The Banker-Customer Relationship

Chapter 22

The Banker Customer Relationship

Learning Outcomes

Studying this chapter should help you to:

- ✓ understand the nature of the banker customer relationship
- ✓ understand the duties of the bank to the customer
- ✓ understand the duties of the customer to theå bank

1 INTRODUCTION

In the last chapter, we looked at the definition of banks and their importance within the general financial system. We considered why these institutions are regarded as 'special' and their impact within the economy. We also explored the definition of a bank, taking into consideration the statutory definition and the common law approach. Subsequently, we have also considered why we regulate and the impact of the global financial crisis. Finally, we started to explore the banker customer relationship and how this is similar to a bailee and bailor relationship which is considered in more detail in Chapter XXX. In this chapter, we look at this banker customer relationship in more detail, focusing on the duties required of the bank to its customer and vice versa.

2 The Banker Customer Relationship

The banker customer relationship is of a contractual nature. It is probably best understood from the perspective of what the customer, depositor puts into the account and the sum of

which is repaid to the customer as an equal value, on demand. In other words, when you pay money into an account at the bank, the banks *hold* that money until you are ready to request for the equal sum.

One of the landmark cases in defining the banker customer relationship is the case of *Foley v Hill (*1848) 2 HLC 28 (HL) as it clarified that the banker customer relationship is essentially a contract which exists between a debtor and creditor. This was discussed in the previous chapter. In relation to the point of the banker customer relationship, when money is paid into an account, the bank does not provide any promises or explanations of how the deposits will be used, and in addition, it's not accountable for the usage of this money. In the case of *Hirschhorn v Evans (Barclays bank Garnishees) 1848 2 HLC 28*, it was held that a bank managing an account on behalf of an insurance syndicate was not holding that money on trust without something more with that understanding.

In the last chapter, we started to explore the characteristics of a bank under the common law approach and started with the case of *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110. This particular case is also really important in relation to the banker customer relationship discussion. This has been discussed in the previous chapter, and it added further clarity to the duties of bank to the customer, and also decided that a customer does not have the right of action against its banks for a repayment of sums until the customer in question make a demand.

When discussing banking law issues relating to the banker customer relationship, and answering exam questions on this topic, it is important that the cases of *Foley v Hill* and *Joachimson v Swiss Bank* are explored in detail. These cases have clarified a few issues, particularly, on the issue of the demand of payment from a customer and the maintenance of bank accounts. First, in the instance of a current of savings account, a customer's demand is

only required to effect payment. If the account is a fixed deposit account, then then the interest is payable on the specified day, without the customer needed to request or demand. Secondly, there is no need for the demand for repayment to be at the branch where the account is held. There are of course logistical matters connected with this, if this were the case. For example, imagine if you opened an account in Nottingham, you then moved to London, but you could only withdraw money from Nottingham. The issue of the demand for repayment was also considered in the case of *Bank of Scotland v Seitz* 1990 SLT 584, it was contended that payment by or to the bank could only be insisted on at the branch where the account was maintained. According to Scottish law, which governed the banker and customer contract, the debtor needed to may payment to the creditor at their registered place of business. Thirdly, when an account is closed, the balance of the account is payable without demand.

When answering banking law exam questions, two of the important cases you should discuss are *Foley* and *Joachimson* as they form fundamental part of the banker customer relationship discussion. Aside from the factors identified above, decisions of the court have demonstrated that the banker customer relationship, for the most part, is regulated by implied terms contractual terms.

✓ **You now understand the banker customer relationship in some more detail. You also now know the two key cases when discussing this relationship.**

3. What are the duties of the bank to the customer?

Now that we have identified the two main cases in this area, it is important to consider the duties that are owed to by the bank to the customers. These duties include the duty to make payment; the duty to conform to the customers' mandate; duty to exceed the customers' mandate; duty to obey the customers' countermand; the duty to collect instruments; duty to render account; and the duty to maintain confidentiality. In the same way, the customer also has duties, but we will consider this towards the end of the chapter.

3.1 Duty to make payment

As noted in the earlier section of this chapter, and indeed the last chapter, the banker customer relationship is of a contractual nature. Once money is paid into an account held with the bank, the customer is regarded as the creditor, while the bank is the debtor. If the customer is overdrawn on that account, the roles reverse in that he customer then becomes the debtor. In ***Foley*** this was clearly articulated by Lord Cottenham who noted:

'Money, when paid into a ban, ceases altogether to be the money of the principle.. it is then then the money of the banker, who is bound to return an equivalent sum to that deposited with him when he asked for it. the money placed in the custody of the banker is, to all intents and purposes, the money of the banker, to do with it as he pleases.'

