# Confidentiality of Customers' Affairs

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## INTRODUCTION

These days a paper on "Confidentiality of Customers' Affairs" is in danger of turning into a paper as to when that duty does not or (in someone's view) should not exist. Those matters may be judged more clearly if one says something as to the general position first.

No one has adequately defined banking. Indeed I doubt if any sensible person has tried to. We must not spend too much time on the history, but a little may be useful. The origin seems to lie in the Old Norse word "banke", a ridge of eminence; a shelf of land. The meaning it had for Shakespeare when he boasted:

> I know a banke where the wilde thyme blows.

The engine-driver who instructs his apprentice that the train must get plenty of speed up for the run at the Gundagai Bank may not always realise that what he is saying is not only sound locomotive practice but perfectly good Old Norse.

In time the word becomes a bench; especially a bench where judges sit. In 1275 the Act 3 Edward I, xlvi, speaks of "Les Justices al baunk le Roi"; or as we would say "The Judges of the King's Bench". In my time as a barrister the court where the Full Court of the Supreme Court of Victoria commonly sits was known as the Banco Court. Those who say with Sir Walter Raleigh that the quinquereme of Nineveh had "five bankes" of oars are not borrowing the word from commerce. They are using the word in an earlier meaning.

The notion of "shelf" led to the word being applied to the tradesman's stall and (especially) the money-changer's table. We talk of Christ overturning the money-lenders' tables in the Temple, but Jewel in 1567 said "Christ overthrew the Exchangers bankes". The word becomes the place wherein such business is conducted. Sometimes it is the fund of money there dealt with. When Barclay said in 1515:

> Where shall I some little banke procure?

he was not searching for a takeover target; he was looking for money. This usage is well known to card-players. Pope wrote in 1720:

> When Kings, Queens, Knaves are set in decent rank
> Expos'd in glorious heaps the tempting Bank.

When a man's own "bank" is broken (mediaeval Latin, "ruptus"), he is said to be "bankrupt". Indeed Dr Johnson finds the origin of this word even earlier, with the Italian money-changers, whose practice it was to break physically the bench (bank) of a money-changer who had become insolvent.

Sometimes the word refers to a fund contributed to by several, not just one; a "joint stock".

> Let it be no Banke or Common Stocke, but every
> Many be Master of his owne Money,

said Bacon in 1625.

So the word is old, and it has had a changing and developing meaning. And the history of an activity which any rate has something to do with banking, as we know it, is long. Throughout the Middle Ages the Church's denunciation of usury ran alongside the resort of both Church and Monarch to merchants such as the Hochstetters, the Haugs, the Meutings, the Imhofs, and above all the Fuggers. Their careers may be exemplified by a passage from Tawney, *Religion and the Rise of Capitalism:*

> The Fuggers, thanks to judicious loans to Maximilian, had acquired enormous concessions of mineral property, farmed a large part of the receipts drawn by the Spanish Crown from its estates, held silver and quicksilver mines in Spain, and controlled banking and commercial business in Italy, and, above all, at Antwerp. They advanced the money which made Albrecht of Brandenburg archbishop of Mainz; repaid themselves by sending their agent to accompany Tetzel on his campaign to raise money by indulgences and taking half the proceeds; provided the funds with which Charles V bought the imperial crown, after an election conducted with the publicity of an auction and the morals of a gambling hell; browbeat him, when the debt was not paid, in the tone of a pawnbroker rating a necessitous clients; and found the money with which Charles raised troops to fight the Protestants in 1552. The head of the firm built a church and endowed an almshouse for the aged poor in his native town of Augsburg. He died in the odour of sanctity, a good Catholic and a Count of the Empire, having seen his firm pay 54 per cent, for the preceding sixteen years.

A dealing in which a banker lends money to a nobleman to enable him to become an Archbishop, and recoups himself by sending an emissary to accompany a team of priests and take half of the proceeds received on the sale of indulgences for the remission of time otherwise to be spent by deceased souls in Purgatory, would not be regarded as in the mainstream of modern banking.

(Although such a dealing might perhaps be said to fall within the slogan "Making money come to terms with people"). For our purposes, suffice to stay with Chorley, *Law of Banking* (5th edn., 1967, herein "Chorley"), and find the starting-point of modern English banking with the goldsmiths of the 17th century, accepting from rich persons of that trouble time deposits of money and plate and other valuables which might otherwise have been seen by King or Roundhead as being of more use to "the government" than to their owner. Dare one see there the shape of things to come?

