BANKING SECRECY IN MALAYSIA

I. INTRODUCTION

The duty of confidentiality or secrecy owed by a bank towards its customer is a vital aspect of the banker and customer relationship. This is a contractual duty implied by the common law and the leading case is *Tournier* v *National Provincial and Union Bank of England*.[1] Besides the contractual duty,[2] a bank is also under a statutory duty of secrecy imposed by the Banking and Financial Institutions Act 1989[3] (hereinafter referred to as "the BAFIA").

This article will examine the banking secrecy provisions under the BAFIA; its aims and objectives, any areas of weakness and proposals for reform. Particularly, it will compare the contractual and statutory duties owed by the bank. Are the two duties different in nature? If they are different, what are the effects on the bank and the customer? In examining the banking secrecy provisions under the BAFIA, comparisons will also be made to the relevant provisions under the former Banking Act 1973[4] (hereinafter referred to as "the 1973 Act").

II. THE CONTRACTUAL DUTY

When a customer obtains banking services from a bank, he enters into a contract with the bank and the law implies a duty of confidentiality on the part of the bank. A bank which wrongfully discloses any information in respect of its customer's affairs is in breach of its contract and is liable for damages in a suit enforceable by the customer.

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[1][1924] 1 KB 461.

[2]The contractual duty implied by the common law applies to banks in Malaysia by virtue of sections 3 and 5 of the Civil Law Act, 1956 (Revised 1972), Act 67. Section 3 provides generally for the reception of the common law in Malaysia. Section 5 provides for the application of English law in all questions or issues which arise with respect to commercial law, *inter alia*, the law of banks and banking. For a discussion on the interaction of the contractual and statutory duties, see *infra* p 177.

[3]Act 372. The BAFIA applies to all licensed institutions carrying on *inter alia* banking business. See the preamble to the BAFIA.

[4]Act 102. This Act was repealed and replaced by the BAFIA

In *Tournier*, the Court of Appeal was unanimous in the view that the obligation of confidentiality was an implied term arising from the banker's contract with his customer. However, their Lordships differed as to the scope of this duty. Both Bankes LJ and Atkin LJ were of the view that this duty is not confined to information derived from the customer's account itself but also to information obtained from sources other than the customer's actual account, as long as the information arose out of the banker and customer relationship. Scrutton LJ however, did not think that this duty would apply to knowledge derived from other sources than from the customer or his account. Further, his Lordship also thought that this duty is inapplicable to knowledge which the bank acquired before the banker and customer relationship was contemplated or after it has ceased. Atkin LJ also did not extend this duty to information obtained after the customer ceased to be a customer.

As to the duration of this duty, it continues even after the customer ceases to be a customer of the bank. This duty however is not absolute but is qualified with four exceptions. First, the bank may disclose where it is compelled by law to do so. A bank may be required to disclose under certain statutes or under an order of the court for discovery or inspection.[5] Secondly, the bank may disclose where there is a duty to the public to disclose. This exception is difficult to define and in *Tournier*, Bankes LJ followed Lord Finlay's description in *Weld Blundell* v *Stephens*[6] whereby "danger to the State or public duty may supersede the duty of the agent to his principal".[7] Thirdly, the bank may disclose for its own interest as in *Sunderland* v *Barclays Bank Ltd*[8] where the bank manager tried to justify to the husband of the customer why the bank did not honour his wife's cheques. Fourthly, the bank may disclose where the customer has authorised the disclosure, whether expressly or impliedly.

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[5]For example, in the United Kingdom, the Banker's Books Evidence Act 1879 and the Police and Criminal Evidence Act 1984.
[6][1920] AC 956.
[7]*Ibid* p 965 and 966.
[8]Reported in *The Times*, November 25, 1938; *see* LDAB Vol 5, p 163.

III. THE STATUTORY DUTY

The statutory provisions governing banking secrecy are found in Part XIII of the BAFIA. Under section 97(1), the directors or officers of a bank are prohibited from disclosing information relating to the affairs or accounts of a customer. The scope of banking secrecy under this statute is wider than under contract. Other than the directors or officers of the bank, section 97(1) applies to any person who for any reason, has by any means access to information relating to a customer's account. Further, section 97(3) provides that any person who has any information which he knows was disclosed to him in contravention of section 97(1) shall not in any manner disclose such information to any other person.

Like the contractual duty, there are exceptions provided in the BAFIA. The prohibition against disclosure does not apply to information lawfully available to the public from any source other than the bank and to information which is summarised or set out in such a manner that no particular bank or particular customer can be ascertained from it.[9] Disclosure is also allowed where it is required for facilitating the performance of functions by the Central Bank or by any person rendering professional services to the Central Bank.[10] The important exceptions are found in section 99 which will be discussed in detail in this article. Disclosure under the Banker's Books (Evidence) Act, 1949[11] has been preserved under section 100.

[9]Section 97(2).
[10]Sections 98(1)(a) and (b).
[11]Act 33.

