Currently, English law as to the duty of confidentiality that banks owe to their customers is based on the decision of the Court of Appeal in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. In accordance with that decision, it is an implied term of the contract between a banker and a customer that the banker will keep the customer's information confidential, but this duty is not absolute and is subject to a number of qualifications. Bankes LJ classified these qualifications under four headings (at 472):

“(a) where disclosure is under compulsion of 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”.

According to *Turner v Royal Bank of Scotland plc* [1999] Lloyd’s Law Rep Banking 231 (Sir Richard Scott VC at 234) and *Christofi v Barclays Bank plc* [2000] 1 WLR 937 (Chadwick LJ at 946), these principles have been confirmed in the Court of Appeal on a number of occasions and are not open to dispute, at least in that court.

Qualification (c) is in similar terms to the requirement which applies in the case of an individual under the Data Protection Act 1998 (DPA) that a customer’s personal data shall not be processed unless the processing is necessary for the purposes of legitimate interests pursued by the bank or by the person(s) to whom the data are disclosed (as 1 and 4; Sch 1, Pt 1, para 1; Sch 2, para 6).

This article suggests that, although the principles stated in *Tournier* are generally accepted and widely applied in many jurisdictions, their precise limits are not clear from the decided cases. It also suggests that the cases have tended to interpret these principles too rigidly and to approach them in isolation, whereas they should be considered in a wider context. This is important for three main reasons. First, because the general law of confidence, misuse of private information, and data protection provides a framework which is not only principled and detailed but also flexible. Second, because this ensures consistency. Third, and perhaps most significantly, because it would enable the law of banker’s confidentiality to keep pace with developments in these substantive areas. The article identifies aspects of the substantive law that it suggests can and should be taken into account in future cases.

**TOURNIER’S CASE**

The claimant complained that his bank had disclosed to his employers that he was not paying off his overdraft but had instead endorsed a cheque in his favour to a bookmaker. In consequence, his employers refused to renew his employment at the expiry of an agreement to employ him for three months. He brought a claim for: (i) slander; and (ii) breach of an implied contract that the bank would not disclose to third parties the state of his account or any transactions relating to it. He lost at first instance, but succeeded on appeal in obtaining an order for a new trial on the ground that the judge had misdirected the jury. The outcome of the retrial is not reported.

The only example which Bankes LJ gave (at 473) of qualification (c) is “where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft”. Scrutton LJ (at 481) formulated qualification (c) differently: “the bank may disclose the customer’s account and affairs to an extent reasonable and proper for its own protection”. However, he gave the same example as Bankes LJ, namely “as in collecting or suing on an overdraft”. Atkin LJ (at 486) described the qualification in similar terms to Scrutton LJ as “the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank’s interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer”.

Bankes LJ’s formulation of qualification (c) is so widely expressed that it can be argued that it covers any disclosure that is to the bank’s advantage. However, the sole concrete example – of suing on an overdraft – given by Bankes and Scrutton LJ does not support such a wide interpretation. Nor do the formulations of Scrutton and Atkin’s LJ. On the contrary, this example and also, at least in part, these formulations can be accommodated within the principle – which is recognised in cases concerning the law of confidence – that the public interest in the due administration of justice may outweigh the public and private interests in maintaining confidence; or, in terms of the rights which are guaranteed by Art 6 of the European Convention Human Rights, with which the court is obliged to act compatibly.
in accordance with the Human Rights Act 1998, the need to give effect to the bank’s right to a fair trial.

**X AG v A BANK**

The argument that Bankes LJ’s qualifications (a), (b) and (c) are only examples of public policy, that the words of the judges in *Tournier* are not those of a statute and ought not to be treated as such, and that the qualifications identified by the judges are only examples of occasions when the customer’s confidentiality is to be displaced are not new. These submissions were made by counsel for the bank (now Longmore LJ) in *X AG v A Bank* [1983] 2 All ER 464. They were not accepted by Leggatt J. However, he was willing to proceed (at 478) on the assumption that it was “right to regard the exercise to be undertaken here ultimately as being a balancing exercise”.

