compelling the disclosure of documentation under, for example, section 175 of the FSMA 2000 (in the case of the FSA), both the NCIS and the FSA need to act in a manner compatible with the Human Rights Act 1998. Thus, in relation to banking confidentiality, these public authorities are required to act consistently with the rights protected under Article 8 of the European Convention.

The difficulty here however, is the caveat introduced under section 6(2) of the Human Rights Act which states that the obligation under section 6 is inapplicable if the public authority could not have acted in any other way by virtue of provisions of primary legislation. Thus, any prospect of the Human Rights Act protecting the concept of banking confidentiality through the status of the NCIS and the FSA as public authorities is, it would appear weak.

The difficulty with this from a banking confidentiality standpoint is that, as has previously been noted, the more serious inroads into banking confidentiality have been through statutory interventions. Thus, even where powers of compelling the disclosure of confidential information are employed by a public authority in such circumstances, there will be no breach of the Human Rights Act by the particular public authority. The logic behind this caveat is clear however: Where a public authority is compelled to act in a certain manner by provisions of primary legislation, the proper cause of action would be against the particular example of legislation which raises human rights concerns.

---

64 This notwithstanding the rather narrow view of 'pure' public authorities adopted by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v. *Wallbank* [2003] UKHL 37.

One interesting argument would be whether, a bank in disclosing suspicions of money laundering to the authorities, would fall within the definition of a public authority for the purposes of the Human Rights Act 1998. Whilst this may initially appear to be fanciful, the recent investigation into the definition of public authorities by the Joint Select Committee on Human Rights would certainly appear to leave the issue open. Clearly the bank cannot be a pure public authority, but it may, conceivably fall within the broader definition of a functional public authority. In the leading case on the meaning of public authority under the Human Rights Act, the *Aston Cantlow* case[65], Lord Hope stated that the secondary category of hybrid, or functional public authorities "has a much wider reach, and is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is.....a "hybrid" public authority".[66] Essentially the approach favoured by the House of Lords in *Aston Cantlow* was requiring an investigation into the character of the function being exercised, rather than concentrating upon the nature and character of the institution concerned. If one is to apply such a sentiment to the role of professionals, and indeed bankers, under the anti-money laundering regime within the United Kingdom, it may be argued that the *function* being performed is essentially public in nature, as they are, as had previously been noted acting as policemen. Certainly, if one analyses the character of the disclosing bank in a money laundering investigation, it is readily apparent that the bank would not be a functional public authority. If however, one accepts the approach of the House of Lords in the *Aston Cantlow* case, the issue is rather more uncertain.

---

[65] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v. *Wallbank* [2003] UKHL 37.
[66] *Ibid*, at para. 41. It is interesting to note that previous judicial rejection for a functionality based approach in determining whether a body is a public authority has been disregarded by the House of Lords in this case. See for example one of the earliest cases on point, *Poplar Housing and Regeneration Community Association* v. *Donoghue* [2001] EWCA Civ. 595. Indeed it would appear that these earlier cases which give minimal importance to issues of function are contrary to the legislative intent behind the Act itself. See for example the comments of Lord Williams, who at the Second Reading stage of the Human Rights Bill stated that, "[T]he point is not the label or description; it is the function. I hope I have made that plain." (*Hnasard*, H.L., November 3, 1997, Cols. 1309-1310).

The scope of this category of public authority has been considered by the Joint Select Committee on Human Rights, and it is revealing to quote at length from the recent Report, '*The Meaning of Public Authority under the Human Rights Act*':

> "The consequence is that, as the law presently stands, a private body is likely to be held to be a public authority performing public functions (a "functional" public authority) under section 6(3)(b) if:
>
> - its structures and work are closely linked with the delegating or contracting out State body; or
> - it is exercising powers of a public nature directly assigned to it by statute; or
> - it is exercising coercive powers devolved from the State.
>
> Beyond these categories, whether the courts will find that a body falls within section 6(3)(b) remains extremely uncertain. Factors such as:
>
> - the fact of delegation from a State body,
> - the fact of supervision by a State regulatory body,
> - public funding,
> - the public interest in the functions being performed, or
> - motivation of serving the public interest, rather than profit,
>
> are not in themselves likely to establish public authority status, though they may have some cumulative effect, indicating that the function performed has a "public flavour"".[67]

If one again applies this analysis to a disclosing bank under the anti-money laundering regime, it is clear that the bank is exercising powers of a public nature which have been assigned to it by statute. This would, arguably, appear to indicate the status of the bank as a functional public authority. Moreover, this conclusion is reinforced through the presence of other factors which are on the second list detailed by the Committee. Clearly banks are

---

[67] Seventh Report of Session 2003-04, HL Paper 39.

supervised by a State regulatory body, namely the Financial Services Authority, and there is a great public interest behind their function within the domestic anti-money laundering regime. Quite whether the courts would be receptive to such arguments is at best, uncertain, and more probably it may be contended, improbable. This is particularly likely if one considers that the Joint Select Committee has reported that the lower courts in particular have not been overly receptive to the decision of the House of Lords in the *Aston Cantor case*.[68] In any event, it is clear that, with regard to the banks role under the anti-money laundering regime, it is largely irrelevant whether the bank may have the status of a functional public authority. Clearly, the caveat contained within section 6(2) of the Human Rights Act, which has been discussed previously, would be of application, even if the bank was deemed to be a functional public body. Clearly, the bank in such situations are compelled to disclose confidential information through section 330 of the Proceeds of Crime Act. Consequently, the public authority acting under such compulsion is not liable under section 6 of the Human Rights Act.

The status of the courts as public authorities

One further issue of importance is the status of the courts as public authorities under the Human Rights Act 1998. This standing is made clear through section 6(3)(a) which states that the definition of public authority includes "a court or tribunal".[69] In essence the inclusion of courts and tribunals within the definition of public authority places the judiciary under an the general obligation under section 6, i.e., to act in a manner compatible with the Human Rights Act. The natural consequence of this is that the judiciary will be under an obligation to comply with the Human Rights Act even when hearing a dispute between two private parties. This much was recognised during the passage of the Human Rights Bill through Parliament.[70] The consequence of this is that the Act, although primarily

[68] *Ibid*, at para. 26 where the Committee reported that "the broad, functional approach to public authority responsibility under the Human Rights Act has not so far found favour in the lower courts".
[69] Furthermore s. 6(4) succeeds in including the House of Lords as a public authority when sitting in a judicial capacity.
[70] See the comments of the Lord Chancellor on this point, *Hansard*, H.L. Vol. 583, November 24, 1997, Col. 783.

aimed at protecting individuals from interferences by the State (i.e. vertical effect), has, albeit impliedly introduced a form of direct horizontal effect. Perhaps unsurprisingly, the introduction of horizontal effect has been the source of considerable academic debate, and indeed disagreement.[71] It is clear however, if one considers the nature of this horizontal effect, that the impact of this effect is rather limited. Clearly the status of the court as a public authority does not itself give rise to any actionable right enforceable by a private body. Thus it follows that whilst the Human Rights Act may be of application in a dispute between two private bodies or individuals, it will only come into play where the claimant has a pre-existing cause of action. Thus Marcus is correct to suggest that the indirect horizontal effect of the Act is of only minimal benefit in practise as "...the jurisdiction of the court will depend on there being some other cause of action upon which the court's role as a public authority can bite".[72] It is one such a basis that Hunt concludes that:

> "Law which already exists and governs private relationships must be interpreted, applied and if necessary developed so as to achieve compatibility with the Convention. But where no cause of action exists, and there is therefore no law to apply, the courts cannot invent new causes of action, as that would be to embrace full horizontality which has clearly been precluded by Parliament".[73]

It may be suggested that this is the position of the majority on the extent of horizontal effect under the Human Rights Act 1998. One this basis, the status of the courts as public authorities is unlikely to offer any great support to banking confidentiality. Whilst in principle the courts would have the ability to amend the common law position on the matter, i.e., the *Tournier* qualifications, on human rights grounds, and indeed would in such a scenario

---

[71] It would be beyond the scope of this Chapter to consider the various merits of these debates, but the reader may be directed to the following: Hunt, 'The Horizontal Effect of the Human Rights Act', [1998] *Public Law* 423; Wade, 'Horizons of Horizontality', [2000] 116 *LQR* 217; Oliver, 'The Human Rights Act and the public law / private law divide', [2000] *EHRLR* 343; Raphael, 'The problem of horizontal effect', [2000] *EHRLR* 393.

[72] Marcus, 'What is Public Power: The Courts' Approach to the Public Authority Definition under the Human Rights Act', in Jowell and Cooper, (eds), *Delivering Rights: How the Human Rights Act is Working,* Oxford: Hart Publishing, (2003).

[73] Hunt [1998] P.L. 423, at 442.

be under an obligation to develop the common law in a manner consistent with the Human Rights Act, in practice it is unlikely that the court will find themselves in such a position. Given the expansive nature of the *Tournier* exceptions as understood in the present day, it may be suggested that the situations where an applicant will have a pre-existing cause of action are minimal.

There is however a more radical possibility which is put forward by Beyleveld and Pattinson in their article, 'Horizontal applicability and Horizontal Effect'.[74] The article seeks to critically appraise the standing of the horizontality debate before putting forward an interesting thesis which contends that the Human Rights Act, on its proper construction compels the judiciary to give it horizontal effect. The thesis proposed by the authors, in their own terms is as follows:

> "Our argument is grounded in the contention that the rights of the Convention, understood conceptually, apply horizontally as well as vertically and that, in consequence, to give unqualified effect to them is to give horizontal effect to them".[75]

The argument relies, primarily upon a broad interpretation of section 6 of the Act and a consideration of Article 17 of the Convention.[76] This is certainly a controversial approach to the limits of horizontal effect under the Human Rights Act. Nevertheless, the authors suggest that:

> "the section 6(1) obligation can be read as requiring the courts to render the law compatible with the Convention rights without ignoring the focus on "public authorities". The Act is merely more specific with regard to actions and remedies available against public authorities. [footnote omitted] If it is interpreted in this way, judges are under a duty to act

[74] 118 LQR 623.
[75] *Ibid*, at 625.
[76] Article 17 reads as follows: "Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention".

compatibly with the Convention rights, but have greater discretion as to the means of complying with this obligation in cases not involving public authorities".[77]

This is certainly a bold proposition, and it may respectfully be submitted, not one which is likely to be met with great favour by the judiciary, particularly if one considers the rather limiting statements on these matters made by the Lord Chancellor during the passage of the Bill through Parliament.[78] Indeed, it is surely more likely that the courts, if faced with such an argument would follow the traditional scheme of the Human Rights Act, i.e., to bind public authorities only and provide for, primarily, vertical effect and not such a broad conception of horizontal effect.[79]

Nevertheless, Beyleveld and Pattinson make an interesting argument in favour of their interpretation of the Act. Moreover, such an interpretation could have interesting repercussions for banking confidentiality and specifically, the reinforcement thereof. It should be emphasized at this point, that the argument forwarded by Beyleveld and Pattinson gives horizontal effect to the Convention rights only where there is no incompatible legislation. Thus the impact of this thesis from the standpoint of banking confidentiality is confined to whether the common law provisions relating to banking confidentiality are consistent with the Human Rights Act.

Tournier and the Human Rights Act 1998

It will be recalled that the Court of Appeal in *Tournier*[80] laid down that a banker owed their customer a duty of confidentiality, stemming out of the contractual relationship between the two parties. Moreover, the Court emphasised that this duty was not absolute, and proceeded to consider the

---

[77] *Ibid*, at 636-7.
[78] *Hansard*, HL.L Vol. 583, Novermber 24, 1997, col 783. The authors are correct to point out certain inconsistencies however within the words of the Lord Chancellor.
[79] See for example, Phillipson, 'Judicial Reasoning In Breach Of Confidence Cases Under The Human Rights Act:: Not Taking Privacy Seriously', [2003 *EHRLR (Special Issue: privacy 2003)* 54.
[80] [1924] 1 KB 461

possible limits of this obligation by analyzing four discrete qualifications to the duty. Briefly re-stated these qualifications were, in the words of Bankes L.J.:

> "(a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer".[81]

It is clear that there are similarities here between the approach of the Court of Appeal in *Tournier* with the framework of Article 8. Both seek initially, to lay down a general obligation which is then immediately qualified by reference to situations where the general obligation is of no application. The issue of whether the *Tournier* position is consistent with the right to privacy as protected through Article 8 is a difficult issue to resolve with any great certainty. Certain preliminary points however, may be raised. There can be no human rights consideration of the first qualification by the Courts, due to the status of the court as a public authority. Any human rights based arguments against a piece of legislation clearly fall under the interpretative obligations detailed in section 3 of the Human Rights Act.

To what extent then are the remaining provisions of the common law governing banking confidentiality consistent with Article 8 of the Convention? The second qualification under *Tournier*, that is where there is a duty to the public to disclose, adopts a similar methodology to the approach of the European Court of Human Rights when applying Article 8(2). It is clear that both require a balancing act between the need to uphold banking confidentiality as weighed against the public interest in making the disclosure. With this in mind, it is useful to reconsider the decision in the case of *Pharaon and others* v. *Bank of Credit and Commerce International SA (in liquidation)*[82]. In *Pharaon*, Rattee J., held that the public interest

[81] *Ibid*, at 471-2.
[82] [1998] 4 All ER 455.

involved in disclosing confidential information held by a banker outweighed the public interest supporting confidentiality. He said that:

> "However, on balance, I am satisfied that the public interest in making the documents relating to the alleged fraud in the acquisition of CCAH shares by BCCI available in the US proceedings does outweigh the public interest in preserving confidentiality as to those documents, provided that disclosure goes no further than is reasonably necessary to achieve the purpose of that public interest in disclosure".[83]

It may be suggested that there is no apparent incompatibility between the approach of the Court in *Pharaon* with the Human Rights Act. The Court, as noted previously, in *Pharaon* was appreciative of the need to find the proper balance between disclosure and confidentiality. This is reflected through the emphasis of Rattee J., upon the need to restrict the disclosure to what was 'reasonably necessary' in the public interest. Provided that any subsequent court follows a similar approach when considering this qualification to *Tournier*, it is unlikely that there will be any incompatibility with the operation of the qualification and the Human Rights Act.

Perhaps the most problematic exception to banking confidentiality from a human rights standpoint is that of disclosure in the interests of the bank, where the customer has not consented to such disclosures. Perhaps the practice most susceptible to a human rights based challenge is where a bank discloses confidential financial information to other companies within their own group, particularly where that company is a non-banking subsidiary. Whilst banks often seek to justify this practice on grounds of self-protection against customer defaults, it is, at best unclear whether they could rely on this being a 'legitimate aim' under Article 8(2), and whether the practice is compatible or otherwise with the Human Rights Act.[84] It should be re-emphasised however, that unless the Courts are willing to adopt the

---

[83] *Ibid*, at 465.

[84] Although banks who subscribe to the Banking Code, pledge not to pass information on to other companies whether within their group or otherwise for marketing purposes, see *The Banking Code*, para. 11.1.

somewhat controversial form of horizontal effect forwarded by Beyleveld and Pattinson, this issue is unlikely to ever grace judicial consideration. Assuming a more conservative approach to horizontal effect is adopted, it is difficult to envisage a situation where a pre-existing cause of action would enable the matter to be litigated.

CONCLUSIONS

The relationship, or indeed possible relationship, between banking confidentiality and human rights law is certainly an unexplored and uncharted area of law. Whilst this Chapter seeks to commence such an analysis of the banker's duty of confidentiality it is clear that there are too many unknown factors to be able to draw any general conclusions. In particular, much of the tension between banking disclosures and human rights principles is apparent through nebulous principles, for example proportionality, which require judicial consideration before any definitive conclusions can be drawn. Equally, the precise scope of the interpretative obligations under section 3 of the Human Rights Act is, to date, unknown, and this too is something which could have an important role in the future development of the statutory exceptions to the banker's duty of confidentiality. Will, for example, this interpretative obligation result in an objective standard being 'read in' to the relevant provisions of the Proceeds of Crime Act in order to meet the demands of Article 8(2) and the principle of proportionality? These are all issues for the future and subsequent analysis. Nevertheless, certain modest conclusions may be drawn now. Firstly, there would appear to be no reason as a matter of law why issues of banking confidentiality cannot fall under the ambit of Article 8, the right to respect for private life. In as much, any public authority infringing upon banking confidentiality must only do so where the justifications and safeguards of Article 8(2) can be met. Furthermore, as banking confidentiality may, *prima facie*, fall under Article 8 any legislation encroaching into banking confidentiality must be, as far as possible, interpreted in a manner consistent with Article 8. Whether, for example the Proceeds of Crime Act 2002 can be afforded such an interpretation, or for

that point whether there is even any incompatibility in the first place, is again a matter for the Courts to determine.

Ultimately, it may be suggested, the likelihood of human rights principles being employed to protect and reinforce the banker's duty of confidentiality is slim. It may be suggested that they more 'creative' arguments raised in this Chapter, including Beyleveld and Pattinson's concept of horizontal effect, and any extended definition of functional public authorities are perhaps exercises of academic interest only, and will not in practical terms find any judicial or indeed political favour. Moreover, the stronger arguments advanced are, it may be suggested, unlikely to result in any reinforcement of banking confidentiality in practical terms. Should the courts find that the broad scope of the disclosure regime in Part 7 of the Proceeds of Crime Act are incompatible with the right to privacy, it is as previously noted, unlikely that the government would introduce any substantial amendments in order to remove the incompatibility.

Whilst then Antoine is right to suggest that "money-laundering fears cannot mean...a complete dismantling of confidentiality in financial affairs, whether offshore or onshore",[85] it may be suggested that human rights based arguments are at present, insufficient to safeguard against this eventuality.

[85] *Confidentiality in Offshore Financial Law*, Oxford University Press 2002, at para. 6.111.

CHAPTER SEVEN

DATA PROTECTION AND BANKING CONFIDENTIALITY

"Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court".

The Data Protection Act 1998, section 35(1)

INTRODUCTION

The previous Chapter has considered the impact of the Human Rights Act 1998 upon the banker's duty of confidentiality. It will be recalled that whilst initially the Human Rights Act appeared to provide much promise for the protection of banking confidentiality, particularly through the jurisprudence of Article 8 and the right to private and family life, ultimately, at least in practice, the impact of the Act as a means of reinforcing banking confidentiality proved, it would appear, rather fruitless. This Chapter will consider the impact of a related statutory framework upon the banker's duty of confidentiality: That of the Data Protection Act 1998 and the principles contained therein.

THE DATA PROTECTION ACT 1998

The Data Protection Act 1998 has an essentially simple aim: As the Long Title explains, the Act makes provision for the processing of personal information, and extends to the obtaining of such information, the use thereof and also to the disclosure of personal information. The Act itself was the

culmination of reform originating at a European level, stemming from the United Kingdom's obligations under the Data Protection Directive.[1]

Whilst the rights laid down to individuals under the 1998 Act are contained within Part Two of the Act, perhaps the most important Part of the Act is that of Part One which deals with preliminary definitional issues. Under the terminology of the Act, certain key definitions must be considered in order to fully appreciate the nature and scope of the legislative provisions. These include the fundamental terms of 'data'; 'data controller'; data processor'; 'data subject'; and 'personal data'. These definitional issues shall now be addressed before considering the nature of the rights laid down within Part Two of the Act.

Definitional issues

One obviously fundamental definition is that of 'data' which is defined as information which:

> "(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
> (b) is recorded with the intention that it should be processed by means of such equipment,
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)".[2]

As one would expect with such a definition, the ambit of the term is broad setting out as it does the general scope of the Data Protection Act 1998 itself. The definition, as evident above, is constructed from five limbs.

---
[1] (95/46/EC).
[2] DPA 1998, s. 1(1).

Paragraph (a) essentially reproduces the previous definition laid down in the Data Protection Act 1984. The obvious example of technology which processes information automatically is that of computers and as such, data processed and stored by a computer or computer server will be caught under this limb of the definition. Paragraph (b) adopts a different approach, and inserts no requirement of automatic processing. Paragraph (b) is concerned with the recording of information by manual means provided there is an intention present at the point of recording to subsequently process the data automatically. Paragraph (c) has received considerable judicial and academic attention and is concerned with the manual processing of data. The key issue here is what precisely is meant by the term 'relevant filing system'. Any manually processed data which is not part of a relevant filing system will not fall under the ambit of the Act.