IV. COMPARISON OF THE CONTRACTUAL AND STATUTORY DUTIES

A. Persons Bound by the Duty

1. Sections 97(1) and (3)

In *Tournier*, the Court of Appeal held that a bank is under a contractual duty of confidentiality. Breach of this duty will render the bank liable for damages to its customer. Under section 97(1) of the BAFIA, the directors and officers of the bank and any person who for any reason, has by any means access to information relating to a customer's account are under a statutory duty not to disclose. The scope of this section is very wide and would cover any person who has access to such information. It is pertinent to note that section 36 of the 1973 Act provides that "no person who *by any reason of his capacity or office*[12] has by any means access to the records" of any customer shall disclose the same. It is clear that section 97(1) is intended to include any person who has access to confidential information, regardless of whether he obtains it by virtue of his capacity or office or otherwise. Thus, it is not restricted to a person rendering professional services to the bank such as an auditor or a lawyer who would have access to such information by virtue of his capacity.[13] If the office boy or the sweeper or the cleaner of the bank has access to a customer's record and discloses such information to a friend or family member, he would be caught under this section. Further, any person who is not an employee of the bank who stumbles upon such information in the bank and discloses it will also be caught under this section. He will be liable although he may not have sought for the information but it was made available to him through the neglect of the bank's officers.

In this respect, the question arises whether the wide scope of section 97(1) can be justified. No doubt the duty encompassed here is not contractual but statutory. The provisions on banking secrecy in the BAFIA appears to be drafted with a strong de-

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[12]Emphasis added.

[13]See sections 40(16) and 99(1)(d).

terrent intent to ward off any possible source of disclosure. It cannot be denied that the public interest of maintaining stability and confidence in the banking and financial system is very important to help develop a successful economy. People need to be assured that their dealings with their banks are kept private and confidential to encourage them to use the banks. However, whether this public interest of maintaining banking secrecy is so vital so as to warrant a strict offence is arguable especially in cases where the disclosure is not intentional nor made to obtain any gain or cause any harm. Under section 97(1), a person is liable regardless of the question of intent or whether the disclosure is made to obtain any gain or cause any harm. It does not matter who the person who discloses the information is or who the recipient of the information is or whether the information disclosed was used in any way to cause harm or damage to the customer concerned. As long as there is disclosure of any information or document relating to the affairs or account of a customer, a person is liable under the said section. Further, under section 97(3), any recipient of such information who knows that it has been disclosed to him in contravention of section 97(1) is also prohibited from disclosing the same to another. The liability under sections 97(1) and (3) is very heavy. A breach of these provisions entail criminal liability warranting a term of imprisonment not exceeding three years or a fine not exceeding RM 3 million or with both such imprisonment and fine.[14] This penalty provided under the BAFIA is very much heavier compared to the 1973 Act.[15]

2. Tort of Breach of Statutory Duty

An interesting question that arises is whether a customer can sue a bank in tort for breach of the statutory duty under section 97(1). This is besides the customer's cause of action in contract for damages against the bank and besides the criminal action by the state against the directors or officers of the bank who have contravened the section. Although the penalties imposed under

[14]Section 103(1) read with the Fourth Schedule.

[15]Section 36(4) provides for a fine not exceeding forty thousand ringgit or imprisonment for a term not exceeding three years or both such fine and imprisonment.

the BAFIA are in respect of the persons guilty of the unauthorised disclosure, the bank is also subject to this duty as the bank acts through its directors and officers. When an employee of the bank makes a wrongful or unauthorised disclosure in the course of his work, the bank being his employer would be vicariously liable for the act of his employee.

Whether a suit in tort for a breach of statutory duty is available is fundamentally a question of interpretation of the particular statute as to whether a civil action can be inferred.[16] Where the only express sanction contained in the statute is a criminal liability, the House of Lords has held in *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*[17] that there can be no civil action unless either the obligation or prohibition imposed is for the benefit or protection of a particular class of individuals or the statute created a public right and the plaintiff suffered "special damage peculiar to himself" for interference with that right.

Applying this principle, the question whether a customer can sue a bank in tort depends on whether the BAFIA was enacted to protect customers as a particular class of individuals. If it was enacted for this purpose and not for the purpose of benefiting the interest of the public as a whole, then a presumption arises that the tort of a breach of statutory duty is to be inferred. The court will have to decide the intention of the legislature. In doing so, the court can use the unified theory of statutory construction[18] by looking at the BAFIA as a whole to discover its underlying purpose and intent or merely look at the sections of the BAFIA which are at issue.

Using the unified theory of construction, one is likely to conclude that the tort for breach of statutory duty cannot be inferred. The preamble to the BAFIA states that it is to provide laws for licensing and regulating institutions carrying on *inter alia* bank-

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[16]WVH Rogers, *Winfield & Jolowicz on Tort*, 13th Ed, (London, Sweet & Maxwell, 1989), pp 170 and 177.

[17][1982] AC 173.

[18]Under this approach, the whole Act and the circumstances including the pre-existing law in which it was enacted with emphasis on the context in which the words are placed and the purposes which produced the enactment are considered. This approach is said to be much favoured by the courts. See KM Stanton, *Breach of Statutory Duty in Tort*, (London, Sweet & Maxwell, 1986) at p 44.

ing business. There is clearly a public interest to protect and the obligation to maintain secrecy is imposed to ensure the efficiency of the banking and financial system. The events leading to the repeal of the 1973 Act and the introduction of a tighter supervisory regime under the BAFIA point to the same conclusion. In the early 1980s, many illegal deposit-taking co-operatives emerged and accepted deposits from members of the public with promises of high interest returns. Abuse and poor management in these bodies resulting in an increased number of banking frauds and losses in the financial institutions revealed the inadequacy of the Central Bank's powers to act quickly and effectively to maintain public confidence in the financial system.[19] Hence, the repeal of the 1973 Act and the Finance Companies Act; 1969[20] and their replacement by the BAFIA.