In that case, three foreign corporations which had accounts with the London branch of an American bank with a head office in New York obtained interim injunctions to restrain the bank from complying with subpoenas issued in New York at the instigation of the United States Department of Justice to produce documents relating to those accounts. Among other arguments, the bank contended that even if *Tournier* “does indeed contain the whole law on the topic without elaboration and public policy is irrelevant, the subpoena should still prevail over the duty of secrecy, because the bank has a genuine and legitimate interest of its own to obey the subpoena since it is issued pursuant to the law of the country to which it is subject and the fear of being held in contempt is genuine and not unreasonable” (see 479). Leggatt J rejected that argument (also at 479) on the basis that the protection which the bank was seeking was “different in character from that which was contemplated in the *Tournier* case, where the circumstances before the court were totally different”.

On the face of it, this suggests that Bankes LJ’s qualification (c) should not be read too widely. However, Leggatt J’s reasoning with regard to the balance of convenience (at 480) is also relevant. On his view of the facts, even if that qualification was to be read as extending to circumstances where it is to the advantage of the bank to produce documents to third parties, those circumstances did not arise, because Leggatt J did not consider that the bank would truly suffer any detriment if it did not produce the documents in question. It is suggested that this tempers what might otherwise be seen as a somewhat brusque rejection of the notion that “the interests of the bank” may extend to avoiding being held in contempt of court.

**OTHER CASES CONCERNING THE QUALIFICATIONS IN TOURNIER**

Turner (referred to above) concerned Bankes LJ’s qualification (d). It was held on the facts that the banking practice on which the defendant bank relied did not justify imputing to the claimant an implied consent to the bank using information that would otherwise be confidential to give the bank references about his creditworthiness. Christofi (also referred to above) concerned a claim by a wife, who was a customer of a bank, that the bank had acted in breach of confidence by informing her husband’s trustee in bankruptcy that a caution against dealings registered by the trustee on the matrimonial home had been warned off. In the result: (i) the trustee reregistered the caution; and (ii) the wife claimed to have suffered various losses, including the chance to sell the property at a time when it would have remained free of the caution and to pay off her overdraft with the bank. It was held that the claim was misconceived and should be struck out. In reaching that conclusion, the Court of Appeal held (among other things) that *Tournier*’s case provided no support for the proposition that “the law implies a duty on a bank not to disclose to a person assessing a claim against property [over which the bank has security] the fact that that claim is no longer protected by the entry of a caution on the Land Registry” (Chadwick LJ at 947). Accordingly, neither of these cases sheds much light on the content of Bankes LJ’s qualifications (c) “have not been the subject of much subsequent decision”. That case concerned questions of confidentiality in arbitration proceedings. However, the Court of Appeal considered the principles of banking confidentiality expounded in *Tournier* in light of the influence of those principles on the development by the English courts of the exceptions to the basic rule of confidentiality in arbitration proceedings.

So far as concerns qualification (c), Lawrence Collins LJ stated (at [101]) that this:

> “was adapted … to mean that disclosure was permissible when, and to the extent to which, it was reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-a-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by that third party”.

Having said (at [106]) that the approach to the confidentiality of arbitrations had resulted from “perhaps, over-reliance” on the banking principles in *Tournier*, Lawrence Collins J concluded (at [107]) that:

> “In my judgment the content of the obligation [of confidentiality with regard to arbitration proceedings and documents relating to the same] may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.”

### Feature

**DISCLOSURE OF CONFIDENTIAL INFORMATION**

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This formulation: (i) recognises that the legitimate interests of the party seeking to disclose confidential information are (or may be) separate and distinct from the interests of justice; (ii) falls short of accepting that the public interest may be a reason for disclosure; and (iii) perhaps most importantly, avoids the lack of flexibility which results from a rigid application of the principles in Tournier. In this last respect it is consonant with the approach that is to be found not only in Lord Goff’s speech cited below but also in cases where the courts are concerned with balancing against other rights the right to respect for private and family life, home and correspondence that is guaranteed by Art 8 of the European Convention on Human Rights.

THE DUTY OF CONFIDENTIALITY

In Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 at 281, Lord Goff stated the broad, general principle as follows:

“...a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others... in the vast majority of cases... the duty of confidence will arise from a transaction or relationship between the parties... But it is well settled that a duty of confidence may arise in equity independently of such cases...”.

Lord Goff identified three limiting concepts to this broad general principle (at 282); first, that the principle of confidentiality does not apply to information that is generally accessible; second, that the duty of confidence does not apply to information that is useless or trivial; and third – which he said is “of far greater importance” – that in certain circumstances the public interest in maintaining confidence may be outweighed by the public interest in disclosure.