Came more settled times, and many people still found it convenient to leave money and valuables with the goldsmith, on the basis of return upon demand. The goldsmiths made the profound discovery, that if one accepted deposits on demand, the amount that would in fact be demanded at any one time would only be a fraction of the total on deposit; and that one could safely lend the balance out at interest. With that discovery the goldsmiths invented modern banking. They enlarged their business by paying interest on such deposits. Banks now beginning to pay interest on current account are not doing something new; they are returning to their origins.

There emerge from the ranks of these goldsmiths institutions which can be seen as having a continuous history from then to the present day. Until the middle of the 18th century bankers were still commonly called "goldsmiths". In 1713 Steele says "He gave me a Bill upon his Goldsmith in London", and in 1719 Wood in his *Survey of Trade* says "All our large Payments are made generally in Exchequer Bills, Bank or Goldsmith notes".

Do not say too quickly that this is mere history, and you have come here hoping for law. The common law never gets too far from history. And the influence of history carries on in the common law. It can affect the judgment of a judge who knows little of it. It took a long time for the common law to determine which of several competing

relationships explained the relationship of banker and customer. Bailment? That was its 17th century origin, but surely it moved on from there. People did not want their actual coins back (though to this day each child begins by expecting that). Trustee and beneficiary? Principal and agent? Debtor and creditor? We know of course that the answer is "debtor and creditor". But it took a long time for that to be recognised. So late as 1840 a respectable argument was mounted that the relationship was trustee and beneficiary: *Foley v Hill* [1848] 2 H.L.C. 28. The relationship of debtor and creditor prevailed. But the defeated relationships had a last laugh. For although the relationship is debtor and creditor, it is a very special one: see *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 esp. per Atkin LJ at 127. In particular, there passed into this contract of debtor and creditor duties of good faith and confidentiality which have their origins in the duties of trustees, and agents.

## THE DUTY OF CONFIDENCE

### 1. Tournier v National Provincial Union Bank of England

Little as to the basic duty of confidence appears in the Law Reports until *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. This presumably reflects a long history of good conduct. Decided cases reflect not good conduct but the allegation of bad. So at any rate it seemed to Scrutton LJ in *Tournier* (at 479):

> It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors, or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion.

Presumably the almost entire absence of Australian authorities has a similarity flattering explanation.

*Tournier* concerned a bank manager, who telephoned his customer's place of employment seeking his private address. He wished to discuss with the customer the erratic discharge of his promise to reduce his overdraft by £1 a week. The manager spoke of two directors of the employer company. In the course of those conversations the manager either did or did not say (the evidence was conflicting) that the account was overdrawn; that the customer had failed to meet his promise to keep it in funds; and that the manager suspected that the customer was gambling. The customer's position as salesman was not renewed at the end of the three month period of employment he was serving.

I wish I could tell you who finally won. That is always a legitimate inquiry, and usually the most interesting aspect of the case. Regretably, we do not know. Mr. Tournier had lost at the trial, before a judge and jury. The Court of Appeal held that the judge had misdirected the jury, and ordered a new trial. Whether there was a new trial or the matter was settled; if there was a new trial, who won it; whether Mr. Tournier got another job; whether the bank manager lost his. These things we do not know. The Law Reports do not give us biographies. They give us only that segment of the parties' affairs which has lasting legal interest. All the participants must now be dead, and the name of the salesman who lost his job, the unsatisfactory customer who failed to reduce his overdraft by £1 a week, and was probably gambling, finds its permanent memorial in the law of banking.

### 2. The duty itself

The trial judge had directed the jury that the duty of confidentiality was not absolute, and had asked the jury whether the communication to the employer was "made on a reasonable and proper occasion". The jury had held that it was.

The Court of Appeal — and one may wonder whether a better appellate court for banking matters than Bankes, Scrutton, and Atkin LJJ has ever sat — held that the matter was more complex than that.

It was held, first, that a duty of confidentiality is implied by law in the contract of banker and customer. Its features include:

(a) It applies not only as regards the state of the account, but as regards transactions which go through the account, and security given in respect of the account: Atkin LJ [1924] 1 KB 485.

