



**أثر إلزام البنوك الإنجليزية بالسرية
ودوره في تعزيز الأنشطة غير المشروعة
(دراسة تحليلية)**

**The Effect Of Obliging English Banks To Secrecy
And Its Role In Promoting Illegal Activities
(An analytical study)**

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ملخص البحث :

إن واجب السرية في القانون الإنجليزي هو أحد قواعد القانون العام الذي يضمن حماية معلومات العملاء بشكل جيد، ويفرض التزامًا تعاقديًا ضمنيًا على البنوك للحفاظ على سريتها وعدم الكشف عنها مع أطراف أخرى. هذا الواجب له بعض الاستثناءات ولكنه يمتد بخلاف ذلك إلى جميع المعلومات الشخصية والمالية لعملاء البنوك.

اجتذب هذا الحد المرتفع من السرية الكثير من الانتقادات لأنه يضع عبئًا مفرطًا على البنوك الإنجليزية للالتزام بهذه القاعدة بالإضافة إلى القواعد المصرفية الأخرى التي تتطلب نوعًا من الإفصاح لمحاربة الأنشطة غير القانونية. أدت الاحتياجات المتناقضة لكل من العملاء الذين يرغبون في حماية معلوماتهم ومصالحهم المصرفية في الامتثال للقانون ، ببعض الأكاديميين إلى اعتبار واجب السرية هذا ملاذًا آمنًا للأنشطة الإجرامية.

لذلك ، فإن هذه الورقة تقيم ما إذا كان القانون الإنجليزي بشأن واجب السرية متخلفاً في أحسن الأحوال ، وفي أسوأ الأحوال يضع البنوك كملاذ آمن لأنشطة غسيل الأموال.

وتختتم الورقة بالاختلاف مع هذا البيان نظرًا لأن هناك قواعد قانونية أخرى عند تطبيقها جنبًا إلى جنب مع واجب السرية ، فإنها ستؤدي إلى التزام مصرفي أكثر توازنًا لا يحمي الأنشطة غير قانونية مع حماية معلومات العملاء في نفس الوقت.

الكلمات المفتاحية : المصرفية ، السرية ، الإنجليزية ، القانون .

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Abstract:

The English law duty of confidentiality is a common law rule that ensures customers information are well protected, and places an implied contractual obligation on banks to keep them confidential and not disclose them with other parties. This duty has some exception but otherwise extends to all personal and financial information of banks' customers.

Such high bar of confidentiality has attracted much criticism since it places an excessive burden on English banks to abide by such rule as well as other banking rules that require some sort of disclosure to fight unlawful activities.

The contrasting needs of both customers desire in protecting their information and banking interest in complying with the law, led some academics to consider such duty of confidentiality as a safe harbor for criminal activities. This paper therefore evaluate whether The English law on the duty of confidentiality is backward at best and at worse is placing banks as the safe harbour for money laundering activities.

The paper concludes by disagreeing with this statement since they are other statutory rules when applied alongside the duty of confidentiality, it will result in a more balanced banking obligation that does not harbour unlawful activities while at the same time protect customer information.

Key words: Banking, Confidentiality, English, Law.

Introduction

Typically under the common law, banks are deemed to owe a duty of confidentiality to their customers, and such a duty has been found to exist from as early as 1924.⁽¹⁾ While this duty is usually considered to be one of the most fundamental duty in the banking world, one that gives legitimacy to the banks and makes them trustworthy, this duty has never been seen as being one that is absolute.⁽²⁾ Rather, this duty is one that is qualified in nature. At the same time, given that the duty of confidentiality was espoused as early as 1924, one must contextualise this duty at the time at which it was espoused – at this time, crime was largely considered to be local.⁽³⁾

However, crime in the last two or so decades has been anything but local. Financial crime has crossed all borders to the extent that syndicates and terrorism cut across the global fabric, and are now worth hundreds of billions of dollars of fraud and crime money.⁽⁴⁾ In such a case, banks have naturally been one of the strongest platforms through which funds transfer have been taking place for decades, and perhaps even a century. In spite of more modern forms of payment such as Bitcoins, the banking industry has the legal capacity to handle such large volumes of funds transfer. Consequently, the banks are always exposed to being misused for illegal purposes such as money laundering, which is a rampant process in both terrorist crime and drug-related crime, among other crimes.⁽⁵⁾

In order to deal with such widespread financial crime, and specifically the crime of money laundering, a plethora of legislations have been enacted in the UK, as in all other countries. The salient point for the purposes of this paper is that these enactments all have the effect of making the banks disclose their customers' financial information, where the law enforcement authorities require the same.⁽⁶⁾ The reason the law enforcement require such information from the banks is because the money laundering process usually could leave behind an audit trail,

(1) D Chaikin, 'Adapting the qualifications to the banker's common law duty of confidentiality to fight transnational crime', [2011] 33 *Sydney Law Review* 265.