What this means therefore is that the bank is entitled to use the money deposited as it needs to, but also undertakes to repay the amount equal to that paid in, when the customer demands it.

3.2 Duty to conform to the customers' mandate

Another important duty of the bank is to conform to the customer's mandate. In practice, this means that when a customer gives an instruction to the bank, to receive or make payments into their account, the bank is obligated to adhere to those instructions. In the

case of *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc [1998] CLC 501* it was stated that:

'*..it is a basic obligation owed by a bank to its customer that the bank will honour on presentation a cheque by the customer on the bank.. when the bank honours such a cheque or other instructions It acts within its mandate..*'

Prior to the advent of electronic transfers, customer instructions were in the form a cheque. The mandate would contain information that one might expect, including information about the beneficiary, the amount and the account to be drawn against, and a signature of the customer. In other words, this mandate operates as an agreement between the customer and the bank.

3.2.1 Can the bank refuse to honour a mandate?

Indeed, there are four instances that the bank can refuse to honour instructions. The first, and the most common reason is where there are no funds in the customer's account, and there is no prearranged overdraft facility. An overdraft can be described as a loan facility which allows a current account customer to borrow money from the bank. This can be used to offset bills and it is an agreement existing between the bank and customer. There is also what we term an unauthorised overdraft. In this instance, the customer goes overdrawn without a prior agreement or arrangement with the bank. When a customer gives an instruction, it must be clear unambiguous. In the case of *London Joint Stock Bank Ltd v Macmillan [1918] AC 777*, this was made clear when Lord Haldane noted that

' the banker has a mandatory right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called on to do'.

If an instruction is unclear or unreadable, the bank can elect to disobey the instruction.

There second reason where the bank may refuse to honour a mandate is if the cheque is out of date. This is actually a matter of practice for banks and if a cheque is presented which is more than six months than the date which is on it, the bank is within its rights to refuse. This was seen in the case of *Commissioner of Inland Revenue v Thomas* Cook (NZ) Ltd [2003] 2 NLR 296.

The third reason is if the bank has a good reason to believe that the mandate is not authorised by the customer. If the bank believes that the customer is in fact being defrauded, they are within their rights to refuse to honour the transaction. The interesting thing here is that if the bank went ahead, without making the proper inquiry, the bank would actually be in breach of its contractual duty to the customer. A good case for this is *Lipkin Gorman v Karpanle & Co* [1989] 1 WLR 1340.

The fourth reason is where the payment has been abrogated by statute of by a court order. These instances occur where the customers' account has been frozen, for example under the Proceeds of Crime Act 2002; where the individual has been declared bankrupt; or where the customer has been served with a freezing injunction or a third-party debt order. In this last instance, this occurs where a corporate customer is 'wound up'.

3.2.2 What damages are available for a wrongful dishonour of a cheque?

A bank will be liable for a breach in contact in some instances, and as such, the customer may be able to bring an action against the bank. There are a few cases in this area for us to explore. One of the first opportunities to explore the issue of damages was the case of *Gibbons v Westminster* Bank [1939] 2 KB 882. In this case, the bank dishonoured a cheque and the court held that the 'loss' needed to be proven in order to recover damages. As the likelihood of a customer suffering any special loss is slim under the contract law rules, claims are limited to

nominal damages. There are other cases including *Marzetti v Williams* (1830) 1 B& Ad 415 which have explored this issue and recognised that there may be a loss of reputation.

Key Case

Kpohraror v Woolwich Building Society [1996] CLC 510

In this case, Mr Kpohraror was a self-employed importer/exporter and maintained a current account with Woolwich Building Society. Mr Kpohraror drew a cheque, payable to his supplies who had agreed to supply him with good to be resold in Nigeria. The following day, the cheque was wrongfully dishonoured by the bank. Payment to the third party was eventually successful, however, the delayed payment resulted in the good being shipped late, further resulting in Mr Kpohraror losing his sub buyer in Nigeria. Mr Kpohraror brought an action against the bank on the grounds of breach of contract. The first ground, he sought general damages for injury to his credit and to his reputation; the second, he sought special damages for loss of profit.

