

ACHIEVING THE BALANCE BETWEEN CLIENT CONFIDENTIALITY AND COMPLIANCE IN JERSEY

Jersey has never had, contrary to the belief held by some, banking secrecy enshrined in statute. It does have a statutory regime of data protection and client confidentiality is, of course, an important principle and fundamental to the relationship between banker and client. The principle was recognised by the Court of Appeal (of England and Wales) in its landmark decision *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. That case recognised the duty of a banker, arising out of contract, not to disclose his clients' affairs. The duty applies to all information that the banker becomes privy to *qua* banker and survives the termination of the relationship of banker and client. The principles in that case have been adopted and developed by the Court in Jersey. Breach of that duty by the banker can lead to an action for damages.

The duty of confidentiality / non-disclosure, as recognised in *Tournier* and applied in practice, is not absolute. There are four well-recognised exceptions. Three are obvious; where there is a public duty to disclose that outranks the contractual one (the existence of a 'danger to the state'); where the interests of the bank requires disclosure (such as the bank issuing proceedings to recover payment of an overdraft); consent from the client (such as a request that the banker provide a reference to some third party as to his character and/or solvency). The fourth is undoubtedly the most important and complex exception; where the financial institution is compelled by law to make disclosure. Jersey, aware its reputation as a clean jurisdiction is amongst strongest assets, is at the forefront of creating and enforcing laws and policies to ensure compliance with recognised international standards; an assessment by the IMF in 2003 found Jersey to be 76% 'compliant' and 18% 'largely compliant' with recommendations issued by the Financial Action Task Force on anti-money laundering and combating the financing of terrorism.

Article 32 of the Proceeds of Crime (Jersey) Law 1999 (POCL) makes it a criminal offence for an individual, knowing that another is or has been involved in criminal conduct, to enter or be concerned in an arrangement that facilitates the retention or control of the proceeds of crime (or that enables the proceeds of crime to be placed at the disposal of that other individual or allows him to acquire such property). To acquire or use property, without adequate consideration, knowing it to be the proceeds of criminal conduct is an offence by virtue of Article 33. Article 34 provides that it is an offence to conceal or disguise the proceeds of crime or to convert or transfer them from the jurisdiction for the purpose of that person avoiding prosecution or assisting another to do so. Similar provisions are contained in the Terrorism (Jersey) Law 2002 (TL) and the Drug Trafficking Offences (Jersey) Law 1998 (DTOL), specifically articles 18 and 37 respectively, making it an offence to be concerned in an arrangement that facilitates the retention or control of terrorist property or the proceeds of drug trafficking. These provisions obviously have a particular resonance for those working within the financial industry.

Disclosure to a police officer pursuant to a suspicion or belief that property is criminal is a statutory defence to any alleged breach of confidentiality (Articles 32(3) and 33(5) of the POCL, 40(4) of the DTOL and 24 of TL) and is a prime example of the *Tournier* exception. There are indeed circumstances where there is a positive obligation on an individual, particularly one working in the financial services sector, to make disclosure. Article 34D of the POCL, introduced earlier this year, makes it an offence if someone in the financial services business fails to disclose to a police officer that he knows, or suspects or has reasonable grounds to know or suspect, that another is engaged in money laundering. Article 34A contains a slightly less onerous duty in respect of all areas of employment. Similar provisions exist in relation to drugs trafficking (Article 40 DTOL) and terrorism; financial institutions are under a positive obligation to make disclosure to the police if there is knowledge or belief that another has been involved in funding arrangements, fund raising, money laundering or using/possessing property for the purpose of terrorism.

In addition the Attorney General has the power, pursuant to Article 2 of the Investigation of Fraud (Jersey) Law 1991 (IFL), to require that an individual answer questions or provide documents where a serious/complex fraud is suspected and there is good reason to require the answers or documents. Article 2 does not require a banker to provide a document in breach of client confidentiality without the authorization of the Attorney General.

The flow of *prima facie* confidential information to the authorities naturally impinges on customer privacy. The aim, of course, is the prevention and prosecution of crime. It is important to guard against the invasion of privacy as data accumulated could well relate to innocent customers engaged in legitimate enterprise. The IFL provides that information obtained pursuant to Article 2 may only be disclosed for the purpose of a prosecution in Jersey or 'elsewhere' (the Criminal Justice (International Co-Operation) Jersey Law 2001 makes provision for evidence obtained in Jersey to be used in other jurisdictions). Disclosure to other jurisdictions cannot be made without the consent of the Attorney General (Articles 30-31 of the POCL), save where disclosure is under the DTOL as Jersey police are entitled to share information with other police authorities without the Attorney General's consent. Information obtained under the PCOL cannot be disclosed unless the disclosure is to the authorities or is for the purpose of a criminal investigation in Jersey, otherwise it is an offence punishable with imprisonment; Article 29(2).

Whilst the Court has the power to compensate an individual for any loss suffered as the result of a confiscation order (Article 26(2) DTOL 25 of the POCL) it is important to have in place measures that ensure ill-founded suspicions in relation to genuine customers are rare. Jersey has in place well placed 'know your customer' rules. Articles 3-7 of the Money Laundering (Jersey) Order 1999 (MLO) provide the statutory framework and are supported by guidelines issued by the Jersey Financial Services Commission (JFSC). New customers have to be identified using reliable and independent evidence. Investigations need to extend to a principal or beneficiary where that customer is acting as an agent or is a company. Factors that will be examined include any connections with "high risk" jurisdictions i.e. those who do not sufficiently comply with FATF recommendations, those with connections to terrorist activities, those with high levels of organised crime or corruption, or those that have received sanctions from the EU or UN.

Once a customer is accepted, there are monitoring procedures to identify suspicious transactions. Suspicious transactions are those which are unusual in the sense that they are inconsistent with the expected pattern of activity or type of business of the particular account, or those where there is 'no apparent economic or visible lawful purpose'.

Article 9 of the MLO provides for an internal reporting procedure; employees of a particular institution will report their concerns to a colleague who then has the task of accumulating all relevant evidence and making the decision whether disclosure should be made to the police. These employees are central to achieving the balance between protecting privacy and ensuring compliance. The MLO and the JFSC's 'Handbook for Regulated Financial Services' provide guidance on ensuring the competence of employees (by confirming references, employment history, qualifications, regulatory action taken against them and criminal record) and ensuring they receive adequate training in identifying money laundering and financing of terrorism.

Joseph Stiglitz, winner of the Nobel Prize for Economics in 2001, former Chief Economist at the World Bank and Professor of Economics at Columbia University noted in his book 'Making globalization work' that Bank secrecy aggravates corruption and is corrosive to societies around the world. There are, however, a high number of perfectly legitimate reasons why an individual would not want his financial affairs to be well known and seeking confidentiality should not be considered inherently suspicious. Achieving the right balance between, on the one hand fighting corruption and combating money laundering with, on the other, protecting the civil liberty that is the individual's right to privacy is a tough task. Jersey's legal structure combined with its record of compliance demonstrates that the jurisdiction has achieved the appropriate balance; the investment Jersey attracts cannot sensibly be explained by references to secrecy or, in turn, nefarious activities.

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