(2) R Hooley, 'Bankers' references and the bank's duty of confidentiality: when practice does not make perfect', [2000] 59(1) *Cambridge Law Journal* 21.

(3) R B Wessling, 'Banking: Disclosure of Records: The duty of a bank as to customer information', (1962) 60(6) *Michigan Law Review* 781.

(4) A Alkaabi et al, 'A comparative analysis of the extent of money laundering in Australia, UAE, UK and the USA', [2010] online, available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539843 (Accessed 1 Jan 2020).

(5) S Nikolosk and I Simonovski, 'Role of Banks as entity in the system for prevention of money laundering in the Macedonia', [2012] 44 *Procedia – Social and Behavioral Sciences* 453.

(6) H Nobanee and N Ellili, 'Anti-money laundering disclosures and banks' performance', [2017] 25(1) *Journal of Financial Crime* 1.

which the banks can trace and provide evidence that helps the authorities deal with the financial criminals.

The slew of legislations have been regarded by some commentators as constituting a serious violation of the fundamental principle of customer confidentiality.⁽¹⁾ At the same time, another dominant view is that the idea that major crime constitutes customer confidentiality is a dead view.⁽²⁾ The key thesis statement that this paper seeks to analyse in this context is whether the English law on the duty of confidentiality is backward at best and at worse is placing banks as the safe harbour for money laundering activities. This paper concludes that this thesis statement is a misstatement of the reality, whereby there are indeed several statutory and common law exceptions that permit the duty of confidentiality to be suspended, in view of combatting money laundering activities. Therefore, the common law of the duty of confidentiality is one that indeed empowers the banks to assist in combatting money laundering, without constituting a breach of the duty of confidentiality.⁽³⁾

The Common Law Duty of Confidentiality

Overview of Duty of Confidentiality

As per the tenets of English common law, the relationship between the customer of a bank and the bank is one that is grounded in a contract, where the contract comes into force when the bank agrees to open a bank account in the name of the customer.⁽⁴⁾ The duty of confidentiality is deemed to be an implied term of this contract between the bank and the customer, whereby it quite simply denotes that the bank will keep all of the customer's information, both personal and financial, as a secret and maintain confidentiality. In other words, the bank is undertaking that it will refrain from revealing the information to any third party, except where the bank has a right to assist the third party with the inquiries, so that this protects the interest of its customer. It is also useful to note that the relationship between the customer and the bank also has the hallmark of an agency relationship, which can further enhance and affect the contractual relationship between the two, whereby the latter is under a duty of loyalty and confidence towards the former.⁽⁵⁾

(1) M Levi, 'Regulating Money Laundering: The Death of Bank Secrecy in the UK', (1991) 31(2) *British Journal of criminology* 113.

(2) P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing, 2003) 270.

(3) R Cranston and T Sante, *Principles of Banking Law* (Oxford University Press, 2018) 260.

(4) *Ladbroke & Co. v Todd* [1914] 19 Com. Cas. 256.

(5) *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Report 194, at 198.

The Duty of Confidentiality in Detail

Whenever a professional relationship is in question, the person whose professional service has been engaged has a duty to ensure that the information that has been revealed to him in his professional capacity will be safeguarded by him.⁽¹⁾ This duty applies to bankers as well, in addition to other professionals such as lawyers and doctors. While there is no definitive formulation of the duty of confidentiality, it has definitely been recognised as the fundamental pillar that holds and legitimises the bank-customer relationship. The duty of confidentiality requires that the confidence of the customer must be protected and respected.⁽²⁾