Even if section 97 is construed on its own, the result may not be different. The provision of banking secrecy in section 97 is worded in the negative. It appears to be a provision that prohibits persons from divulging information rather than clearly conferring the right of secrecy to a customer. Courts have made a distinction between statutes which confer rights and statutes which only provide incidental advantages to a class of persons. In *Cutler* v *Wandsworth Stadium Ltd,*[21] section 11(2)(b) of the Betting and Lotteries Act 1934 obliged the occupier of a dog racing track upon which a totaliser was operated to provide space for the use of bookmakers. An issue arose whether that section could be used by a bookmaker to compel the occupier to admit him to a track. The House of Lords held that the statutory intention was to protect the public interest by regulating the operation of dog tracks. Any benefit accruing to bookmakers was incidental to that purpose.

Morever, there are decisions which indicate that a court will not impose an additional civil liability when there is already

[19]Paper presented by Encik Abdul Murad Khalid, Manager, Bank Regulations Department, Bank Negara Malaysia at a Workshop cum Dialogue on the BAFIA on November 10, 1990 at p 1. See also Ling Hea Hoon,"The Structure, Uses and Abuses of Deposit-Taking Co-operatives in West Malaysia: The Legal Perspective", (Faculty of Law, University of Malaya unpublished LLM Thesis, 1990), pp 229-325.

[20]Act 6.

[21][1949] AC 398. See also *Atkinson* v *The Newcastle and Gateshead Waterworks Company Ltd* (1877) 2 Ex D 441.

adequate remedy to enforce private rights.[22] In a case of breach of confidentiality, there is already the cause of action for damages in contract. However, such a restriction may be questionable since the concept and calculation of damages differs in contract and in tort.

B. Source of Information

In *Tournier*, their Lordships were divided in their views as to whether a bank could disclose information which was not obtained directly from a customer's account. In that case, the bank disclosed to a potential employer of the customer that the customer's cheque was diverted to a bookmaker's account. The bank knew about this after enquiring from the bank at which the drawer of the cheque kept his account. The majority view (Bankes LJ and Atkin LJ) was that the bank was liable as the duty was not confined to information derived from the customer's account itself but also to information obtained from other sources, as long as the information arose out of the banker and customer relationship. Scrutton LJ however was of the view that this duty should be restricted to information derived from the customer's account itself. This view was based on the ground that the court can only imply terms which the parties must necessarily have contemplated. It cannot be said to be a necessary term that a bank shall not talk about its customer at all although the subject matter of its conversation is not derived from its dealings with the customer.

Section 97(1) adopts the wider source of information as accepted by the majority view in *Tournier*. It prohibits any disclosure of information obtained from "any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular the account" of a customer. The words used here are wide and include any source as long as it relates to the affairs or account of a customer. Under the 1973 Act, section 36(2) merely provided for "access to the records of that bank registers or any correspondence or material with regard to the account" of any customer. The fact situation in *Tournier*

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[22]See *McCall* v *Abelesz* [1976] QB 585, *Phillips* v *Britania Hygenic Laundry Co* [1923] KB 832.

would not be covered under the 1973 Act as the information was not derived from the account of a customer but from the account of a third party from another bank.

C. The Subject Matter of the Duty

In *Tournier,* the bank had disclosed that the customer had diverted the proceeds of a cheque payable to him to a bookmaker. Although this disclosure did not relate to monies in his account or was a particular of his account, the court held that the bank had breached its duty of confidentiality.

If *Tournier* was decided under the 1973 Act, the bank might not be liable as section 36(2) merely prohibited disclosure of "any information whatsoever regarding the moneys or other relevant particulars of the account of the customer". However, if it was decided under the BAFIA, the bank would be liable as section 97(1) prohibits disclosure of "any information or document whatsoever relating to the affairs or account" of a customer.

D. Duration of the Duty

In *Tournier,* the duty of secrecy was said to commence once the banker and customer relationship was established and it continues even after the customer has closed his account. Under the BAFIA, section 97(1) prohibits the directors or officers of a bank from any unauthorised disclosure during their tenure or employment or thereafter. For other persons having access to such information, no time period is specified.

Under the BAFIA, it is unclear whether the protection of secrecy will extend to a customer who has closed his account. The duty of confidentiality is owed by a bank to its customer. While "bank" and "banking business" are defined in the BAFIA,[23] a "customer" is not defined. The common law defines a "customer" as one who has an existing account with the bank.[24] Following this, it is arguable that the duty of secrecy under the

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[23]See section 2.

[24]See *Great Western Railway Co* v *London and County Banking Co Ltd* [1901] AC 414 at pp 420 and 421 wherein Lord Davey stated that ". . .there must be some sort of account, either a deposit or current account or some similiar relation, to make a man a customer of a banker".

BAFIA exists only for the period a customer holds an account and ceases when the account is closed. However, to adopt this approach would be inconsistent with *Tournier* and against the interest of the customer.

On the other hand, it can be said that the section does protect all customers, whether existing or former customers. This is because the directors or officers of a bank are bound by the duty of secrecy even after their tenure or employment. For any other persons having access to such information, it would appear that they are also bound by the duty of secrecy perpetually since no time period is specified as to how long they are bound.

To make the position clear, it has been suggested elsewhere[25] that the BAFIA be amended to include a statutory definition of a customer and an express provision that the duty of secrecy continues even after the customer has closed his account. This will ensure that the privilege of confidentiality will be available to all customers, whether existing or former customers.

