"Law Relating to Banker's Duty on Confidentiality"

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Introduction

Duties on the part of a banker towards its customers derive from the bank-customer relationship, which is governed by common law as well as statutory law. Generally, the bank-customer relationship was given birth as a result of various financial needs of people. Banking is considered to be a business, where it has turned out to be one of the indispensable institutions not only among the business community, but also among the ordinary community. The relationship between the bank and the ordinary community have grown into a new level, which has invited greater responsibilities and rights for both the bank and the customer.

The nature of the relationship between banks and customers begin with a transaction that does not limit only to money, however, extends to other material information of the customer, which are required and requested by the bank to be held by the bank. These information gives rise to a duty on the part of the bank to secure them without being disclosed to any other party.

The purpose of this article is to scrutinise especially regarding the duty of bankers to secure confidential information of their customers, how the duty on confidentiality emanated, and special focus will be made on the legal framework which provides the practical aspect on how this duty is currently recognized before law.

Bank-Customer relationship and Confidentiality

In terms of section 86 of the Banking Act No. 30 of 1988, a banking business means "*the business of receiving funds from the public through the acceptance of money deposits payable upon demand by cheque, draft, order or otherwise, and the use of such funds either in whole or in part for advances, investments or any other operation either authorised by law or by customary banking practices*". Apart from the above-mentioned situation practically

more information of customers are being obtained by the banks. When a bank account in any nature is opened specific personal information of the customer are obtained[1] and the transactions done through that bank account make evident the pattern of expenditure and income of a customer, which is a matter of privacy. This reveals realities of lifestyle of a particular person that subsequently emphasize his or her right to privacy. Indeed, the right to privacy being a universally accepted human right under and by virtue of Universal Declaration of Human Rights[2] (UDHR) and International Convention of Civil and Political Rights[3] (ICCPR) give more importance to right to privacy. Regardless of this right not being absolute in nature, it vehemently demonstrates the need to secure confidentiality. This is equally applicable to banking sector as well.

Obligations of confidentiality apply to almost all professional relationships. Due to the sensitive nature of personal financial information, the banking profession was also one of the professions in which the law sought to impose positive duties.

With respect to the banking context, one of the earliest cases in the English common law was the 1868 case of ***Hardy v Veasey and Others***[4], a case of the Exchequer Court. Here the Court set out that a bank has an implied moral obligation that it will not disclose the financial affairs of its customers to third parties. Although this was not precisely a legal duty, this was the first step towards recognizing that bankers had an obligation to their customers to keep personal financial affairs confidential.[5] This position was later legally accepted[6] in the case of ***Tournier v National Provincial and Union Bank of England Ltd***[7] by Bankes L.J which stated as follows;

> *'The privilege of nondisclosure to which a client or a customer is entitled may vary accordingly to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor the doctor, and the banker,*

[1] Details of the National Identity Card, Parental details, occupational details, source of income as well as salary scale of a person etc.
[2] Article 12 of the UDHR
[3] Article 17 of the ICCPR

[4] [1868] LR 3 Exch 107
[5] Muharem kianieff, 'Jones v Tsige: A Banking Law Perspective' [2013] 44(3) Ottawa Law Review <https://scholar.uwindsor.ca/lawpub/63/> accessed 20th September 2019
[6] ML Tannan, Tannan's Banking Law and Practice in India (23rd edn, Lexis Nexis 2010) 658
[7] [1923], 1 KB 461 at 474

though the underlying principles may be the same. The case of the banker and his customer appears to be the one in which the confidentiality relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence.'

For that reason, there exists a greater responsibility of securing confidentiality on bankers towards their customers that need to be acted upon with due diligence.

Furthermore, the extent to which the information covered from this duty is a matter of relevance. In fact, there could be an argument *against* the continuance of strict application of this duty in respect of certain situations namely; illegal transactions, financing terrorism, and to the fact of less concern given to the transparency of monetary transactions between individuals as well as institutions. As a result the original purpose in which this duty was laid down no longer emanates a greater purpose on securing confidential information of banking customers in present context. Thus, the relationship between the bank and customer has now deviated from the original context. However, divulgence of details of a banking account need to be done with utmost diligence.

Change of Bank-Customer Relationship and Tournier Case

The duty of confidence arises when certain amount of confidential information is being given to an entity/person who is reckoned to secure them without divulging them to any other party. Throughout the time duty of confidentiality was prioritized until the landmark judgment on ***Tournier v National Provincial and Union Bank of England Ltd***[8] was delivered in 1923. It was held in its headnote as follows;

"It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, ***unless*** *the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or*

[8] 1 KB 461

the protection of the banker's own interests requires it."