Under English law, this duty of confidentiality is established on the contractual principles of debtor and creditor.⁽³⁾ Previously, it was thought that in order for such a duty of confidentiality to arise, a bank account must exist between the bank and the customer, as this was seen as the instrument that invoked the contract in question.⁽⁴⁾ It is worth noting that the time period for which the bank account was held is immaterial – even if the account is overdrawn or the account was live only for a short period, this does not prevent the duty of confidentiality from applying. This in itself signifies the extent to which the doctrine of confidentiality is given prominence in the UK. This is further explained by the fact that in contemporary times, the duty of confidentiality can exist even when such a bank account is not held by the customer. Ellinger has argued that in today's digital world, an individual can be receive banking services from a bank without holding a formal account with that bank, as banks today offer such a wide variety of financial products and services.⁽⁵⁾ Therefore, this further exemplifies the fact that in the UK, the duty of confidentiality is seen to arise the moment a person has some sort of professional relationship with a bank, thereby exhibiting the fundamental nature of this duty.

The notion of the duty of confidentiality in the context of the bank-customer relationship arose first in the seminal case of *Tournier v National Provincial and Union Bank of England*.⁽⁶⁾ In this case, for the very first time in English law, it was held that the banks were under an implied contractual duty to protect the customer's financial information from third parties, and cannot reveal this information wantonly. Bankes LJ stated prominently that:

(1) T Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford University press, 2012) 381.

(2) P Latimer, 'Bank Secrecy in Australia: Terrorism Legislation as the New Exception to the Tournier Rule' [2004] 8(1) *JMLC* 56.

(3) *Foley v Hill* (1848) 9 ER 1002, 1005.

(4) *Commissioner of Taxation v English, Scottish and Australian Bank Ltd.* [1920] AC 683 (PC).

(5) E P Ellinger et al, *Ellinger's Modern Banking law* (5th edn, Oxford University press, 2011) 116.

(6) *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).

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. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualifications and to indicate its limits.⁽¹⁾

While it is important to note that this duty is a qualified one, it will be further explored in the next section. What is important to realise at this stage is that such a duty was found to exist, and indeed the judicial treatment to such a duty has been that this duty can rarely be breached.

An element that can be noted here however is the way English law has responded to financial crimes in a flexible way. While this duty of confidentiality was found to exist in 1924, as noted above this was also in light of the way financial crime was occurring then. Prior to 1924, there were several cases where the counsels alleged that the banks had a duty of secrecy which they cannot breach, and yet no affirmative decision had been made with regards to the finding of this duty.⁽²⁾ The courts were also reluctant to impose this duty because they were of the opinion that this duty was a matter of morals, as opposed to the law. The courts were of the belief that for the prevailing types of crimes back then, they had the trust that the banks were behaving responsibly and there was no need for the imposition of this obligation.⁽³⁾ Hence, English law has always exhibited the ability to be flexible with its financial laws, such that financial crimes can be duly tackled.

Statutory Reinforcement of the Duty of Confidentiality

It can be further noted that the English (and the EU) statutory legal framework also reinforces this duty of confidentiality, making one believe that the duty of confidentiality is so iron-clad that money launderers end up abusing the protection offered to the banks. The two pieces of legislation in the UK that directly protect and reinforce the duty of confidentiality is that of the Data Protection Act 1998⁽⁴⁾ and the Human Rights Act 1998,⁽⁵⁾ which implements the European Convention on Human Rights 1950⁽⁶⁾ into the UK legal framework.

Under Section 4 of the Data Protection Act 1998, banks and financial institutions, among other business organisations, are under the legal obligation to ensure that the personal information of the customer that they use and process

(1) Ibid, at [471].

(2) *Hardy v Veasey* (1868) LR 3 Ex. 107.

(3) R Cranston, *Principles of Banking Law* (2nd edn, Oxford University Press, 2002) 168.

(4) Data Protection Act 1998.

(5) Human Rights Act 1998.

(6) European Convention on Human Rights 1950.

must be used only for the purpose they obtained the information for, and must also duly protect the information while processing and transferring it.⁽¹⁾ Likewise, as per Section 6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in any manner that is incompatible with the European Convention on Human Rights.⁽²⁾ In such a way, the courts are under the legal obligation to declare any statutory provision that is incompatible with the ECHR as invalid.⁽³⁾ Similarly, Section 3 of the Human Rights Act 1998 requires the courts to construe all statutory provisions in line with the ECHR rights, so far as it is possible to do so.⁽⁴⁾