This case is important as it reflects on the social and societal changes. A wrongful refusal of payment may actually cause harm to the public, regardless soft if they are traders or private individuals. Of particular interest, he said:

It is abundantly clear, in my judgement, that history has changed the social factors which moulded the rule in the nineteenth centaury. It is not only a tradesman of whom it can be said that the refusal to meet his cheque is 'so obviously n n injurious to his credit' that he should 'recover, without allegation of special damage, reasonable compensation for the injury done to his credit'… The credit rating of individuals is as important for their personal transactions, including mortgages and hire purchase as well as banking facilities, as it is for

> those who are engaged in trade… I would have no hesitation in holding what is in effect a presumption of some damage arises in every case, in so far as this is a presumption of fact.

The decision in Kpohraror has established that in every case, irrespective of whether the individual in question is a trader or not, there is an irrebuttable presumption that the party suffers some injury to his credit and to his reputation when a cheque is wrongfully dishonoured. This case is indeed a landmark one as it has clarified the application of the law in practice and recognises the implications that a wrongfully dishonoured cheque may have for both traders and private individuals in respect to the availability of credit.

It is also important to note that a bank may also face action in defamation, if the wording on a cheque which is returned makes reference to a lack of funds in the account of the customer. This can quite clearly damage the reputation of the customer when and if it is read by the payee. In the case of *Jayson v Midland Bank* [1968] 1 Lloyds Rep 409, it was accepted by the court that the phrase 'refer to the drawer' could be interpreted as the customer having insufficient funds in the account to be drawn on and this was in fact could damage the customer reputation and indeed be defamatory if it was untrue. To avoid actions in defamation in the example above, is to not provide a reason for the non-payment. In the case of *Frost v London Joint Stock Bank Ltd* (1906) 22 TLR 760, the bank returned a cheque which was stamped 'reason not stated'. It was held that this could not be regarded as defamatory because while it could be interpreted as defamatory it could also have an innocent meaning.

3.3 Duty to obey customer's countermand

The bank also has a duty to obey the customer's countermand to make payment. A countermand can be described as the revocation of instructions to pay. It is important that the customers' countermand is unambiguous and clear. In this section, the focus will be on

cheques. There is a statutory obligation which is defined under s75 of the Bill of Exchange Act 1882. This section states that:

'The duty of and authority of a banker to pay a cheque drawn on him by his customer is determined by (1) the countermand of payment.'

There are some noteworthy cases in this area, which help to understand this duty more clearly. These cases include the case of *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124, which also reaffirms the nature of the banker and customer relationship; *Rewade v Royal Bank of Scotland* [1922] 2 IR 22; *Curtice v London City and Midland Bank* [1908] 1KB 293; and *Commonwealth Trading Bank v Reno Auto Sales Pty Ltd* [1967] VR 790.

In the case of *Westminster Bank v Hilton*, the customer drew a post-dated cheque for 2 August. He telegraphed the bank the day before, instructing the bank to stop the payment. While he provided the correct details in regard to the amount and payee, Hilton provided the wrong serial number for the cheque. The bank honoured the cheque which resulted in the customers funds depleting from that particular account. When a subsequent was presented, it was dishonoured.

The customer sued for damages; however, the House of Lords dismissed this appeal, stating that the customers instructions were unclear and ambiguous. When a customer provides instructions that are unclear or capable of having more than one interpretation, the bank would not be liable if it assumes an interpretation which is reasonable. If, however, the instructions are ambiguous, then it is necessary for the bank to ensure that they contact the customer to clarify. This was held in the case of *Cooper v National Westminster Bank* [2009] EWHC 3035.

Lord Atkin also offered some further clarity on the banker customer relationship which we covered in the previous chapter. He remarked the following:

'*It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that quoad the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof..*'

The bank is bound by the customers instructions as long as there are funds in the account to make the payment. The bank cannot refuse to honour any cheques which are drawn, prior to the notice of termination being received.

In the case of *Reade v Royal Bank of Scotland,* the customer provided instructions to countermand a cheque and set out the number of the check and the name of the payee of the cheque. Unfortunately, Mr Reade did not provide information as to which of his two accounts which he held with the bank the cheque was to be drawn from. The bank made a note on one account and drew the cheque against another account. It was held by the court that the countermand was indeed effective, and that the bank was not entitled to debit the customer's account.