The DPA 1998 offers the following definition of a 'relevant filing system':

> ""relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible".[3]

This then is clearly a complicated definition. The key point however from this definition is that the data must be part of a manually operated filing system, such as a traditional card based system and that this system must be maintained in a structured way so that information relating to a specific individual may be easily located. The most straightforward illustration of such a system would be a paper based filing system with each folder linked

[3] s. 1 (1).

to a specific, named individual, with each folder being organized in accordance with the alphabet.[4]

Thee term 'relevant filing system' received judicial consideration in the recent case of *Durant* v. *Financial Services Authority*.[5] The Court of Appeal were of the opinion that in order to fall within the definition of a 'relevant filing system', manual files would need to be of "sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system".[6] Moreover, the Court of Appeal also suggested that a manual filing system which required the user to "leaf through files to see what and whether information qualifying as personal data of the ...[data subject]... is to be found there"[7] would not qualify as a relevant filing system and such data contained therein would therefore not fall under the ambit of the DPA 1998. This then is clearly a very restrictive interpretation of what constitutes a relevant filing system, and will serve to greatly reduce the number of manual files which fall under the ambit of the DPA 1998. As a result of the Court of Appeal decision in *Durant*, the Information Commissioner[8] released the following (extended) guidance:

> "(a) know that there is a system in place which will allow the retrieval of file/s in the name of an individual (if such file/s exists); and:
> know that the file/s will contain the category of personal data requested (if such data exists); or
> (b) know that there is a system in place which will allow the retrieval of file/s covering topics about individuals (e.g. personnel type topics such as leave, sick notes, contracts etc); and
> know that the file/s are indexed/structured to allow the retrieval of information about a specific individual (if such information exists (e.g.

[4] Typically found in university faculty offices for student records. See however, post, and the case of *Durant* v. *FSA* [2003] EWCA Civ 1746.
[5] [2004] F.S.R. 28, Court of Appeal (Civil Division), 8th December 2003.
[6] *Ibid*, at para. 47.
[7] *Ibid*, at para. 45.
[8] Formerly the Data Protection Commissioner.

the topic file is subdivided in alphabetical order of individuals' names))".[9]

Whilst this guidance is consistent with the judgment of the Court of Appeal in *Durant*, and as such represents the current state of the law, it would appear to the author that effectively matters of great importance, including the rights of individuals are being allowed to turn on how well organized a manual file is. Moreover, the issue of effective sub-divisions within a file and records of all data and information within that file are, at present, determining factors in whether the DPA 1998 is of application. This is, it may be suggested, an unfortunate factor upon which to base an important issue. It is likely that this issue will be revisited by the courts on future occasions and it remains to be seen whether the position adopted in *Durant* is maintained.

In any event, this then is an important definition in terms of establishing the scope of the Act itself. Allied to this definition, is the narrower concept of 'personal data':

> "personal data" means data which relate to a living individual who can be identified--
> (a) from those data, or
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".[10]

One of the most frequently used terms within the Act is that of 'processing'. The Act provides a particularly wide definition of 'processing' in relation to personal data:

---

[9] *The 'Durant' Case and its impact on the interpretation of the Data Protection Act 1998*, The Information Commissioner's Office, Guidance released October 4th, 2004, at 5.
[10] DPA 1998, s. 1 (1).

“"processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including--

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data".[11]

Obviously, the key feature for the purposes of the current investigation is that of paragraph (c), which emphasizes that the term 'process' specifically includes the disclosure of the information (from which the personal data is created), or of the data itself. It is worth appreciating the width of this definition. In essence it covers virtually anything than can possibly be done to data, with the possible exception of simply ignoring the data and information contained therein. Remaining terminology employed vigorously throughout the Act include 'data controller'[12]; 'data processor'[13] and 'data subject'.[14]

Rights of data subjects under the Data Protection Act 1998

Broadly speaking, the DPA 1998 confers the following rights on data subjects:

- The right to subject access;[15]
- The right to prevent processing;[16]
- The right to prevent processing for direct marketing;[17]

---

[11] DPA 1998, s. 1(1).

[12] DPA 1998, s. 1(1), "a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed".

[13] DPA 1998, s. 1(1), "any person (other than an employee of the data controller) who processes the data on behalf of the data controller".

[14] DPA 1998, s. 1(1), "an individual who is the subject of personal data".

[15] DPA 1998, s. 7.

[16] DPA 1998, s. 10.

- Rights in relation to automated decision making;[18]
- The right to compensation;[19]
- The right to rectification, blocking, erasure and destruction;[20] and
- The right to ask the Commissioner to assess whether the DPA has been complied with.[21]

The more pertinent rights provided to data subjects under the DPA 1998 fall under two categories: Subject access rights and prevention of processing rights. The primary right of the data subject under the DPA 1998 is that of subject access which is outlined within section 7 of the Act. Under this provision, the data subject is entitled to request from the data controller whether personal data are being processed by or on behalf of the data controller.[22] Furthermore, if this is the case, the data subject has the right to receive a description of the personal data being processed, the purpose or purpose behind the processing and also to whom the personal data and information therein will or may be disclosed.[23] Moreover, the data subject is also entitled to be informed "in an intelligible form"[24] the information constituting the personal data being processed[25] and also receive "any information available to the data controller as to the source of those data".[26]

These then are fairly extensive rights of access. The rationale behind subject access rights is clear, continuing as it does, the general aim of the Act which is to ensure greater transparency behind information and personal data held on individuals. To implement legislation without subject access rights would clearly be ineffective in practice as those individuals would be unable to discover whether if at all, and if so the nature, of any personal data held. Moreover, in principle, such access rights are an important feature of

---

[17] DPA 1998, s. 11.
[18] DPA 1998, s. 12.
[19] DPA 1998, s. 13.
[20] DPA 1998, s. 14.
[21] See, on the duties of the Commissioner generally, ss. 51-54.
[22] DPA s. 7(1)(a).
[23] DPA s. 7(1)(b).
[24] DPA s. (7)(1)(c).
[25] DPA s. (7)(1)(c)(i).
[26] DPA s. (7)(1)(c)(ii).

personal autonomy. Consequently, personal autonomy is reduced where individuals are unjustifiably refused access to or details of personal data held on them. This is something which has been recognised for many years by the European Court of Human Rights and it is unsurprising therefore that the DPA 1998 contains reasonably extensive subject access rights within its provisions.[27]

Equally unsurprising however, are the extensive provisions within the DPA 1998 restricting subject access rights. Where the request under section 7(1) is made orally, the data controller is under no obligation to respond, to the request as all request must be made in writing.[28] Equally, the data controller is under no obligation to provide any requested information under section 7(1) where any applicable fee levied has not been paid.[29] A further restriction is that the data controller is again not obliged to supply any information in response to a subject access request unless the data subject provides information reasonably necessary to establish the identity of the individual making the request, and locate the information that person has requested.[30] The Act also contains various exemptions from subject access right provisions.[31] The more notable situations where the DPA 1998 prevents access rights to personal data by data subjects are:

- National security;[32]
- Crime prevention or taxation;[33]
- Regulatory activity;[34]
- Journalism, literature and art;[35]
- Research, history and statistics;[36]

---

[27] See for example, the case of *Leander* v. *Sweden* (1987) 9 EHRR 433.
[28] DPA 1998, s .7(2)(a). Of course, there is, as a matter of the Act, nothing to prevent the data controller from responding to an oral subject access request, although good practice would, for obvious security reasons, be to not respond to request made verbally.
[29] DPA 1998, s. 7(2)(b).
[30] DPA 1998, s. 7(3). Note here that there is no requirement for the data subject to disclose any reasons behind the subject access request, nor is the data subject required to justify any such request.
[31] See generally, DPA 1998, Part IV.
[32] DPA 1998, s. 28.
[33] DPA 1998, s. 29.
[34] DPA 1998, s. 31.
[35] DPA 1998, s. 32.

- Disclosures required by law.[37]

The more pertinent of these categories of exempt material shall now be considered.[38] The first exemption which will be of relevance to the financial services industry generally, and to banks in particular, will be the exemptions for crime and taxation under section 29 of the DPA 1998. Under section 29(1) where personal data is processed for the purposes of crime prevention or detection, apprehension or prosecution of offenders, or for the collection of any tax, such processing is exempt from various provisions of the Act. The exemption here is broad, applying as it does to both the first data protection principle and section 7 access rights where the application of those provisions "would be likely to prejudice any of those matters mentioned in this subsection". The data processing in such a situation however is not exempt from compliance with the conditions laid down in Schedule 2[39] or Schedule 3.[40] Thus provided the data, whether personal or sensitive personal data, may be legitimately processed in accordance with Schedules 2 and 3 (and obviously those provisions within the Act to which the exemption does not apply), the processing need not comply with the other provisions of the first data protection principle, and nor need any data controller respond to any subject access request made by a data subject under section 7. Note also that where the exemption applies, it also exempts the data controller from the 'non-disclosure' provisions.[41]

This then is a broad exemption, applying to a variety of possible situations. Perhaps one of the greatest difficulties with this exemption is with the definition of the term 'likely to prejudice". Clearly, this is initially a question to

---

[36] DPA 1998, s. 33.
[37] DPA 1998, s. 35.
[38] For further academic considerations of all of the exempt categories within Part IV of the DPA 1998, reference may be made to Carey, *Data Protection: A Practical Guide to UK and EU Law*, Oxford: OUP, 2nd ed., (2004).
[39] With regard to personal data.
[40] With regard sensitive personal data.
[41] DPA 1998, s. 29(3). These are data protections principles 2 to 8 inclusive with the exception to principle 7(which deals with security).

be determined by the data controller wishing to rely on the exemption.[42] Initial guidance provided by the Registrar's Office suggested that:

> "...for any of these three exemptions to apply, there would have to be a substantial chance rather than a mere risk that in a particular case the purposes would be noticeably damaged. The data controller needs to make a judgment as to whether or not prejudice is likely in relation to the circumstances of each individual case".[43]

Whilst the offering of such guidance is not without merit, it may be suggested that this guidance is of little assistance in practical terms. Indeed, it would appear that the Registrar's Office[44] replaced one assessment (likely prejudice) with a number of equally problematic questions, including, 'to what extent is it possible to distinguish between a substantial chance and a *mere* risk'; and also as to the boundaries of the concept of 'noticeable damage'. It is likely such guidance will be of minimal comfort to data controllers attempting to comply with the Data Protection Act 1998. Indeed, it is likely that this issue will be addressed by the Tribunal and the courts in the coming years.

A second area of exemption laid down by Part IV of the Act is that where disclosure is required by law. Section 35(1) states:

> "Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court".

Thus any disclosure by a data controller will be Data Protection Act compliant where compelled to do so under statute, common law or court order and the provisions within Schedule 2 (personal data) and Schedule 3

[42] The exemption is not drafted in a 'blanket' style, and the relevant data controller must decide in each case whether it is of application, i.e., whether responding to a subject access request, for example, would be likely to prejudice one of the listed purposes. It is likely however, that this issue will require resolution by the Tribunal, initially. It is of course, a question of fact to be decided in each case.
[43] *The Data Protection Act 1998 – An Introduction*, Office of the Data Protection Registrar, October 1998.
[44] As it then was.

(sensitive personal data) and the Seventh data protection principle are complied with. It would then prima facie apply to, for example, the obligation of a banker to divulge information under section 330 of the Proceeds of Crime Act 2002. Note however, that, unlike the exemption laid down in section 29 of the DPA 1998, there is no exemption within section 35(1) for the subject access rights under section 7. Thus, whilst personal data could be processed and disclosed in such a situation, the exemption would not allow the banker to ignore their obligations under section 7 if a subject access demand was made.[45] Note also that, by virtue of the use of 'required' by law, it is likely that this exemption would not apply to any voluntary disclosures made by a data controller where an Act or other applicable legal provision merely allows or authorises a disclosure.

The provisions of section 7 are altered where the subject access request is made of a credit reference agency. Where the data controller is a credit reference agency, section 7 has effect subject to section 9 which permits a data subject making an access request under section 7 to limit the request to "personal data relevant to his financial standing".[46] Furthermore, any subject access request made in general terms, i.e., without specific requests as to the subject's financial standing may be presumed to be a request for personal data relevant *only* to their financial standing. Thus, if a data subject wishes to make a general access request, not limited to their financial standing, this must be made explicit within the request itself.[47]

Section 10 of the DPA 1998 lays down a further important data subject right: That of preventing the processing of personal data. By virtue of section 10(1), a data subject may require the data controller to cease or not begin processing personal data. This request must be made in writing, and the data controller has twenty-one days[48] from receiving such a notice to give the data subject written notice of either compliance with the request[49] or the

[45] This issue will be considered at length shortly.
[46] DPA 1998, s. 9(2).
[47] This is the impact of s. 9(2).
[48] DPA 1998, s.10(3).
[49] DPA 1998, s. 10(3)(a). A notice indicating the intention to comply will suffice.

reasons why the request has not, nor will not be complied with. This will be done where the data controller considers the request to be unjustified. This right then is not an automatic right of every data subject. Indeed, the data subject wishing to prevent the processing of personal data must, in the written notice to the data controller, give specified reasons as to why the data processing is "causing or is likely to cause substantial damage or substantial distress to him or another" and also that "the damage or distress would be unwarranted.[50] Consequently where no reasons for the substantial damage or distress are specified by the subject to the data controller, the request will be rejected. Moreover, if the data controller believes the request to be unjustified, again the request will also be rejected. Presumably, the standard to be applied here is objective, thus the subjective position of the data controller as to the justification of the data protection in making the request is irrelevant. Again, this objective test will, presumably, involve a balancing exercise between the strength of the specified reasons forwarded by the data subject, the result sought, i.e., destruction of the data or an alteration in the purposes for which the data is being processed, and also the importance of the purpose behind the data processing.

Furthermore however, even where the request is justified under section 10(1), there is no right to make a request under section 10 where either:

- The data subject has consented to the processing; or
- The processing is necessary for the performance of or the entering into a contract to which the data subject is, or will be a party; or
- The processing is necessary in order to comply with the data controller's legal obligations; or
- The processing is necessary in order to protect the vital interests of the data subject.[51]

---

[50] DPA 1998, s. 10(1)(a) and (b) respectively.
[51] s. 10 is of no application where the first four conditions of Schedule 2 are applicable. These conditions will be considered in greater detail subsequently.

Under section 11 a data subject may, again through written notice to the data controller, request the controller to cease, or not to start data processing for the purposes of direct marketing.[52] This is a right available to all data subjects who have personal data being processed for the purpose of direct marketing, and unlike the right laid down in section 10, there are no limitations upon this right, although the data controller is given a reasonable period of time to stop such data processing.[53] Note also that this right will be enforced by the court: Where the court is satisfied that a notice under section 11 has not been complied with, the court may take "such steps for complying with the notice as the court thinks fit".[54]

Section 12 establishes rights in relation to automated decision-taking. Thus, a data subject is entitled to require that no decision which is taken by the data processor which significantly affects the subject is based solely upon automatic processing of personal data for the purpose of evaluating matters relating to the data subject.[55] Thus, where an individual has made a written request under section 11(1), no decision may be made by the data controller which significantly affects, for example, the credit-worthiness of the individual. This is of obvious importance to the financial services industry and to banks in particular, and shall be considered subsequently.

Moreover, where no notice is in effect under section 11(1), if a decision which significantly impacts upon an individual is based solely upon automated data processing, the data controller must, as soon as is reasonably practicable, notify the data subject concerned that such a decision was made on an automated basis.[56] This then provides the data subject with an additional right under section 12 (2)(b): The data subject is entitled to, within 21 days, require the data controller to reconsider the

---

[52] DPA 1998, s. 11(1). Direct marketing is defined in s. 11(3) as "the communication...of any advertising or marketing material which is delivered to particular individuals".
[53] This is a question of fact, and will vary according to individual circumstances.
[54] DPA 1998, s. 11(2).
[55] DPA 1998, s. 12(1).
[56] DPA 1998, s. 12(2)(a).

decision or to take a new decision through non-solely automated mechanisms.[57]

A further right of any data subject is to apply to the court[58] and ask for inaccurate personal data held by a data controller to be either rectify, block, erase or destroy those data.[59] If the court is satisfied with the application and an order is granted the order will also apply to other personal data which contain an expression of opinion which is, in the view of the court, based upon the inaccurate data. Any such order also applies, if the court so wishes, to third parties to whom the inaccurate data has been disclosed. Such third parties will then also be obliged to comply with the terms of the court order, i.e., rectify, erase etc.[60]

DATA PROTECTION PRINCIPLES UNDER THE ACT

A key feature of the 1998 Act, as it was under the 1984 version, is the data protection principles which form the "backbone of the legislation".[61] The Principles are listed within Schedule 1 of the Act, and may be listed thus:

> "1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
>
> (a) at least one of the conditions in Schedule 2 is met, and
>
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
>
> 2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

---

[57] DPA 1998, s. 12(2)(b). Note however, that these provisions shall not apply where the decision is taken for contractual or pre-contractual reasons (DPA 1998, s. 12(6)(a)). Nor will the provisions apply where the decision is authorised or compelled by any enactment (DPA 1998, s. 12(6)(b)).
[58] In England and Wales, this will be the High Court (DPA 1998, s. 15 (1)).
[59] s. 14(1).
[60] DPA 1998, s. 14(3). This will be determined in relation to whether the extension of the order is reasonably practicable with specific regard to the number of third parties to whom the inaccurate data has been divulged. See, s. 14 (6).
[61] Carey, *Blackstone's Guide to the Data Protection Act*, London: Blackstone Press (1998), at 21.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."

The key Data Protection Principles form the perspective of this Chapter are numbers one to six. The remainder of this section shall set out each of those Principles and comment on their application.

The First Principle has in essence two elements. Firstly, any personal data processed, must be processed fairly and lawfully. Secondly, any personal data may not be processed unless certain conditions are satisfied. In either eventuality then, it is clear that the First Principle is only of Application where personal data is involved. The definition of what constitutes 'personal data' under the DPA 1998 has already been addressed, and need not be repeated here.[62]

---

[62] See page 236.

Beginning then, with the prohibition on the processing of personal data, it is clear that again, this is sub-divided into two distinct issues: In the case of processing personal data, it must be established that one, or more of the criteria listed in Schedule 2 is met. In the case of sensitive personal data, in order to be processed one or more of the conditions laid down within Schedule 3 must be met. Schedule 2 lists six conditions relevant to the processing of personal data. Again, this list is of considerable importance, the processing of personal data in a situation where one or more of the conditions cannot be satisfied will result in a breach of duty by the data controller, unless section 27(1) is of application.[63]

The first condition is that the data subject has given his consent to the processing. It is to be presumed that given the silence of the Act on this point, that written consent is not required, and moreover, that implied consent will suffice for this condition.[64]

The second condition is that the processing of personal data is required either for the performance of a contract to which the data subject is a party, or alternatively, is required for the taking of steps at the request of the data subject with a view to entering into a contract. The second condition then is concerned with the need to process personal data for contractual reasons.[65] The third condition is essentially where personal data is processed in order to meet non-contractual, legal obligations under which the data controller is bound. Presumably this could be raised by any data processor in order to process material held under a duty of confidentiality, including information gathered in the course of the banker customer relationship. It may be emphasised again, that the definition of 'processing' under the DPA 1998

---

[63] The duty upon data controllers as regards the Data Protection Principles is set down in section 4(4).

[64] Note that with regard 'sensitive personal data', the Act specifically requires explicit consent of the data subject. This will be considered shortly.

[65] As Jay and Hamilton note, this is likely to be of application where the data subject makes purchases through mail order catalogues, although this condition would only be satisfied where the processing of data is necessary for the specific contract entered into, whether simple sale, or more likely, in the case of credit dealings. It may not therefore be used to allow for the processing of personal data for future events, such as publicity mailings, or advertising campaigns. See Jay and Hamilton, *Data Protection: Law and Practice*, London: Sweet and Maxwell, 1999, at para. 4.11, further on this point.

specifically includes the "disclosure of the information or data by transmission, dissemination or otherwise making available".[66]

The fourth condition is where the processing is necessary in order to protect the vital interests of the data subject. Whilst there is considerable debate over the breadth of this provision, given the width of any possible definition of the term 'vital', it is of no significant importance to the ambit of this Chapter, and thus may not be discussed further at this point. The fifth situation where the processing of personal data is permitted under Schedule 2 is where the processing is necessary in order to fulfil public functions. Paragraph 5 refers to public functions in a particularly broad manner, including, the administration of justice; for the exercise of any functions conferred on any person by or under any enactment; for the exercise of any functions of the Crown, a Minister of the Crown or a government department or finally, for the exercise of any other functions of a public nature exercised in the public interest by any person.[67] This clause would also allow banks, as data controllers, to process, and indeed disclose personal data where permitted by statute.

The sixth condition of Schedule 2 is perhaps the most controversial, and permits data processing where it is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed. Perhaps the key term within this clause is that of 'necessary'. Presumably, although there is no further guidance proferred from within the DPA 1998, the term will be interpreted narrowly. Consequently, where the processing of personal data will merely assist the data controller, they will not be able to rely on this clause. Indeed, this could be of significance to the financial sector in terms of the use and dissemination of credit information.

[66] s. 1(1).