All of these Human Rights Act provisions must be viewed in light of Article 8(1) of the ECHR, which states that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8 has been influential in developing the way confidentiality is interpreted and applied in today's terms, and therefore it also carries serious implications for the duty of confidentiality in the bank's context.⁽⁵⁾ Indeed, given how fundamentally and importantly Article 8 rights have been interpreted, and the authoritatively definitive approach taken by the ECtHR in enforcing Article 8 rights, one can duly conclude that the duty of confidentiality has become all the more entrenched in the law, such that it cannot be derogated from easily, even to meet the contemporary requirements of financial fraud prevention (money laundering).⁽⁶⁾

Scope of the Duty of Confidentiality

The scope of the duty of confidentiality further helps establish the fundamental and expansive way in which this duty applies today. In the case of *Tournier*, the Court of Appeal was called upon to decide whether the duty of secrecy would apply to information that the bank had collected from sources other than the customer or his account, as the information which the bank had disclosed in this case was not provided by the customer to the bank. However, the court rejected the argument that the duty of disclosure was confined to the information that the

(1) Data Protection Act 1998, s 4.

(2) Human Rights Act 1998, s 6(1).

(3) Human Rights Act 1998, s 4.

(4) Human Rights Act 1998, s 3.

(5) T H Berhe, 'Conflict between anti-money laundering and anti-terrorism finance laws requirements and bank secrecy and confidentiality laws', [2 Sep 2014] *University of London* (online), available at:

<<https://sas-space.sas.ac.uk/5926/1/Teklit%20Hailemichael%20Berhe%20LLM%20Dissertation.pdf>>

(Accessed 1 Jan 2020).

(6) *Ibid.*

bank had directly obtained from the customer, but rather applies also to information that the bank had acquired in its capacity as a professional bank.⁽¹⁾

From this, it becomes clear that the duty of confidentiality is not one that is restricted to the information provided by the customer. In the case of money laundering, a bank now cannot seek to reveal information to the law enforcement authorities, where its suspicion that money laundering is taking place was not secured from the customer himself, but rather from investigations conducted by the bank about the customer. This clearly shows that the expansive nature of the duty of confidentiality is one that could truly interrupt the way money laundering is handled by authorities, if one were to go by the scope of the duty of confidentiality alone.

As such, only information that was secured prior to the commencement of the banking relationship, or after its termination, is excused from the scope of the duty of confidentiality.⁽²⁾ All other information that the bank has secured about the customer during the currency of the account or banking relationship, regardless of the source of the information, is subject to the duty of confidence.⁽³⁾ In fact, it is strongly arguable that the duty of confidence is one that could persist even after the death of the customer.⁽⁴⁾

From these points, it can be surmised that the common law duty of confidentiality is one that is indeed expansive, and one that is considered to be fundamental to the proper operation and preservation of the bank-customer relationship. In fact, given the way the statutory law has also further enshrined this duty of confidentiality, one can argue that it is indeed possible that the duty of confidentiality in English law could indeed be so fundamentally protected that this could make banks as a safe harbour for money laundering activities. Such a conclusion is subject to analysis of how other aspects of UK anti-money laundering laws deal with this situation.

Anti-Money Laundering Laws of the UK

Overview of Money Laundering Crimes

One practical definition of the phenomenon is that it refers to how illegal money arising from illegal activities, through a succession of transfers and deals until the source of illegally acquired funds, is obscured and the money takes on the

(1) P Hood, *Principles of Lender Liability* (Oxford University Press, 2012) 53.

(2) G Leahy, *Managing Banking Relationships* (Woodhead Publishing, 1997) 53.

(3) *Attorney-General v Times Newspapers Ltd. (No.2)* [1990] 1 AC 109 HL 281.

(4) J E Moliterno, *Professional Responsibility* (Aspen Publishers, 2010) 79.

appearance of legitimate assets.⁽¹⁾ Without the involvement of banks, it is virtually impossible to have money laundered.⁽²⁾

Common Law Qualifications of Duty of Confidentiality

It is important to first consider how the common law itself makes it possible for the banks to cooperate with the law enforcement authorities in relation to the combat against money laundering, without being in breach of the duty of confidentiality. As noted above, the duty of confidentiality is not an absolute one, but rather one that is qualified in nature.⁽³⁾ In the very case of *Tournier* where the duty of confidentiality was established, the court was careful to note that there are four main qualifications – disclosure by compulsion of law, disclosure under duty to the public interest, disclosure under the bank's own interest and disclosure with the customer's approval.⁽⁴⁾

While the latter two are not of consequence to the purposes of this paper, the former two are of paramount importance in deciding whether the English law on the duty of confidentiality is one that is amicable with anti-money laundering laws, or one that is in conflict with it. Typically, it can be argued with certainty that where there are indeed public interests in imposing the duty of confidentiality upon the banks to keep the customers' information a secret, there are similarly competing public interests which justify the suspension of this duty such that the bank can lawfully disclose the information.