In *Curtice v London City Midland Bank*, the customer sent a countermand to the bank, however, as it was sent in the evening and delivered outside of business hours, it did not receive the attention of the bank until after the cheque had been paid. The customer brought an action against the bank, and the court noted that the constructive notice would not be applicable to a countermand and that only actual notice would be sufficient. This case is instrumental in term of defining a countermand, and the remarks of Cozen – Hardy MR is of particular interest:

'Countermand is really a matter of fact. It means much more than a change of purpose on the part of the customer. It means, in addition, the notification of that change of purpose to the bank. There

is no such thing as a constructive countermand in a commercial transaction of this kind. In my opinion, *on the admitted facts of this case, the cheque was not countermanded.'*

The decision in this case is important as the court's interpretation clearly here is that a countermand will not be effective, unless the bank has actual notice of the countermand. Furthermore, the countermand has to be brought to their attention of a employee of the bank who is capable of action on the instruction.

The final requirement of obeying the countermand is that it is made on time. Countermands that are received *after* the original payment instruction has been executed, would be ineffective. In the case of *Capital Associates Ltd v Royal Bank of Canada* (1970) 15 DLR (3d) 234, it was established that a cheque would be considered as paid and the countermand out of time, if the funds are made available to the payee, without any conditions attached. A more up to date and relatable example could be where payment is made through CHAPS as these payments are usually instant. In this instance, a customer will not be able to countermand once the bank has received instruction from the customer.

3.4 The duty to give account

The bank has a duty to provide an account to customers. With the paperless option now available, this may be either as the customer demands it, or periodically. Generally, you might expect to receive a statement of account quarterly, although a customer may request for it more frequently, for example, monthly. The account is a summary of all the transactions on the account – debits and credits – and any other banking activity.

3.5 The duty to maintain confidentiality

The duty of confidentiality is probably the biggest part of the discussion in this chapter. The basis of this duty is that the customer gives confidential information to the bank and as such,

they are bound to keep it confidential. The duty of confidentiality can be described as an implied contractual term in the banking contract. As noted earlier, the banker customer contract may also be said to find its routings in the agency relationship. Generally, an agent would owe a duty of loyalty and confidentiality to his principle, and this is the same in the case of the banker customer relationship.

The idea of secrecy was emphasised in the case of *Parry Jones v Law Society* [1969] 1 Ch 1 where Lord Diplock noted:

'*Such a duty exists not only between solicitor and client, but for example, between banker and customer, doctor and patient and account and client. Such a duty of confidence is subject to, and overridden by, the duty of any party to that contact to comply with the law of the land. If it is the duty of such a party to a contract, whether at common law or under statute, to disclose in defined circumstance confidential information, then he must do so and ant express contract to the contrary would be illegal and void.'*

The idea of confidentiality is not exclusive to the banking relationship – it may manifest in other instances as noted in Lord Diplock's reflections above. There have been other cases which demonstrate this duty, such as Attorney General v Guardian Newspaper Ltd (No 2) [1990] 1 AC 109:

'A duty of confidence arises when confidential information comes to the knowledge of a person (the confident) in circumstances where he has notice or is held to have agreed that the information is confidential with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to other...'

One of the early cases to recognise the duty of confidentiality within the banking space is the case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. This is an important case to note if you are answering a question on this topic.

Key Case

Tournier v National Provincial and Union Bank of England [1924] 1 KB 461

Mr Tournier was a customer of the defendant bank and his account was heavily overdrawn. He had entered into an agreement to make repayments to clear the funds but failed to do so. A cheque was drawn on the account of another customer holding an account at a different branch, but payable to the claimant. The branch manager called the claimants employers in order to ascertain the claimants' private address. During the conversation, the manager divulged that the claimants account was overdrawn and that he had had dealings with bookmakers. As a result, the claimants' employer refused to renew the claimant's contract of employment.

The claimant sued and the Court of Appeal held that the bank had indeed breached its duty of confidentiality to their customer and awarded damages to the claimant. It was also held that there was an implied term between the bank and the customer, that the bank would not disclose any information to a third party, whether it was pertaining to the condition of the account, or any transactions pertaining to the account, without first obtaining the consent of the customer.