[67] This final subclause is essentially a 'catch-all' provision, although whether the interpretation of functions of a public nature will be made in accordance with the traditional test, or whether the similar concept from within the Human Rights Act 1998 will be favoured.

Where the data is not merely personal however, and falls within the definition of sensitive personal data, one or more of the conditions laid down in Schedule 3 must be satisfied in order for the data to be processed. The concept of sensitive personal data is defined in section 2 as personal data containing information relating to certain factors. Those factors are:

- Racial or ethnic origin;
- Political opinions;
- Religious beliefs;
- Trade Union membership;
- Physical or mental health;
- Sexual life;
- The commission or alleged commission of any offence;
- Information regarding court proceedings for any offence either committed or alleged.

Schedule 3 then adopts a similar stance to Schedule 2 in setting out a list of conditions one of which must be satisfied if the sensitive personal data is to be lawfully processed. The first condition is that the data subject has given his explicit consent to the processing of the personal data. Note the distinction here which is specific to Schedule 3: The data subject must give explicit consent to the processing of sensitive personal data. This then will exclude any form of implied or implicit consent to processing, although as with Schedule 2, presumably verbal as opposed to written consent will suffice, provided it is explicitly granted. The second condition is that the processing is necessary in order to perform any right or obligation which is conferred or imposed by law on the data controller in connection with employment. This then is a similar, albeit narrower, condition to that within clause 3 of Schedule 2. Here however, the processing must be either compelled or permitted by law for the sole purpose of employment.

As with Schedule 2, again the issue of data processing in the vital interests of the data subject is raised. Although within Schedule 3, this condition is

more narrowly framed being limited to situations where:

- consent cannot be given by or on behalf of the data subject, or
- the data controller cannot reasonably be expected to obtain the consent of the data subject, or

Alternatively, data processing is permitted where it is in the vital interests of another person and consent by or on behalf of the data subject has been unreasonably withheld.

The Fourth condition where sensitive personal data may be processed may be stated briefly, as it is of no impact upon the ambit of this thesis. Clause 4 states that:

> "The processing-
>
> (a) is carried out in the course of its legitimate activities by any body or association which-
> (i) is not established or conducted for profit, and
> (ii) exists for political, philosophical, religious or trade-union purposes,
> (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
> (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
> (d) does not involve disclosure of the personal data to a third party without the consent of the data subject".

As far as this clause may apply to banks as data processors, presumably sub-clause (b) may be of application, although this raises no issues pertinent to this thesis, beyond those raised previously within Chapter Five. Also of possible application to banks is sub-clause (d), although as it is immediately restricted to situations where the data subject, for our purposes, the

customer, has given consent to the disclosure.

Similarly of little significance to the ambit of this thesis is condition 5, which permits the processing of personal financial information where the data is in the public domain "as a result of steps deliberately taken by the data subject".

The sixth condition within Schedule 3 is where the processing is necessary in order to defend or commence legal proceedings, or where advice is sought prior to the commencement of such proceedings. The seventh condition is similar to its counter-part from Schedule 2, although, again, is framed in more specific terms. Under this clause, processing may proceed where it is necessary in the administration of justice; or for the fulfillment of functions laid down by statute, or finally for "the exercise of any functions of the Crown, a Minister of the Crown or a government department".[68]

Assuming then that the personal data or alternatively, sensitive personal data may lawfully be processed under the First Principle, any such processing must also be done fairly and lawfully.

Lawfully in this sense is fairly unproblematic to define, although no statutory definition is offered within the DPA 1998 itself. Certainly, any processing of data, including it will be remembered the disclosure of personal data, will be unlawful if processed in contravention of any applicable statutory provisions. From the perspective of the banker as a data controller, and the customer of that bank as a data subject, this would require any disclosure of personal data to comply with those legislative provisions detailed within Chapter Two, and of course, also with the Human Rights Act 1998. Any processing of such data which is in breach of the common law will also render the processing unlawful, thus where information is disclosed in breach of an equitable or contractual obligation, such a disclosure will be unlawful under

[68] The final two conditions have been omitted from consideration due to their lack of relevance to the present investigation. In the interests of completeness, they are, respectively, where the data processing is for medical purposes, and carried out by a health professional, and where the sensitive personal data is concerned with ethnicity, and the processing is required for the purposes of evaluating equal opportunities or treatment.

the First Data Protection Principle. Thus between banker and customer, any disclosure which contravenes the *Tournier* principles would also constitute a failure to process data lawfully under the First Data Protection Principle.

In addition to the requirement of lawful processing is a further, independent requirement of fair processing. Consequently, if personal data is processed lawfully, and in accordance with Schedule 2, (or Schedule 3 as per sensitive personal data), if the processing is carried out in an unfair manner, the First Principle will be breached. The concept of fair processing therefore, is of considerable importance. The first point to note then, is that there is no statutory definition as such of what constitutes fair, or unfair, processing. There is however some guidance offered within Part 2 of Schedule 1 of the DPA 1998, the "fair processing code",[69] which offers a consideration of the term.

This states that in making an assessment of fairness:

> "regard is to be had to the method by which they [data] are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed".[70]

To offer a simple example, were personal data to be obtained by a bank, for example, under the appearance of being related to account security, but was in fact, processed in order to facilitate future mail marketing campaigns, this would be a clear example of unfair processing under the DPA 1998. The requirement of fair processing of personal data is however, immediately limited through paragraph 2 of the fair processing code, which establishes that data will be deemed fairly processed where the data consists of information which a person is "authorised" to supply the information under domestic statute, or alternatively through any other enactment made at an

---

[69] To use the terminology favoured by the Data Protection Commissioner, see *The Data Protection Act 1998 – An Introduction*, Office of the Data Protection Registrar, October 1998, at 11.
[70] DPA 1998, Sch. 1, Pt. 2, para. 1.

international level which imposes such an obligation on the person concerned. Note here that the terminology of the Act is 'authorised'. Consequently, *prima facie*, where a bank provides information from personal data held by it on a customer under compulsion through statute, e.g., section 330 of the Proceeds of Crime Act 2002 concerning the disclosure of suspicions or knowledge of money laundering, the bank will be deemed to have met the requirements of fair processing under Schedule One and the first data protection principle. Moreover however, the preference for the term 'authorised' in the fair processing code would also lead to a similar result where the bank is not compelled by statute to provide the information but is merely permitted to so disclose if it wishes to do so.

Furthermore, it is worth noting that, this treatment of disclosure through statutory authorisation is subject to the requirements laid down in paragraph 2 of the code which imports certain conditions upon the disclosee in such circumstances. The data controller must provide, (or alternatively make available) certain information to the data subject, including:

- the identity of the data controller;
- if he has nominated a representative for the purposes of this Act, the identity of that representative;
- the purpose or purposes for which the data are intended to be processed, and;
- any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.[71]

The Act however draws a distinction between data obtained from the subject and data obtained through any other means. Where the data *is* obtained from the data subject, the information noted in paragraph 2(3) must be provided to the data subject. Where however, the data is obtained from a source other than the data subject, the information listed need not be

[71] DPA 1998, Sch. 1, Pt. 2, para. 2(3).

provided where one of two conditions are met. Firstly, no information need be provided to the data subject where the "provision of that information would involve a disproportionate effort. Secondly, again no information need be provided where "....the disclosure of the data by...the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract".

The Second Principle states that:

> "Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes."

Part 2 of Schedule 1 to the DPA provides that the purpose(s) behind the data being obtained shall be specified either by the data controller to the data subject at the time of collection, or alternatively by the Commissioner through the online register of notifications. The key then to this Principle is the definition afforded to the term 'incompatible', which as Pattenden notes is capable of supporting two alternative interpretations:

> "There is an ambiguity in the second data protection principle. 'Incompatible' could mean either:
>
> (1) a purpose that is inconsistent with the notified purposes; or
>
> (2) a purpose that will not have been anticipated by the data subject".[72]

Indeed, Hamilton and Jay suggest that the use of the term 'inconsistent' is "curious since it suggests a use that is contradictory to rather than simply different from any originally specified purpose".[73] It is interesting then, to note that there is disagreement as to the correct interpretation of 'inconsistent' in this context. Pattenden suggests that incompatible ought to be interpreted so as to allow processing of the data for the original specified

[72] *The Law of Professional-Client Confidentiality*, (2003) at para. 18.31.
[73] *Data Protection: Law and Practice*, (1999), at para. 3.23.

purpose, or "some *kindred* purpose".[74] This contrasts with a stricter interpretation offered by Hamilton and Jay, who favour the interpretation of 'incompatible' as meaning unspecified.[75]

The third data protection principle requires that personal data shall be adequate, relevant and not excessive when considered against the purpose(s) for which the data are processed.[76]

The fourth data protection principle requires all personal data to be accurate, and where applicable, to be updated as necessary.[77] This is, one would hope of little application in practice to the banking sector, as good practice itself would require mechanisms for the maintenance of customer information. It does however oblige banks, and of course all data controllers to maintain personal data in an up-to-date fashion.

The fifth data protection principle requires that personal data which is processed shall not be kept longer than is necessary for that purpose(s).[78] It may be suggested that such a position would have been required in any event through the relevant provisions of the Human Rights Act 1998, especially with regard to the test of proportionality under Article 8, the right to family and private life. This however, could be subject to litigation in the future, given the ambiguous nature of the principle. What is a reasonable timeframe in which to keep personal data, is obviously a matter of fact and varies from case to case in accordance to the nature of the purpose behind the processing.

The sixth data protection principle requires that the processing of such data be conducted in accordance with the rights of data subjects under the DPA 1998.[79] This would therefore include those rights afforded to data subjects, already noted, including, *inter alia*, section 7 subject access rights, section 10

[74] *The Law of Professional-Client Confidentiality*, (2003), at para. 18.31.
[75] *Data Protection: Law and Practice*, (1999), at para. 3.23.
[76] DPA 1998, Sch. 1, para. 3.
[77] DPA 1998, Sch. 1, para. 4.
[78] DPA 1998, Sch. 1, para. 5.
[79] DPA 1998, Sch. 1, para. 6.

prevention of processing rights and section 11 rights regarding direct marketing.

The seventh data protection principle requires data to be secure, and that any "appropriate technical and organizational measures" so required shall be carried out.[80] This principle expressly includes both preventing unauthorized access to personal data, but also to the maintenance of such data free from corruption or loss whether deliberate or otherwise.

The eighth, and final, data protection principle restricts the transfer of personal data to a destination outside the European Economic Area.[81] There is an explicit prohibition on personal data being transferred outside of the EEC unless the destination country has an adequate level of data protection.[82]

IMPACT OF CONTRAVENTION OF DATA PROTECTION ACT 1998

Where the DPA 1998 is contravened by a data controller, and such contravention causes the data subject to suffer damage,[83] that individual will be entitled to compensation under section 13 of the Act. The Act does however, furnish the data controller with a statutory defence to a section 13 claim for compensation. Where the data controller can prove that "he had taken such care as in all the circumstances was reasonably required to comply"[84] with the relevant (contravened) provision of the Data Protection Act, this will be a successful defence to any section 13 compensation claim.

A further option under the Data Protection Act 1998 is laid down in section 42, which provides that, "a request may be made to the Commissioner by or

---

[80] DPA 1998, Sch. 1, para. 7.
[81] DPA 1998, Sch. 1, para. 8.
[82] Given the domestic ambit of the thesis the eighth data protection principle need not be considered further at this point.
[83] By virtue of s. 13 (2), if a breach of the provisions of the DPA 1998 cause distress, this too will be actionable, either where damage, in addition to distress is inflicted or where the contravention relates to the processing of personal data for special purposes. See further, s. 13(2)(b).
[84] DPA 1998, s. 13 (3).

on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment" as to whether such processing has been carried out in compliance with the Act. The Commissioner must be supplied, by the applicant, with the information needed to firstly identify the processing in question, and also then to make an assessment as to the compliance or lack thereof with the Data Protection Act.[85] The factors to which the Commissioner *may* have regard in such an assessment are clearly laid down within the Act. Those factors are:

- the extent to which the request made under section 42 is one of substance;
- whether there has been undue delay in making the request; and
- whether the applicant is entitled to make an application under section 7 of the DPA 1998, i.e., a subject access request.

DATA PROTECTION IMPLICATIONS UPON THE BANKER'S DUTY OF CONFIDENTIALITY

There are clearly very wide ranging data protection implications arising out of the DPA 1998 upon the banker's duty of confidentiality, and indeed, upon the nature of the banker customer relationship in a broader sense. There are also certain specific issues arising out of the DPA 1998 which impact upon banker customer confidentiality, including the relationship between the provisions of Proceeds of Crime Act 2002 concerning money laundering, the implications of the DPA 1998 upon the longstanding judgment of the Court of Appeal in *Tournier* v. *National and Provincial Bank of England*[86] and upon the relationship between the current banking practice regarding confidentiality within the Banking Code of Practice. The ultimate issue this section seeks to address is whether, in any practical, meaningful sense, the Data Protection Act 1998 is able to uphold banking confidentiality in situations where previously the duty either did not exist or alternatively has

---

85 DPA 1998, s. 42 (2).
86 [1924] 1 KB 461.

been eroded since the traditional understanding of the principle was laid down in the *Tournier* case.

It is helpful to analyse the impact of the DPA 1998 under two separate categories: Firstly, how the rights of a bank customer have been altered through the provisions of the DPA 1998, and secondly, how the obligations upon the banker have been amended through the DPA 1998. Prior to this however, certain preliminary points must be developed. It has been seen how, in order for the DPA 1998 to be of application to any given scenario, certain features must be present. Clearly, the ambit of the Act itself is limited to situations where personal data is processed. The previous discussion has noted that this data will generally be in the form of automated records, such as computerised databases, although manually maintained collections of personal data will be covered provided they fall under the definition of a 'relevant filing system'.

It is clear that information held by a bank in respect of a specific customer could *prima facie*, constitute data for the purposes of the DPA 1998. Certainly those records maintained within a computerised database will meet the definition of data under section 1(1)(a) of the Act. The vast majority of information held by banks in respect of their customers will be in this form of record, and would be included within the concept of 'data'. Moreover, manually processed information will also fall under this definition provided that, in accordance with the Court of Appeal decision in *Durant* v. *Financial Services Authority* and are sufficiently well organised and maintained so as to be similar in operation to those systems which are computerised. As noted, the likely impact of this restrictive interpretation by the Court of Appeal is likely to be the decrease in the amount of information held in such a manner falling under the Data Protection Act 1998. Equally however, in the specific context of information held by a bank concerning specific customers of that bank, the vast majority of such information will be stored electronically.

The next issue of importance is whether the data held by a bank would constitute 'personal data' under the DPA 1998. If one recalls the key feature of 'personal data', namely that the data relates to a living individual who can be identified from either those data, or from a combination of those data and other information possessed or likely to be possessed by the data controller. Starting from the position that information held by a bank would not be anonymous records and thus beyond the scope of the DPA 1998,[87] all of the pertinent information held by the bank would bear the name of the account holder(s) together with other information, such as the current address of the customer.[88] In as much this information would allow the customer to be easily identified under the first limb of the definition of personal data.[89] Consequently account information, including the financial standing of the customer would fall within the definition of 'personal data', as would banker's references by virtue of the specific inclusion of "any expression of opinion" within the section 1 (1) definition of 'personal data'. If digitised, and placed on a computer based database, the copies of identification documentation provided upon the customer opening the account would also be deemed to be 'personal data', which from the purposes of this thesis, would include, *inter alia*, passport or drivers license numbers.[90] Generally speaking, it is surely unlikely that financial information held by a bank in respect of a customer could fall into the further category of data, that is 'sensitive personal data', if one considers again the exhaustive list laid down in section 2 of the DPA 1998.

[87] In any event, any information held by a bank which was anonymous would not fall under the ambit of this thesis, if one considers the nature of the disclosures made by banks, e.g., in the fight against money laundering under the PCA 2002, clearly anonymous information regarding a customer would not discharge the duty of the bank under such legislation.
[88] Indeed, much of the information within data held by banks would allow the customer to be readily identified, particularly since the introduction of identification requirements to open an account under the Know Your Customer Principle, see further on this issue, Chapter Four.
[89] Note that the account holder must be living if the DPA is to apply. Thus, were the account holder to be deceased, whilst the DPA 1998 would not apply, the banker's duty of confidentiality would still be of application.
[90] If such records of the identification used to open the account were merely photocopied, rather than being digitalised, they *could* fall within the DPA 1998, but only if they were filed in such a way so as to meet the principle laid down by the CA in *Durant*.

Certainly the disclosure by banks[91] of personal data, and the information contained within would fall under the definition of 'processing' under section 1 (1), especially considering the broad definition of 'processing' so as to specifically include the disclosure of...information or data. Given then, that, *prima facie*, the banker customer relationship and the data processed in the course of that relationship can fall within the Data Protection Act 1998, the issue is quite what implications this has from the perspective of both the customer (data subject) and the bank (data controller)?

Data protection rights of the account holder

In essence all of the rights which attach to data subjects under the provisions of the Data Protection Act are of application to the account holder. Thus the customer would gain the following rights:

- The right of subject access under section 7;
- The right to prevent processing where the processing of data would cause damage, or alternatively damage and distress under section 10;
- The right to prevent processing for direct marketing under section 11;
- The rights noted in relation to automated decision taking under section 12;
- The right to compensation, where applicable under section 13;
- Rights to rectification, blocking, erasure and destruction under section 14; and
- The right to request an assessment by the Information Commissioner under section 42.

Data protection obligations of the bank

The Data Protection Act 1998 has certainly altered the landscape of the banker customer relationship. If, and when, a bank acts in a capacity if a

[91] In a capacity of data processor under the DPA 1998. Note also, that a bank customer could, and would satisfy the definition of 'data subject' without difficulty.

data controller under the DPA 1998, it must ensure that any applicable provisions of the Act, including the data protection principles listed in Schedule One, are complied with to the extent required by the Act. It may be stated without any great controversy that the introduction of the DPA 1998 has increased the regulatory burden[92] upon the industry as a whole. The difficulty however faced by those who seek to use the Data Protection Act 1998 as a shield with which to defend encroaches upon banker customer confidentiality, is that the provisions which have the potential to reinforce the principle of confidentiality in reality fail to do so due to the nature of the exceptions to the DPA 1998. An illustration of this, the broad exemption laid down in section 29, is ideal. The exemption applies it will be recalled where compliance with the DPA 1998 would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the assessment or collection of any tax or duty. If relied upon the exemption removes the non-disclosure provisions of the DPA 1998, and partially negatives the first data protection principle, other than those conditions required under Schedule 2 and Schedule 3. Thus, in such a situation the bank would be under no obligation to respond to a subject access request under section 7; nor to inform the customer of the disclosure of confidential financial information.

This exemption correlates with, for example, the duty of bankers to report suspicions of money laundering under section 330 of the Proceeds of Crime Act 2002. There is however, one possible dilemma for the bank in such a situation. Under the PCA 2002, the banker is compelled, as a matter of law, to disclose even the merest suspicion or inkling of money laundering.[93] This exemption however is only of application where compliance with the DPA 1998, and with for example the non-disclosure provisions within the DPA 1998, would be *likely to prejudice* one of the specified aims of section 29. There could therefore be a situation where, the banker has a slight suspicion that a customer is engaged in money laundering. Consequently, the banker

---

92 In addition to the financial burden imposed.

93 See Chapter Four for a more detailed consideration of this point.

should, both as a matter of law and also as an exercise in self-preservation[94] make a disclosure either to the Money Laundering Reporting Officer within the bank, or to the National Criminal Intelligence Service. If however, the merest of suspicions is just that – an inkling of money laundering, can it be said to genuinely be *likely to prejudice* the prevention and detection of crime? It may be suggested that it would be stretching the natural meaning of the words *likely to prejudice*, if one is to accept that a faint inkling was likely to prejudice the prevention or detection of crime, i.e., money laundering. That said, given the difficulty of the situation for the banker, or for that matter any professional under such obligations, it would be unfair on the professional to remove the section 29 exemption when reporting under section 330 of the PCA 2002. Indeed, if one finds that where there is no *likely* prejudice to the specified aim, and that consequently, the, *inter alia*, access rights under section 7 stood despite the disclosure of information, the data controller would be in an unenviable situation. The choice in that situation would be to either comply with the section 7 request, and run the risk of breaching the tipping off provisions of the PCA 2002, or refuse the subject access request, thus running the risk of being liable to pay compensation under section 13 of the DPA 1998 but comply with the tipping off provisions of the PCA 2002.