It can be seen from the discussions above that the provisions on banking secrecy in the BAFIA are widely framed and are wider than the scope enunciated in *Tournier* itself. Why is a stricter duty imposed under the BAFIA? In *Tournier*, the duty was contractual and the court held that there was such an implied term which must necessarily have been in the contemplation of the parties. To this extent, the court could only infer the intentions of the parties based on the test of necessity considering the underlying relationship of a banker with his customer. This relationship is basically that of a principal and agent. The bank as the agent owes a duty of loyalty and confidentiality to his principal, the customer.[26] Under the BAFIA, the duty is imposed by statute. The legislature is less constrained and section 97(1) appears to be an attempt to set out the scope of banking secrecy widely. The background leading to the enactment of the BAFIA to replace the 1973 Act shows the need for stricter control over financial bodies[27] and the provisions on banking secrecy have

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[25]MF Cheong & GH Khoo, "The Banking and Financial Institutions Act, 1989 and the Offshore Banking Act, 1990" in *Developments in Malaysian Law* by Sharifah Suhana Ahmad (Ed), (Kuala Lumpur, Pelanduk Publications, 1992), p 130.

[26]EP Ellinger, *Modern Banking Law*, (Oxford, Clarendon Press, 1987), p 96.

[27]*Supra*, p 163.

followed along these lines. The BAFIA was drafted having in mind the large number of crimes involving banking and financial bodies that have occurred[28] and its future potential occurrence.

E. Exceptions Permitting Disclosure

The duty of secrecy is not absolute. Under the common law, a bank may disclose under the four exceptions stated in *Tournier*.[29] While the common law provides for fewer exceptions worded in general terms, under the BAFIA there are more exceptions to disclosure which are specifically set out. The exceptions provided in the BAFIA will be examined in detail; its rationale and its differences with the common law and particularly, whether the common law public interest exception should be made available in the BAFIA. Besides sections 97(2) and 98,[30] the important exceptions are found in sections 99(1)(a)-(h).

1. Section 99(1)(a)

Section 99(1)(a) allows disclosure if a customer gives his written consent. This is different from the position under the 1973 Act which did not impose a written requirement. This also differs from the common law which allows express or implied consent. Although it is not provided, section 99(1)(a) would seem to exclude implied consent unless as one author aptly puts it, one is prepared to deal with "implied written consent".[31]

It is beneficial to exclude implied consent. Implying consent from a given state of facts is subjective and may give rise to different inferences as can be seen in *Sunderland* v *Barclays Bank Limited*.[32] In that case, the plaintiff a customer of the bank had complained to her husband of the dishonour of a cheque by

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[28]See Mary George, "Criminal Breach of Trust under Malaysian Law: A Review - Part 1" [1990] 1 CLJ i, n 6 on breach of trust cases involving financial institutions.
[29]See *supra*, p 158.
[30]*supra*, p 159.
[31]Soh Kee Bun, "Banking Secrecy and Taking Evidence Abroad" in *Current Developments in International Banking and Corporate Financial Operations* by Koh Kheng Lian (Ed), (Butterworths, 1989), p 298.
[32]*supra*, n 8.

the bank. In a telephone conversation, the bank manager had informed the husband that most of his wife's cheques were drawn to bookmakers. In a suit by the plaintiff for breach of banking secrecy, the bank argued that it had the implied authority of the plaintiff as the plaintiff had handed the telephone to her husband to continue the conversation with the bank manager. The learned judge, Du Parcq LJ agreed with the bank's argument as he thought that the manager was justified in thinking that the wife would not object to his giving an explanation to her husband since the husband had taken over the conduct of the matter. On the facts above, the court held that there was implied consent to disclose. However, another equally possible conclusion is that Mrs. Sunderland had not consented to the bank disclosing the gambling debts but merely to inform of the lack of funds in her account.[33] It is pertinent to note that in the United Kingdom, the Review Committee on Banking Services Law[34] has recommended that implied consent be excluded and the fourth exception in *Tournier* be amended to the position "where the disclosure is made by the express consent of the customer".

This exception of disclosure relying on the customer's consent was argued in *Tan Lay Soon* v *Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener).*[35] In that case, the plaintiff had commenced an action claiming for specific performance of a contract that he had allegedly entered into with the defendant, by which the defendant agreed to sell his land to the plaintiff. The land was charged to the intervener, a bank. The plaintiff lodged a caveat in respect of the land but this caveat was successfully removed. Thus, the plaintiff applied for an interlocutory mandatory injunction that he be authorised by the defendant to tender the amounts due under the charge so as to redeem the charge. The plaintiff sought the injunction in order that the land be preserved pending the trial of the action.

The defendant argued that if the order was granted, the intervener would be required to disclose the amount owing under the charge by the defendant as chargor, without the consent in writing of

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[33]Ellinger, *supra*, n 26, p 104.
[34]Great Britain, Banking Services: Law and Practice Report by the Review Committee, (London, HMSO, 1989). This report is also commonly referred to as the "Jack Report".
[35][1992] 2 MLJ 434.

the defendant. This would be a breach of confidentiality and inravention section 97 of the BAFIA.

The court dismissed this contention on the ground that the customer had given his permission to disclose. The defendant who was the customer and chargor, had by his letter to the plaintiff (which was the basis of the alleged contract between them) expressly authorised the utilization of the proceeds of the sale to discharge its liability to the chargee, the intervener. This would amount to at least implied, if not express consent. It is regrettable that the learned judge did not take the opportunity to expound the law on this matter and consider section 99(1)(a) of the BAFIA. In that case, the letter was given by the defendant (the vendor of the land and a customer of the intervener bank) to the plaintiff (the purchaser of the land). Could the letter authorising the use of the proceeds of the sale to discharge the charge amount to written consent under section 99(1)(a)? In that case, the letter was not given to the bank directly. Must the written consent in section 99(1)(a) be given directly to the bank? A plain reading of the section would appear so. Possibly, it was for this reason that the court based its decision on implied or express consent. However, this would not be valid under the BAFIA which provides for "permission in writing" and unless the notion of an implied written consent can be read into section 99(1)(a). As stated earlier, it is best to leave out implied consent. Section 99(1)(a) requiring written consent from a customer is consistent with the recommendations made by the United Kingdom Review Committee on Banking Services.