(b) It extends not only to what is learned from the customer himself, but also to information coming from other sources to the banker "in the character of banker" to that customer: Bankes LJ, at 474, Atkin LJ, at 485. But not, *semble*, to information coming to the banker fortuitously (as eg from the financial press) notwithstanding that the banker-customer relationship does exist at the time: cf. Scrutton LJ at 481.

(c) The duty continues after the relationship of banker and customer has ceased: Bankes LJ at 473, Atkin LJ at 485.

(d) The duty does not extend to information gained after the banker-customer relationship has ceased: Bankes LJ at 473 (inferentially), Scrutton LJ at 481, and Atkin LJ at 485.

(e) The duty of confidence is subject to exceptions. I deal with these below.

That is where the banker must start; with a fundamental general duty of confidentiality as to his customer's affairs, which duty is subject to certain exceptions. Until he is satisfied that the case falls within one of the exceptions, the bankers will do well to abide by his general duty.

It is important to recognise this restraint on the banker is not an extra "bonus" for the customer, like access to Automatic Tellers. It is part of the structure of banking; a pre-condition to effective banking. Proper performance of the banker's role involves his knowing such things as personal habits (a propensity for gambling), personal relationships (relationship between husband and wife), corporate ambitions (the target company in the takeover for which a line of credit is being sought), likely future corporate performance (budgets, cash-flows). And much more. Only if the customer knows that his private affairs may safely be revealed to his banker will there be that frank revelation of the truth which effective banking demands. Only if the banker believes he is getting the truth from the customer will the customer get the maximum benefit from the banker. As with lawyers and doctors, accountants and priests, so also with bankers. Without confidentiality the relationship does not work effectively. It is not a duty imposed on the banker in respect of this customer, for the benefit of this customer; it is a duty imposed in respect of all customers, for the benefit of all customers.

## 3. The exceptions to the duty

### *(a) The statement of the exceptions*

Although the decided cases are few, it is clear that the duty of confidentiality is not absolute, but subject to qualifications. In what has been described in Weaver & Craigie, *The Law Relating to Banker and Customer* (1st edn., 1975: herein "Weaver & Craigie") as "one of the most respected and celebrated instances of judicial lawmaking in the entire field of banking", Bankes LJ in his judgment in *Tournier* expressed four qualifications on the general duty of confidentiality (at 473).

> There appears to be no authority on this point. On principle I think that the qualifications can be classified under four heads:
>
> (a) where disclosure is under compulsion by law;
>
> (b) where there is a duty to the public to disclose;
>
> (c) where the interests of the bank require disclosure;

(d) where the disclosure is made by the express or implied consent of the customer.

**Chorley** at 17 warns that the list is not necessarily exhaustive. But the list has to date been found sufficient to carry the known examples.

*(b) The exceptions*

(i) **Disclosure under compulsion of law**

In a sense the position here is simple and can be put in one sentence. The banker is a citizen, and must disclose such facts as he is compelled to by law. No customer can make legal complaint of his banker complying with the law.

But the lawyer likewise is a citizen, and equally bound to disclose when required by law. And every schoolboy knows that the positions of banker and lawyer in this respect are different. It is necessary to explain the position further.

The lawyer has legal privilege; more properly, is the vehicle for expressing his client's legal privilege. The client benefits from the fitting together of two principles.

First, there is the common law privilege itself: that what the client has said to his lawyer for the purpose of obtaining legal advice or in relation to litigation, and what in that context the legal adviser has said to the client, are "privileged" from the requirement that a witness answer questions put to him as a witness. Only if the client waives the privilege will the court require that the lawyer attest to those matters. This is a common law privilege which the common law itself evolved as an exception to its own requirement to give evidence.

Second, there is a principle which the common law adopts for the interpretation of statutes, namely that a statute is to be interpreted as not intended to override established common law principles unless the statute makes the intention clear; in practice, unless it virtually says so. No one doubts that legislatures *may* do so; but it is required that they show that they realised they were doing so.

In relation to the merely contractual duty of confidentiality, one thing has long been clear and another thing has become clear in recent years.

(A) The duty cannot prevail against legal compulsion.

This of course has long been known. Indeed, it was because bankers were so often inconvenienced by themselves and/or their books being compulsorily required in the law courts that there was enacted legislation like the *Bankers' Books Evidence Act* 1879 (UK), to facilitate proof of the position as shown by the banker's books of account.