CONCLUSIONS

It is also important to repeat the conclusions of Chapter Two in relation to the impact of the DPA 1998 in protecting banking confidentiality. Chapter Two noted that the vast majority of the exceptions to banking confidentiality are though compulsion at law, and indeed generally through primary legislation.[95] Throughout the Data Protection Act, as noted in the previous discussion, there are numerous exemptions or exceptions where the provisions of the DPA 1998 are severely curtailed. For example, with regard to the second data protection principle, the information which would normally be provided by a data controller to the data subject is inapplicable where the

[94] Given the severely penal nature of failing to make the necessary suspicious activity report.
[95] e.g., the Proceeds of Crime Act 2002; The Consumer Credit Act 1974; The Companies Act 1985 to name three of an ever increasing list.

disclosure of the data is required in order for the controller to comply with any legal obligation. Similarly, under Schedule 2, the processing of personal data, including the disclosure of information contained within the data, is permitted where *inter alia*, the processing is necessary to exercise functions of any person conferred by "any enactment".[96] A recurring theme then through the Data Protection Act 1998 is that is does not, as such set out to protect or uphold professional confidentiality. Similarly to the Human Rights Act 1998 and the European Convention on Human Rights, the Data Protection Act 1998 sets out to achieve a balance between the legitimate need on occasion for information, as against the importance attached to the rights of the individual who wishes, again legitimately to discover what information is held on themselves. This balancing act must try to regulate two essentially opposing aims, and it is not surprising then, that the Data Protection Act will not always complete that balancing act in favour of upholding professional confidentiality, whether banker customer or other.

---

[96] DPA 1998, Sch. 2, para. 5 (b).

PART THREE: CONCLUSIONS – RECENT DEVELOPMENTS AND FORTHCOMING CHALLENGES

CHAPTER EIGHT

CONCLUSIONS ON THE BANKER'S DUTY OF CONFIDENTIALITY

The banker's duty of confidentiality has long been recognised as a corner-stone of the banker-customer relationship. The proposition that it still warrants such a status however, is vulnerable. This thesis has attempted to assess this important duty through times of considerable change, tracing and analysing the obligation of confidentiality through genesis, maturity and beyond. The thesis argues firstly, that the banker's duty of confidentiality is at risk of becoming an antiquated concept in banking law, and that secondly, the diminishing importance of the duty is likely to continue unless measures are introduced to limit the seemingly irrepressible erosion of banking confidentiality. It may be suggested that even at the present time, the banker's duty of confidentiality has been eroded to such a degree that one may now refer to the banker's duty to disclose, allied to a secondary obligation: That of confidentiality where the first duty is of no application.

Part One of the thesis has investigated the banker's duty of confidentiality from the starting point of the very first reported cases where banking confidentiality was considered. This, hitherto undocumented period in the development of banking confidentiality is important, illustrating as it does, a point in time where social and political considerations were such that banking confidentiality was afforded no protection in law. Such analysis serves to

illustrate the importance of banking confidentiality as a legal principle, and also reinforces the vital part played by the Court of Appeal in *Tournier* v. *National Provincial and Union Bank of England*.[1] It is not controversial to suggest that banking confidentiality ought not to be disregarded in the Twenty First Century to the extent where cases such as *Hardy* v. *Veasey*[2] and *Tassell* v. *Cooper*[3] begin to once again fall on the court's doorstep.

As has been discussed within the thesis, the decision in *Tournier*, is important on many grounds, none more important than it laid down for the first time that a banker owed their customers a duty of confidentiality by virtue of the contractual nature of their agreement. An obligation of confidentiality was imported into this contract, which went beyond a merely moral obligation. The second key feature of the decision in *Tournier*, was that the Court attempted to draw the perimeters and characteristics of the obligation. In this certain key questions were mooted including:

- To whom was the duty of confidentiality owed?
- At what point does the duty of confidentiality commence?
- Conversely, at what point does the duty of confidentiality cease?
- What information is covered by the obligation of confidentiality?
- What are the limits of the obligation?

Thus a traditional account of the banker's duty of confidentiality would state that, generally, the duty of confidentiality is owed to the customer of the bank and begins upon opening of the account. The duty attaches to any information gained by the character of the bank due to the banker customer relationship. Furthermore, the obligation is not absolute and is subject to four qualifications where the disclosure of confidential information would not constitute a breach of the implied term of confidentiality:

---

1 [1924] 1 KB 462.
2 (1868) LR 3 Ex. 107.
3 (1850) 9 CB 509.

- Compulsion at law;
- Public interest;
- Interests of the bank; and
- Where the customer has consented.

These four heads of exception to the duty of confidentiality have seen a torrent of reform throughout the Twentieth Century and in consequence the scope of these exceptions have been refined and, ultimately expanded (for the most part by the ever increasing number of statutes permitting or compelling disclosure) beyond the concept enunciated by the Court of Appeal in *Tournier*. This trend was a cause of much concern to the Banking Services: Law and Practice Committee[4] and represents a sea-change in attitude and policy towards banking confidentiality. Further, this erosion has continued seemingly unabated into the Twenty First Century, and it is this erosion which forms the basis of Part Two of the thesis, viewed in the context of certain key issues related to banking confidentiality in the modern era, including, money laundering; human rights concerns; and principles of data protection.

Without doubt, the greatest threat facing a viable duty of confidentiality between banker and customer is the growing eagerness of the State to combat money laundering through the expansion of the anti-money laundering legislation and the insistence on the use of bankers as policemen. This important issue is considered at length in the thesis, and its impact upon banking confidentiality analysed. Clearly, the provisions of the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 demonstrate a (not necessarily unjustified) palpable disregard for the banker's duty of confidentiality in their quest to prevent, or at least prohibit, money laundering.

The impact of the Proceeds of Crime Act 2002 coupled with the Money Laundering Regulations 2003 cannot be underestimated. Through this ultimately noble attempt to prevent money laundering, the nature of the

---

[4] London: HMSO, Cmnd. 622 (1989).

banker customer relationship has been altered considerably. Indeed, the very role of the banker has been amended and they now, by virtue of the reporting regime and penal sanctions attached, act as a quasi agent of the state in reporting suspicious customers and transactions to the relevant authorities. With such disclosures now continuing to rise beyond the level set in 2003 of 100 000 per annum, it is clear that this poses a great challenge to the concept of banking confidentiality.

Crucially however, two points must be raised. Firstly, banking confidentiality is not, and indeed, should not be drawn in absolute terms. That there are situations where banking confidentiality must be superseded by other interests is not in dispute. Moreover, in principle, it is clear that the fight against money laundering is one which warrants the limitation of confidentiality. The threat posed by money laundering is real. Moving beyond the obvious impact on the financial sector, and beyond the obvious need to prevent criminals from prospering through their unlawful activities the modern climate has also turned against money laundering and its proponents due to the undeniable link to terrorist and organised crime activities globally. This is something which has naturally gathered pace since the incidents in America on September 11th 2001, and clearly, neither terrorists nor criminals more generally should be given any assistance in their activities through a dogmatic insistence upon the principles of banking confidentiality.

The second important point to appreciate is that neither the Proceeds of Crime Act, nor indeed, the Money Laundering Regulations 2003 contradict the common law position as stated by the Court of Appeal in *Tournier*. This is important, as it would be to over simplify the matter to state that the traditional understanding of banking confidentiality has been irrevocably altered by these recent developments. The key argument therefore is that whilst *Tournier* is an ageing representation of the banker's duty of confidentiality it remains a reasonable attempt to define the obligation. It has however, inevitably been overtaken by events such as the growth of money laundering and the associated element of criminality. These developments

have changed the very climate in which the banker customer relationship operates. Consequently, the nature of the duty of confidentiality has altered to reflect this changing landscape.

The thesis argues however, that what is needed is a proper balance between upholding banking confidentiality and the need to disclose confidential information on occasion. Confidentiality in financial dealings and status is an important facet of one's private life, and accordingly, ought to be protected as far as reasonably possible in law. Further, confidentiality is a fundamental feature of the banker customer relationship, and indeed any professional relationship. The question is therefore, how best to balance these valid, yet on occasion, competing interests. Like any balancing exercise, much depends upon the relative weight one attaches to the interests involved, and this is ultimately dependent upon a personal conception of ethics and policy. The thesis has illustrated however, that banking confidentiality is afforded very little protection against the encroachment of the Twentieth and indeed now Twenty First Century, and that this is to the detriment of banking confidentiality. That considered, it is clearly not correct that banking confidentiality reverts to the much stronger position laid down in 1924: As illustrated in Chapter One, the impact of social climate, banking practice and regulatory influences cannot be under estimated. The new challenges of serious organised crime, terrorism[5], drug trafficking and the associated money laundering for example must be faced both at national and international levels. This is entirely different however, from suggesting that banking confidentiality is unimportant and ought to be safely discarded.

Moreover, the balance must be reached whereby confidentiality is neither diminished nor undermined, but where it cannot be used as a veil to cover illegal activity. There is much scope for further research into this issue, focusing in particular upon the development of the anti-terrorism legislation and the impact thereof on banking confidentiality. As previously noted, this is a major factor in the current global climate and the constant development of

[5] A consideration of the Terrorism Act 2000 and associated provisions is beyond the constraints of this thesis, but will be the subject of future research.

the anti-money laundering provisions. Also worthy of further research are investigations into the approach of the courts to some of the issues raised in Part Two of the thesis, including the relationship between banks and the Data Protection Act 1998 and the Human Rights Act 1998. Certainly, the first challenge on human rights based grounds to Part 7 of the Proceeds of Crime Act 2002 will need to be analysed and explored closely. A further issue which could not be included within this study, is that of international co-operation with regard to requests for confidential information. Clearly, the globalisation of banking services and associated difficulties will continue to be of relevance and indeed, importance to banking confidentiality in the years to come.

These are then, interesting times for banking confidentiality, and academics conducting research into this area of banking law. The danger, if measures are not taken to address the current imbalance whereby banking confidentiality is afforded insufficient weight, is that banking confidentiality and the *Tournier* decision with it, become nothing more that a curious relic of a bygone age, inapplicable to modern banking law. Such an eventuality would be unfortunate, with history already having illustrated the result where no principle of banking confidentiality is recognised. Moreover, as the Jack Committee noted, the roots of banking confidentiality "go deeper than the business of banking: it has to do with the kind of society in which we want to live".[6]

[6] Cmnd. 622 (1989), at para. 5.26.

BIBLIOGRAPHY

Alexander, 'Multi-National Efforts To Combat Financial Crime And The Financial Action Task Force', *J. Int'l Fin. Mkt.* (2000) 2(5), 178;

Alldridge, *Money Laundering Law*, Oxford: Hart Publishing (2003);

Allmendinger, 'Lender Liability - Banks As "Fact-Sensitive Fiduciaries:" It's All in the Pleadings. Mans v. Peoples Bank, 340 Ark. 518, 10 S.W.3d 885 (2000)', 23 *University Arkansas at Little Rock Law Review*, 869 (2001);

Alqudah, 'Banks' Duty Of Confidentiality In The Wake Of Computerised Banking', (1995) *Journal of International Banking Law* 10(2) 50;

Andrew, 'Customer care and banking law: part 2', *Law Society's Gazette*, Vol. 85 No. 33 p. 26;

Anon, 'Banking Regulation: Government Response To Jack Committee', *Journal of International Banking Law* [1990], 173;

Anon, Case Comment: Confidentiality: Meaning Of Personal Data, [2004] *Public Law*, 422;

Anon, 'The Lawyer - Feature: I spy', *The Lawyer*, March 1, 2004, p. 18;

Antoine, *Confidentiality in Offshore Financial Law*, Oxford: Oxford University Press (2002);

Arora, 'A White Paper On Banking Services: Law And Practice', *International Banking Law*, [1990], 310;

Arora, 'Code Of Banking Practice: Part A', *International Banking and Financial Law* [1992] 177;

Arora, 'Electronic Funds Transfer And The Law', *Company Lawyer*, [1986] 195;

Arora, 'Round Up: Banking Law', (1999) *Company Lawyer* 20(8) 263;

Arora, 'Round Up: Banking Law', (2000) *Company Lawyer* 21(8) 234;

Arora, 'Round Up: Banking Law', (2001) *Company Lawyer* 22(10) 298;

Arora, 'The Bank's Liability As A Constructive Trustee', [1990] *Journal of Business Law*, 217;

Arora, 'The Draft Code of Banking Practice', [1991] *International Banking*

Law, 448;
Arora, 'The Jack Committee Report On Banking Services: Law And Practice', *Company Lawyer*, [1991] 127;
Arora, 'The Jack Committee Report On Banking Services: Law And Practice', [1990] *International Banking Law*, 219;
Austin, 'Fiduciary Accountability for Business Opportunities', in Finn (Ed.) *Equity and Commercial Relationships*. Finn. Sydney: The Law Book Company Ltd (1987);
Baggally, 'Banker-Customer- Fiduciary Duties', (1999) *Journal of International Banking Law*, 14(3) 33;
Barker, 'Lost in the Umbrian Hills: Seeking Direction for O'Brian', (2000) *Restitution Law Review*, 1, 114;
Battersby, 'Equitable Fraud committed by third parties', (1995) *Legal Studies*, 15(1) 35;
Bean, *Fiduciary Obligations and Joint Ventures*, Oxford: Clarendon Press (1995);
Beatson, 'The Relationship between Regulations Governing the Financial Services Industry and Fiduciary Duties under the General Law', in McKendrick, (Ed.). *Commercial Aspects of Trusts and Fiduciary Obligations*. Oxford: Clarendon Press (1992);
Beatson, Forsyth and Hare (eds.), *Constitutional Reform in the United Kingdom*, Oxford: Hart Publishing (1998)
Bedard and Kilgour, 'Tracking Funds: Canada's Recent Initiatives To Combat Money Laundering And The Financing Of Terrorism', *Journal of International Banking Law* (2002) 17(5) 117;
Bell, 'The ECHR And The Proceeds Of Crime Legislation', (2000) *Criminal Law Review*, 783;
Bennett, 'Step Wake-Up Call On Anti-Money Laundering Legislation', (1999) *Private Client Business*, (3) 159;
Bergkamp and Dhont, 'Data Protection in Europe and the Internet: An Analysis of the European Community's Privacy Legislation in the Context of the World Wide Web', (2000) *The EDI Law Review* (7) 71;
Beyleveld and Pattinson, 'Horizontal applicability and horizontal effect', 118 *Law Quarterly Review* 623;

Biggs, Farrell and Padfield, *The Proceeds of Crime Act 2002*, London: Butterworths (2002);

Birks (Ed.) *Breach of Trust*, Oxford: Hart Publishing (2002);

Blair (General Ed), *Blackstone's Guide to the Financial Services and Markets Act 2000*, London: Blackstone Press Ltd (2001);

Bompas and Griffiths, 'Civil Liability Of Banks To Office Holders Arising From Money Laundering Transactions', (2001) *Insolvency International* 14(4), 25;

Booth, 'Solicitors and Money Laundering Part One: new law- new dangers', *New Law Journal*, 28th February 2003;

Booth, 'Solicitors and Money Laundering Part Two: risk, responsibility and compliance', *New Law Journal*, 7th March 2003;

Bosworth- Davies, 'CJA 1993: Money Laundering', (1994) *Company Lawyer* 15(2) 56;

Bosworth-Davies and Saltmarsh, *Money Laundering: A Practical Guide to the New Legislation*, London: Chapman Hall (1994);

Bosworth-Davies, *The Impact of International Money Laundering Legislation*, London: Financial Times Publishing (1997);

Bottomley and Kinley, *Commercial Law and Human Rights*, Dartmouth: Ashgate, (2002);

Brown and Bailey, 'Case Comment - Bank Of Scotland v A Ltd', (2000) *Journal of International Banking Law*, 15(11), 287-289;

Brown, 'Money Laundering: A European and U.K. Perspective', (1997) *Journal of International Banking Law*, 12(8) 307;

Burrows, 'In Practice: Money Laundering - Four Disclosures And A Privilege', *Family Law Journal* 34 (210);

Burrows, 'In Practice: Proceeds of Crime Act 2002 - Money Laundering', *Family Law Journal*, 34(143);

Burrows, 'Money laundering guidance and the family lawyer', (2004) *New Law Journal*, 154, 328;

Burrows, 'Proceeds of Crime Act 2002 and the Family Lawyer: An Interim View', *Family Law Journal* 33 (909);

Bygrave, 'Data Protection Pursuant To The Right To Privacy In Human Rights Treaties', (1998) *International Journal of Law and Information Technology*, (6) 247;

Caldwell, 'White Collar Crime', *The Lawyer*, 8th March 2004;
Cannon, 'Israel: Money Laundering - Israel's New Anti-Money Laundering Law', (2001) *Journal of International Banking Law*, 16(1), 1;
Capper, 'Undue Influence and Unconscionability', *Law Quarterly Review* 114 479
Carey, *Blackstone's Guide to the Data Protection Act*, London: Blackstone Press (1998);
Chan, 'Banks Caught in the Middle', (2001) *Company Lawyer* 22(8) 245;
Rees and Brimsted, 'Charybdis or Scylla? – Navigating a Course Between Money Laundering Law and Data Protection', *Computer Law & Security Report* (2003) Vol. 19 no. 1, 25;
Clark and Burrell (Eds), *A Practical Guide to International Money Laundering Law and Regulation*, London: City and Financial Publishing (2003);
Clayton, (1989). 'Banks Which Knowingly Assist', *Journal of International Banking Law* 4(2) 70;
Clayton, (1992). Banks as Fiduciaries: The UK Position', *Journal of International Banking Law* 7(8) 315;
Clayton, (1993). 'Banks as Constructive Trustees: The English Position', (1993) *Journal of International Banking Law*, 8(5) 191;
Cole, 'Editorial – Money Laundering', (1993) *Journal of International Banking Law* 8(4), 129;
Cook, 'Canada: Banker-Customer: Duty of Care', (1996) *Journal of International Banking Law* 11(4) 70;
Corker, 'Money Laundering: tread warily (but not too warily)', (2004) *New Law Journal*, 154, 202;
Cranston, 'Case Comment - The Libyan Arab Foreign Bank Case', [1987] *Journal of Business Law*, 499;
Cranston, 'Case Comment - The Libyan Assets Case: Limits To Extraterritorial Claims', (1987) *Journal of International Banking Law*, 177;
Cranston, *Principles of Banking Law*, Oxford: OUP, (1998);
Cranston, 'The Bank's Duty of Disclosure', [1990] *Journal of Business Law* 163;

Curtis, 'The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationships', 20 *Loyola Law Review* (1987) 795;
Davis, 'The Last Word', 34 *Family Law Journal*, 373;
Dennis and Fox, *The New Law of Insolvency: The Insolvency Act 1986 to the Enterprise Act 2002*, London: The Law Society, (2003);
Dermott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation', [1988] *Duke Law Journal*, 879;
Ellinger, Lomnicka and Hooley, *Modern Banking Law*, 3rd edition, Oxford: OUP, (2002)
Ewing, 'The Draft EEC Money Laundering Directive: An Overview', (1991) *Journal of International Banking Law* 6(4) 139;
Ewing, 'The EC Money Laundering Directive: An Update', (1992) *Journal of International Banking Law*, 7(3) 54;
Feldman, *Criminal Confiscation Orders: The New Law*, London: Butterworths (1988);
Ferrers, 'An Australian Court on Confidentiality: Getting the Bank to Tell', *Intertax*, Volume 28, Issue 2, 89;
Finn, 'Fiduciary Law and the Modern Commercial World' in McKendrick (Ed.) *Commercial Aspects of Trusts and Fiduciary Obligations*, (1992);
Finn, *Fiduciary Obligations*, Sydney: The Law Book Company (1977);
Finn, 'The Fiduciary Principle' in Youdan (ed.) *Equity, Fiduciaries and Trusts*. Toronto: Carswell (1989);
Finn, 'Fiduciary Law and the Modern Commercial World', in McKendrick (Editor), *Commercial Aspects of Trusts and Fiduciary Obligations*, Oxford: Clarendon Press (1992);
Finn, (Ed.) *Essays in Equity*. Sydney: The Law Book Company Ltd (1985);
Finn, (Ed.) *Equity and Commercial Relationships*, Sydney: The Law Book Company Ltd, (1987);
Fisher and Bewsey, 'Laundering the Proceeds of Fiscal Crime', (2000) *Journal of International Banking Law*, 15(1) 11;
Fisher, 'Drug Trafficking Offences Act', (1986) *Journal of International Banking Law*, 124;
Flannigan, 'The Fiduciary Obligation', (1989) *Oxford Journal Legal Studies* 9

(Autumn) 285;

Flint and Mallon, 'Big Brother – some reflections RIPA2K+ HRA98+ DPA98= Confusion03', (2003) *Computer Law & Security Report* Vol. 19 no. 1, 30;

Foster, 'Developments in Accountability for the Money Laundering Reporting Officer in the United Kingdom', (2001) *Journal International Financial Markets*, 3(3) 113;

Frankel, 'Fiduciary Law', (1983) *California Law Review*, 71(3) 795;

Gely, 'Tax Offences: The Hidden Face of Money Laundering?', *Intertax*, Volume 31, Issue 10, 328;