The current position under the BAFIA requiring written consent is useful both to the bank and the customer to formalise consent and to provide evidentiary proof that the said consent had been given. However, questions may still be raised whether consent had really been given and the extent of such consent, if alleged to be given.

2. Section 99(1)(b)

Under section 99(1)(b), disclosure is permitted "where the customer is declared a bankrupt, or, if the customer is a corporation, is being or has been wound up, in Malaysia or outside Malaysia". The position under the BAFIA is clearer compared

to the 1973 Act which only provided for disclosure on a customer's bankruptcy. In respect of disclosure where a corporation is wound up, an author, Myint Soe[36] has pointed out that this exception permitting disclosure is understandable if the corporation is wound up because it is unable to pay its debts[37] as this is equivalent to being bankrupt but he queries its rationale if the corporation is wound up for reasons other than its insolvency. However, it is submitted that there is no need to distinguish the different circumstances as to why a company is wound up. Once a company is wound-up, whether it is wound up because it is unable to pay its debts or otherwise, the statement of its affairs and all relevant documents have to be disclosed to enable the liquidators to carry out their duties.

3. Section 99(1)(c)

Section 99(1)(c) allows disclosure where the information is required by a party to a *bona fide* transaction to which the customer is also a party, to assess the creditworthiness of the customer relating to such a transaction. This exception was available under the 1973 Act. However, under the BAFIA, the information provided must be of a general nature where the details of the customer's account or affairs cannot be ascertained. Since all that can be disclosed is information of a general nature only, it is questionable how useful that information will be to the enquirer. What is information of a general nature is very subjective. However, it could have been the intention of the legislature to draft a general proviso and leave it to the bankers to exercise their own discretion as to its limits. The exception applies not only to a *bona fide* existing commercial transaction but also to a *bona fide* prospective commercial transaction. Again, what is a *bona fide* transaction is difficult to ascertain. The question also arises as to who bears the burden of proving the *bona fides* of a trans-

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[36]"Changes in the Law Relating to Banking Secrecy, The Banking (Amendment) Act 1983", (1983) 25 *Mal LR* 387 at p 389 in relation to an amendment made to section 42 of the Singapore Banking Act 1970. The amendment was *inter alia* to allow disclosure where a company is wound up besides the then existing provision allowing disclosure on a customer's bankruptcy.

[37]See the Companies Act 1965 (Act 125) for circumstances in which a company may be wound up by the court, *ie* section 218(1) and wound up voluntarily, *ie* section 254(1).

action? Should it be the bank or must the prosecution prove that the said transaction was not sufficiently *bona fide* for the bank to warrant the disclosure. It is submitted that the onus would fall on the bank as it is the party trying to rely on this exception for the disclosure. The test of what is *bona fide* must be an objective test, that is, would a reasonable banker in the like circumstances consider the transaction sufficiently *bona fide* to provide the information requested?

Under the common law, the legal position is still unclear although it is a long established practice among bankers to answer enquiries and give opinions concerning their customers' creditworthiness. Some authors have justified this form of disclosure on the ground of implied consent from the customer[38] while others have some doubts on this view.[39] While there are limitations under section 99(1)(c) of the BAFIA, it is commendable that the BAFIA has recognised the giving of bankers' reference as a statutory exception to the duty of confidentiality. How useful this exception will be to the business community will depend very largely on the bankers themselves.

4. Section 99(1)(d) and (e)

The exceptions in sections 99(1)(a)-(c) were available in the 1973 Act but improved in the BAFIA. Sections 99(1)(d)-(h) are new exceptions included in the BAFIA. Under section 99(1)(d)(i), the bank may disclose in the course of proceedings between the bank and its customer or guarantor relating to the customer's transactions with the bank. This exception is necessary as the bank has to disclose the sums due and owing by the customer in legal proceedings to recover the same from the customer or if the sum had been guaranteed, from the guarantor. If the bank has lent out a large sum of money, it will insist on some form of security for the loan, usually a charge over land, whether belonging to the customer (first party charge) or other persons (third party charge). Any prudent banker will require the chargor,

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[38]Mark Hapgood, *Paget's Law of Banking*, 10th Ed, (London, Butterworths, 1989), p 257; Ellinger, *supra*, n 26, p 103.

[39]Lord Chorley, *Law of Banking*, 6th Ed, (1974), p 335; J Milnes Holden, *The Law and Practice of Banking*, Vol 1, 5th Ed, (ELBS, 1991), p 101

whether under a first or third party charge to also personally guarantee repayment of the loan made to the customer. In such cases, when the bank institutes foreclosure proceedings to sell the charged property and has to disclose the sums due and owing by the customer, this disclosure will be covered by the exception in section 99(1)(d)(i) since the chargor is also the guarantor of the customer. However, if for some reason or other, the chargor is not also made a guarantor for the loan, the disclosure made in the foreclosure proceedings will not be protected by this section since the section provides for legal proceedings between the bank and its customer or guarantor only. In such cases, the bank will have to obtain the consent of the Central Bank in writing to disclose under section 99(1)(h).