The compulsion of law qualification is the most important one here, which will be further analysed separately below. This qualification simply states that where the statutory law demands/permits the bank to reveal the confidential information of the customer, for whatever purpose, then the bank is under the legal obligation or legal capacity to do so, without otherwise flouting the duty of confidentiality rule.⁽⁵⁾ It must once again be noted that when this qualification was espoused in 1924, the English law only had two main Acts that required such a form of disclosure from the banks.⁽⁶⁾ However, the very nature and number of

(1) HM Treasury, 'Anti-Money Laundering Strategy', [2004] online, available at: <http://www.amnet.co.il/joomla/attachments/uk%20Anti-Money%20Laundering.pdf> (accessed 1 Jan 2020) para 1.3.

(2) V Mitsilegas, *Money Laundering Counter Measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles* (Kluwer, 2003) 133.

(3) S Jawahitha, 'Banking Confidentiality: A Comparative Analysis of Malaysian Banking Statutes', [2002] 17(3) *Arab Law Quarterly* 255.

(4) *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 503-540; *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) CA 664.

(5) M M Gallant, *Money Laundering and the Proceeds of Crime* (Edward Elgar Publishing, 2005) 22.

(6) British Bankers' Book Evidence Act 1879, s 7; Extradition Act 1873, s 5.

legislations that require such a disclosure today from the banks are indeed very different from the pre-1924 Acts.

Yet, it is safe to conclude that this qualification still applies under English law, and in spite of the spike in the number of anti-money laundering provisions that require such a disclosure, the erosion of the duty of confidentiality has not stripped the doctrine of this qualification. Indeed, the very reason for such an erosion of an otherwise fundamental doctrine is the fact that public policy demands that crimes of money laundering are dealt with decisively.⁽¹⁾ The legislators have been clear in the UK that this banking law doctrine should not serve as a conduit for the criminals to use banks as a safe harbour, keep their details and identities a secret, and complete their illegal financial activities. The consideration in the next section of the exact provisions which demand banks to disclose such information will reveal the fact that contrary to the thesis statement, the reality seems to be that the duty of disclosure is the one that is somewhat weakly applicable today.

The second qualification also warrants some discussion here. Under this second qualification, banks can also lawfully disclose confidential information regarding their customers, when a duty to the public to disclose arises. Such a duty usually becomes relevant where there is a higher duty of the bank where there is danger to the State or the public, such that the duty of confidence and loyalty owed by the bank as an agent to the customer as a principal can be superseded.⁽²⁾ Typically, disclosure under this qualification is usually done so as to ensure that financial crime, and in particular money laundering, is dealt with effectively.

However, it must be established that this qualification is very rarely used, and is almost never used in the area of money laundering. The reason for this is that such a qualification has become somewhat obsolete, owing to the fact that disclosures are now mandatorily required under the various anti-money laundering laws. In such a case, there usually is no need for the banks to rely on this heading/qualification. It can be concluded that this qualification does not provide much support in disputing the thesis statement, as its very scant invocation leads one to conclude in the opposite, that the duty of confidentiality is indeed a very strong one. The Jack Report stated that:

The generalised ground of public interest needs to be abolished as statutory specification of this type of disclosure ... has now been carried so far that it is hard to see in what circumstances the generalised provision, with its

(1) HM Treasurer, *'White Paper on Banking Services: Law and Practice'* (1990, London, Cm. 1026) Annex 2, para 2.13.

(2) E F Mannino, *Lender Liability and Banking Litigation* (Law Journal Press, 2019) 3-20.

uncertainty of application, could any longer be needed, given that emergency legislation could always be enacted in time of war.⁽¹⁾

Yet, in spite of the redundancy of this qualification, the UK courts have taken an entirely different approach to this matter. Indeed, the government is of the opinion that this exception should be maintained as a buffer, as it gives the banker a common law safeguard where he seeks to make a disclosure in the public interest. The difference between this qualification and the previous qualification is the fact that the former requires that the bank is under a mandatory duty to disclose, whereas this qualification gives the banker the legal capacity and permission to disclose such information.