Gilligan, 'The Origins of UK Financial Services Regulation', (1987) *The Company Lawyer*, 18(6), 167;

Gilmore, *Dirty Money- The Evolution of Money Laundering Countermeasures*, Council of Europe Publishing, 2nd Edition, (1999);

Goode, *Consumer Credit Law and Practice, Loose Leaf*, London: Butterworths (2001);

Goode, 'The Banker's Duty of Confidentiality', [1989] *Journal of Business Law* 269;

Goode, *Commercial Law*, London: Penguin Books, 2nd Edition, (1995);

Goode, *Consumer Credit Law*, London: Butterworths, (1989);

Gottselig and Gleason (Editors), *Financial Intelligence Units: An Overview*, IMF: The World Bank Group, (2004);

Gottselig and Gleason (Editors), *Suppressing the Financing of Terrorism*, Legal Department – IMF, (2003);

Graham, 'Money Laundering: The FSA's New Role', (2000) *Journal International Financial Markets*, 2(6) 240;

Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention*, London: Sweet & Maxwell (2000);

Gurry, *Breach of Confidence*, Oxford: Clarendon Press (1984);

Hapgood, *Paget's Law of Banking*, 11th edition, London: Butterworths, (1996);

Hapgood, *Paget's Law of Banking*, 12th edition, London: Butterworths, (2002);

Haynes, 'Recent Developments In Money Laundering Legislation In The United Kingdom', (1994) *Journal of International Banking Law*, 9(2) 58;

Haynes, 'The FSA Moves In', (2001) *Company Lawyer*, 22(1), 23;
Hendrie-Liano and Bate, 'The Data Protection Implications Of Data Rooms', (2004) *Privacy & Data Protection*, 5(2) 8;
Hinterseer, *The Political Economy of Money Laundering in a Comparative Legal Context*, The Hague: Kluwer Law International, (2002);
Horn (Ed.), *Legal Issues in Electronic Banking*, The Hague: Kluwer Law International, (2002);
Howcroft, 'Case Comment: Banker-Customer: Confidentiality', (1999) *Journal of International Banking Law*, 14(10), 91;
Howells, 'Data Protection, Confidentiality, Unfair Terms, Consumer Protection and Credit Reference Agencies', [1995] *Journal of Business Law* 343;
Hudson, 'Constructive Trusts and the Liability of Banks and Fund Managers', (2000) *Journal International Financial Markets* 2(6) 212;
Hudson, *Equity and Trusts*, London: Cavendish (2001);
Hunt, 'The Horizontal Effect of the Human Rights Act', [1998] *Public Law* 423;
Jawahitha, 'Banking Confidentiality in Malaysia in the Aftermath of the 9/11 Attack on the US', *Business Law Review*, January 2004, 8;
Jawahitha, 'Banking Confidentiality – A Comparative Analysis of Malaysian Banking Statutes', [2002] *Arab Law Quarterly*, 255;
Jay and Hamilton, *Data Protection: Law and Practice*, London: Sweet & Maxwell, (1999);
Jay and Hamilton, *Data Protection: Law and Practice*, London: Sweet & Maxwell, 2nd Edition, (2003);
Johnson, 'Confidentiality Diminishing', (1995) *International Banking and Financial Law*, 13(9), 98;
Johnson, 'Editorial - Confidentiality: The Disappearing Principle', (1989) *International Banking Law*, 66;
Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty', (1968) *Law Quarterly Review*, (84) 472;
Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence', (1970) *Law Quarterly Review* (86) 463;
Jones, 'The Proceeds of Crime Act 2002', (2002) *New Law Journal*, 152

1394;
Jowell and Lester 'Proportionality: Neither Novel nor Dangerous', in Jowell and Oliver (eds.) *New Directions in Judicial Review*, Stevens & Sons, (1988);
Kearney, 'Accounting for a Fiduciary's Gains in Commercial Contexts' in Finn (Ed.) *Equity and Commercial Relationships*, Sydney: The Law Book Company Ltd (1987), 186;
Kearns, 'Privacy and the Human Rights Act 1998', *New Law Journal*, Vol. 151, 377;
Keay and Walton, *Insolvency Law: Corporate and Personal*, London: Longman (2003);
Kennedy, 'Justifying the civil recovery of criminal proceeds', (2005) *Company Lawyer*, 26(5) 137;
Kennedy, 'Equity in a Commercial Context', in Finn (Ed.) *Equity and Commercial Relationships* Sydney: The Law Book Company Ltd (1987);
Kentridge, 'The Incorporation of the European Convention on Human Rights', in Beatson, Forsyth and Hare (eds.), *Constitutional Reform in the United Kingdom*, Oxford: Hart Publishing (1998);
Kersten, 'Financing of Terrorism – A Predicate Offence to Money Laundering?', *European Journal of Law Reform*, Volume 4, Number 2, 299;
Kirk, Gumpert, and Bojarski, *The Proceeds of Crime Act 2002*, London: Jordans (2003);
Lehane, 'Fiduciaries in a Commercial Context' in Finn (Ed.), *Essays in Equity*, Sydney: The Law Book Company Ltd, (1985) 95;
Levi and Gilmore, 'Terrorist Finance, Money Laundering and the Rise of Rise of Mutual Evaluation: A New Paradigm for Crime Control?', *European Journal of Law Reform*, Volume 4, Number 2, 337;
Lilley, *Dirty Dealing- The Untold Truth about Global Money Laundering*, London: Kogan Page (2000);
Lustgarten, 'Case Comment - USA: Banking Regulation - 'Know Your Customer' (KYC)', (1999) *Journal of International Banking Law*, 14(2), 23;
Macleod, *Consumer Sales Law*, London: Cavendish (2002);
Marcus, 'What is Public Power: The Courts' Approach to the Public Authority Definition under the Human Rights Act', in Jowell and Cooper, (Eds.)

Delivering Rights: How the Human Rights Act is Working, Oxford: Hart Publishing, (2003);

Marshall, 'Risk and Legal Uncertainty under the Proceeds of Crime Act 2002 – The Result of Legislative Oversight', (2004) *Company Lawyer*, 354;

Martin, *Hanbury and Martin: Modern Equity*, London: Sweet & Maxwell 16th ed. (2001);

Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World', (1994) *Law Quarterly Review* (110) 238;

McCormack, 'Money Laundering and Banking Secrecy', (1995) *Company Lawyer*, 16(1), 6;

McCormack, Fiduciaries in a Changing Commercial Climate', (1997) *Company Lawyer* 18(2), 38;

McCormack, 'Money Laundering And Banking Secrecy', (1995) *Company Lawyer*, 16(1), 6;

McKendrick, (Ed.) *Commercial Aspects of Trusts and Fiduciary Obligations*, Oxford: Clarendon Press (1992);

Medley, 'Hungary: Money Laundering – Legislation', (2002) *Journal of International Banking Law* 17(7), 49;

Merrills and Robertson, *Human Rights in Europe: A study of the European Convention on Human Rights*, Manchester: Manchester University Press, 4th Ed. (2001);

Millet LJ, 'Equity's Place in the Law of Commerce', (1998) *Law Quarterly Review* 214;

Mitchell, Taylor and Talbot, *Confiscation and the Proceeds of Crime*, London: Sweet & Maxwell, 2nd Ed. (1997);

Moghaizel, 'Lebanon: Money Laundering', (2001) *Journal of International Banking Law*, 16(6), 34;

Morgan, 'The Public Duty Exception In Tournier - Getting There The Hard Way In New Zealand', (1994) *Journal of International Banking Law*, 9(6), 241;

Morgan, 'Privacy in the House of Lords, Again', (2004) 120 *Law Quarterly Review* 563;

Morrison, 'Money Laundering Legislation In The UK', (1995) *International Banking and Financial Law*, 14(1), Supp. ML, 3;

Murphy, 'Keep It Clean', *Estates Gazette*, 15th Novermber 2003;
Myint, 'Solicitors Beware: Money Laundering after R v. Duff', *Journal of International Trust and Corporate Planning*, April 2003;
Nolan, 'A Fiduciary Duty to Disclose?' (1997) *Law Quarterly Review* (113) 220;
Obank, 'Banker-Customer Confidentiality in the 1990s', [1995] *Journal of International Banking and Financial Law*, 113;
Oglivie, 'Banker and Customer Revisited', (1986) Canadian Bar Review (65) 3;
O'Keeffe, 'Case Comment: Banker-Customer: Confidentiality', (1999) *Journal of International Banking Law*, 14(9), 80;
Oliver, 'The Human Rights Act and the public law / private law divide', [2000] *European Human Rights Law Review*, 343;
Osofsky, 'Fighting Money Laundering, American Style', (1993) *Journal of International Banking Law*, 8(9), 359;
Parwani, 'Singapore: Money Laundering Of Criminal Proceeds - New Offence In Singapore', (1999) *Journal of International Financial Markets*, 1(6), 59;
Pattenden, *The Law of Professional-Client Confidentiality*, Oxford: Oxford University Press (2003);
Pavlou, 'In Practice -- Losing Trust -- Privilege After POCA', 34 *Family Law Journal*, 53
Petkovic, 'Case Commernt - The Banker As Constructive Trustee, (1989) *Journal of International Banking Law*, 88;
Petkovic, 'The Jack Committee Report On Banking Services Law And Practice', (1989) *Journal of International Banking Law*, 77;
Phillipson, 'Judicial Reasoning In Breach Of Confidence Cases Under The Human Rights Act:: Not Taking Privacy Seriously', [2003 *EHRLR (Special Issue: privacy 2003)* 54;
Pickworth and Talwar, 'Taxing times: the Inland Revenue cracks down on avoidance', (2004) *New Law Journal*, 154, 98;
Pugh-Thomas, 'The Bank - An Attractive Deep-Pocket Defendant: Part 1', (1998) *Journal of International Banking Law* 14(1) 5;

Radmore and Morris, 'Anti-Money Laundering – A Challenge Explored', *Compliance Monitor*, August 2003;

Radmore, 'Money Laundering Prevention: Effect of the New Law on Solicitors', (1995) *Company Lawyer*, 16(5) 155;

Raphael, 'The Problem Of Horizontal Effect', [2000] *European Human Rights Law Review* 393;

Reed and Chastney, 'Price Waterhouse v BCCI Holdings (Luxembourg) SA And Others: The Public Interest Exception To Duties Of Confidentiality', [1992] *Journal of International Banking Law*, 72;

Rees and Fisher, *Blackstone's Guide to the Proceeds of Crime Act 2002*, Oxford: OUP, 2nd ed. (2003);

Rees and Ormerod, 'Money Laundering: Conspiracy To Convert Or Transfer Property With Reasonable Grounds For Belief That Property Represented Proceeds Of Crime', [2005] *Criminal Law Review*, (June) 482;

Reid, *Confidentiality and the Law*, London: Waterlow Publishers (1986);

Rickett, 'The Banker's Liability for Receipt in Equity and at Common Law', (1995) *Company Lawyer* 16(2) 35;

Rider (Editor), *The Corporate Dimension*, Bristol: Jordans (1998);

Rider, 'Shutting The Stable Door', (2001) *Company Lawyer* 22(10), 289;

Rider, 'Wrongdoers' Rights', (2001) *Company Lawyer* 22(3), 87;

Robins, *'I Spy'*, *The Lawyer*, 1st March 2004;

Rosen, A., 'The myth of independent advice', (2001) *New Law Journal*, 296;

Ryley, 'Discipline And Enforcement - Specific Investigations, Search And Seizure And Challenging The FSA', *Compliance Monitor*, 16(2) 10;

Santangelo, 'International Ramifications of U.S. Anti-money Laundering Policy: Whose Law is the United States Enforcing', (2000) *Journal of International Banking Law* 15(4/5), 91;

Sanya, B., 'Nigeria- Banker-Customer: Debtor-Creditor', (1994) *Journal of International Banking Law* 9(8) 167;

Savla, *Money Laundering and Financial Intermediaries*, The Hague: Kluwer Law International (2001);

Schmitt and Jean-Francois Trapp, 'New Luxembourg Rules On Money Laundering', (2002) *Journal of International Financial Markets*, 4(1), 13;

Sealy, 'Fiduciary Relationships', [1962] *Cambridge Law Journal* 69;

Sealy, 'Some Principles of Fiduciary Obligation', [1963] *Cambridge Law Journal* 119;
Sealy and Hooley, *Commercial Law* London: Butterworths, (1999);
Shaffer, 'The Fiduciary Relationship your Corporate Law Professor (should have) Warned you About', (2000) American Bankruptcy Institute Law Review (8) 479;
Shams, 'The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control', *Law and Business Review of the Americas*, Winter/Spring (2001), 85;
Sharpe and Russell, 'Disclosures Under The Proceeds of Crime Act 2002', (2003) *Privacy and Data Protection*, 3(6) 8;
Shea, The Review Committee On Banking Services Law', (1987) *Journal of International Banking Law*, 2(4) 261;
Silvertown, Bankers' Duty Of Confidentiality, [1988] *International Banking Law*, 72;
Singh, 'The Future of Human Rights in the United Kingdom', Oxford: Hart Publishing (1997);
Singleton, *Tolley's Data Protection Handbook*, London: Lexis Nexis UK, 3rd Edition (2004);
Smith and Owen (General Eds.), *Asset Recovery: Criminal Confiscation and Civil Recovery*, London: Lexis Nexis UK, (2003);
Smith, 'Proceed With Caution- Laundering Regulations At Work', *New Law Journal*, 14th May, 2004;
Starmer, *European Human Rights Law*, London: Legal Action Group, (1999);
Stessens, *Money Laundering: A New International Law Enforcement Model*, Cambridge: Cambridge University Press, (2000);
Stewart, 'Civil Recovery', (2003) *New Law Journal*, 153, 463;
Stockwell and Petkovic, 'The Jack Committee Report On Banking Services: Law And Practice', [1989] *Journal of International Banking Law*, 134;
Treitel, *The Law of Contract*, 11th Edition London: Sweet & Maxwell (2003);
Toulson and Phipps, *Confidentiality* (London: Sweet & Maxwell (1996);
Wade, 'Horizons of Horizontality', (2000) 116 *Law Quarterly Review*, 217;
Wadsley and Penn, *Penn & Shea: The Law Relating to Domestic Banking*, 2nd edition, London: Sweet & Maxwell, (2000);

Wadsley, ' Banks in a Bind: The Implications of the Money Laundering Legislation', (2001) *Journal of International Banking Law* 16(5) 125;
Wadsley, 'Professionals as Policemen', [1994] *Conveyancer and Property Lawyer*, 275;
Walton, 'The Drug Trafficking Offences Act 1986: The Thin End Of The Wedge For Bank Secrecy', (1988) *Journal of International Banking Law,* 5;
Ward, 'Bulwarks in the Fight Against Crime', *Estates Gazette*, 21 February 2004;
Waters, 'Fiduciary Obligations and Unconscionable Transactions', (1986) *Canadian Bar Review*, (65) 37;
Williamson, 'Recent Developments In Contentious Banking Law', (2001) *Journal of International Banking Law*, 16(12), 299;
Wong, 'Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality', [2000] *Public Law* 92;
Wood, 'The Lawyer: Opinion', *The Lawyer*, 16th February 2004;
Wylie, 'Case Commentary - P v P (Ancillary Relief: Proceeds of Crime) - Disclosure under the Proceeds of Crime Act 2002 of suspicions of tax evasion gained during ancillary relief negotiations', (2004) *Child and Family Law Quarterly*, 16(2) 203;
Xanthaki, 'The Duties of Lawyers Under the Draft European Union Money Laundering Directive: is Confidentiality a Thing of the Past?', *European Journal of Law Reform*, Volume 3, Number 2, 111;
Youdan, (Ed.) *Equity, Fiduciaries and Trusts*, Toronto: Carswell (1989);
Zander, *The Police and Criminal Evidence Act 1984,* London: Sweet & Maxwell, 4th ed. (2003);
Zander, *The Police and Criminal Evidence Act 1984*, London: Sweet & Maxwell (1995);

OFFICIAL DOCUMENTS

Egmont/FATF Collection of 20 Sanitised Cases Relating to Terrorist Financing (2002);

European Commission Working Paper: Preliminary Draft Articles for a Directive of the European Parliament and of the Council on prevention of the use of the financial system for the purpose of money laundering and terrorist financing and repealing Directive 91/308/EEC as amended by Directive 2001/97/EC, (MARKT/MLCC/02/04/2004), (2004);

Explanatory Notes to Proceeds Of Crime Act 2002, available online at <http://www.opsi.gov.uk/acts/en2002/2002en29.htm>;

Financial Action Task Force on Money Laundering: Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 8 Special Recommendations, Paris: FATF, (2004);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 1995-1996, Paris: FATF, (1996);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 1996-1997, Paris: FATF, (1997);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 1997-1998, Paris: FATF, (1998);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 1998-1999, Paris: FATF, (1999);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 1999-2000, Paris: FATF, (2000);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 2000-2001, Paris: FATF, (2001);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 2001-2002, Paris: FATF, (2002)

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 2002-2003, Paris: FATF, (2003)

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 2003-2004, Paris: FATF, (2004);

Financial Action Task Force on Money Laundering: Report on Money Laundering and Terrorist Financing Typologies 2004-2005, Paris: FATF, (2005)

Financial Action Task Force on Money Laundering: The Forty Recommendations, Paris: FATF, (2003);

FIUs In Action: 100 Cases From the Egmont Group, Edgmont Members: Financial Intelligence Units;

FSA Discussion Paper 22, *Reducing money laundering risk - Know Your Customer and anti-money laundering monitoring*, (2003), available online at, <http://www.fsa.gov.uk/Pages/Library/Policy/DP/2003/discussion_22.shtml>;

FSA Press Release: *FSA fines Bank of Scotland Plc 1,250,000 for money laundering rule breaches*, (FSA/PN/001/2004), available online at, <http://www.fsa.gov.uk/pages/Library/Communication/PR/2004/001.shtml>;

FSA Press Release: *FSA fines Northern Bank 1,250,000 for money laundering control failings*, (FSA/PN/084/2003), available online at, <http://www.fsa.gov.uk/pages/Library/Communication/PR/2003/084.shtml>;

FSA Press Release: *FSA fines Raiffeisen Zentralbank sterreich 150,000 for money laundering rule breaches*, (FSA/PN/035/2004), available online at, <http://www.fsa.gov.uk/Pages/Library/Communication/PR/2004/035.shtml>;

FSA Press Release: *FSA fines Royal Bank of Scotland Plc 750,000 for money laundering control failings*, (FSA/PN/123/2002), available online at <http://www.fsa.gov.uk/pages/Library/Communication/PR/2002/123.shtml>;

FSA's Consultation Paper 46, *Money Laundering: The FSA's new role*, (2000), available online at, <http://www.fsa.gov.uk/Pages/Library/Policy/CP/2000/46.shtml>;

Informal consultation on the Third EC Money Laundering Directive, London: HM Treasury, (2004);
Home Office Partial Regulatory Impact Assessment: *Measures Arising Out Of The Performance And Innovation Unit Report "Recovering The Proceeds Of Crime"*, (2000), available online at <http://www.homeoffice.gov.uk/docs/riacons.html>;
Johnston and Nedelescu, *IMF Working Paper: The Impact of Terrorism on Financial Markets*, (WP/05/60);
KPMG, *Review of the regime for handling Suspicious Activity Reports*, KPMG Forensic (2003), available online at <http://www.ncis.gov.uk/kpmgsarreport.asp>;
NCIS Annual Report 2001-2002, available online at <http://www.ncis.gov.uk/publications.asp>, London: NCIS (2002);
NCIS Annual Report 2002-2003, available online at <http://www.ncis.gov.uk/publications.asp>, London: NCIS (2003);
Pieth and Aiolfi, *The Private Sector becomes active: The Wolfsberg Process*, Basle: The Wolfsberg Group, available online at <http://www.wolfsberg-principles.com/index.html>;
Performance and Innovation Unit Report: *Recovering the Proceeds of Crime* (2000), available online at <http://www.strategy.gov.uk/downloads/su/criminal/recovering/contents.htm>
Regulatory Frameworks for Hawala and Other Remittance Systems, Washington DC: International Monetary Fund (2005);
Report of the Committee on Banking Services: Law and Practice, London: HMSO, Cmnd. 622 (1989);
Report of the Committee on Data Protection, London: HMSO, Cmnd. 7341 (1978);
Report of the Committee on Consumer Credit, London: HMSO, Cmnd. 4596, (1971);
Report of the Committee on Privacy, London: HMSO, Cmnd. 5012 (1972);
Twelve-Month Pilot Program of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Assessments, International Monetary Fund: World Bank (2004);

UK Threat Assessment: The threat from serious and organised crime 2003, London: NCIS, available online at <http://www.ncis.gov.uk/ukta/2003/default.asp>;

UK Threat Assessment: The threat from serious and organised crime 2004, London: NCIS, available online at <http://www.ncis.gov.uk/ukta/2004/default.asp>;

UK Threat Assessment: The threat from serious and organised crime 2002, London: NCIS, available online at <http://www.ncis.gov.uk/ukta/2002/default.asp>;

UK Threat Assessment: The threat from serious and organised crime 2001, London: NCIS, available online at <http://www.ncis.gov.uk/threat_assessment.asp>;

White Paper, Banking Services: Law and Practice, London: HMSO, Cmnd. 1026, (1990);

White Paper, Rights Brought Home, London: HMSO, Cmnd. 3782, (1997);

White Paper, *Criminal Justice: The Way Ahead*, London: HMSO, Cmnd. 5074 (2001).