This case was important to the Court of Appeal, as it presented an opportunity to explore whether the duty of confidentiality covered any information that has been received by the bank, or, whether it was relevant to information that was received from other sources.

There are two comments relevant which should help you understand the importance of the case in more detail and particularly why the case was helpful in understanding the scope of the duty of confidentiality.

Scrutton LJ remarked:

'*The Court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. Applying this principle to such knowledge of life as a judge is allowed to have, I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customers except in certain circumstances' and 'I doubt whether it is sufficient excuse for disclosure, in the absence of the customer's consent, that it was in the interests of the customer, where the customer can be consulted in reasonable time and his consent or dissent obtained.*'

and Atkin LJ noted:

'The facts in this case as to the course of business of this bank do not appear to be in any degree unusual in general banking business. I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent…. I have already stated the obligation as an obligation not to disclose without the customer's consent. It is an implied term, and may, therefore, be varied by express agreement. In any case the consent may be express or implied, and to the extent to which it is given the bank will be justified in acting. A common example of such consent would be where a customer gives a banker's reference. The extent to which he authorises information to be given on such a reference must be a question to be determined on the facts of each case. I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers, except to say it appears to me that if it is justified it must be upon the basis of an implied consent of the customer.'

Atkin LJ made the point to stressed that the duty itself was relevant not only to the facts obtained pertaining to the condition of the customer's account, but all other information

which may have been gathered from other sources. Scrutton LJ had a different view and maintained that while the bank had a duty to respect its customers confidence, this was not applicable to the 'knowledge derived from other sources during the continuous of the relation'.

There have been subsequent cases which have approved the principles established in *Tournier*. In the case of *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, May LJ endorsed 'the correctness of the principles of law stated by the majority in the *Tournier's* case has not been doubted since the case was decided.' In *Barclays Bank v Taylor* [1989] 1 WLR 1066, Lord Donaldson noted that '[t]he banker customer relationship imposes upon the bank a duty of confidentiality in relation to information concerning its customer and his affaire which it acquires in the character of his banker'.

The case of *Tournier* is important as it provides clarity in terms of the *scope* of confidentiality. The case demonstrates that information is only covered by this duty, if the information is received by the banker in that capacity. If any information is received before the account is opened, it may not be covered by the duty. Any information which the bank becomes aware of prior to the relationship existing, and is then repeated once the relationship is established, would be covered by the duty. A good case which explores this is the case of *Attorney General v Guardian Newspaper* Ltd (No 2) [1990] 1 AC 19. The general principles of confidentiality were considered in this case, and particularly, Lord Goff noted:

'[*A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. To this broad general principle, there are three limiting principles... the first is that the principle of confidentiality only applies to information to the extent*

that is confidential…the second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia... the third limiting principle is that although the basis of the laws protection of confidence it that there is a public interest that confidence should be preserved and protected by the law, never the less, the public interest must be outweighed by some countervailing public interest which favours disclosure..'

On reflection of the above, general approach considered in *Attorney General v Newspaper*, it would seem that disclosure is only allowed when it is clear that it is in the public interest to do so. In the case of *Tournier*, there is an appreciation that disclosure may take place in four other instances, which will be discussed shortly.

The issue of confidentiality was also considered in the case of *Douglas v Hello! Ltd* (No 3) [2008] 1 AC 1. In this case, Michael Douglas and Catherine Zeta Jones, a Hollywood celebrity couple, sold exclusive photography rights to OK! Magazine. Unfortunately, a photographer was able to gain access to the wedding, and subsequently sold these pictures to OK! Magazine's rival, Hello! In their claim, both OK! Magazine and the Douglas' claimed that under the Data Protection Act 1998 (DPA 1988), there was a breach of confidence, an invasion of privacy and an intention to damage and conspiracy to injure. The judge noted that in a wedding of 250 guests, there could be no real expectation of privacy. As such, they were only successful on the breach of confidence and breach of the DPA, 1988.

The Douglas' were granted an interlocutory injunction, which prevented the Hello! Magazine from printing the pictures, but this was lifted after a few days. Ok! Magazine brought their publication of the event forward, and in doing so, incurred expenses. The Douglas' also sued for damages. The House of Lords reversed the decision of the Court of Appeal. OK! Magazine has paid for the pictures and were entitled to them.

The duty of confidentiality is one of the important duties, especially as it may manifest in other ways.