Besides proceedings between the bank and its customer or guarantor, the bank may also disclose in interpleader proceedings where two or more parties are making adverse claims to money in a customer's account. Further, under section 99(1)(e) the bank may disclose where it has received a garnishee order attaching monies in a customer's account.[40] The garnishee order requires the bank to attend court on a date fixed for hearing to show cause why the order should not be made absolute. If the bank does not have any claim against the customer, it may not attend the hearing and the order will be made absolute. However, if the bank has a right of set-off against the customer's account, it must attend court on the date fixed to make its claim. These are also civil proceedings and it would be more consistent if this exception was included in section 99(1)(d) above.

So far, the only civil proceedings in which disclosure is allowed are provided in sections 99(1)(d) and (e). For civil proceedings other than these and for criminal proceedings, applications for disclosure may be made under section 7 of the Banker's Books (Evidence) Act 1949.[41] However, in cases where there may not be any proceedings at all but where disclosure may be necessary in the interest of the bank, as in *Sunderland*, it would seem that there are no exceptions which can apply under the BAFIA.

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[40]Section 99(1)(d)(ii).

[41]*Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26; *PP v Dato Kee Yong Wee & Ors, PP v Koh Kim Swee* [1988] 2 MLJ 198.

In *Sunderland,* as will be recalled, the bank manager disclosed to the customer's husband that most of his wife's cheques were drawn to bookmakers. The court held that the bank was protected on two grounds, that is, on the implied consent of the customer and also because it was for the bank's own interest to make the disclosure. Here the bank was asked why it failed to honour the cheque. The court appeared to take the view that the bank had to protect its own interest and give a reason for the dishonour. However, it has been argued by Ellinger that the bank's interest would have been adequately protected if the bank had merely stated that there were insufficient funds to honour the cheques.[42]

The common law exception allowing disclosure to protect the bank's interest is available under the BAFIA by way of specific situations in sections 99(1)(d), (e) and (f) and not in its general form as expressed in *Tournier.* While it appears that the drafters of the BAFIA intended to offer similar exceptions as under the common law, a different approach has been taken in drafting these exceptions. Instead of the four general heads under the common law, specific instances are provided instead. However, by being specific, some of the possible instances necessitating disclosure are left out. A case like *Sunderland* is one example.

However, it may also be the intention of the legislators to avoid widely worded exceptions in order to protect customers and reduce an over reliance on wide catch-all exceptions. Arguably, there need not be such fears because ultimately, the courts can decide the scope and limitations of these exceptions as and when the need arises.

5. Section 99(1)(f)

Under section 99(1)(f), disclosure is permitted where the head office of a licensed foreign bank requires information which relates solely to credit facilities given by its branch. This privilege is understandable since it is expected that branch offices may take advice and instructions from its head office.

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[42]Ellinger, *supra,* n 26, p 104.

6. Section 99(1)(g)

Under section 99(1)(g), disclosure is permitted where it is required or authorised by any provision of the BAFIA. Under section 43(2), a bank may be required to submit information relating to their customers as and when required by the credit and central bureau which are established under the Central Bank of Malaysia Ordinance 1958[43] (hereinafter referred to as "the Ordinance").

Under section 69, the Central Bank shall from the time to time examine the books, documents and accounts of the bank. It may also make such examination when directed by the Minister of Finance.[44] For the purposes of such examinations, the bank is required to produce all its books, documents, accounts, documents of titles, securities or cash to the person carrying out the examination.

Under section 83, an investigating officer appointed by the Central Bank may enter any premises and search and seize any property, book or other document. Section 98 provides for disclosure of information to the Central Bank or to any person appointed by the Central Bank or to the Advisory Panel[45] or to any person rendering professional services to the Central Bank to facilitate the performance of its functions. Sections 101 and 102 provide for examination by the relevant overseas supervisory authority of the books, accounts and transactions of any office of a foreign bank and a representative office or licensed institution which is a subsidiary or associate of a foreign institution. Section 113 is a general provision requiring a bank to submit any information required by the Central Bank for the purpose of the exercise of any of its powers, performance of any of its functions or discharge of its duties under the BAFIA or under any other written law.

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[43]FM Ordinance 61 of 1958. See sections 30(1)(mmm) and (nnnnn) of the Ordinance.

[44]Under section 70, the Minister may direct such examination if he suspects that the bank is carrying on its business in a manner which is detrimental to the depositors' or customers' interest or has insufficient assets to cover its liabilities to the public or is contravening the BAFIA or the Ordinance.

[45]The Advisory Panel is established under section 31A(2) of the Ordinance.

Most of the above provisions are new and were not provided in the 1973 Act. By the number of clauses and the extent of the clauses above, the exceptions to section 97 appear to have become rules in themselves. Further, the persons making the examinations particularly the investigating officers[46] are given wide powers. This reflects the current structure under the BAFIA which grants to the Central Bank wide supervisory powers over financial institutions. The main approach adopted by the BAFIA is prudential control. The Central Bank is given wide powers to check on financial institutions and take remedial steps before the situation gets out of hand. Bankers now have more obligations to fulfil and furnish all the necessary information as and when required to do so. Although these measures are burdensome, they are worthwhile in the long run in the light of the recent spate of banking fraud and money laundering activities worldwide. From the aspect of banking secrecy such infringement may be justified on the ground of the larger interest and need of the Central Bank to supervise financial institutions. In any event, the persons to whom such information has been disclosed can only use the information for the purposes as provided in the BAFIA. They are prohibited from making any unauthorised disclosure as they will fall under the category of "persons who for any reason, has by any means access" to the records of a customer under section 97(1).