SUPPORTING PAPER

THE DUTY TO REPORT UNDER THE MONEY LAUNDERING LEGISLATION WITHIN THE UNITED KINGDOM

Mr Robert Stokes and Professor Anu Arora (The Liverpool Law School, University of Liverpool)

Journal of Business Law [2004] May 332-356

Lawyers often speak of maintaining a satisfactory balance between the need to protect private (individual) rights whilst ensuring that the public interest is similarly protected. This is particularly true of banking lawyers and something which is evident through the debates on the issue of client confidentiality and the duty to disclose financial information. In 1989 the *Report of the Committee on Banking Services,*[1] whilst appreciative that there are strong arguments in favour of disclosure and transparency within the financial sector (particularly to facilitate the fight against money laundering), expressed concern at the pace and direction in which this area of banking law was moving. The Jack Committee suggested that the balance between the preservation of private rights and disclosure in the public interest had moved too far in the direction of disclosure, and was therefore failing to adequately protect individual rights. Furthermore, the Jack Committee concluded that the issue of preserving confidentiality as between bank and its customer should be addressed "because its roots go deeper than the business of banking: it has to do with the kind of society in which we want to live".[2]

One can, therefore, only speculate as to how the Jack Committee would react were it to reconvene some 13 years after its initial findings were

---

[1] *Banking Services: Law and Practice*, Cm. 622 (1989), hereafter, the '*Jack Report*'.
[2] *Ibid*, at para. 5.26.

published. Despite its recommendations, the preference for disclosure over individual rights has continued unabated. The torrent which became a spate[3] has since become a deluge. It must be emphasised however, that the 'deluge', whilst posing serious confidentiality questions which will need to be addressed, is not without justification.[4] The need to combat money laundering and the activities of money launderers is a difficult one, and importantly one which is unlikely to ever be won. The aim is too hinder such practices as far as it is reasonably possible. As Bosworth-Davies has noted:

> "It would require a counsel of perfection to require banks and financial institutions to institute a regulatory regime which would ensure that the phenomenon of money laundering was extinguished forever from commercial life."[5]

Nevertheless, increasing concern regarding the threat posed by the practice of money laundering, both in the United Kingdom and throughout the (economically) developed world has resulted in considerable legislative and regulatory action in order to prevent misuse of financial systems. In order to fully appreciate and understand recent developments in this area of banking confidentiality however, it is necessary to consider the genesis and evolution, which directly affects the reporting regime within the United Kingdom. It would be unnecessarily repetitious to detail the substantive money laundering offences at this point as much academic time has been spent on such provisions, and the discussion which follows will deal solely with the reporting regime. By way of reference however, the relevant substantive offences of money laundering currently in effect within the United Kingdom may be listed thus:

- Assisting another to retain the benefit of the relevant criminal act;
- Acquisition, possession or use of the proceeds of the relevant criminal act;

[3] In the language of the Jack Report, at para. 5.07.
[4] On the issue of confidentiality, see Morrison, 'Money Laundering Legislation in the U.K', 14(1) *I.B.F.L.* (1995), Supp. ML. 3, at 6, in addition to the subsequent discussion.
[5] 'CJA 1993: Money Laundering', 15(2) *Comp. Law.* (1994), 56, at 56.

- Concealment or transfer of the criminal proceeds to avoid prosecution or a confiscation order and;
- Tipping off.[6]

It is to the reporting regime however, that we must now turn.

The Early Legislation

The threat posed by the process of money laundering has long been recognised under domestic law. Indeed, the fight against money laundering began in earnest[7] with the Drug Trafficking Offences Act 1986 (henceforth the 1986 Act), which introduced the criminal offence of laundering the proceeds of drug trafficking, complemented through a "comprehensive confiscation regime to deprive drug traffickers of the fruits of their criminal career".[8] In this initial guise however, the role played by professionals in preventing the financial system from being exploited by drug traffickers was merely peripheral in nature. The 1986 Act[9] contained provisions allowing for disclosure to the relevant authorities,[10] but it did this through what swiftly became labelled 'defensive' or 'subsequent disclosures'.[11] This refers to the idea that a disclosure to the National Criminal Intelligence Service (NCIS) affords the discloser immunity from any criminal action subsequently instigated, clearly of great personal significance to the discloser (who may possibly continue to act on behalf of their client, perhaps even under the direction of the authorities). This defence is worthy of further consideration. It is explicitly stated that such a disclosure may be made following the completion of the suspect transaction, provided that the disclosure is made

---

[6] For a particularly useful consideration of these substantive offences reference may be made to Bosworth-Davies, *The Impact of International Money Laundering Legislation*, (1997), Chapter 2.

[7] Prior to the enactment of the 1986 Act any such money laundering activities could be prosecuted under the ambit of the Theft Acts, through for example, the offence of handling stolen goods under the Theft Act 1968, s. 22.

[8] McCormack, 'Money Laundering and Banking Secrecy', 16(1) *Comp. Law.* (1995) 6, at 6. It would be beyond the scope of this article to consider the impact (or lack thereof) of the confiscation regime.

[9] The relevant provisions 1986 Act, as repealed by the Criminal Justice Act 1993, was subsequently re-enacted in identical terms by Part 3 of the Drug Trafficking Act 1994.

[10] Although the legislative terminology refers to disclosure to a "constable", this in practice is something of a misnomer, and in reality refers to the NCIS.

[11] For an interesting discussion of this concept of 'subsequent disclosure' reference may be made to McCormack, above n. 8, at 7.

as soon as reasonably practicable and is made of the discloser's volition. Essentially, the defence refers to the situation where the person concludes a transaction which he subsequently becomes suspicious of, provided that the retrospective disclosure is made as soon as reasonably practicable and on his own initiative he will be guilty of no offence. Bosworth-Davies explains the defence memorably in reminding those affected by the legislation that:

> "It will be no use attempting to rely on the defence by making the disclosure when confronted with officers from a financial investigation unit, armed with a production order, and deciding then that disclosure is the better part of valour."[12]

Nevertheless, McCormack contends that this concept of subsequent disclosure is "somewhat strange."[13] In as much this is correct. It is perhaps difficult to appreciate the logic behind allowing such a defence *following* the offence being commited. In the instance of a subsequent disclosure it is entirely possible, and indeed even perhaps probable, that at the time of the disclosure, the disclosure has completed both the actus reus and mens rea necessary for a successful conviction, the mens rea required, of course, being the nebulous idea of suspicion. Whilst it may be accepted that by precluding such disclosures, important intelligence will probably remain uncovered, as if the disclosure would raise the possibility of criminal charges being conducted against the discloser, there would be no incentive for the disclosure to be made, it still allows for the process of money laundering to occur. This difficulty is compounded through the related defence also expressly provided, where the would be discloser intends to make a disclosure, but has reasonable grounds for omitting to do so. Precisely what the term 'reasonable grounds' refers to in this context is wholly uncertain.[14]

This reporting scheme was essentially duplicated through the enactment of the Criminal Justice Act 1988, although a crucial step was taken through the

[12] Above n. 5, at 57.
[13] Above n. 8, at 7.
[14] See the following discussion of this issue in relation to the Proceeds of Crime Act 2002, and the defence of reasonable excuse for omitting to make the required disclosure.

enactment of the Criminal Justice Act 1993 which substantially amended both the 1986 and 1988 Acts in relation to both the substantive criminal offences of money laundering and also as regards the reporting requirements placed upon those who have suspicion or knowledge of drug money laundering through the course of their employment.

The Criminal Justice Act 1993

The Criminal Justice Act 1993 (henceforth, the 1993 Act) represents a significant milestone in the offensive against the misuse of the financial system through money laundering. The Act, together with the associated Regulations that were released soon thereafter, implemented the 1991 European Directive[15] through the amendment of existing legislation.[16] Fundamentally, the 1993 Act introduced the concept of mandatory reporting: Where, through the course of his trade, profession, business or employment, a person knows or suspects that another person is engaged in drug money laundering, and he is under a legal duty to report his knowledge or suspicions to a constable.[17] The use of the term 'person' is particularly striking, emphasizing, as it does, that the offence may be committed by a person in the natural sense of the term: The offence is not limited to financial organizations, and Brown[18] is correct to note that this is reinforced by the criminal sanctions imposed for non-compliance: Failure to report knowledge or suspicion of drug money laundering, ignoring for the moment the various defences available, constitutes a criminal offence, punishable by virtue of s. 26B(11) DTOA 1986 by imprisonment for up to five years and an unlimited fine, where tried on indictment.[19] This was clearly then a major development in the fight against money laundering, and a clear change of direction from

---

15 Indeed it is clear that the CJA 1993 actually exceeds the requirements imposed under the 1991 Directive, see for example the commentary in Brown, 'Money Laundering: A European and U.K. Perspective', 12(8) *J.I.B.L.* (1997) 307.
16 Perhaps greater clarification would have been achieved through the enactment of one consolidating piece of legislation? Indeed, the Proceeds of Crime Act 2002 has introduced such a legislative scheme, see the subsequent discussion.
17 s. 26B DTOA 1986, as inserted by CJA 1993, s. 18.
18 Above n. 15, at 308.
19 In accordance with s. 26B (11)(a), where the non-disclosure is tried summarily, the maximum penalty is a term of imprisonment not exceeding 6 months, and a fine not exceeding the statutory maximum.

the earlier legislation which, made references merely to defensive reporting as a preventative measure on the part of the professional.

The first point to appreciate is that the offence of failing to disclose knowledge or suspicion of money laundering is strictly limited to knowledge or suspicion of drug money laundering, and does not extend to cover 'all-crime' money laundering. This appears, at least initially to be relatively straightforward. Such an assumption would be inaccurate however. Firstly it is clear that on a practical level, the restriction of the duty to report to drug related money laundering is ineffective. It may be queried precisely how one determines the precise (criminal) origin of the dubious funds in question. This dilemma is compounded if one considers that the professional who seeks to question the source of the funds with the client runs the risk of 'tipping-off' the client: This is no small matter, considering the severe penal sanctions associated with such an offence. The end result therefore, is that the professional will, in reality, be pressurised into making disclosures regarding any suspicious transaction, which are mandatory in all but name, regardless of any suspicions the professional may have as to the source of the funds.[20]

The CJA 1993 replicates the defensive reporting elements contained within the previous legislation, and it is a defence to each of the substantial money laundering offences to make a disclosure to a constable either prior to the prohibited act (provided that the act is done with the consent of the constable), or even following the prohibited act, where the disclosure is made as soon thereafter as is reasonably possible (and of course, of his own volition). There is also a reproduction of the reasonable excuse defence, which again remained undefined in the legislation. The substantive money laundering offences also permit the defence of what may colloquially be described as 'reporting up the line'. Essentially this refers to the situation where an employee, whose suspicions have been aroused or has knowledge

[20] It is also surely ludicrous to contend that a professional would plead, as a defence to a charge of failing to disclose suspicions of drug money laundering, that he knew the illicit funds derived from some other criminal enterprise, and was therefore under no duty to report.

in connection with money laundering, reports such information "up the managerial chain of command"[21] to the appropriate person in accordance with the procedures established by the financial institution for such occurrences. This defence avoids certain practical difficulties, apparent within the previous legislation whereby reporting was required by each employee, with any failure to report leaving the possibility of criminal charges available. This situation resulted in numerous difficulties, not least the risk of liability of the bank, to a customer where an employee made an unjustified report. Moreover, on a practical level, suspicious behaviour by a customer in one branch of a bank could possibly, be explained by employees within another branch with greater knowledge of the customer's financial affairs. The requirement of internal reports both as a defence to criminal charges and also as a requirement under the 1993 Money Laundering Regulations circumvents this eventuality by acting as a screen for those reports which are not in fact, suspicious.[22] This is naturally desirable as it both serves to reduce the risk of unhelpful reports of legitimate transactions to the NCIS whilst also protecting the bank from suits by disgruntled lawful customers who have been subjected to over-zealous disclosures.

The Money Laundering Regulations 1993

The Criminal Justice Act 1993 was supplemented by the Money Laundering Regulations, made under the European Communities Act 1972, and again is designed to fulfill the United Kingdom's obligations under the 1991 EC Money Laundering Directive.[23] These regulations compel financial institutions covered by the Regulations[24] to put into place systems to detect and deter money laundering. It is not proposed to go into the generalities of

[21] Above n. 8, at 9.
[22] Although of course, given the low standard of mens rea for a report to be justified, i.e. mere suspicion, the effectiveness of the screen is surely questionable? This issue shall be considered subsequently.
[23] For a comprehensive examination of the 1991 EC Directive, see Ewing, 'The EC Money Laundering Directive: An Update', 7(3) *J.I.B.L.* (1992) 54; and the predecessor to this article, also by Ewing, 'The Draft EEC Money Laundering Directive: An Overview', 6(4) *J.I.B.L.* (1991) 139.
[24] Detailed under Regulation 4: The term 'relevant financial business' is the gateway of the Regulations, and is defined broadly, correlating with the equivalent gateway in the Proceeds of Crime Act 2002, see post on this issue. Since altered by the Money Laundering Regulations 2001, so as to incorporate the activities of a bureau de change, see Regulation 3 which makes a series of minor amendments to the 1993 Regulations. The Regulations, for the most part, came into legal effect on 12 November, 2001.

the Regulations in any great detail, and the remainder of this section will focus on the main obligations in respect of reporting and training requirements. In the interests of completeness however, the Regulations impose obligations in the following key areas:

- Systems and training to prevent money laundering;
- The establishment of identification procedures;
- Record keeping procedures;
- Internal reporting procedures.

By virtue of Regulation 5, all institutions covered by the ambit of the Regulations, are compelled to establish and maintain internal measures to prevent money laundering, and to provide employees with sufficient training to comply with their legal obligations. As Regulation 5(2)(a) makes clear, failure to comply with these requirements is a criminal offence, punishable on indictment by two years imprisonment or an unlimited fine or, of course, both.[25] A breach of this Regulation is then, no small matter, and again raises issues of the draconian nature of the money laundering provisions. It was no doubt believed that the Regulations had to be reinforced by severe penalties[26] in order to enforce compliance by financial institutions, particularly considering the onerous nature of the responsibilities being imposed on such institutions.[27]

Regulation 5 certainly places a substantial burden upon financial institutions:[28] Such institutions must be able to show that employees are aware of the relevant law, including the criminal offences under the statutory framework, and of their own responsibilities and duties under the Regulations. Employers must also provide specific training for those employees who are directly involved with customer accounts so that they may discharge their legal obligations adequately. Moreover, such training

---

[25] Where the offence is tried summarily, the maximum penalty is a fine not exceeding the statutory maximum, in accordance with Reg. 5(2)(b).
[26] And indeed the full force of the criminal law, something which, is unusual in itself.
[27] Bosworth-Davies and Saltmarsh are right to emphasise that "these requirements place a heavy burden on the shoulders of financial institutions", *Money Laundering: A Practical Guide to the New Legislation* (1994), at 145.
[28] The Banking Ombudsman has deemed the requirements under this legislation as "onerous" in the 1994/5 Annual Report, OBO A.R., 1994/5, at para. 13.2.

must, by virtue of the wording in Regulation 5(1)(b), be continuous. Thus a one-off training day or course is insufficient training to comply with the Regulations, and more continuous training is required. Furthermore, in accordance with Regulation 5(3), the Court may[29] take into account of any relevant supervisory guidance issued. Thus, as a bare minimum, the financial institutions covered under the ambit of the Regulations should, upon the risk of penal sanctions, ensure that their training systems are up to the standard laid down in any such guidance. Accepting the reality that such guidance often takes the form of 'examples of good practice', the net effect is to raise the standards of training (and also therefore of detection) in relation to money laundering. This is, in itself an entirely noble aim, but the vast burden it places upon the financial sector may be queried. As Bosworth-Davies and Saltmarsh wrote shortly after the enactment of the 1993 Regulations, "these provisions are more all-embracing than might at first appear and will almost certainly cause all sorts of difficulties for practitioners in the future".[30] Writing with the benefit of hindsight, whilst such concerns were, and indeed still are, justifiable, it would appear that a clear majority of those institutions affected by the 1993 Regulations are circumventing such onerous requirements through the option of simply *ignoring* them entirely.[31]

Regulation 14 necessitates the instigation and maintenance of internal reporting procedures. Regulation 14 requires that a person be assigned the function within a financial institution whereby they are to receive internal reports of suspicious transactions.[32] It is the function of the appropriate person to then assimilate the information which arouses suspicion (or of course knowledge) of money laundering, before determining whether the information contained in the report does in fact, give rise to such knowledge

[29] Note the use of the term 'may', as opposed to 'must' in the similar provision of the PCA 2002, a matter considered subsequently.
[30] Above n. 27, at 145.
[31] Something considered subsequently.
[32] This crucial role has been referred to under numerous labels, including those of 'Authorised Person', 'Compliance Officer' and 'Money Laundering Compliance Officer', and, perhaps most memorably, even as "prisoners in waiting", by Mr Monty Raphael during a presentation made at a Butterworths Tolley Conference, entitled '*The Proceeds of Crime Act: How it will work in practice*', London, 10th February 2003. For an excellent discussion of the requirements of such a role, reference may be made to Foster, 'Developments in Accountability for the Money Laundering Reporting Officer in the United Kingdom', 3(3) *J. Int'l Fin. Mkt.* (2001) 113.

or suspicion. Naturally therefore the appointed individual must have reasonable access to any pertinent material, including internal accounting systems and documentation. If the appointed person does concur with the author of the initial report, it is the responsibility of the appointed person to make the necessary report to the NCIS.

Clearly then, this is a crucial position within the system of combating money laundering within the United Kingdom. Great emphasis is placed upon the ability of the suspicions based reporting regime as a source of vital intelligence, but this requirement of an MLO within a financial organisation is clearly intended to operate as a form of quality control, dispensing with reports which do not warrant a further external report. Given the draconian penalties associated with arriving at an incorrect decision in this area, the qualitative judgment of the appointed person must be impeccably tuned if he is to avoid criminal proceedings, and it is perhaps surprising that there are applicants willing to assume such a precarious role.

The Proceeds of Crime Act 2002

With this brief overview of the existing offences related to the duty to report knowledge or suspicion of money laundering completed, it is appropriate to address the incoming Proceeds of Crime Act 2002 (henceforth the 2002 Act) which, represents an important development in the legislative initiative combating money laundering, as it is distinct in both form and substance from the relevant legislation which proceeded it.[33] The 2002 Act lays down various money laundering offences, with a striking combination of both the usual suspects from previous legislation and also, crucially, new offences. The relevant provisions regarding this paper, and money laundering generally are to be located in Part 7 of the Act, and given the significance of the legislation to this field of banking law, it is intended to discuss the more pertinent provisions, prior to considering the implications for the 'suspicions based reporting regime' in the United Kingdom in greater depth.

---

[33] The prospective date of implementation for Part 7 of the 2002 Act is 24th Febrauary 2003.

It has been noted, and indeed lamented, that the United Kingdom model of combating money laundering has developed in something of an incremental and ad hoc manner. Indeed, this is accurate. The present statutory framework regarding money laundering, has developed into an intricate patchwork of legislation which when taken as a whole, and appreciating the differences between the legislation which apply to different circumstances, form the legislative framework. Whilst Savla is justified in criticising this mélange,[34] it may be suggested that this simply reflects social and political realities operative at the time. Thus, initially money laundering legislation was for many years restricted to the proceeds of drug-trafficking, not simply to draw artificial boundaries and demarcate between the various sources of criminal profit, although this is the obvious criticism, but simply to reflect the particular issue that was at the fore front of the socio-political thinking at that specific time. However, as Fisher and Bewsey explain, "it soon came to be appreciated by Western governments that money laundering legislation had a useful role to play in curbing other forms of organized crime [besides merely drug-trafficking]".[35]

Whilst the development of the duty to report in relation to this notion of 'all-crime' money laundering is certainly the next logical progression for domestic law, the PCA 2002 represents a significant change in this respect, and marks the culmination of increasing international concern over money laundering as a practice, regardless of the specific criminal offence from which the funds being laundered are derived.[36] Not only does the 2002 Act duplicate the effect of the CJA 1993 in continuing the universal criminal offence of money laundering, it also creates a mandatory reporting of such universal money laundering; something hitherto resisted by Parliament. This issue will be

[34] *Money Laundering and Financial Intermediaries* (2001), at 30.
[35] 'Laundering the Proceeds of Fiscal Crime', 15(1) *J.I.B.L.* (2000) 11, at 11.
[36] It is worth noting that, in any respect, such a move would have been compelled under the Second European Money Laundering Directive (2001/97/EC), which was adopted by the European Parliament and the Council on 4th December 2001. Member States are obliged to implement the Directive by 15th June 2003, although it remains to be seen whether this deadline will be honoured by the United Kingdom. The requirements of the Second European Directive and the Regulations made pursuant to the Directive (presently being drafted) will be the subject of a subsequent article by the authors, and shall not be discussed further at this juncture.

addressed shortly, but first it is worth highlighting the other dominant feature of the Act. The PCA 2002 is truly universal in nature for not only does it encompass universal mandatory reporting, it also has the unique effect of drawing all the relevant offences of money laundering under a single, unifying statute. The previous incremental system has been replaced, almost in its entirety by a complete legislative framework aimed at reducing the ability of criminals to engage the financial system to launder their illicit gains.

