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Privacy-the Civil Liberties Issue

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I. Introduction

The traditional description of the right to privacy is "the right to be let alone."[1] A precise or logical formula of the right is difficult to find.[2] However the following alternative definitions are instructive when considering the question of privacy in the area of bank secrecy:

> (a) First, freedom from intrusion upon oneself, one's home, family and relationships. Secondly, privacy of information: the right to determine for oneself how and to what extent information about oneself is communicated to others.[3]
>
> (b) The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.[4]

These definitions strongly point to the right of privacy which may be asserted only by an individual. As a result, the implication is that other types of legal persons, for example, corporations, may not assert the right to privacy. The definitions also suggest that the right may only be asserted in the sphere of one's personal life, and not necessarily one's commercial life. However, it might be wrong to take such a restrictive view. As at least one U.S. court has recognized, an individual's financial and personal lives are often intertwined: "the totality of bank records provides a virtual current biography."[5] In other words, one's commercial life can be seen as

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1. Olmstead v. United States, 277 U.S. 438, 478 (1928).

2. JUSTICE REPORT ON PRIVACY AND THE LAW 5 (1970); YOUNGER COMMITTEE REPORT ON PRIVACY, 1972, CMND 5012, at 17 [hereinafter YOUNGER COMMITTEE REPORT].

3. YOUNGER COMMITTEE REPORT, *supra* note 2, at 10.

4. CALCUTT REPORT (REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS), 1990, CMD 1102, at 7.

5. Burrows v. Superior Court of San Bernardino County, 529 P.2d 590, at 596 (Cal. 1974).

an aspect of one's personal life. Thus, once the possibility of commercial privacy in the context of civil liberties is recognized then implicitly, the right belongs not only to individuals but also to corporations.

II. No General Right to Privacy under English Law

The right to privacy under English Law has been summarized as follows: "[T]he protection afforded to privacy by English law is piecemeal, incomplete and inadequate."[6] When a plaintiff seeks to protect her right to privacy she must assemble a hodgepodge of common law remedies that are fundamentally unsuited for protecting civil liberties.[7]

III. Rights under the European Convention on Human Rights

The United Kingdom does not have a written constitution containing provisions for the protection of basic human rights. However, this void is filled to an extent by the European Convention on Human Rights (ECHR).[8] An example of the ECHR's impact on commercial crime adjudication is shown by a recent ruling of the European Commission on Human Rights involving the Guinness take-over. In this case, offenses charged against Mr. Ernest Saunders were ruled to be an abuse of the ECHR.

The Commission ruled that Mr. Saunders' trial was unfair because evidence given by him, under compulsion, to Department of Trade Inspectors was then used against him at his trial.[9] A ruling is expected from the court in the summer of 1996.[10]

The ECHR also addresses the question of the right to privacy. Article 8 of the ECHR provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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6. CIVIL LIBERTIES CASES AND MATERIALS 471 (3d ed. 1991).

7. *See, e.g.*, Kaye v. Robertson, [1991] F.S.R. 62. In that case, an actor who was recovering in a hospital from serious injuries suffered in a motor accident was interviewed and photographed by journalists. He claimed damages under the following headings: libel, malicious falsehood, trespass to the person and passing off. All failed except for malicious falsehood. *Id.*

8. 1950 CMD 8969. *See also* John Mason, *European Ruling on Guinness Questions U.K. Fraud Procedures*, FIN. TIMES, Sept. 19, 1994, at 1.

9. *See* Michael & Emmerson, *Current Topic: The Right to Silence*, 1995 EUR. HUM. RTS. L. REV. 4.

10. *Id.*

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[11]

"Private life" is not defined, but could have a wide meaning and include one's financial records, whether of a personal or commercial nature. "Correspondence" would undoubtedly include one's bank statements. However, the Court of Human Rights has made it clear that for the right to privacy to be abrogated by a particular state, the domestic law must do so with certainty and clarity.[12] In particular, the law must clearly describe what degree of discretion is afforded to an executive agency when its proposed actions may interefere with an individual's privacy.[13] It should be noted that the ECHR explicitly allows signatory states to abrogate or suspend the right to privacy in the public interest.