7. Section 99(1)(h)

Section 99(1)(h) permits disclosure where the Central Bank gives its written authorisation or where the disclosure is authorised under any Federal Law. It is odd why this provision places two different sources of authorisation in the same paragraph. For disclosure authorised by the Central Bank, full discretion is given to the Central Bank. This would cover any situation necessitating disclosure which have not been provided by the BAFIA; for instance, where the disclosure may be necessary to foreign banks not covered by sections 101 or 102. Such an authorisation must be given in writing by the Central Bank.

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[46]See sections 83-88.

For disclosure authorised under any Federal Law, it can only be made to a police officer investigating into an offence specified in such law and the disclosure is limited to the account and affairs of the person suspected of the offence. An issue that arises here is whether such disclosure may be made under general statutes like the Criminal Procedure Code (hereinafter referred to as "the CPC"). Section 51(1) of the CPC provides for "the production of any property or document necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code... ". Or does section 99(1)(h) refer only to statutes that expressly provide for the inspection and production of banker's books such as the Internal Security Act, 1960,[47] the Prevention of Corruption Act, 1961[48] and the Essential (Security Cases) (Amendment) Regulations, 1975?[49] If the latter view is taken, disclosure under this paragraph would be limited to the particular offences under the specific statutes which have expressly provided for inspection of the banker's books. Thus, relevant information about the financial position of offenders for a large number of offences under the Penal Code and governed by the Criminal Procedure Code[50] would not be subject to inspection and disclosure. It is submitted that given the overall purpose of the BAFIA and the width of the other provisions on banking secrecy, this limited interpretation cannot be the intention of the section.

Under section 99(1)(h), the disclosure is limited to the account and affairs of the person suspected of the offence. This would mean that tracing the monies of the person suspected of the offence is not possible. This limitation is unfortunate. To be effective, the disclosure should extend to any banker's books relating to the wife or child or to any person who is or is reasonably believed to be an agent or trustee of the person suspected of the offence as provided in statutes such as the Prevention of Corruption Act 1961.

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[47]Act 82, section 76.
[48]Act 57, sections 23 and 24.
[49]Regulation 22.
[50]FMS Cap 45.

F. The Contractual and Statutory Duties

The comparison of the position pertaining to permitted disclosures under the common law and that under the BAFIA shows that there are differences. A bank may raise different defences for a breach of secrecy, depending on whether it is sued in contract by its customer or whether it is liable for contravening the BAFIA. This arises because the bank owes a duty of confidentiality to its customer due to its contractual relationship with the customer. This duty is implied by the common law and is as stated in *Tournier*. At the same time, the bank is under a statutory duty under the BAFIA. What should the position be in relation to this matter? Two possibilities exist. First, the common law duty is read subject to the statutory duty under the BAFIA. Secondly, the common law duty in contract exists separately and independently from the statutory duty under the BAFIA.

The first position appears attractive as it subjects both the contractual and statutory obligations to one regime. In relation to the position in Singapore, one author, Poh Chu Chai,[51] argues that since the duty of confidentiality is implied into the contract between the bank and the customer, the implied term must not be contrary to law or statute. Thus, he submits that the common law exceptions allowing disclosure which are not found in the Singapore Banking Act 1970 would not apply to banks in Singapore. As to the position in Malaysia, it may be argued that sections 3 and 5 of the Civil Law Act 1956 (Revised 1972)[52] are applicable to support a similar view as the said sections allow the reception of common law provided no other provisions have been made under any written law. Thus, where there are statutory provisions made on the matter, that is, the BAFIA, the common law duty must be read subject to the statutory duty under the BAFIA.

However, this argument is not without difficulties. Sections 3 and 5 of the Civil Law Act merely disallow the reception of the common law where other written provisions have been made. The BAFIA has been enacted to provide for the licensing and

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[51]Poh Chu Chai, *Law of Banking*, 2nd Ed, (Longman, Singapore Publishers (Pte) Ltd, 1992), pp 267 and 268.
[52]*Supra* n 2.

regulation of institutions carrying on *inter alia* banking business. The BAFIA does not provide for matters arising from the contractual relationship between the bank and its customer. Secondly, it is doubtful whether the common law duty should be read subject to the BAFIA as the exceptions to banking secrecy in section 99 are not exhaustive. As was pointed out earlier, the common law exceptions such as disclosure in the interest of the bank and in the interest of the public are not available in the BAFIA.

From the arguments above, it would appear that the second view, that the contractual duty of a bank towards its customer is distinct and separate from its statutory duty under the BAFIA, is a better one. An author, Angeline Yap[53] adopts this view and argues that section 47 of the Singapore Banking Act 1970 which is quite similar to section 97 of the BAFIA was never intended to replace the common law position as the functions and subject matter of the two duties are different.

G. The Public Interest Exception

While it is best to allow both the contractual and statutory duties of confidentiality to exist separately and independently, it may be worthwhile to consider whether the common law public interest exception to disclosure should be included in the BAFIA. In the United Kingdom, the Review Committee on Banking Services[54] has advocated the abolition of the public interest exception on the ground that this exception is vague and unnecessary since there are already 19 statutes authorising disclosure.[55] This exception is also difficult to define and its scope is still unclear. In *Tournier*, Bankes LJ described the exception in the words of Viscount Finlay in *Weld-Blundell* v *Stephens*[56] as where "danger to the State or public duty may supersede the duty of the agent to his principal". For instance, a bank may be obliged to disclose information about a customer's dealings with an enemy

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[53]"Singapore" in *International Bank Secrecy* by Dennis Campbell (Ed), (London, Sweet & Maxwell, 1992), p 598.

[54]*Supra*, n 34.