The seven offences which will apply in England and Wales as a result of the PCA 2002 are:

- concealing, disguising, converting, transferring or removing from the United Kingdom, criminal property;
- entering into, or becoming concerned with an arrangement which facilitates the acquisition, retention, use or control of criminal property;
- acquiring, using or having possession of criminal property;
- failing to disclose knowledge or suspicion of money laundering, which came to his attention through the course of a business in the regulated sector;
- failing to disclose knowledge or suspicion of money laundering, which came to his attention by virtue of his position as the nominated officer in the regulated sector;
- failing to disclose knowledge or suspicion of money laundering where the offender is an other nominated officer; and
- the disclosure of information prejudicial to an investigation, i.e. 'tipping off'.

Concealing etc criminal property

This offence, detailed in s. 327 of the 2002 Act is committed by any person who either conceals[37], disguises[38], converts[39], transfers[40] or removes from

[37] By virtue of s. 327 (1)(a).

the United Kingdom[41] criminal property. The striking feature of s. 327 is the vastly broad scope of the offences covered by the section, and indeed the continuation of the expansive definitions of the offences[42]. The section will catch those engaged in both money laundering type activities per se, that is concealing or disguising criminal property, but also to what may be thought of as standard banking practices, such as transfers, conversions and also sending funds abroad through wire transfers. The section in effect replaces and combines two offences from the earlier legislation, those of concealing or disguising criminal proceeds and converting or removing from the jurisdiction criminal proceeds for the purposes of avoiding a prosecution for a money laundering offence or in order to avoid a enforcement order, and either concealing, disguising, converting or transferring criminal proceeds with the knowledge or reasonable suspicion that the funds were criminally derived.[43]

The first offence detailed in the earlier legislation, namely that containing the purposive element of avoiding criminal prosecutions or confiscation orders, and the second offence, namely that containing objective mens rea before the person may be convicted of the concealing etc offence, have been amalgamated. In reincarnating these offences however, Parliament has made certain crucial alterations, specifically that neither the objective mens rea, i.e. the reasonable grounds for knowledge or suspicion of money laundering, nor the purposive element have survived. The offence of concealing etc criminal property is now committed solely through actually concealing, disguising, converting, transferring or removing from the United Kingdom, criminal property, provided that the person cannot avail himself of one of the statutory defences. There is a necessary element of mens rea however, as in order for the property to be criminal, not only must the

---

[38] By virtue of s. 327 (1)(b).
[39] By virtue of s. 327 (1)(c).
[40] By virtue of s. 327 (1)(d).
[41] By virtue of s. 327 (1)(e).
[42] See for example, the broad definition of precisely what constitutes concealing or disguising under s. 327 (3).
[43] Both of which were inserted into the CJA 1988 by the CJA 1993 s. 31.

property, in fact be criminal by virtue of s. 340 (3)(a), the alleged offender must know or suspect that the property is criminal.[44]

The other crucial addition to this offence is that of the insertion statutory defences. Under the equivalent offence within the previous legislation, there were no statutory defences available.[45] This was presumably the result of the view taken in Parliament that the offence could not be committed unwittingly due to the purposive element of the first offence, and the objective mens rea of the second,[46] and it may be suggested that this is an accurate position. The insertion of a series of statutory defences in the 2002 Act therefore should not come as any great surprise. The breadth of the offence itself, coupled with the absence of any purposive or mental element surely warrants the insertion of the defences, which may be listed thus:

- where an authorized disclosure is made[47];
- where the person intended to make such a disclosure but has a reasonable excuse for failing to do so[48];
- where the act is done in fulfillment of a function he has relating to any legislative provision concerning criminal conduct or benefit there from[49].

It is worth dwelling on the second statutory defence, which, it may be suggested is somewhat curious. The 2002 Act expressly states that where the person intended to make the necessary disclosure, but failed to do so, he will not be guilty of an offence under this provision provided that he has a reasonable excuse for his failure to report. This defence is not in itself novel, being available as a defence to certain offences connected with money

---

44 This is the effect of s. 340 (3)(b).
45 See for example the concealing or transferring offence under the Criminal Justice Act 1988 s. 93C, as inserted by the Criminal Justice Act 1993 s. 31.
46 Hansard, H.L. Debs, 3 December 1992, vol. 540, col. 1492 in relation to the relevant provision of the Drug Trafficking Bill (as it was then). For a discussion of this point the reader may be directed to *Savla, Money Laundering and Financial Intermediaries* (2001), at 31-32.
47 By virtue of s. 327(2)(a), and is unproblematic referring, as it does, to the situation whereby a disclosure will not to be taken to breach any legal rule which would otherwise restrict that disclosure.
48 By virtue of s. 327(2)(b).
49 By virtue of s. 327(2)(c).

laundering in the earlier legislation,[50] although even in its previous guises (which were essentially identical in approach) this defence was subjected to substantial criticism. As Morrison has somewhat sardonically commented, "[I]t is a good defence if one can prove a reasonable excuse for not having made such a report".[51] Indeed it would be, and it is problematic to even contemplate a situation where the court would entertain such a defence if one considers the importance placed upon such disclosures. As the term has yet to be considered in earnest by the Court, the parameters of this interesting defence remain untested. Would it, for example include factors such as personal illness, or circumstances such as bereavement?[52] Would it include elements of duress, or would such issues be confined to mitigation? How is the term 'reasonable' to be interpreted? The provision clearly raises more questions than it answers. It will be interesting to consider the provision in light of any judicial observations, and as noted in the Standing Committee debates of the Proceeds of Crime bill, it is something for the judiciary to determine.[53] Nevertheless, however, the defence has been incorporated into the 2002 Act, and thus remains a legal possibility, even if perhaps a practical fiction.

Entering into, or becoming concerned with an arrangement which facilitates the acquisition, retention, use or control of criminal property

This offence may be committed by any person who enters into, or becomes concerned with an arrangement which he knows or may suspect assists in the acquisition, retention, use or control of criminal property by or on behalf of another person. It is, essentially, a reworking of the previous offence relating to entering into arrangements whereby the process of money laundering is facilitated.[54] It is a striking feature of the 2002 Act generally

[50] Although it is a new development in relation to this *specific* offence.
[51] Above n. 4, at 5.
[52] These factors were considered during the Parliamentary debates on the Proceeds of Crime Act 2002. Even more incredible was the discussion regarding the issue of whether 'having a bad day' would constitute a reasonable excuse! Hansard, HC Debs, Col. 1108, 22nd January 2002.
[53] Hansard, HC Debs, Col. 1114, 22nd January 2002.
[54] In relation to drug money laundering, the applicable offence may be found in DTA 1994 s. 50; in relation to the laundering of general criminal funds, the applicable offence may be found in CJA 1988 s. 93A, as inserted by CJA 1993 s. 29.

that the offences are drafted in the broadest terms possible. This is particularly obvious throughout the drafting of s. 328, which adopts the vast latitude afforded to prosecutors under the earlier legislation. It is clear that a person need not have a specific or direct link with the money laundering activity (which would fall under the 'enters into' element of the actus reus). As Bosworth-Davies has noted, "the secondary phrase, 'or is otherwise concerned in' connotes a remoter element of activity".[55] Whilst this observation was made in respect of s. 93A CJA 1988, it is still of equal relevance to the s. 328 offence which contains a similar 'secondary phrase', that of becomes concerned in. It is notable that the preceding offence sought to offer a list of the various methods through which criminal conduct (this is now criminal property under the 2002 Act) is facilitated. In relation to all-crime money laundering offence, the CJA 1988 s. 93A(1)(a) provides that facilitation may be through 'concealment, removal from jurisdiction, transfer to nominees or otherwise' (emphasis added). This reference to 'otherwise' is important and indicates that, as Bosworth-Davies correctly observes, "the forms of facilitation envisaged by the Parliamentary draughtsmen are limitless".[56] Indeed it stated so regularly, that it is scarcely worth repeating, that the forms and methods of money laundering are limited only by the imagination and ingenuity of the launderer himself. This was obviously something still troubling Parliament as it attempted to draft the 2002 Act, for the section now refers to facilitation 'by whatever means'. If the intention of the Parliamentary draughtsmen to effectively future-proof this offence was not clear through the earlier legislation, it is absolutely evident through the 2002 Act: The plausible boundaries of this offence are limitless.[57]

Acquisition, use and possession of criminal property

[55] Above, n. 6, at 23.
[56] Above, n. 6, at 24.
[57] Although, any person prosecuted under this section will perhaps be comforted by the re-appearance of the statutory defences available under the s. 327 offence.

This offence is a re-working of the established offence, detailed in the earlier legislation, of acquisition, possession or use of the proceeds of criminal conduct.[58] The offence applies to any person who acquires, possesses or uses criminal property without providing adequate consideration. Again, the only necessary mens rea is that in relation to the criminal property.[59] The section also specifies that a person acquires, uses or possesses the criminal property for inadequate consideration where the value of the consideration is significantly less than the value of the acquisition, use, or possession.[60] Furthermore, the Act is explicit in preventing the provision of goods or services with the knowledge or suspicion that such provision is to assist criminal activities from constituting consideration.[61] The offence then is relatively straightforward[62] and is designed to prevent the criminal from disposing his illicit gains to others. Again the standard statutory defences are present, namely that there will be no offence where an authorised disclosure is made, or where there is reasonable excuse for the failure to make such a disclosure.

Failure to disclose in the regulated sector

Under s. 330 of the 2002 Act a person commits an offence where, through the course of his business in the regulated sector, he knows or suspects that another person is engaged in money laundering, and he fails to make the required disclosure as soon as reasonably practicable. This is clearly, a particularly important offence for those professionals who have dealings with the regulated sector. The failure to report their suspicions or knowledge of money laundering is punishable, in accordance with s. 334(2)(b), on indictment, by a maximum of five years imprisonment and an unlimited fine.[63]

[58] In relation, for example, to the general criminal money laundering offence introduced to meet the United Kingdom's obligations under Article 1 European Directive on Money Laundering, the offence is detailed under the CJA 1988 s. 93(B), as inserted by the CJA 1993 s. 30.
[59] S. 340(3).
[60] S. 329(3)(a) as regards acquisition and s. 329(3)(b) for the use or possession offence.
[61] By virtue of s. 329 (3)(c).
[62] Although reference may be made to an interesting discussion of the possible impact of the offence in relation to the payment of legal fees, Hansard, HC Debs, Cols. 1055-1056, 22nd January 2002.
[63] If the offence is tried summarily, the maximum penalty under s. 334(2)(a) is that of six months imprisonment, and a fine not exceeding the statutory maximum

The first crucial issue to highlight, is that it creates, a universal "all-crime"[64] duty to disclose knowledge or suspicion of money laundering; something hitherto limited to the laundering of drug trafficking or terrorist funds. Whilst this is commendable as a point of law, as it does close the gap left by the earlier legislation as regards non trafficking or terrorist funds, it is debatable whether the creation of this new disclosure offence is necessary in practical terms. Although the Working Group on Confiscation, in its Third Report considered that the absence of an all-crime money laundering reporting duty left a "gap in the United Kingdom's anti-money laundering defences",[65] it is perhaps difficult to support the proposition that this omission had any practical impact on the disclosure practices of financial professionals. It is likely when one considers the severely penal nature of failing to disclose knowledge or suspicion of trafficking or terrorist money laundering under the old legislative patchwork, that the financial professional would disclose regardless of the source of the criminal funds. On a purely practical level, it is unrealistic to suggest that the professional would know the source of the criminal funds (and even more unlikely when one considers, as previously discussed, the nature of the tipping-off offence, that they would attempt to discover the source of the funds).

The offence is structured on a tri-partite basis, and all the requirements are needed for a conviction under this section. Firstly, the person must know or suspect, or have reasonable grounds for knowing or suspecting that another person is engaged in money laundering. Secondly, the information upon which his knowledge or suspicion is based, or which gives him reasonable grounds for such knowledge or suspicion, must have come to him through the course of a business in the regulated sector. Finally, he must fail to make the necessary disclosure as soon as reasonably practicable after the information has come to his attention. It is worth dwelling a little on each requirement. The first condition appears at first glance to be essentially identical to that required under the earlier reporting obligations, being based,

[64] To use the terminology favoured by the Working Group on Confiscation in their Third Report, *Criminal Assets*, November 1998.
[65] *Ibid*, at para. 3.4.

as it is on knowledge or suspicion and thus creating a duty to report mere suspicions of money laundering. Indeed, this is the effect of s. 330(2)(a). This requirement caused uproar even when enacted initially[66], particularly as the suspicion was defined in purely subjective terms, with no requirement of reasonable grounds to have suspicion. Thus once a professional had doubts concerning the validity of the client, such suspicion was sufficient to necessitate a report to the relevant person. Concerns were raised over the erosion of the confidential nature of the professional-client relationship[67], and on a more practical level on the onerous nature of requiring, with the full force of the criminal law, disclosure with such minimal justification. The absence of any reasonable grounds with regard to the suspicion was also of grave concern to the Standing Committee debating the Proceeds of Crime Bill, particularly if one considers the penal sanctions attached to the offence.[68] Indeed an amendment was tabled to alter the element of mens rea so as to refer to knowledge or suspicion on reasonable grounds, although the amendment was ultimately rejected.

However, the incorporation of negligence based liability for non-disclosure through s. 330(2)(b), is somewhat controversial. This is clearly a major departure from the previous statutory framework, which omit to punish merely negligent non-disclosures, and this is something which every professional covered by the 2002 Act must take note of. The inclusion of negligence for the basis of criminal liability under this section, is clearly designed to prevent the defence of, to use the Scottish tale, the sinner who was about to be consigned to the flames by God. The sinner said "Lord, Lord, we didnae ken", to which God replied, "well, ye ken noo."[69] The negligence test prevents professionals operating within the regulated sector, from claiming ignorance of any suspicion (or of course knowledge regarding a money laundering transaction) as a defence in circumstances where the reasonably competent professional would have been put on alert by the

---

[66] See the following discussion regarding the widespread criticism of this reliance upon suspicion.

[67] See Radmore, 'Money Laundering Prevention: Effect of the New Law on Solicitors', 16(5) *Comp. Law.* (1995) 155, on this point. This important issue is also considered in detail subsequently.

[68] See, for example, Hansard, HC Debs, Cols. 981-982, 17th January 2002.

[69] A point raised during the Standing Committee Debates on the Bill, Hansard, HC Debs, Col. 1008, 17th January 2002.

transaction in question. During the passage of the Bill through Parliament there was, as would be expected, much consideration of the suitability of such a negligence based test.[70] It may be suggested that whilst allowing for penal sanctions, and indeed severe penal sanctions for negligent non-disclosures may perhaps operate in something of a draconian manner, rightly or otherwise, it certainly serves as a clear statement of intent by the Government in its fight against money laundering.[71] It also forces those business' in the regulated sector to constantly re-evaluate the systems and training procedures currently in place, and query whether they are up to the required standard. This introduction of negligence into the criminal law is, it may be contended, the result of the mixed reception given to the 1993 Regulations as regarding training and reporting procedures. It is generally accepted that the firms which have actively sought to follow the spirit of the Regulations have compelled their employees to attend training sessions on the detection of suspicious transactions, and as such it is this select group of firms which account for the vast majority of the reports made.[72] There are still many firms however who do not report transactions which are suspicious simply for the reason that the attitude of self-regulation prevails and employees neither receive nor consider themselves needy of such crucial training.

Support for this view is, somewhat unfortunately, bountiful. The NCIS has reported that only 126 of the approximately 500 deposit-taking institutions have reported suspicious transactions, with some 78 per cent of the reports made by the banking sector being disclosed by only 10 banks.[73] Clear evidence then, that the standards alluded to under the suspicions based reporting regime are being ignored by a clear majority of the financial institutions: that many financial institutions are ignoring their obligations to report suspicious transactions was emphasised by the FSA in a press release concerning General Abacha. A staggering total of 23 banks were

---

[70] See for example the discussion in Hansard, HC Debs, Col. 1089, 22nd January 2002.
[71] A point emphatically appreciated by the Standing Committee in its debates upon the Bill, as the "desire to instil terror into those who handle money because of the possible penalties and consequences of doing so". Hansard, HC Debs, Col. 974, 17th January 2002.
[72] See the comprehensive study undertaken by Bosworth-Davies on this issue, above n. 6, chapters 6 and 7.
[73] NCIS Service Plan, 2000-2001, at page 10.

discovered to have held accounts linked to the former President of Nigeria, all of which, had flaws in their money laundering procedures, and had not followed industry guidance.[74] Certainly, such evidence is disappointing given the importance placed upon the disclosure system to the prevention of money laundering,[75] and in particular, the gathering of important intelligence. It is perhaps not altogether surprising that this new head of liability has been introduced to encourage, if not compel, regulated firms to alter their attitudes towards training in the detection of suspicious transactions.[76]

The second requirement under the tripartite basis of the non-disclosure offence is that the information which causes the person to know or suspect that another person is engaged in money laundering, must come to his attention through the course of a business in the regulated sector. This, naturally, depends on the definition afforded to the term 'regulated sector'. This issue is addressed in Schedule 9, and it should come as no surprise that it is defined in particularly broad terms. It is convenient to define 'regulated sector' in negative terms, with Schedule 9, Paragraph 3 providing that:

> "A business is not in the regulated sector to the extent that it engages in any of the following activities-
>
> (a) the issue of withdrawable share capital within the limit set by section 6 of the Industrial and Provident Societies Act 1965 (c. 12) by a society registered under that Act;
> (b) the acceptance of deposits from the public within the limit set by section 7(3) of that Act by such a society;
> (c) the issue of withdrawable share capital within the limit set by section 6 of the Industrial and Provident Societies Act (Northern Ireland) 1969 by a society registered under that Act;

[74] FSA Press Release, March 8, 2001.
[75] Such co-operative institutions are "an important source of valuable information", *C v. S* [1999] 2 All E.R. 343 at 345.
[76] This theme is further reinforced through the statutory defence available under s. 330(7), see post.

(d) the acceptance of deposits from the public within the limit set by s. 7(3) of that Act by such a society;

(e) activities carried on by the Bank of England;

(f) any activity in respect of which an exemption order under s.38 of the Financial Services and Markets Act 2000 has effect if it is carried on by a person who is for the time being specified in the order or falls within a class of persons so specified."

Given the width therefore of precisely what constitutes a business within the regulated sector, it is clear that the role of many professionals, including for example bankers, accountants and members of the legal profession will fall under the duty to disclose requirements of this section, and failure to comply will result in criminal, and indeed heavily penal, consequences.

The final requirement under the tripartite structure of s. 330 is that the person fails to make the required disclosure as soon as is reasonably practicable after the information comes to his attention. Precisely what is meant by the term 'required disclosure' is clarified through s. 330(5) which defines 'required disclosure' in terms which essentially refer to 'reporting up the line',[77] i.e. the person must make a disclosure to a nominated officer (refined through s. 330(9) so as referring to the person appointed to receive and handle money laundering disclosures in the discloser's company) or alternatively to any person authorised to receive such disclosures by the Director General of the NCIS.

As to the necessity of the disclosure being made as soon as it is reasonably practicable it is clear that it is a brave professional indeed who would procrastinate over whether, and when to make the required disclosure, once suspicion had been aroused. This is particularly when one considers that there is no threshold element dictating when a disclosure should be made. On a strict interpretation of the provision, the merest suspicion as to the

[77] The concept of 'reporting up the line' has been considered previously, and therefore need not be repeated here.

legality of the slightest funds[78] is sufficient to compel disclosure, and it is unlikely that the court would look favourably upon the professional who failed to make the necessary disclosure after any significant period of time, which in the context of money laundering intelligence, could well refer to any disclosure not made within a matter days.