3.5.1 The Qualifications to the Duty of Confidentiality

We have explored the case of *Tournier* in some detail, with some other cases. It is clear that the duty of confidentiality is not absolute, and this was identified by Bankes LJ:

'At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified… 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 interest of the bank require disclosure; (d) Where the disclosure is made by the express or implied consent of the customer.'

3.5.1.1 Compulsion by Law

More recently, a plethora of judicial and statutory intervention has compelled institutions to disclose information which would otherwise be considered confidential information. As result, the common law duty of confidentiality, it may be argued, is in existence to fill a void. In 1989, the Jack Committee reviewed banking services and made the recommendation of codifying the banker's duty of confidentiality. There was an appreciation and recognition that the concept of duty of confidentiality was fundamental to the banker customer relationship. The lack of scope of the duty was problematic, as it was unclear how the duty applied to protecting consumers, and that in itself, could result in a lack of confidence in the banking system.

3.5.1.2 Legislation

The Police and Criminal Evidence Act 1984 and the Insolvency Act 1986 provides provisions that may compel a bank to disclose confidential information about an insolvent customer. A typical example here may be where the bank is ordered by regulatory and investigative authorities to provide access to them about customers of the bank. There are other important legislations to note here, including the Proceeds of Crime Act 2002 and the Terrorism Act 2000. These provisions of these Acts make it an offence on the part of the bank to failure to disclose information to the police, in the instance that there is a suspicion or knowledge of an offence.

The compulsion by law instances arise where the court has mandates for a disclosure. In this instance, the court can mandate the bank to disclosure information about its customer, to allow a third-party start proceeding, against that customer. The claimant can ask the court to exercise the jurisdiction in the *Norwich Pharmacal Co v Customs and Excise Comrs* [1874] AC 133. In this case, the

3.5.1.3 Duty to the public to disclose

This second exception to the duty of confidentiality was recognised by Bankes LJ, where he noted that the bank may have a duty to disclose information, if it is the public interest. Bankes LJ relied on the position the case of *Weld Blundell v Stephens* [1920] AC 956, Lord Finaly talked about the second qualification in relation to cases where 'some higher duty is involved', for example, in the instance where 'danger to the state or public duty my supersede the duty of the agent to his principle'. In other words, where the duty of confidentiality of the bank to the customer is superseded by the public interest. It is interesting to note however that while Bankes relied on view of Lord Finlay in *Weld Blundell*, he had doubts that bank should be able to disclose information, simply because it had suspicions that the customer was involved in a crime.

There has been some discussion about this second qualification and whether it should still be accepted. The biggest issue, clearly, is balancing the public interest against maintaining confidentiality of a customers' financial information and any other relevant dealings with the bank. This particular qualification is also difficult because there seems to be an overlap between the first duty (compulsion by law) and this duty of confidentiality. The Jack Committee recommended that this exception be abolished, however, the government rejected this recommendation, on the grounds that the public duty qualification allows banks to make that the disclosure, in contrast to the different statutes which require disclosure.

There have been a few cases where the courts have been faced with applying this second qualification. One of the key cases in this area is *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, as this provided some early insight to this particular duty. In this case they relied on the qualifications established by Tournier. The first two grounds for justifying disclosure were rejected by Staughton J, however, he was of the view that public interest ground could be applicable. It should be noted here that he did not have to decide the case on this specific ground and added:

'*..But presuming (as I must) that the New York law on this point is the same as English Law, it seems to me that the Federal Reserve Board as the Central Bank in the United States, may have a public duty to perform in obtaining information from banks*.'

Another important case in this respect is the case of *Price Waterhouse BCCI Holdings (Luxembourg) SA* [1922] BCCLC 583. Here, the courts were able to consider the public interest in more detail.

Key Case
Price Waterhouse BCCI Holdings (Luxembourg) SA [1922] BCCLC 583.

In this case, the issue was a disclosure by Price Water Cooperhouse of confidential information pertaining to their clients Bank of Credit and Commerce International Groups (BCCI) to the 'Bingham Inquiry'. The Bingham Inquiry was created by the Chancellor of Exchequer and the Governor of the Bank of England, with the objective of investigating the collapse of BCCI. The Bingham enquiry was a non-statutory enquiry, therefore, there was no statutory duty which required Price Waterhouse to disclose any information. They applied to the court to see whether they could legally provide the information, as they wished to assist the investigation.