IV. Relationship Between Right to Privacy and the *Tournier* Rule

A bank is under a duty to keep secret and confidential information relating to customers' accounts and customers themselves.[14] The duty arises from an implied term in the contract governing the relationship between a bank and its customer.[15] Indeed, the duty also applies, without doubt, to building societies, credit unions, and other financial institutions that provide banking services for their customers. Thus, the duty is legal, not just moral.

If this duty is breached, a claim for damages will resultingly arise.[16] However, damages may not provide an adequate remedy in certain circumstances and in specific circumstances, the customer

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11. *Id.*
12. Malone v. United Kingdom, 7 Eur. H.R. Rep. 14 (1984) (case on telephone tapping and interference with correspondence).
13. *Id.*
14. Tournier v. National Provincial and Union Bank, [1924] 1 KB 461 (C.A.).
15. *Id.*
16. Sunderland v. Barclays Bank Ltd. (1938), *reprinted in* LEGAL DECISIONS AFFECTING BANKERS 163 (1986).

should instead seek an injunction to prevent disclosure of information.[17]

In the landmark case of *Tournier*,[18] a bank official revealed to the plaintiff's employer that the plaintiff was indebted to the bank, behind in his repayments, and appeared to engage in betting because the plaintiff had endorsed a check to a bookmaker.[19] The plaintiff was, at the time, under a temporary contract of employment with his employer.[20] This contract was not renewed. The plaintiff, however, successfully sued the bank for damages.[21]

The duty of confidentiality may apply to all information in the bank's possession which concerns the customer, whether or not such information is derived from the account itself. Although the *Tournier* majority implies this right to privacy, several justices did not agree about the scope of the bank's duty.[22] Indeed, Lord Justice Scrutton held that the duty of confidentiality did not extend to knowledge from other sources obtained during the currency of the bank-customer relationship.[23] Further, Lord Justice Atkin said that the duty only applied if the occasion upon which the information was obtained arose out of the bank-customer relationship.[24] However, it would be prudent for banks to construe the duty liberally.

The duty of confidentiality arises when the bank-customer relationship is established. The duty does not cease, however, when that relationship is terminated, for example, by the closing of the account. The duty may also arise where the person about whom the bank has confidential information is not yet, or has never become, a customer. For example, a duty arises where a customer has unsuccessfully applied for a loan and the bank is thereby in possession of confidential information relating to the customer.[25]

Occasionally, a bank will pass information to another company within the same group for cross-marketing purposes. For example, if a bank has a subsidiary that provides specialist financial services,

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17. El Jawhary v. Bank of Credit and Commerce Int'l, [1993] B.C.L.C. 396 (Ch.).
18. [1924] 1 KB 461 (C.A.).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Tournier*, 1 KB 461.
24. *Id.*
25. Djowharzadeh v. City Nat'l Bank and Trust Co., 646 P.2d 616 (Okla. Ct. App. 1982).

such as insurance, then the bank might pass customer lists (which might include confidential information pertaining to those customers) to the other group company. The U.K. Court of Appeal considered that disclosure of information by one company within a group raised an arguable case of breach of contract.[26] Moreover, given that disclosure is to an entirely different legal person, such action may well constitute a breach of the duty of confidentiality.

V. Exceptions to the Duty of Confidentiality

The duty of confidentiality is not absolute; there are exceptions. The exceptions are as follows:

1. Where the customer consents to the disclosure of the information either impliedly or expressly;
2. where there is a duty to the public to disclose;
3. where it is in the interests of the bank to disclose; or
4. disclosure under compulsion of law.

Undoubtedly, the *Tournier* rule and the civil liberties question should not be confused. The former is a statement of an implied contractual term in the bank-customer contract. The latter is a question that has nothing whatsoever to do with that contract: rather it concerns the issue of whether the customer has some higher right. It is accordingly a separate constitutional issue.