One case cited by Lord Goff in support of his third limiting principle is Lion Laboratories Ltd v Evans [1985] QB 560. In that case, claims for breach of confidence and infringement of copyright were made by an employer in respect of documents taken by former employees that cast doubt on the reliability of the employer’s electronic breath testing equipment. The Court of Appeal held that the public interest may afford just cause or excuse for breaking confidence or infringing copyright, that the test is whether there is legitimate ground for supposing that it is in the public interest for disclosure to be made, and that there was on the facts sufficient just cause and excuse so that no interim injunction should be granted restraining use or disclosure. The reasoning was informed by the public interest in the due administration of justice. For example, Griffiths LJ said at 551:

“The plaintiffs are the only manufacturers licensed by the Home Office to produce this machine. They owe a grave obligation to the public to ensure that the machine is produced and maintained to the highest standards. If they do not honour this obligation, with the result that the machine may give inaccurate readings, or fail to register a sample of breath, people may be wrongly convicted and be powerless to do anything about it. In these circumstances, if material comes into the hands of the press which on a fair reading suggests that the manufacturers are not honouring their obligation, or that the machine is not reliable, it seems to me that it is beyond question that it is in the public interest that this disturbing information should be made known to the public.”

That the public interest in doing justice in legal proceedings may outweigh the interest in preserving confidence is also apparent, for example, from British Steel Corporation v Granada Television Ltd [1981] AC 1096, Lord Wilberforce at 1168–1169:

“...as to information obtained in confidence, and the legal duty, which may arise, to disclose it to a court of justice, the position is clear. Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships... But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance.”

It is suggested that in a number of instances – including the example of use in legal proceedings given by Bankes and Scrutton LJ in Tournier – the public interest in disclosure will form a sufficient, and more principled, basis upon which to decide the justifiability of disclosure by a bank of a customer’s confidential information than reliance on a wide qualification that “disclosure is in the interests of the bank”.

MISUSE OF PRIVATE INFORMATION

For present purposes, the elements of the cause of action for misuse of private information are sufficiently summarised by Tugendhat J in Goodwin v News Group Newspapers Ltd (No 3) [2011] EMLR 27 at [62]:

“a. The starting point is the Human Rights Act 1998. By s.6 the court (as a public authority) is required to act compatibly with Convention Rights... The Convention rights in question... [include] the right to respect for private life protected by Art 8. So far as material to the present case [Art 8 provides]:

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

(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... for the protection of the rights and freedoms of others.
b. [The exception relating to the protection of the rights of others] can apply only where three conditions are satisfied. The restrictions must (a) pursue a legitimate aim or aims, (b) be ‘prescribed by law’ (ie be easily accessible and formulated with sufficient precision for the ordinary citizen to rely upon them to regulate his conduct) and (c) be necessary in a democratic society for the protection of the legitimate aim...[of protecting the rights of others]... They must also be proportionate to the end pursued, securing what is necessary for the protection of these aims and no more.

c. In accordance with the guidance given by the House of Lords in Re S (2005) 1 AC 593, Lord Steyn at [17], the correct approach to the balancing exercise where both Article 8 and Article 10 [the right to freedom of expression] rights are involved is that: (i) neither Article as such has precedence over the other (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary (iii) the justifications for interfering with or restricting each right must be taken into account (iv) finally, the proportionality test – or 'ultimate balancing test' – must be applied to each.

[NOTE: The same approach can be adapted to apply in cases where Art 8 falls to be balanced against other rights recognised in Article 8(2).]

d. When deciding whether information is in principle protected by Article 8 and, if so, whether Article 8 must yield to some countervailing right or rights, the court considers the matter in two stages:

(1) The first question is whether there is a reasonable expectation of privacy. This is the threshold question, and it is an objective test. See Murray v Express Newspapers plc [2009] Ch 481, where Sir Anthony Clarke MR said at [35]:

‘In these circumstances, so far as the relevant principles to be derived from Campbell v MGN Ltd [2004] 2 AC 457 are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in Campbell v MGN Ltd. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]:

‘The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity. We do not detect any difference between Lord Hope’s opinion in this regard and the opinions expressed by the other members of the appellate committee.’