[55]*Supra*, n 53, p 600.

[56]*Supra*, n 6, pp 965 and 966.

alien.[57] However, as pointed out by Ellinger, this exception is difficult to apply. He queries, for instance, whether trading with an enemy alien in a minor way with products having no bearing with war is any more a public interest matter than knowledge of a customer's major involvement in narcotics in a period of peace.[58]

However, in light of the increasing use of sophisicated methods used by white collar criminals in misusing the banking system and money laundering activities, the public interest exception is still useful. This view finds support in the relatively recent case of *Price Waterhouse* v *BCCI Holdings (Luxembourg) S A and Others*.[59] In that case, the court allowed Price Waterhouse to disclose confidential information it possessed relating to BCCI to an enquiry set up to review BCCI's past performance of its statutory functions. The court arrived at this decision on the ground that there would equally be a public interest to require confidential information to be disclosed to the Bank of England to enable it to carry out its supervisory functions under the Banking Act 1987. However, the court restricted the dissemination of such information to the extent of only what would have been authorised and disclosed to the Bank of England.

It is pertinent to note that under the Offshore Banking Act, 1990,[60] the exception to banking secrecy includes disclosure on the ground that it is in the interest of first the financial or economic well-being and secondly of the internal security of Malaysia. These disclosures may be ordered by the High Court upon the application of the Central Bank supported by a certificate from the Minister of Finance for the first ground and of the Minister of Home Affairs for the second ground. These exceptions are very similar to the public interest exception. Though these exceptions are wide, they may be justified on the necessity of protecting the offshore banks in the Federal Territory of Labuan from being abused by illegal activities such as money laundering. Similar considerations should apply to banks governed by the BAFIA. Banks play a crucial role in the economic development of a

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[57]PE Smart, *Chorley and Smart Leading Cases in the Law of Banking*, 6th Ed, (London, Sweet & Maxwell, 1990).
[58]*Supra*, n 26, p 103.
[59]Reported in *The Times Law Reports*, October 30, 1991, p 478.
[60]Act 443.

country and protective measures are necessary to provide a stable and an efficient financial system. In any event, having a public interest exception may not necessarily have the effect of opening the floodgates to disclosure. Like the Offshore Banking Act, provisions can be made for on application for disclosure to be made to the High Court supported by the relevant certificates. To overcome the problem of definition and scope, rather than wording it as "a public interest" exception, similar provisions like the Offshore Banking Act can be used.

IV. CONCLUSION

The bank's duty of confidentiality is an onerous one. It owes a contractual duty to its customer and at the same time, it is subjected to a statutory duty under the BAFIA. These two obligations are distinct and separate from each other. The purposes and subject matter and the circumstances when disclosure are permitted are slightly different under these two obligations. The BAFIA was not intended to override the contractual duty and both these duties owed by the bank can co-exist separately and independently.

The banking secrecy provisions under the BAFIA are commendable especially when they are compared with the provisions under the 1973 Act. The BAFIA has taken into account new possibilities of misuse of this privilege and at the same time, new circumstances when disclosure may be necessary. At the same time, there are areas in the banking secrecy provisions under the BAFIA which can be improved. These have been discussed in various segments of this article and it is only proposed to highlight the weaknesses and the suggested reforms here.

In respect of the persons who may be liable for a breach of confidentiality, the present provision in section 97(1) covering "any persons who for any reason has by any means access" to such information is too wide and difficult to justify. Liability ought to be restricted only to any person who discloses with the intent to obtain some gain or cause some harm.

On the question whether a bank can be sued in tort for a breach of statutory duty, it is submitted that a customer is unlikely to succeed in this cause of action. It is proposed that the BAFIA

be amended to provide expressly for this remedy. While it is true that a customer already has a remedy in contract, the damages that may be obtained in an action in tort for breach of this statutory duty differs in concept and calculation from that which may be obtained in an action in contract. This would provide an alternative basis of claim for a customer.

In respect of the duration of the duty of secrecy, since there is no provision on this under the BAFIA, the common law position that the duty of secrecy continues even after the customer has closed his account should be adopted and expressly provided for.

On the exceptions to disclosure available under the BAFIA, disclosure for the purpose of foreclosure proceedings should be expressly provided for in section 99(1)(d)(i). The present provision providing for disclosure in proceedings between the bank, its customer or guarantor would not cover a situation where the chargor of a security which is given for a loan made to a customer, is not made a guarantor as well.

For purposes of clarity, since garnishee proceedings are a form of legal proceedings, it would be better placed in section 99(1)(d) instead of appearing in a separate paragraph in the present section 99(1)(e). For the same reason, the provision on disclosure authorised by the Central Bank and disclosure authorised under any Federal Law in section 99(1)(h) would be clearer if they are put in separate paragraphs as each stands on its own.

For disclosure authorised under any Federal Law, it is not clear whether it refers only to specific statutes expressly providing for inspection of bankers books or also to general statutes such as the CPC. In order to achieve the objective of the BAFIA to supervise and regulate the financial industry effectively, it is submitted that the latter position should be adopted and expressly provided for. Further, the section should be amended to provide for disclosure not only of the account and affairs of the person suspected of the offence but also of his wife and children or near relatives to enable tracing of any possible ill-gotten gains.

Two exceptions under the common law which are not available under the BAFIA should be considered for inclusion. The case of *Sunderland* shows the need for an exception allowing

disclosure in the interest of the bank. The *BCCI* case is a timely indication of the usefulness of having a public interest exception.

Cheong May Fong*

*Lecturer
Faculty of Law
University of Malaya