Confidentiality of Customer's Affairs

Comment by

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Thank you Mr. Chairman. I thought I detected in S.E.K. Hulme's paper a disapproval of fishing expeditions directed to banks. When I sought to match his semantic investigations I saw a little irony. I quickly went through the definitions of banker. I rejected one that described a banker as one who is a dealer in a game of chance. The next one defines a banker as a fishing boat or fisherman off Newfoundland!

I have an interest in the topic under discussion for at least two reasons. The first is that in my present role as Special Prosecutor I have to consistently seek information concerning the affairs of customers of banks, and have had occasion to negotiate with banks in an endeavour to solve their problem, or solve the dilemma which the chairman and the speaker have mentioned. Secondly, and coincidentally, in one of the cases I did not long before taking this appointment, I lost a claim that an employee of a client for whom I was appearing could be restrained and the Trade Practices Commission could be restrained from using material which that employee had given to the Trade Practices Commission. I think you will appreciate, and I will come back to the point in a moment, that very much the same sort of question was there involved as is involved in the banker's position.

May I for my part restrict my commentary upon a very interesting and enlightening paper to that exception to confidentiality which relates to the public interest. We should be clear that we are not discussing the earlier exception of legal compulsion. We are speaking of the circumstances under which the bank is entitled, if it wishes to, to give information to somebody else concerning the affairs of a customer. I say, 'if it wishes to' because by definition there is no means of legal compulsion in these circumstances.

There are a number of cases, in the English courts particularly, which recognise that there is a social or moral duty upon all citizens to assist in the suppression of crime, including co-operating with the authorities which are investigating crime. But there is no sanction for that. On the other hand it is quite clear that a banker will be liable to its customer if it improperly authorises the supply of information. It is true, as the paper suggests, that there has been little elucidation of the public interest exception in the field of banking. However, there have been a number of cases over the last decade which have examined the dilemma in circumstances which, at least to my way of thinking, cannot be distinguished from it. The dilemma is, on the one hand, as we have heard, between the right of privacy and indeed in some circumstances the right to silence, and on the other hand, the legitimate interests of the community in investigating crimes, frauds and the like. One of the other cases is the employee's duty of confidentiality and the employee's duty of fidelity to his employer. Under what circumstances can an employee take to the authorities information concerning his employer's activities? I think that we would all recognise that he may do so in some circumstances, otherwise there would be an undue difficulty in the suppression of crime where the employer was involved in criminal activity. On the other hand, there is something which tells us that there is a limit

to this, and that it is not right that every employee should be able to take along highly secret material to various bodies simply because he imagines there may be some illegality on foot. The case to which I earlier referred is the case of *Allied Mills v. Trade Practices Commission*. In that case Mr. Justice Sheppard, in the Federal Court, found that an employee was entitled to go to the appropriate authority to disclose confidential matters, but under certain conditions. The basic principle is that there can be no confidence in iniquity and the suppression of iniquity justifies the breach of confidentiality. That case examines a number of other and earlier authorities which dealt with some of the same problems. The *British Steel Corporation v. Granada Television*, which is a decision of the House of Lords, dealt with circumstances under which an employee of the British Steel Corporation had gone to a television station with material illustrating what the employee at least regarded as evidence of gross mismanagement, if not worse. In the event the employer succeeded in restraining the publication of that material, but, in the course of the judgment the House of Lords put its imprimatur upon the principle that the public interest does authorise disclosure in certain circumstances.

There was also the case in our High Court against John Fairfax in 1980 before Mr. Justice Mason concerning certain disclosures of confidential information by a Commonwealth employee or presumably by a Commonwealth employee to *The National Times*, in which, whilst restraint was granted, the public interest exception was noted.

There has also been the discussion of the circumstances under which telephone tapping can take place, where there is no statutory limitation upon it, and of the circumstances under which police officers may seize material going beyond the scope of their search warrants.

In these associated fields lines have been sought to be drawn as to where one can and where one cannot produce documents or give information in the public interest.

Now, confronted with the loss in *Allied Mills* on my part, and the consequent instruction on the law, when I came to seek to obtain information from banks and was met, of course, with the passage from the textbook to which Mr. Hulme has referred, I ventured the view that whilst the English Court of Appeal in 1924 did give a useful summary of the position, a number of cases in subsequent years in various courts had very much elucidated the public interest exception, and that the statement of the textbook could not be really read without regard to those cases. In the event, what the solicitors for one of the banks and I agreed was that we would select a mutually agreed counsel and pose the problem for him. Although neither of us agreed to be bound entirely by the opinion that was to be delivered, we hoped it would lead to some practical solution. And indeed it has. A solution which, as with all compromises, is not entirely satisfactory to either party, but has achieved a result.