(B) The duty being a merely contractual one, there is no need to interpret generally expressed legislation as not intended to interfere with it.

In this respect the contractual duty differs from legal privilege. The latter was in its origin an exception to the general position, and as I have said judges see it still as an exception to generally expressed statutes, unless the statute says otherwise. This is not the position with the contractual duty of confidence, which will yield to a general statement without more.

That was held by Mr. Justice Stephen in *Smorgon v Australia and New Zealand Banking Group Ltd.* (1976) 134 CLR 475. (I should record the profession's indebtedness to the Smorgon family for having had the law in this area clarified to such an extent over the last decade). The Commissioner of Taxation served on the bank a notice under section 264(1)(b) of the *Income Tax Assessment Act* 1936, requiring it inter alia to produce certain documents which had come into its hands pursuant to the relationship of banker and customer. Mr. Justice Stephen rejected an argument that the general words of section 264(1)(b) should be read as not intended to override the contractual duty of confidentiality.

> If the legislature plainly says that those having information shall disclose it to the Commissioner then no more contractual duty of confidentiality can stand in the way.

> In my view it is just such language which appears in s. 264 and I regard it as effective to require the Bank to make such disclosure as the Commissioner may require (at 489).

A similar result had been reached by the English Court of Appeal in *Parry-Jones v. Law Society* [1969] 1 Ch 1, in relation to a solicitor and a requirement to make his books of account available to an investigating accountant appointed by the Law Society pursuant to the Solicitors' Account Rules made under the *Solicitors' Act* 1957.

Similar questions arose before the Full Court of the High Court in *F.C.T. v. The Australia and New Zealand Banking Group Ltd.* (1979) 143 CLR 499, the strongbox case. It is implicit in the decision of the court, and expressly stated in the judgment of Gibbs A-CJ, that the duty of confidentiality yields to the general expression of section 264 (1) of the *Income Tax Assessment Act:* see 143 CLR at 521.

(ii) **"A duty to the public to disclose"**

The second exception of Bankes LJ is as stated above. The vagueness inherent in it is apparent. Bankes LJ did give some guidance:

> Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in *Weld-Blundell v Stephens* [1920] A.C. 956, 965, where he speaks of cases where a higher duty than the private duty is involved, as where "danger to the State or public duty may supersede the duty of the agent to the principal" (at 473).

Elsewhere in the judgment his Lordship made it clear that he took what some might call a narrow view as to his exception.

> To make a simple illustration. A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank, because he knows that the person about whom he wants information is a customer of the bank. Police Officer is asked why he wants the information. He replies, because the customer is charged with a series of frauds. Is the banker entitled to publish the information? Surely not. He acquired the information in his character as banker (at 474).

Scrutton LJ said that a banker "may disclose the customer's account and affairs to an extent reasonable and proper "to prevent frauds or crimes": [1924] 1 KB at 481. Atkin LJ said that disclosure was justified "for protecting the bank, or persons interested, or the public, against fraud or crime": [1924] 1 KB at 486.

The textbooks do not take the matter very much further. Chorley gives as an example for this exception the case where during time of war the customer's dealings indicate trading with the enemy: at 18. *Weaver & Craigie* at 169 gives Sir John Paget's 1924 suggestion that it might be proper under this lead to give the authorities notice of the accumulation of funds "for some very extreme political purpose of propaganda subversive of social order": cf. 3 L.D.A.B. 312. *Weaver & Craigie* finish their short discussion by saying (at 169):

> Until there is any decided authority on the matter, however, the warning given by Sir John Paget remains as valid today as it was when he delivered it in 1924 namely that "... it would be inadvisable for a banker to exercise his private judgment in such matters at the expense of his customer".

Paget's *Law of Banking* refers to Chorley's example of trading with the enemy, and concludes (at 173):

> No case seems to have been brought where a banker has thought himself under a duty to disclose. It would be idle to formulate an instance in which he would be justified, but it can perhaps be said that the licence to disclose by reason of such a duty should not be too lightly assumed.

If I were a banker I would stay with the warnings, and disclose only where things were very clear in relation to events taking place or to take place. "Marked" kidnap money

or stolen money may be seen as relatively plain cases for notification to the police. But I doubt if there will be many such cases.