This can be taken as evidence of the approach of the UK government in dealing with money laundering and its interaction with the duty of confidentiality. While it is true that this qualification does not in itself support the argument that the duty of confidentiality is not as absolute in the UK as the thesis statement claims, the reality is that this qualification helps to reveal that the UK government is indeed of the opinion that this ground can be exploited where necessary, to combat money laundering. Given the increasing nature of complexity of money laundering crimes, banks might increasingly feel that while there is occasion to disclose information, the existing statutes might not be up to date such that the banks are given the express power to make the disclosure. Hence, the existence of this ground helps give banks the security that they would not be breaching their duty of confidentiality in making such a revelation.⁽²⁾

Indeed, in the case of *Price Waterhouse v BCCI Holdings (Luxembourg)*,⁽³⁾ it was held that this qualification is still a live and useful one, and one that could be used proactively by the banks to help the authorities combat money laundering activities. Academic opinion on this matter also states that this qualification will be useful to help uncover major money laundering crimes, and will also be useful to comply with foreign legal obligations for disclosure, given that money laundering today is a truly international crime.⁽⁴⁾ Overall then, it is safe to assume that the two common law qualifications are in themselves useful in disputing the thesis statement, for they prove that there are grounds for the duty of confidentiality to operate without violating the requirements of anti-money laundering laws. It is not important to consider the exact provisions of money

(1) HM Treasury, 'Banking Services: Law and Practice' (Report by the Review Committee, London, 1989, Cm. 622) para 5.30.

(2) P Mathews and H M Malek, *Disclosure* (Sweet & Maxwell, 2012) 11.47.

(3) *Price Waterhouse v BCCI Holdings (Luxembourg)* [1992] BCLC 583.

(4) T Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford University press, 2012) 385.

laundering laws, so as to consider the effect these provisions have on the duty of confidentiality today.

Statutory Provisions Requiring Disclosure

It is necessary to see what the statutory laws state with regards to anti-money laundering, as this ties in directly with the first common law qualification considered above. The primary legislations that are relevant are that of the Proceeds of Crime Act 2002,⁽¹⁾ and the Terrorism Act 2000,⁽²⁾ both as amended. Both of these statutes criminalise money laundering activities and lay down staunch reporting requirements. The key secondary legislation to consider here is that of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.⁽³⁾ These Regulations impose on banks due diligence and record keeping requirements.

As per Part 7 of the 2002 Act, it is an offence to conceal, disguise, transfer or remove criminal property or convert the same from the UK,⁽⁴⁾ to become concerned in arrangement with a person suspected to facilitate or use criminal property,⁽⁵⁾ and to acquire, use or have possession of criminal property.⁽⁶⁾ Section 340(11) of the Act defines money laundering as any act that constitutes an offence under Sections 327-329, or an attempt or conspiracy to commit these offences, or aiding, abetting, counselling or procuring the commission of the same.⁽⁷⁾

Most importantly for banks, Section 330 makes it an offence for the person in a regulated sector conducting relevant business to fail to make the require disclosure to the NCA or the Money Laundering Reporting Officer (MLRO hereafter) of the bank, if there are reasonable grounds for knowing/suspecting that a customer is engaged in money laundering, and that information came to him during the course of the business.⁽⁸⁾ This is in line with the common law duty of confidentiality, where it was held that the duty applies to all information gathered about the client during the course of the business. Section 330 therefore seems to directly engage with this aspect.

(1) Proceeds of Crime Act 2002.

(2) Terrorism Act 2000.

(3) Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692).

(4) Proceeds of Crime Act 2002, s 327.

(5) Proceeds of Crime Act 2002, s 328.

(6) Proceeds of Crime Act 2002, s 329.

(7) Proceeds of Crime Act 2002, s 340(11).

(8) Proceeds of Crime Act 2002, s 330.