In keeping with the previous offences, there is a series of statutory defences, and again the issue of having reasonable excuse for failing to disclose is present. The second statutory defence available is strictly limited to the legal profession and is couched in similar terms to the equivalent offence of non-disclosure in relation to laundering the proceeds of drug trafficking in the DTA 1994. There will be no offence committed where the person is a professional legal adviser, and the information or other matter which causes him to either know or suspect money laundering came to him in privileged circumstances. This defence is elaborated through s. 330(10) which, provides that:

> "Information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him-
>
> (a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client,
>
> (b) by (or by a representative of) a person seeking legal advice from the adviser, or
>
> (c) by a person in connection with legal proceedings or contemplated legal proceedings."

This would appear then to be a reasonably broad defence of which members of the legal profession can avail themselves.[79] To accept such a position

[78] The proposed amendment of inserting a financial threshold beneath which a transaction need not be reported, although perhaps desirable on a practical level was abandoned during the course of the Parliamentary debates, and would certainly have been inconsistent, and indeed unhelpful, to the general tone and intended effect of Part 7.

[79] Indeed, perhaps this subsection also serves as a retort to those who have openly criticised the minimal number of disclosures made to the NCIS over money laundering by the legal professionals. See for example,

would however, be incorrect as the availability of the defence is immediately restricted (and moreover quite severely so) by the effect of s. 330(11) which provides that where the information or other matter is communicated or given with the intention of furthering a criminal purpose, the legal privilege defence is unavailable. This reflects the current position at common law. The case of *Ex parte Francis*,[80] interpreting s. 10 of the Police and Criminal Evidence Act 1984, determined that the term 'criminal purpose' refers to the criminal purpose of the client, and not to that of the solicitor. Thus the defence of legal privilege will not be available where the transaction is in fact for the purposes of money laundering, irrespective of any guilt on the part of the solicitor. If this narrow interpretation, is to be favoured by the judiciary under the PCA 2002,[81] it is clear that, as Wadsley emphasises:

> "...the protection afforded to solicitors and their clients...is not helpful...[S]olicitors will still be bound to report any case where they suspect money laundering, because the information will have been communicated with a view to furthering a criminal purpose if the suspicion was correct."[82]

There is a further statutory defence that is highly instructive as to the general approach and stance adopted by the legislative and regulatory framework within the United Kingdom. Under s. 330(7), it is a defence to establish that the person (who should have disclosed) neither knew nor suspected that another person was engaged in money laundering and had not been provided with the required training by his employer. This is a particularly interesting defence being available where the person is charged with the s. 330(2)(b) offence, namely the situation whereby the professional has reasonable grounds for either knowledge or suspicion of money laundering and by virtue of the omission of the training necessary to detect possible money laundering vehicles, fails to disclose as required. This is therefore

---

the observations of the Standing Committee debating the Proceeds of Crime Bill, Hansard, HC Debs, Cols. 1010-1014, 17th January 2002

[80] *R v. Central Criminal Court, Ex Parte Francis and Francis* [1989] AC 346.

[81] This interpretation is, it may be suggested, likely to be favoured by the courts.

[82] Wadsley, 'Professionals as Policemen', *Conv. and Prop. Lawyer*, (1994) 275, at 281.

allowing, for example, a junior employee[83] of a company operating in the regulated sector, to avoid personal criminal liability under this section. It is only available where the employee has not received the necessary training from his employer, and therefore serves as a reminder to those institutions within the regulated sector that the legislative framework under which they operate is geared to revolve around the disclosure of information concerning money laundering, and this is something which is, in turn, dependant upon the training that they provide to their employees to detect suspect transactions and clients. The insertion of this defence will certainly encourage, if not compel, such companies to re-evaluate their internal training procedures and to ensure that their obligations under the Money Laundering Regulations are met. Certainly, where this defence is pleaded successfully by an employee, criminal investigations will commence under the Regulations, and it is almost certain that the regulated institution responsible for the training of the person who failed to disclose will face criminal sanctions for non-compliance with the 1993 Regulations. Moreover, it may also be contended that where an individual employed by such an institution is prosecuted under s. 330, the great likelihood is that their defence counsel will raise a plea of insufficient/non-existent training. Whilst the defence is one of good intentions, it may be suggested that it may well be open to misuse by defence counsel eager to allow the defendant to escape the draconian sanctions imposed by s. 334 by shifting the blame onto the institution.[84]

The final issue of note in relation to the s. 330 offence of non-disclosure is the reference to guidance issued by a supervisory, or other appropriate body, being approved by the Treasury and published in an approved manner, as

[83] Indeed the case of a junior employee facing criminal sanctions for negligently failing to disclose was of grave concern to the Standard Committee in their debates on the Bill who concluded that it would ultimately be a matter for determination by the Crown Prosecution Service, Hansard, HC Debs, Cols.1108-1114, 22nd January 2002.

[84] Perhaps one pre-emptive response to the possibility of such a defence succeeding, is that those institutions within the regulated sector shall be somewhat less tardy in keeping detailed records of staff training in relation to the detection of suspicious transactions. This role, it may be suggested, is most likely to fall under the remit of the nominated officer, and it is likely that records ought to be compiled on both a policy basis (that is the training policies of that institution generally), and also on an individual basis (that is the actual training received by each employee specifically, including the date received, not to mention the duration and specific nature of the training so received).

appropriate in its opinion to bring the guidance to the attention of those persons likely to be affected by it. The Court *must* consider such guidance in determining whether the person committed an offence. The inclusion of this sub-section again emphasises the liability for merely negligent non-disclosures. In ascertaining whether the failure to disclose by the professional was indeed negligent the Court must consider the standards adopted generally by the industry as to whether the reasonably prudent professional would have been alerted as to the dubious nature of the funds in question. It is against such standards that the individual professional must, and will be judged.

Under s. 334, a failure to report as required is punishable by, where tried summarily, imprisonment for a term not exceeding 6 months, and a fine not exceeding the statutory maximum. Where the offence is tried on indictment, the offence is punishable by imprisonment for a maximum of 5 years, and an unlimited fine.

Failure to disclose: Nominated officers

This provision is essentially a re-working of the s. 330 offence with specific application to nominated officers in the regulated sector. This therefore refers to the individual whose role it is to receive internal 'reporting up the line' disclosures, (i.e. the appropriate person under Reg. 14 of the 1993 Regulations as discussed previously) and decides whether there are sufficient grounds to warrant a disclosure to the NCIS. Again the offence may, by virtue of s. 331(2)(b) be committed negligently, although this is perhaps less troublesome than the liability for negligence under the s. 330 offence on the grounds that it is the purpose of the nominated officer to determine whether or not a disclosure to the NCIS should be made. It is perhaps then less objectionable to impose a negligence based head of liability upon such a figure, who by virtue of their elevated, and as previously noted important role both with the individual financial institution, and also within the system of preventing money laundering generally, one would

expect to show due diligence and reasonable care in the fulfillment of their functions.

It is therefore interesting to note that the ever-present defence of reasonable excuse is once again available. This inclusion of this defence throughout Part 7 is troublesome generally, but the specific inclusion of the defence in relation to nominated officers who fail to make the necessary disclosure is even more astonishing. One really would have to delve into the realms of fantasy surely, before the Court would entertain this defence from the very person whose function it is to consider the internal reports and then either make a further report to the NCIS or determine that there is, in fact, no basis for such a report. As with the corresponding provision in the s. 330 offence however, the precise parameters of this defence will have to await judicial consideration.

Disclosures of information prejudicial to an investigation

The solitary remaining offence under the 2002 Act is that of tipping-off, where a professional makes "a disclosure which is likely to prejudice a money laundering investigation being undertaken by law enforcement agencies."[85] It is not proposed to consider this offence in any great detail as the recent case law on the difficulties that the offence of tipping-off may create for professionals, and indeed the academic commentaries on such issues ably consider the offence.[86] It is however worth emphasizing that where the person does not know or suspect that the disclosure was likely to be prejudicial, he does not commit an offence. Likewise, there will be no offence where the discloser is a law enforcement officer going about his official duty, nor where legal privilege may be invoked by the discloser.[87] As with it's predecessors, the tipping-off offences under s. 53 of the Drug

[85] As defined by the Government in the *Publication of Draft Clauses Document*, which may be found at <http://www.archive.official-documents.co.uk/document/cm50/5066/5066-11.htm>.
[86] The dilemma created by this offence are well illustrated by the cases of *C* v. *S* [1999] 2 All E.R. 343, and *Governor and Company of the Bank of Scotland* v. *A Ltd and others* [2001] 1 W.L.R. 751. See Chan, 'Banks Caught in the Middle', 22(8) *Comp. Law.* (2001) 245; Wadsley, 'Banks in a Bind: The Implications of the Money Laundering Legislation', 16(5) *J.I.B.L.* (2001) 125.
[87] By virtue of s. 333(2). The legal exemption is limited through the need to satisfy the requirements of s. 333(3).

Trafficking Act 1994 and s. 93(D) Criminal Justice Act 1988, the offence is punishable, in accordance with s. 334(2), by where tried summarily, imprisonment not exceeding a term of 6 months and a fine not exceeding the statutory maximum. If the offence is tried on indictment, it is punishable by an unlimited fine and imprisonment for a maximum of 5 years.

Suspicion as the basis for the United Kingdom reporting regime

This overview of the Proceeds of Crime Act 2002, and the discussion of the preceding legislative framework, has emphasized the reliance upon the "professional as policemen"[88] and the importance of the disclosure of *suspicions* to the NCIS. The remainder of this article will consider some of the underlying tension resulting from such an arrangement, focusing particularly upon the difficulties associated with the meaning of 'suspicion' and constant erosion of the relationship of trust and confidentiality between a professional and client.[89]

The "pivotal concept"[90] of suspicion as it relates to the money laundering legislation has established itself as a deep rooted cause for concern amongst both legal academics and the professionals covered by the legislation. It barely needs to be repeated that suspicion is a nebulous (and indeed subjective) state of mind, and as Feldman correctly emphasisies, suspicion is a "far less assured state of mind than either knowledge or belief".[91] Certainly there has been a healthy, and indeed heated[92] debate even amongst commentators on the money laundering provisions as to precisely what level of mens rea is required before the duty to report bites. The traditional position is stated simply by Mitchell, Taylor and Talbot who contend that the term must be given it's ordinary, literal meaning.[93]

The Oxford English Dictionary defines suspicion as:

---

88 To use the phrase coined by Wadsley, above n. 82.
89 By way of an introduction to the issues raised, reference may be made to Cole, 8(4) *J.I.B.L.* (1993) 129.
90 Above n. 35, at 16.
91 *Criminal Confiscation Orders: The New Law* (1988), at para. 3.09
92 See the observations of Bosworth-Davies, above n. 5, at 56.
93 Mitchell, Taylor and Talbot, *Confiscation and the Proceeds of Crime* (1997), at 186.

"(1) the feeling or state of mind of one who suspects: imagination or conjecture

of the existence of something evil or wrong without proof, apprehension of guilt or

fault on slight grounds or without clear evidence ...

(2) Imagination of something (not necessarily evil) as possible or likely; a slight belief or idea of something, or that something is the case: a surmise; a faint notion; an inkling ...

(3) Surmise of something future; expectation ...

(4) A slight or faint trace, very small amount, hint, suggestion (of something)."

As Fisher and Bewsey rightly emphasise then, this literal definition:

"...places the threshold rather low, since it contemplates the forming of suspicion where a person has only an inkling or merely a faint notion or surmise that a person has been engaged in criminal conduct or benefited from the proceeds of criminal conduct."[94]

There is a school of thought however, that suggests that such inklings or speculations are not sufficient to fall within the reporting requirements. Brown is particularly forthright on this issue stating that:

> "...in a criminal statute, carrying a potentially serious sentence of imprisonment, what is required is some real suspicion, going beyond an inkling, fleeting thought or fleeting doubt all of which are surely de minimis."[95]

Whilst this is perhaps accurate on a pragmatic level (and moreover it may be contended, entirely sensible), it may be suggested that inklings of doubt or mere speculations are to be reported under the strict wording of the

[94] Above n. 35, at 17.
[95] Above n. 15, at 309.

provision.[96] Whilst it may well be true to suggest that no prosecution would be brought against a professional who failed to report such a low level of suspicion, this is entirely different to there being no legal basis for liability in such a situation. This is supported by the overriding idea behind the creation of the suspicions based reporting scheme, namely, that the reports by those most likely to come across possible instances of money laundering are under the legal duty to report such suspicions so that the authorities may gather as much evidence as possible. In this, it is clear that the reporting system in the United Kingdom, has been successful, as the constant increase in the quantity of disclosures made to the NCIS demonstrates.

Academic debate aside, it is clear that the concept of suspicion still retains it's position as a cornerstone of the money laundering provisions under the PCA 2002, and, moreover, it is still a term which nimbly defies precise identification in practical terms. This is, in itself worrying, after all, simplification was one of the Government's objectives with the enactment of the PCA 2002.[97] Furthermore, one must query whether the insistence on the reporting of mere suspicions, as opposed to, for example, suspicion based on reasonable grounds as is the accepted norm in criminal statutes.[98] Such an amendment was tabled during the Parliamentary debates on the Proceeds of Crime Bill and concerns were raised regarding the breadth of the duty as applicable with such a minimal standard of mens rea, with Mr Grieve, M.P., stating that:

> "Yes it is [tyrannical], because it leaves people in a state of massive uncertainty about where they stand, whereas normal tests in English law, knowledge and belief, are well established and make sense to the ordinary lay person and the person dealing with the matter."[99]

---

96 Such a conclusion is supported by Bosworth-Davies and Saltmarsh, above n. 27, at 189-190.
97 As enunciated by the Government in the *Publication of Draft Clauses Document*, which may be found at <http://www.archive.official-documents.co.uk/document/cm50/5066/5066-02.htm>.
98 See for example the various provisions of the PACE 1984 which require objective justification for suspicion.
99 Hansard, HC Debs, Col. 982, 17th January 2002.

This is certainly accurate, and ably sums up the fears held by many regarding the reliance upon suspicion as a trigger for compulsory reporting requirements. The difficulty however, is two-fold. Firstly, as was pointed out in the Standing Committee debate, all that the professional need do to avoid any such possibility of criminal sanctions, is to make the necessary report,[100] although such an approach raises serious questions of the confidential nature of a professional-client relationship.[101] Secondly, the effect of setting the trigger at such a low level is to increase the number of disclosures made. The consequence of this, is that the NCIS is able to gather substantially more intelligence than it would if the trigger were placed at, for example, suspicion on objectively reasonable grounds.[102] The Government rejected drafting the Bill with the requirement of reasonable grounds as a threshold, before suspicions must be reported on the reasoning that, "one of the aims of the legislation is to require the exercise of greater caution in handling suspicious transactions" the standard should be one of suspicion alone.[103] It may be suggested that to move to a more restrictive level of mens rea would be inconsistent with the development of the legislative framework combating money laundering within the United Kingdom. Moreover, it would be inconsistent with the general approach of the PCA 2002. To impose a higher threshold before a disclosure to the authorities may be legally compelled would be counter-productive to the suspicions based reporting regime,[104] as it would have the obvious effect of limiting the number of reports made to the NCIS, and would, as a consequence, limit the amount of intelligence gathered by the NCIS in the fight against money laundering.

Thus, the pre-emptive response by the Government to the unavoidable consequence of this approach, namely the increase in the number of reports, is that, it is preferable that "all laundering activity be reported for possible

---

[100] See Hansard, HC Debs, Col. 983, 17th January 2002.

[101] Something to be considered shortly.

[102] Although, of course, the quality of the intelligence gathered through such means, is an entirely different matter.

[103] As stated in the *Publication of Draft Clauses Document*, which may be found at <http://www.archive.official-documents.co.uk/document/cm50/5066/5066-11.htm>.

[104] At least as it is perceived by the Government and the NCIS.

investigation by law enforcement given the importance it attaches to money laundering."[105]

The other concern again voiced in the Parliamentary debates on the Bill, regarding the use of suspicion as the trigger for mandatory reporting, is the damaging effect such requirements have upon the professional relationship between, a professional and his client. Mr Boris Johnson M.P., in replying to the suggestion that all a professional need do to avoid any criminal liability is make the necessary disclosure, articulates such undeniable tension ably in stating:

> "How can an accountant [for example] have a professional relationship with his client if he goes around sneaking...[H]ow can that relationship be possible if the accountant is sneaking to all and sundry about his private transactions with his clients?"[106]

This initially appears to be somewhat undeniable. Any professional relationship is based upon the idea of trust and confidentiality, and it is clear that such fundamental principles are being undermined by these stringent reporting requirements. The difficulty, however, is once again the necessity for the correct balance to be struck between upholding the virtue of such a relationship and the important public policy aims of the legislation. The importance of inhibiting money laundering is undeniable, and if one considers that the 2002 Act is restricted to those engaging in the regulated sector, and not to the wider public in general, one must consider whether an adequate balance has been met between conflicting interests. There is, unsurprisingly, no easy answer to such a question. It is a personal matter of taste and preference, and whilst the Government's favoured approach of 'leave no stone unturned' has a certain logic, there is certainly strong justification for the requirement of reasonable grounds for suspicion to be inserted into the s. 330(2)(a) offence. Whilst it must be accepted that in setting the trigger for mandatory disclosures at such a low threshold, the flow

[105] Above n. 103.
[106] Hansard, HC Debs, Col. 983, 17th January 2002.

of intelligence to the NCIS is increased, consequently, there must be doubts as to the actual quality of such disclosures for intelligence purposes where the threshold is placed so low. Whilst the internal reporting system *should* remove any blatantly unfounded reports, it is clear that it does not necessarily follow that all reports of suspicious persons are, in fact suspicious by virtue of the fact that the client is engaged in money laundering. If the sheer number of reports increases, so too must the quantity of 'red herrings', where the employee was justified to report his suspicion, but in fact the client was engaged in a perfectly legal transaction. It may therefore be queried if the increased *number* of reports expected by the Government following the enactment of the 2002 Act is not counter-productive, diverting the NCIS from more substantiated instances of money laundering.[107] It is true that the insertion of suspicion on reasonable grounds as opposed to mere suspicion in the subjective sense would not negate the possibility of such 'red herrings' entirely, but it would certainly reduce the number of unjustified reports made to the NCIS. This would in turn result in the NCIS gaining more valuable intelligence, although inevitably in reduced quantities.

Conclusion

The enactment of the Proceeds of Crime Act 2002 clearly then, raises some important, and indeed difficult issues. Whilst the 2002 Act retains certain problematic features of its predecessors, notably the reliance upon suspicion based reporting, and the interesting defence of having a reasonable excuse for failing to make the required disclosure, it also introduces some new elements into the fight against money laundering within the United Kingdom. The full impact of the incorporation of the negligence based head of liability, for example, is something which will no doubt not be fully realised for some

[107] An important related issue is whether the NCIS is sufficiently resourced to adequately deal with the unavoidable increase in the number of disclosures made. Crucially, it is not yet clear whether the Government in tends to increase the funding available to the NCIS, although it may be suggested that such additional funding is absolutely necessary if the NCIS is to operate properly. An interesting question is whether information technology software can alleviate this very real difficulty. Certainly such packages are not without potential, and no doubt the development of packages such as the *Search Space® Anti-Money Laundering Solution*, shall be vigorously monitored (not to mention the results of the NCIS *Money-Web* pilot scheme).

time yet. It will certainly be interesting to see how far this idea of negligently failing to report will develop with the common law at the helm. In particular, it remains to be seen whether the courts, and indeed the NCIS, will seek to punish heavily those persons (and institutions), which are deemed to have acted negligently in omitting to disclose their knowledge or suspicion of money laundering. Given the stance of the Government on this issue, and particularly their disappointment towards the 'variable' standards of reporting practice amongst members of the regulated sector as a whole, it is certainly possible that this negligence based head of liability will be employed to its full extent in an attempt to forcefully persuade those members of the regulated sector who have viewed the reporting regime with a mixture of scorn and contempt, to actively improve their reporting habits.

In as much, it is surely a foregone certainty that the number of disclosures made to the NCIS will increase sharply. It remains to be seen whether the NCIS has the resources to effectively cope with the likely increase, and moreover whether the 'leave no stone unturned' approach to the reporting system will, in reality, lead to an improvement of the quality of the disclosures made.[108] Clearly, the answers to these problem will not become apparent for some time yet, and if one wishes to see the menace posed by money laundering averted, one must hope that the Government's new legislative framework is successful in persuading those disbelievers within the regulated sector that the suspicions based reporting regime is effective. In any event, it is clear that challenging times lay ahead for those professionals, whether they are bankers, accountants or lawyers, affected by the provisions of the Proceeds of Crime Act 2002.

---

[108] Thus leading to an improvement of the intelligence collated from the reports.