This is not to deny a duty of good citizenship, but to recognise that many bad things can occur under that banner. The hardest charge to withstand at a court martial is "Conduct unbecoming an officer and a gentleman". It means what the tribunal wants it to mean. In the U.S.S.R. and other communist countries the legal charge which is impossible to withstand is "Conduct contrary to the interests of the State": impossible, for there in the court is the State saying that the conduct was contrary to its interests. The United States looks back with dismay and repentance on the era when good citizens were found "guilty", not of crimes, but of "un-American activities". The proposition that good citizenship means whatever suits the government of the day, or suits the most fair-minded revenue officer, is not the law.

### (iii) Disclosure required by interests of the bank

It is not necessary to say much as to this exception, but one or two things do need saying. The exception is stated much too widely. A word like "legitimate" is required before the word "interests". The exception is intended to cope with cases such as a bank suing to recover an overdraft. It would be wrong for my banker to tell anyone the state of my overdraft, but suing to recover it will involve disclosing it to the whole world. Similarly, to mark a cheque with the words "Insufficient Funds" involves revealing a fact which the banker would otherwise be obliged to keep confidential.

These of course are "legitimate" cases. The banker is not to be kept helpless in these regards. But other very real commercial interests will not justify disclosure. It would be very wrong of a banker to disclose information in the course of making a killing on the Stock Exchange by using information given to him by a customer as to a pending takeover.

So "Disclosure required by the legitimate interests of the bank", or "Disclosure required for the legitimate protection of the bank" seems a better rendering of this exception.

Two reported cases may illustrate this exception further. In *Sutherland v. Barclays Bank Ltd. (The Times,* 25th November 1938), a wife complained to her husband that her bank had dishonoured several cheques. He telephoned the bank, and was told that although there were in fact insufficient funds in the account to meet the cheques the real reason for disallowance was that most of the cheques were in favour of bookmakers. Du Parcq LJ held that in the circumstances the disclosure was required in the interests of the bank; and that the wife had impliedly consented to discussion of her affairs.

In *Ross v. Bank of New South Wales* (1928) 28 SR (NSW) 539, Harvey CJ in Eq. held that a guarantor who had mortgaged property to the bank as a collateral security was entitled to be told, and the bank was obliged to disclose, the amount of the account, the rate of interest being charged, and the amount realised on the collateral securities. Holden, *The Law and Practice of Banking* (1971) adds the gloss that if the amount of the account exceeds the amount of the guarantee the guarantor should be told as to amount no more than that he is liable to the full amount of the guarantee. If the account is less than the amount of the guarantee, he should be given the precise figure.

Weaver & Craigie discuss this case under this exception, but if you saw it as really a case of implied consent, as a necessary part of the transaction the customer initiated, I should not entirely disagree.

### (iv) Disclosure with the express or implied consent of the customer

Again not much need be said as to this exception. The principal question is whether the consent must be given expressly, as where the customer expressly authorises a reference to his banker. Weaver & Craigie says at 171 that in *Tournier*, Bankes LJ clearly limited the matter to express consent, and that Atkin LJ had reservations about anything less than express consent.

That seems to me wrong. Bankes LJ's own formulation included the words "express *or implied* consent of the customer" ([1924] 1 KB at 473), and Atkin LJ said: "In any case the consent may be express *or implied*": at 486.

The relevant distinction is not between "express" and "implied", but between "actual" consent of the customer, whether given by express words or implied from his conduct, on the one hand, and on the other hand a "consent" based on no more than the custom of bankers in giving one another information as to the affairs of their respective customers ("the multitudinous inquiries of this kind that everyone knows are constantly made of bankers", as Mr. Justice Kitto called them in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* (1968) 122 CLR 556 at 588-589), and knowledge of that custom. The issue here is whether the practice is so universal, and so notorious, that a totally implied term permitting it forms part of the contract between banker and customer unless the customer had had inserted into his contract an express term to the contrary. Paget at 177 expresses doubts as to the custom being so widely known, especially among non-trading persons, as to give the bank protection in all cases, notwithstanding the universality of the practice of giving other banks such information. Weaver & Craigie suggests at 171 that in Australia the practice may be sufficiently notorious to bind *all* customers. It seems sufficient to leave the matter there.