Millet J noted that this particular instance fell within the scope of the second qualification as established by Tournier, as it was clearly in the public interest to disclose information pertaining to the performance to the Bingham Inquiry. There was an emphasis that the context in which this second qualification should be applied does not need to be limited to instances that are devised to prevent wrongdoing but should also include the interest that exists in maintaining effective regulation and supervision of banking institutions by the central bank and ensuring the protection of depositors' funds.

The case of *Price Waterhouse* is an important one, as it provided further clarity into the second exception as established by *Tournier.* This also makes it quite clear that there is a need to keep and preserve this as a separate and independent qualification to the duty of confidentiality. The courts had another opportunity to examine this issue in the case of *Pharon v Bank of Credit an Commerce International SA (in Liquidation*) [1998] 4 ALL ER 455. This case finds its roots in *Price Waterhouse* and demonstrated that the second *Tournier* exception can be applied in the context of disclosing to a private person – there is no need for it to only be a public or

regulatory body. In the case of *Pharon*, Rattee J maintained that the duty of confidentiality could be overridden by some greater public interest. From a review of all of the above cases therefore, it maybe concluded that this exception continues to have a place in the law.

3.5.1.4 Interests of the Bank

The third qualification that the case of *Tournier* establishes is when disclosure is necessary as it is in the interest of the bank. In this case, the most apparent example is when the bank itself starts proceedings against its customer, with a view to recovering unpaid sums. This may be an unpaid loan or even an unpaid overdraft facility. Interestingly however, it is possible that this exact situation could fall within the scope of the second exception that we have just looked at, especially where disclosure is in the interest in the public.

The case of *Sunderland v Barclays Bank* (1938) 5 LDAB 163 was an example of how this third qualification may be interpreted too favourably for the bank. In this case, the bank dishonoured a cheque of a married woman for two reasons. The first, there was insufficient funds available in the account; and the second, the bank had information that the cheques were being drawn in relation to gambling activity. In a telephone conversation between the bank manager, the wife and the husband, it was revealed by the manager that Mrs Sunderland (the wife) had been drawing cheques in favour of bookmakers. The wide brought an action against the bank on the grounds of breach of duty of confidentiality, however, her claim was dismissed by Du Parcq LJ, who maintained that the banks reputation was under threat, and as such, it was justifiable that the information was disclosed to the husband. Furthermore, it was held that she had given her implied consent to the disclosure by permitting him to join the telephone conversation.

The decision in *Sunderland* can and was criticised. When you think about, in order to protect the banks 'reputation', the bank manager only needed to mention that the wife had insufficient

funds in the account to meet the payments; he actually did not need to go the extra mile by disclosing that the wife's' gambling endeavours. Nevertheless, with this criticism, this third qualification n has been followed and was recognised in the case of *Christiofi v Barclays Bank Plc* [1999] 2 ALL ER. While this qualification is recognised, it is also important to note that there also seems to be a general acceptance that the scope of this qualification is maintained narrowly, given that there is scope for an abuse of it. The Jack Committee had reservations about this qualification. The first, being that the sharing confidential information between two different entities of the same banking group. More so, these would be clear breaches, given that each company is indeed a separate corporate personality in its own right. The recommendation here was that banking groups should be permitted to share information within the same group, without customer consent, as long as the disclosure was reasonably necessary, for the actual purpose of protecting the bank from losses that may occur in providing banking services. The second reservation the Jack Committee had was in relation to the uncertainty in relation to the banking practice of disclosing customer information to credit reference agencies and whether or not this could be justified to by reference to this third qualification or any other as established by *Tournier*.

3.5.1.5 Disclosure with the customers' consent

The final qualification in *Tournier* is disclosure with the customers' consent. This may be expressly or implied. When the customer does so expressly, this is as a matter of fact. A good example may be where the customer has clicked, signed or ticked a box which says that information can be shared with a third party. In *Tournier*, Banks LJ himself provided the example where a customer authorises the disclosure by the bank of confidential information, for the objective of providing a credit reference. This then became a practice of banks to provide references on the basis that their customer has given their implied consent.

This particular practice was examined in the case of *Turner v Royal Bank of Scotland* [1999] 2 ALL ER (Comm).. In this case, it was held that this was not an implied term as the custom was not well known to the bank's customers. In this case, Mr Turner held both a current and business account with the defendant bank, and when enquires were made about Mr Turners creditworthiness, the response from the bank was unfavourable. In responding to these enquires made about his creditworthiness, the bank made use of confidential information held about the state of Mr Turners' account, before formally responding to the enquiries.