Similarly, Section 331 makes it an offence for the MLRO to fail to disclose his knowledge/suspicion of a money laundering customer/activity.⁽¹⁾ Yet, Section 337 clearly states that where the disclosures under Section 330 and 331 meet the requirements of Section 337, then the law will not consider that there is an inherent conflict between the duty of disclosure and the duty of confidentiality.⁽²⁾ Rather, the reality is that the statute itself grants the banks the freedom from the obligation of confidentiality where they are reporting about a suspected/actual case of money laundering. In other words, this ties in with the first qualification of the common law doctrine of confidentiality – thus, the banks are not bound by the duty of confidentiality under both statutory and common law, and therefore the thesis statement is indeed inaccurate.⁽³⁾

Section 21A(1) of the 2000 Act also imposes a disclosure obligation on the bank, where a person belonging to a bank will be taken to have committed a crime where he has reasonable grounds to suspect, or knows, that another person is committing a crime related to terrorist property, and that information came to him during the course of the business in the regulated sector, and has failed to disclose this to the MLRO.⁽⁴⁾ The nature of this provision and the way it interacts with the duty of confidentiality is the same as the 2002 Act considered above.

Finally, as per the 2017 Regulations, Regulations 29 and 34 impose upon the bank stringent due diligence requirements.⁽⁵⁾ Banks are therefore required to conduct strong due diligence measures prior to the establishment of a business relationship. Where they doubt the veracity of the documents, or have any other reason to suspect that money laundering is afoot, then they must abandon the transaction and consider reporting suspicious activity under either the 2000 or the 2002 Acts.⁽⁶⁾ Most importantly, Regulation 41 permits any relevant data collected by the banks to be processed for the purposes of preventing money laundering and terrorist financing.⁽⁷⁾

In such a case, this is the most explicit statutory reference, and the most recent one at that, that permits the banks to disclose customer information without

(1) Proceeds of Crime Act 2002, s 331.

(2) Proceeds of Crime Act 2002, s 337.

(3) M Goldby, 'Anti-money laundering reporting requirements imposed by English law: measuring effectiveness and gauging the need for reform', [2013] 4 *Journal of Business Law* 371.

(4) Terrorism Act 2000, s 21A(1).

(5) Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692), Reg 29 & 34.

(6) Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692), Reg 7.

(7) M Krzysztofek, *GDPR: General Data Protection Regulation (EU) 2016/679* (Kluwer Law International, 2018).

actually violating the duty of confidentiality, proving that the English law is indeed keeping up with times. Furthermore, this is established by the fact that while breach of the duty of disclosure will give rise to massive damages in favour of the customers,⁽¹⁾ banks will not be liable for losses suffered by customers due to a delay in the implementation of their instructions, so long as the bank had a genuine suspicion of money laundering taking place.⁽²⁾

(1) *Jackson v Royal Bank of Scotland* [2005] UKHL 3; *Force India Formula One Team Ltd v Malaysian Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); *Primary Group (UK) Ltd v Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch); *Absolute Lofts South West London Ltd v Artisan Home Improvements Ltd and Another* [2015] EWHC 2608 (IPEC).

(2) *Shah and Another v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB).

Conclusion

In summary, it is clear that contrary to the thesis statement, the English law on the duty of confidentiality has confidently evolved to meet the dynamic challenges presented by money laundering, without compromising the rights and the position of the bank. This paper concludes that the English law on the duty of confidentiality has indeed kept up with the times, and is not placing the banks as the safe harbour for money laundering activities. Instead, the existing laws on anti-money laundering, coupled with the way the duty of confidentiality has been interpreted and applied in practice, has placed the banks at the forefront of combatting money laundering activities.

While not destroying the very ethos of the doctrine of confidentiality, the first qualification of the common law doctrine, coupled with the 2002 and 2000 Acts and the 2017 Regulations, has resulted in the duty of disclosure in money laundering cases and the duty of confidentiality of the bank being able to co-exist. Indeed, it is owing to the common law qualification that the suspension of the duty of confidentiality in lieu of statutory obligations has become possible. Next, the extensive provisions that deal with the issue of obligatory/permitted disclosure by the bank in money laundering cases also ensures that banks are able to disclose confidential material without being liable in law for breach of contract, nor be morally responsible for the breach of trust.

Hence, even though the doctrine of confidentiality is an iron-clad concept as far as English banking law is concerned, as noted in the paper, the very reason that led to the inception of the doctrine of confidentiality has also led to the situation where this doctrine could be amended to accommodate financial crime combatting. Hence, the thesis statement is inaccurate and does not reflect the reality that English banking law facilitates banks to assist in anti-money laundering efforts, without compromising on their duty of confidentiality.

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