Thus, it can be stated that in any event where the above qualifications are present the banker's duty on confidentiality will be relaxed. Therefore, the strict adherence of this duty has now been deviated through case precedence for a good cause. Moreover, courts possess a duty to look upon the necessity of disclosing information before any direction and/or order being made. For the reason that, there is an argument with regard to public interest as opposed to this duty on bankers. It was examined in ***British Steel Corporation v Granada Television Ltd***[9] and pronounced by Lord Wilberforce that;

"...as to information obtained in confidence, and the legal duty, which may arise, to disclose it to a court of justice, the position is clear. Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships. But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance."

Therefore, the matters deciding whether banking details to be disclosed or not depend on the facts of each case, and subsequently a duty is imposed upon the judge to carefully make his decisions. Hence, the court is by some means authorized to order to disclose banking information in respect of a specific account.

Legal Framework in Sri Lanka and the Principles to be followed when divulging Details of a Bank Account

Banking Act of Sri Lanka creates several provisions as per to the liability of bankers to maintain secrecy of bank accounts of its customers. This is established under ***section 77*** of the Banking Act No 30 of 1988 as amended by Act No. 02 of 2005. Section 77(1) reads thus;

(1) Every director, manager, officer or other person employed in the business of any licensed commercial bank or licensed specialised bank ***shall observe strict secrecy*** *in respect of all transactions of the bank, its customers and the state of accounts of any person and all matters*

[9] [1981] AC 1096

relating thereto and shall not reveal any such matter ***except****—*

(a) *when required to do so—*

(i) by a court of law;

(ii)by the person to whom such matter relates;

(b) in the performance of the duties of the director, manager, officer or other person; or

(c) in order to comply with any of the provisions of this Act or any other written law.

Apart from the above said provision, only to mention, the ***section 02*** of the Act No. 39 of 1990, a new part was introduced to the Banking Act under the heading of "***Numbered Accounts***"[10] and originally it contained section 34A to 34D, which gave protection to a special category of accounts. However, the status of numbered account was deviated under the provisions of the section 2(1) of the Financial Transaction Reporting Act No. 06 of 2006 which read as follows;

"No Institution shall open, operate or maintain an account, where the holder of such account cannot be identified, including any anonymous account or any account identified by number only, or any account which to the knowledge of the Institution is being operated in a fictitious or false name."

Thus, the category of "Numbered Accounts" is not in existence as at present, and accordingly, the commercial banks are not permitted to open and maintain "Numbered Accounts".

Applicability of the Evidence Ordinance

Observing the provisions in the Ordinance with relation to banker's duty on confidentiality, there exist several distinct provisions that point out thereunto. ***Section 90D*** states as follows;

"No officer of a bank shall, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the content of which can be proved under this Chapter, or to appear as a witness to prove the matters, transactions, and accounts therein

[10] In terms of Section 34B(3) numbered account means an account opened with a licensed commercial bank authorized by the Monetary Board under repealed section 34A, that is identified only by a number, code, word or such other means as was determined by the Monetary Board.

recorded, unless by order of the court, or a Judge, made for special cause."

Apart from the above provision ***section 130(3)*** of the Evidence Ordinance further adds discussion with regarding the duty which reads as follows;

"No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party, except as provided by section 90D."

To that effect Mr. E.R.S.R Coomaraswamy[11] **in his book "*The Law of Evidence (Vol II – Book 1)*"** has commented as to the provisions of section 90D and section 130 as follows at page 163;

"section 90D is intended to confer on a bank and its officers an immunity, in any legal proceedings, to which the bank is not a party from producing the original books of the bank or from appearing as witness to prove the entries."

"But Section 90D also provides for exceptional cases where an order can be made by a court or a judge for special cause to do either the acts specified in the section. Section 130(3) of the Ordinance, however, states that no bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by section 90D. The two sections should be read together. It is also necessary to mention section 66 of the Code of Criminal Procedure Act, which deals with summons to produce documents. Section 66(3) provides that nothing in section 66 is to be deemed to affect the provisions, inter alia of section 130 of the Evidence Ordinance."