## BANKS AND THE COMMISSIONER OF TAXATION

The Commissioner of Taxation has two principal powers which serve to bring him into contact with banks:

1. Section 263 of the *Income Tax Assessment Act*, giving him a right of "full and free access to all buildings, places, books, documents and other papers" for the purposes of the Act.

2. Section 264, authorising him to give notice in writing to any person to attend and give evidence, etc.

The two provisions are as follows:

> 263 The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
>
> 264(1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connection with any department of a Government or by any public authority—
>
> (a) to furnish him with such information as he may require; and
>
> (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.
>
> 264(2) The Commissioner may require the information or evidence to be given on oath and either verbally or in writing, and for that purpose he or the officers so authorized by him may administer an oath.
>
> 264(3) The regulations may prescribe scales of expenses to be allowed to persons required under this section to attend.

Sanctions exist for the enforcement of these provisions. Refusal to comply with a section 264 notice will constitute an offence under section 224 of the Act. The fine is not large, but it has been held that if default continues an injunction will lie to compel obedience to the notice: *Attorney General v. Thomas* (1983) 13 ATR 859. Disobedience to an injunction can lead to imprisonment. Indeed it usually does.

Section 263 is protected by section 232, which makes it an offence to obstruct an officer of acting in the discharge of his duty under the Act. Again an injunction might well lie if obstruction continues.

Section 264 was in issue in *Smorgon v. Australia and New Zealand Banking Group Ltd.* (1976) 134 CLR 475 mentioned earlier. The Commissioner served on the bank a notice requiring it to attend and give evidence concerning certain matters, and to produce seven stated categories of books and papers plus all other papers in its possession "concerning the said matters". The notice to Mr. Smorgon required him to produce all books and papers in two safe deposit boxes at the bank, plus all other papers in his possession "concerning the said matters". Mr. Smorgon sued the bank and the Commissioner for an injunction restraining the bank from complying with the Commissioner's notice. With equal enthusiasm the Commissioner sued Mr. Smorgon and the bank for declarations and various protective orders.

Stephen J held, first, for present purposes, that neither bank nor any other corporation could be required under section 264 to attend and give evidence. Giving evidence is something for human beings. Bank officers certainly. But not banks: 134 CLR at 484-485.

Stephen J held next, that the second part of section 264 (1)(b) is independent of the first part, and that a corporation which cannot "attend and give evidence" can nevertheless be required to "produce all books, documents and other papers" etc: 134 CLR at 485-486.

Stephen J held thirdly that notice must give some guidance as to the documents sought. It is insufficient for it simply to set out the terms of section 264. The taxpayer himself, let alone a third party like a bank, may easily not be able to tell what documents in its possession answer the description of "concerning the process of assessment which the Commissioner has adopted or may adopt" for a particular taxpayer. So a category of documents described as:

> (viii) all other books, papers, writings and other documents concerning the said matters which are in your custody,

where "the said matters" were the "income of, or concerning the ascertainment of the amount of taxable income and the tax payable by" several hundred persons, trusts, and companies, was held to be "quite unsatisfactory", and a "nullity": 134 CLR at 490-491.

Section 264 was again in issue in *F.C.T. v. Australia and New Zealand Banking Group Ltd.* (1979) 143 CLR 499. The Commissioner served on the bank and twelve members of the Smorgon family notices requiring the production of papers in four designated strong boxes. The Commissioner sued for declarations as to the validity of the notices.

There is a complexity as to the facts which I mention below. For now, I take them as in the judgment of Stephen J. On that version the customer hired a deposit box. To open the box required two keys. The customer had one, and the bank another. The bank also had in a sealed package a duplicate of the customer's key, to be used in replacement if the customer lost his key. The papers were in the box.

Stephen J held that although a mere contractual term to keep documents confidential could not prevail against section 264 notice, the arrangements as to the keys meant that the bank did not have that "custody" or "control" of the papers required before section 264 could require the bank to produce them; but that such notices could be given to the actual customer or to persons who, since authorised by those customers, did have access to the boxes.

Stephen J also held as improper a notice in a "short form", simply requiring the bank to produce all papers in the four designated strong-boxes. The section 264 power is a limited one, and a notice must tell the person holding the papers at least the names of the taxpayers to whose income or the assessment thereof the papers must relate for their production to be required.