Mr Turner brought an action against the bank and claimed damages for the breach of the duty of confidentiality. The bank held the position that it was the general practice of banks to respond to queries from other banks by providing information in respect to the credit worthiness of customers. This case went to the Court of Appeal, and the court dismissed the banks argument, maintai8ning that there was a distinction between banking practices which operates as 'no more than a private agreement between banks' and a practice which amounts to an established usage contractually binding on a customer, even if the customer is not aware of it. The Court of Appeal upheld the decision of the trial judge and rejected the argument o the bank that the customer had given implied consent to disclosing confidential information. The court held the bank liable for the breach of duty of confidentiality.

It is clear the bank owes duties to the customer, however there are some exceptions as we have seen in the case of Tournier.

6. Duty of the customer to the bank

We have spent some time going over the duties of the bank to the customers, but it is also important to note that customers too, have a duty to the bank. While the duties of the bank

to the customer is quite broad in some respects, we find that in the case o the duties owed by the customer to the bank, are quite straightforward and easier to follow. There are two main duties that we will explore here. The first, the duty to note draw fraudulent cheques or to engage in fraud; and the second, the duty to notify the bank as soon as they become aware of forgery or fraud.

6.1 Duty to not draw fraudulent cheques or engage in fraud

The case of *London Join Stock Bank Ltd v MacMillian* [1978] AC 777 settled this duty. In this case, the firm made it a practice to allow the clerk to prepare and present cheques to a partner of the firm in order for them to append their signature. The clerk presented a blank cheque for signature to a partner who believed that the cheque was being drawn to for petty cash. Once the cheque had been signed, the clerk wrote 'one hundred and twenty pounds' in the space allocated for words. The cheque was presented at the firms' bank, payment was made, and the clerk fled. This case, which reached the House of Lords reflected on the question as to whether the bank was entitled to debit the firms account for the £120. The court held that indeed the bank was entitled because the customer had breached its duty in relation to the manner of which cheques were drawn. Lord Finaly reviewed the entire case in the following way:

'*.. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty*.'

This issue was addressed again in the case of *Slingsby v District Bank* [1932]1 KB 544, where the court held that a cheque being blank, would not always mean that the customer has been negligent. The customer in this case had left a blank space after the payees' name, which made

it possible for the payee to add additional words. The courts did not find the customer negligent in this instance, and therefore, the customer was able to argue that he should not have been debited by the bank.

6.2 Duty to inform the bank of forgery once the customer has notice

It is necessary that the customer makes the bank aware once there is evidence of forgery. The case of *Greenwood v Martin Bank Ltd* [1933] AC 51. In this case, the wife of the defendant fraudulently withdrew different amounts from his account. She forged his signature to enable make the withdrawal. Sadly, he learned that the wife had lied about the reasons she withdrew money from his account and when threatened to inform the bank, she committed suicide.

Mr Greenwood sought to bring an action against the bank to recover the amounts, however, the House of Lords noted that he had a duty to the bank to make them aware of the forgeries, as soon as he became aware of them. This disclosure would have enabled them to take the necessary steps to recover the money wrongfully paid out. As he had waited a period of eight months before he informed the bank, he estopped by claiming the signatures were forged and unable to recover the funds. This particular duty was also visited in the case of *Brown v Westminster Bank* [1964] 2 Lloyd's Rep 187.

While the banks have duties to the customers, what we have established in the last few sections is that the customers also have duties to the bank. These have clearly been established in the cases of Macmillan and *Greenwood*. When you are discussing the banker customer relationship in essay or exam questions, it is worth noting these duties also.

✓ **You now understand that the customer too owes the bank a duty of care. You should now be familiar with these duties as discussed in the cases of Macmillan and Greenwood.**

7 Summary

In this chapter, we have considered the banker and customer relationship in quite a lot og detail. We have focused on some of these important duties, such as the duty to make payment and the duty to maintain confidentiality. We have also explored some really important cases here such as *Tournier* and *Kpohraror*. Finally, we have also considered the duties of the customer to the bank, including not drawing out fraudulent cheques' and informing the bank when a customer becomes aware of a fraud.