VI. United States Cases[27]

Several United States cases have reviewed the *Tournier* decision.[28] Indeed these cases have interpreted the extent of the duty of confidentiality itself and its exceptions. In *Peterson v. Idaho First National Bank*,[29] a bank manager informed the plaintiff's employer who was a customer of the bank, that the plaintiff employee had drawn checks with insufficient funds to meet

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26. Bank of Tokyo v. Karoon, [1987] AC 45n at 53, 54 [1986] 3 All ER 468, 476-7 (C.A.).

27. This section examines principal United States' case law. This area has, of course, also been regulated by statute at the federal level by the Right to Financial Privacy Act of 1978. 12 U.S.C. §§ 3401-3422 (1993).

28. Thomas C. Russler & Steven H. Epstein, *Disclosure of Customer Information to Third Parties: When Is the Bank Liable?*, 111 BANKING L.J. 258 (1994); Donald A. Doheny, *Modern Banking: Easy Access v. Privacy*, 48 J. MO. B. 287 (1992); Mary Catherine Green, *The Bank Secrecy Act and the Common Law: In Search of Financial Privacy*, 7 ARIZ. J. INT'L L. 261 (1990).

29. 367 P.2d 284 (Idaho 1961).

them.[30] This eventually led to the employer dismissing the plaintiff from his employment. In its opinion, the court analyzed the bank-customer relationship as being one of agent and principal.[31] It held that the duty of confidentiality extends to all bank customers whether they are equally depositors or borrowers.[32] The court also addressed exceptions to the duty and limited the exceptions to two situations; where the customer consents to the disclosure being made and where the authorization to disclose is created by law.[33]

In another case, *Barnett Bank of West Florida v. Hooper*,[34] the court adopted all four of the *Tournier* exceptions.[35] However, it limited the scope of the obligation of secrecy in favor only of depositors.[36] According to the court, the duty was not owed to borrowers, nor did it apply to the disclosure of credit information between banks.[37]

The plaintiff company in *Graney Development Corp. v. Taksen*,[38] defaulted on its loan obligations to its bank, Citibank N.A.[39] The plaintiff sought financing from a second bank which requested from Citibank N.A. information about plaintiff's credit record.[40] An officer of Citibank N.A. replied truthfully that the plaintiff had failed to pay its loan.[41] The court distinguished the relationship between a bank and its depositors and a bank and its borrowers.[42] The former was an agency relationship, where the bank as agent was under a confidentiality obligation, the latter was a debtor-creditor relationship where no such obligation existed.[43] The records pertaining to the client were as much the property of the bank as they were the customer because they were both party to the debtor-creditor contract. The court said:

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30. *Id.* at 286.
31. *Id.* at 288-89.
32. *Id.* at 290.
33. *Id.*
34. 498 So.2d 923 (Fla. 1986).
35. *Id.* at 925.
36. *Id.*
37. *Id.*
38. 400 N.Y.S.2d 717 (N.Y. Sup. Ct. 1978), *aff'd*, 411 N.Y.S.2d 756 (N.Y. App. Div. 1978).
39. *Id.* at 718.
40. *Id.*
41. *Id.*
42. *Id.* at 720.
43. *Graney*, 400 N.Y.S.2d at 720.

> One who defaults on his debts owed to a merchant cannot expect that his default will be kept a secret. While a creditor, who publishes his debtor's defaults to the public at large may be liable for breach of privacy, he will not be liable (in the absence of malice) if he divulges the default not to the public at large, but privately to selected individuals.[44]

Courts in other jurisdictions have extended the bank's duty of confidentiality to cover borrowers and loan applicants. For example, in *Djowharzadeh v. City National Bank & Trust Company of Norman,*[45] the plaintiff applied for a loan to purchase property.[46] The bank official handling the loan application realized from the figures provided that the property was being purchased at a particularly advantageous price.[47] He mentioned this to the wives of two other bank officers, who purchased the property instead, adding $500 to the purchase price to induce the vendor to "forget"[48] his informal promise to allow the plaintiff time to arrange financing.[49] Although, the court noted that the bank and the plaintiff had not yet entered into a contractual relationship,[50] it nonetheless held that the bank had special duties under these circumstances where bank enjoyed "inordinate power."[51] This relationship specifically prohibits the bank from competing with customers or even potential customers for investments about which the bank learns through loan applications.[52] The court also held that the bank was under a duty to keep loan applications confidential.[53]