This leads to ***section 90E*** of the Evidence Ordinance, which clarifies the circumstances in which a judge may order to disclose details of a bank account, which reads as follows;

"(1) On the application of any party, to a legal proceeding, the court or a 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 proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and

[11] E.R.S.R Coomaraswamy, "*The Law of Evidence*" (Lake House Investments Lt, Vol II – Book 1)

subscribed in manner herein before directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the court or Judge shall otherwise direct.

(3) The bank may at any time, before the time limited for obedience to any such order as aforesaid, either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

The above position goes along with the principle emanated from the *Tournier Case*. However, a question need to be posed whether the power to order for inspection of banking books is absolute and/or unrestricted.

Mr. Coomaraswamy, in his book validate in fact of certain principles to be followed by the judiciary when such matters are concerned, and had commented as thus;

"The power to order inspection is a discretionary, and to be ***exercised with great caution, and on sufficient grounds only****. The court has also a discretionary power to make an order for inspection and copying before trial, which will ordinarily be made where the party applying cannot otherwise ascertain what entries are relevant and obtain copies of them."*

Moreover, in the case of ***Arnott v Hayes (1987)***[12], it was held that;

"*The order, if made, should be limited to relevant entries. The order should only be made where the entries of which inspection is sought would be admissible in evidence at the trial*."

Thereafter, in ***Owen v Sambrook (1981)***[13], it has been held that;

"*The judge must take care to ensure that the person whose bank account is to be inspected is not oppressed and the period of inspection is to be limited. He should also ensure that the prosecution is not using the power for ulterior purposes*."

Furthermore, Mr. Coomaraswamy in his book has set out the **guidelines** to be followed when making an order under section 90E of the Evidence Ordinance as discussed in the case of **R v Nottingham justices, ex parte**

[12] 36 Ch.D 731 at 738
[13] Crim. L. Rev 329

Lynn (1984)[14]**;** "The Lord Chief Justice then laid down certain principles as guidelines for the justices:

(a) *To warn themselves of the importance of the step which they were taking in making an order under section 7;*

(b) To recognise the care with which the jurisdiction should be exercised;

(c) To be alive to the requirement of not making the order extend beyond the true purpose of the charge before them;

(d) To make into account, inter alia, whether there was other evidence in the possession of the prosecution to support the charge or whether the application under section 7 was a fishing expedition in hope of finding some materials upon which the charge could be hung – perhaps the only evidence."

In terms of the above authorities it is abundantly clear that even though the court are vested with power to peruse banking books, specific guidelines need to be followed with due diligence.

Conclusion

As observed, it is very clear that the banker's duty with regard to the confidentiality of the account of its customers have deviated gradually from a strict application to a more lenient application. Thus, courts are permitted to order for perusal of any kind of banking book of a customer, and the aforesaid provisions of the Banking Act as well as Evidence Ordinance substantiate to that effect. However, when doing so priority must be given as for the need of securing confidentiality of customers of a banks, and thus, the courts shall be bound by the principles established in the aforementioned authorities maintaining limits without abusing the power given from the legislature.

Bibliography

- *Arnott* v *Hayes* (1987) 36 Ch.D 731 at 738
- *British Steel Corporation v Granada Television Ltd* [1981] AC 1096
- *Owen v Sambrook* (1981) Crim. L. Rev 329
- *Tournier v National Provincial and Union Bank of England Ltd* (1923), 1 KB 461
- *R v Nottingham justices, ex parte Lynn* (1984) 79 Cr App Rep 238, 283
- Banking Act No 30 of 1988 as amended by Act No. 02 of 2005
- Evidence Ordinance No. 14 of 1895
- Financial Transaction Reporting Act No. 06 of 2006
- E.R.S.R Coomaraswamy, "*The Law of Evidence"* (Lake House Investments Lt, Vol II – Book 1)

[14] 79 Cr App Rep 238, 283

- ML Tannan, *"Tannan's Banking Law and Practice in India"* (23rd edn, Lexis Nexis 2010) 658
- Wijeyadasa Rajapakshe, *"The Law Of Banking And Finance"* (2nd edn, 2014) 113
- Muharem kianieff, *'Jones v Tsige: A Banking Law Perspective'* [2013] 44(3) Ottawa Law Review <https://scholar.uwindsor.ca/lawpub/63/> accessed 20th September 2019
- Chamila S Talagala, 'The Law Relating to Bank-Customer Relationship: Some Salient Duties of Banks' (*Academia*, 25th February 2010) <https://www.academia.edu/2413477/The_Law_Relating_to_Bank-Customer_Relationship_Some_Salient_Duties_of_Banks> accessed 19th September 2019