On appeal Stephen J's decision as to the custody and control of the bank was disapproved. Gibbs A-CJ said that as a mere physical matter the bank could get at the papers. It had both keys: 143 CLR at 521. From that point on all that could be said as to the keys rested in contract between the customer and the bank, something which must give way to the general words of section 264. All other members of the Court came to a similar result.

It was held that the only papers which can be required to be produced are those which *do in fact* relate to the income of a person or the assessment thereof. It is then for the recipient of the notice to determine which of the papers he holds do so relate.

Various formulations appear in the judgments as to the form a section 264 notice must take in order to be valid. But it is established that the notice must state the person or persons to whose income or the assessment thereof its relation operates to make the paper producible.

To this point I have accepted the simple formulation of the facts, as appearing in the judgment of Stephen J and all members of the Full Court other than Gibbs A-CJ. On that formulation, entry to the box lets one get at the papers. I referred earlier to an unfortunate complexity as to the facts.

For it appears from the judgment of Gibbs A-CJ that the "box" is not a box but a locker, and that "it may be surmised that the locker contains a box": 143 CLR at 518. Whose key opens the box does not appear, but it might easily be a different key held by the customer alone.

Say that it is. When the bank opens the locker (which the keys in its control enable it to do) it is met by a locked box to which it does not have a key. How does it produce papers from inside the box? The answer of Gibbs A-CJ is:

> However, whatsoever may be its contractual obligations, the Bank is physically able to abstract from the locker, and produce to the authorized officer, anything movable that the locker contains.

So far so good.

> If the documents which the Bank is required to produce are kept in a box inside the locker, and the box is secured with a padlock or in some other way, the Bank would have no power to force it open, but could produce the documents by producing the box containing them. (143 CLR at 519.)

Where the bank can examine the documents, it can decide as well as possible what relates to the income or assessment of a named person, and what does not. With a locked box the bank is entirely in the dark. It is all the documents, or none. The locked box inside the locker goes far to making futile that insistence that the notice section 264 state the names of the taxpayers concerned. For production of documents which are inside the box and do not relate to anyone's income remains improper.

Probably the answer to this lies in a combination of section 263 (which is *not* limited to papers to do with the income or assessment of named persons) and section 264; to use section 264 to require the bank to produce the papers in the locker; if there is then found a box, for the Commissioner to rely on self-help justified under section 263 to get access to the papers in the box (force the padlock) and then either to sort out the papers himself or to return them to the bank with a section 264 notice requiring it to produce to him such of the papers as relate to the income or assessment of the persons concerned. Ways can usually be found to do these things.

I should mention lastly *O'Reilly v Commissioners of the State Bank of Victoria* 83 ATC 4156. It must have been an interesting morning. The investigator wanted access to bank vouchers. The manager said that the bank would give access to the premises, but no assistance. Vouchers were in fact in two rooms, one unlocked, one locked. The manager refused a request to unlock the locked room. The Court held that the Commissioner had not had "full and free access" to the papers in the locked room; and that the bank officers

were not obliged to tell the investigator where the papers he sought were, or to deliver the papers to him, or to take any step to facilitate his inspection. That was because no positive obligations flow from section 263. All there is, is the section 232 duty not to obstruct. Mere failure to assist, is not obstructing, (though locking documents up and hiding the key might well be). Whether the actual events of the morning constituted obstruction the Court was not asked, and was not in a position to say.

The position is not as silly as one might at first think. As the Court said, the Commissioner has his section 264 power, to require persons to produce documents. In this very case, the Commissioner could have served a section 264 notice returnable in the Bank premises and got delivery into his investigator's hand. One wonders why in such a case, it was necessary to use section 263 at all. It is not obvious why the drama of section 263, or of a warrant under section 10 of the *Crimes Act*, is necessary in the case of solicitors' offices and banks. Use of the words "*Now* in your custody or control" would prevent removal prior to the time appointed for production.

No doubt the Commissioner has his own views, but the cases reported to date do not seem to me to show that his powers are inadequate. Bear in mind that under section 264 the Commissioner can ask for information as well as documents; can require information to be given in writing; can therefore require the giving of a written list of the documents held. That course does permit the recipient to take legal advice and does permit him to refer to the courts questions such as legal professional privilege. But the Commissioner would hardly say that he prefers using section 263 because it prevents resort to advice or the courts.

Much inquiry would be necessary before finding the existing powers inadequate.