In yet another case, the Maryland Special Appeals Court, in *Suburban Trust Co. v. Waller,*[54] considered the legality of a bank's reporting to the FBI a customer's deposit of large amounts of money.[55] The bank's disclosure eventually led to the customer's arrest for a robbery which he did not commit.[56] The court

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44. *Id.* at 720 (citations omitted).
45. 646 P.2d 616 (Okla. Ct. App. 1982).
46. *Id.* at 617-18.
47. *Id.* at 618.
48. *Id.*
49. *Id.*
50. *Djowharzadeh*, 646 P.2d at 619.
51. *Id.*
52. *Id.*
53. *Id.* at 619-20.
54. 408 A.2d 758 (Md. Spec. App. 1979).
55. *Id.* at 760-61.
56. *Id.* at 761.

expressly rejected the *Tournier* exceptions in this case because they conferred too much discretion on the bank.[57] The court held that the bank could only breach its obligation of confidentiality under compulsion of law.[58] The court was clearly influenced by recent Maryland legislation to that effect. However, the legislation, while in force at the time of the hearing, was not applicable at the time of the facts of the case.[59] In contrast, the court in *Indiana National Bank v. Chapman*,[60] held that the bank was not liable when it disclosed customer information in response to an informal, but legitimate, law enforcement inquiry because such disclosure was covered by the "public duty" exception to the *Tournier* duty of confidentiality.[61]

As can be gleaned from the overview of these U.S. cases, there is a tendency on the part of U.S. courts to confuse the right to privacy with the *Tournier* rule relating to a bank's contract with its customer.[62] This temptation should, if possible, be resisted.

VII. Right to Privacy under the Irish Constitution

There is no specific right to privacy under the Irish Constitution. However, article 40.3 of the Constitution provides as follows:

> 40. 3. 1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.[63]
>
> 40. 3. 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.[64]

There has been recent a trend by the Irish judiciary to identify further ancillary or corollary rights to those set out in article 40.3.2.[65] These "latent" constitutional rights include the right to privacy.

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57. *Id.* at 764.
58. *Id.*
59. *Suburban Trust*, 408 A.2d at 764-65.
60. 482 N.E.2d 474 (Ind. Ct. App. 1985).
61. *Id.* at 476, 480-82.
62. Burrows v. Superior Court of San Bernardino County, 529 P.2d 590 (Cal. 1974); United States v. Miller, 425 U.S. 435 (1976).
63. IR. CONST. art. 40.3.1.
64. *Id.* art. 40.3.2.
65. J.M. KELLY, THE IRISH CONSTITUTION 755 (Hogan & Whyte eds., 3d ed. 1994).

To date, these latent rights have mainly been considered in the context of state intrusion into aspects of an individual's personal life.[66] However, in *Desmond v. Glackin*,[67] the issue of privacy was considered in the commercial context. The applicant sought to restrain an inspector appointed by the Minister for Industry and Commerce from using information which the inspector had obtained indirectly through the Central Bank in the course of his official investigation into the ownership of two companies involved in a controversial property transaction.[68] The applicant alleged that the use of the information would breach a duty of confidentiality imposed by the Constitution.[69] Mr. Justice O'Hanlon considered the constitutional right of privacy and confidentiality to be coextensive with the common law right of confidentiality.[70] He also held that the public interest justified providing the information to the inspector and concluded that no duty of right of privacy was violated.[71]

The applicant unsuccessfully appealed to the Supreme Court.[72] Mr. Justice McCarthy, speaking for the Supreme Court, held that there was no principle of law or common sense which prohibits a Minister of State who has properly obtained information from transmitting such information to another Minister of State to assist the latter Minister in carrying out his statutory duties.[73] Accordingly, the Irish courts have, to date, taken a sanguine approach to the alleged constitutional right of privacy where there is a clear legislative intent to require disclosure.