Now, may I just read to you some passages from the advice that we received. Or perhaps it is easier to give a short summary of it. Counsel was asked — does a bank's duty to its customers prevent it from volunteering information to police investigating serious criminal offences? And the answer was — "No, but a bank would not in my opinion be justified in volunteering information unless it was at least satisfied that there existed reasonable grounds for believing (a) that a serious crime had been committed involving the customer and/or the use of his account or other transactions by him as a customer, and (b) that the information would provide evidence relevant to the proof of the commission of that offence".

My own view is that this is too limited in the light of the authorities in a couple of respects. In the first place, all of the authorities including *Tournier's* case talk about crime or fraud, and are not restricted to serious crime, and the later cases would indicate that perhaps that is putting it too highly in any event. Secondly, the restriction to criminal conduct by the customer involving the use of his account may, if one reads it too strictly, be not warranted. There will often be cases where the person whose account is being investigated has had nothing to do with the crime or fraud, and indeed the transactions

themselves were not directly involved or implicated in crime or fraud, but rather provide either evidence of it or information which may lead to evidence of it.

The next, and perhaps most controversial aspect, is the limitation that the information would provide evidence relevant to the proof of the commission of that offence. Now, if what that means is that it must give information which is relevant to proof of the offence, then there could be no quarrel with it. If it is intended to restrict the information to that which is strictly admissible evidence, then I would venture to disagree.

The second question which counsel was asked was — has a banker public duty to give information to police and others bona fide engaged in the investigation of serious criminal offences even if this duty may not be enforceable by legal sanctions? His answer was — 'Yes, of the nature I have already discussed, but it is not enforceable', and he had referred to the English authorities concerning the moral and social duty upon the citizen. It does not justify, counsel goes on, the voluntary disclosure of information except in the circumstances I have described in answering the former question.

Well now, accepting for a moment that the sort of answer to question one which was given is either correct or correct save for some qualifications, the practical question that arises is, how can a bank satisfy itself that the preconditions have been met? On the one hand law enforcement authorities, in the view I take, could not safely or properly tell the banker precisely what they are about for a number of reasons. Firstly, it would interfere with operational secrecy which may be quite vital. Secondly, it would be defamatory. Thirdly, it may do great harm to the person whose affairs are being investigated to have a bank know that those affairs are being investigated. It is not necessarily the customer who is the subject of the investigation. On the other hand the bank may well take the view that it is not sufficient simply to take the word of the investigating police officer. Now in those circumstances there is certainly a difficulty, and in the particular case I have in mind, it has been solved by nominating an officer of the bank who has undertaken obligations of confidentiality over and above the normal obligations, which involve him in being given information concerning the matter which would otherwise not be given. Of course, we only give him information which would not be so operationally sensitive as to prejudice the enquiry that we are involved in.

So that is how I have sought to deal with the practical problem, but I think I should say that it is not a problem restricted to tax related frauds, it is a problem which, of course, concerns every white collar investigation and indeed the investigation of all crime including violent crimes and offences of that sort. Take the investigation of the Watson bombing. The purchase of the gelignite might be a most material matter to find out about, and banking transactions may be relevant to that. It is not restricted to banks of course. A great many people, institutions of one sort and another, governments, and individuals, have a great deal of knowledge about the affairs of others, the disclosure of which imposes no risk to the person disclosing it. In other words we are not concerned with the privilege against self incrimination. We are talking about the holding of information by those who are not involved in the criminal or fraudulent activities. The inability of our system to obtain the evidence will, I am sure, prove to be a continuing and increasing source of difficulty. It does not exist in the United States, where the grand jury procedure enables documents to be produced and people to be questioned in private, subject to their right to refuse to answer if it may incriminate them. It seems to me that in the future, although it may be adding one more step along the road to the gestapo which has been mentioned, I would not be surprised if the interests of law enforcement authorities become such as to require us to provide some mechanism whereby law enforcement bodies can obtain information of that sort without destroying the privacy of others, and without incriminating those that give the information. Thank you.