VIII. Self-Incrimination

The *Saunders* case, as previously mentioned, brings to mind questions about self-incrimination under the ECHR.[74] The decision of the Court may have far reaching ramifications for all regulatory agencies in signatory states that depend on an express or implied statutory abrogation of the right not to incriminate

66. *See* McGee v. Attorney General, [1974] I.R. 284 (right to marital privacy); Norris v. Attorney General, [1984] I.R. 36 (failed attempt to declare unconstitutional legislation penalizing homosexual acts).
67. [1993] 3 I.R. 67 (Ir. H. Ct.).
68. *Id.*
69. *Id.*
70. *Id.*; *see* Marcel v. Commissioner of Police, [1992] 1 All E.R. 72 (C.A.).
71. *Desmond*, [1993] 3 I.R. 67.
72. Desmond v. Glackin, [1993] 3 I.R. 106 (Ir. S.C.).
73. *Id.*
74. *See supra* Part III.

oneself in the carrying on their functions.[75] So far, under Irish law, the Courts have not yet consistently recognized a "latent" constitutional right not to incriminate oneself.[76]

IX. Fraud and other crimes

In *Finers v. Miro,*[77] the U.K. Court of Appeals held that when a client acts with a criminal or criminal or fraudulent intent, the privilege of legal assistance is lost, whether or not the lawyer is aware of the intent.[78] By analogy the implied duty of confidentiality in the bank-customer contract would be overridden in the case of fraud or other crime.[79] Nonetheless, it might be possible for the bank to claim that some of the existing exceptions to the *Tournier* rule would allow it to disclose customer account details in appropriate circumstances, such as disclosure under compulsion of law or in the interests of the bank. The latter is especially relevant where the bank could incur substantial liability as a constructive trustee by being a dishonest accessory to a breach of trust,[80] by receiving trust property in an unconscionable manner,[81] or under legislation enacted in European Union member states, pursuant to the Money Laundering Directive.[82]

X. Conclusion

It is vital to keep the civil liberties or constitutional law question of privacy separate from the implied contractual duty owed by a bank to keep customer information confidential, subject to certain exceptions. The civil liberty or constitutional right exists,

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75. *See, e.g.*, Bank of England v. Riley, [1992] 1 All E.R. 769 (C.A.).

76. KELLY, *supra* note 65, at 593. Recently, the Irish government proposed a change to Irish Tax Law to require solicitors and accountants to inform the Revenue if a client was in breach of Tax Law. The Law Society, the regulating body for solicitors, apparently received senior counsel's opinion that the provision would be unconstitutional as requiring the taxpayer to incriminate himself. The Government withdrew solicitors from the scope of the section; accountants are, it is understood, still to be subject to this "whistle-blower's" provision.

77. [1991] 1 All E.R. 182 (C.A.).

78. *Id.* at 188.

79. In the United States, courts appear to have gone as far as saying that if the bank has actual knowledge of the fraud of a customer it may be under a duty to disclose such information to other customers who may have been adversely affected. Richfield Bank and Trust Co. v. Sjogren, 244 N.W.2d 648 (Minn. 1976); Cunningham v. Merchant's Nat'l Bank, 4 F.2d 25 (1st Cir. 1925), *cert. denied*, 268 U.S. 691 (1925).

80. Royal Brunei Airlines v. Tan, [1995] 3 All E.R. 97 (P.C.).

81. *In re* Montagu's Settlement Trusts, [1992] 4 All ER 308 (Ch.).

82. Council Directive 91/308, 1991 O.J. (L 166) 77.

if at all, under United Kingdom and Irish law, in an amorphous and vulnerable form. The right to privacy under the ECHR is made expressly subject to a clearly enacted domestic law abrogating or suspending the right to privacy in the public interest. It is submitted that neither the implied duty of confidentiality, nor the constitutional right or civil liberty of privacy, can withstand the higher public interest inherent in the prevention and detection of fraud and other crime. Thus, the courts today may be more willing to uphold the rights of victims of fraud and other crimes over those claiming secrecy, which is so often "the badge of fraud."[83]

83. Agip (Africa) Ltd. v. Jackson, [1992] 4 All E.R. 385, 406 (Ch.).