(2) If and only if that question is answered in the affirmative, the Court proceeds to the second part of the two-stage approach which is laid down by the authorities. See Murray v Express Newspapers plc [2009] Ch 481, where Sir Anthony Clarke MR said at [27];

'[There are] two key questions which must be answered where the complaint is of the wrongful publication of private information. They are, first, whether the information is private in the sense that it is in principle protected by article 8 (ie such that article 8 is in principle engaged), and, secondly, if so, whether in all the circumstances the interest of the owner of the information must yield to the right of freedom of expression conferred on the publisher by article 10.'

e. It is also clear from the authorities that the correct application of this approach requires the Court to give separate consideration to different items or classes of information. See, for example, Lord Browne of Madingley v Associated Newspapers Ltd [2008] QB 103, Sir Anthony Clarke MR at [37]."

Much information held by a bank concerning an individual will typically be subject to a reasonable expectation of privacy on the part of the customer (and, it may be, others, such as members of the customer’s family). In this regard, the courts have not been astute to draw a bright line between private life (in the home or family sense) and business life in the context of documents. In Immerman v Tshengu [2010] Fam 116, the Court of Appeal said at [76]:

“Communications which are concerned with an individual’s private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality, and are specifically covered by Article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence.”

Accordingly, when it comes to questions of whether and to what extent it is legitimate for a bank to disclose such information, it will be necessary to adopt the approach set out in the judgment of Tugendhat J above. This involves applying a test of proportionality, and dealing with matters not in terms of generalities but on the concrete facts of each particular case and even, it may be, of each item of information. Where disclosure is for purposes of legal proceedings, Art 6 rights will be in play.

DATA PROTECTION

In any event, privacy considerations arise due to the DPA. This was passed to give effect to Council Directive 95/46/EC and largely follows the format of that Directive. Foremost among the aims of that Directive is the protection of individuals as a consequence of the processing of their personal data, including invasion of their privacy. That is also the "central mission” of the DPA; see Campbell v MGN Ltd in the Court of Appeal at [2003] QB 633, Lord Phillips MR at [72]-[73]; Johnson v MDU [2007] EWCA Civ 262, [2007] 96 BMLR 99, Buxton LJ at [1].
Central to the DPA are the definitions listed in s 1. Among other things, “Data” is defined as “information which – (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose, (b) is recorded with the intention that it should be processed by means of such equipment, (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system...”. “Personal data” means “data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...” A data controller is defined, subject to an immaterial exception, as “a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed.” “Processing” in relation to information or data is defined as “obtaining, recording or holding the information or data, or carrying out any operation or set of operations on the information or data, including... disclosure...”

In Durant v Financial Services Authority [2004] FSR 573, the Court of Appeal (Auld LJ at 587) held that the DPA applies only to information which affects the privacy of the data subject “whether in his personal or family life, business or professional capacity” and gave as examples “the name of a person or identification of him by some other means, for instance by giving his telephone number...”

It is possible that information processed by a bank will also include “Sensitive personal data” within the meaning of s 1. However, it is beyond the scope of this article to consider that question, and its implications for disclosure by the bank.

An essential feature of the DPA (see s 4) is that it imposes a duty on a data controller to comply with the data protection principles (the DPPs) set out in Pt I of Sch 1 to the DPA in relation to all personal data with respect to which he is the data controller. The 1st DPP provides that personal data must be processed both “fairly” and “lawfully”. The 8th DPP provides that personal data “shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data”.

The 1st DPP also provides that personal data shall not be processed unless at least one of the conditions in Sch 2 to the DPA is met. These conditions cater for specific circumstances in which countervailing interests and considerations require to be taken into account by way of balance against the data subject’s fundamental right to privacy with respect to the processing of personal data. The interpretation provisions contained in paras 1 and 2 of Pt 2 of Sch 1 to the DPA are also relevant. Among other things, these state that personal data are not to be treated as processed fairly where the data controller fails to provide the data subject so far as practicable with the information specified in para 2(3) of Pt 2 of Sch 1, including “the purpose or purposes for which the data are intended to be processed”. If data are not processed in compliance with these conditions they will be processed “unlawfully”. If data are processed in a way that infringes rights of confidentiality or privacy they will be processed “unlawfully”.

Section 35 contains exemptions for personal data from the non-disclosure provisions of the DPA where the disclosure is required by or under any enactment, by any rule of law or by the order of a court, or where it is necessary for the purposes of, or in connection with, any legal proceedings (including prospective legal proceedings), or obtaining legal advice. These reflect Banks LJ’s qualifications (a) and (in part) (c).

As already mentioned above, Banks LJ’s qualification (c) is similar to para 6 of Sch 2, which contains the following condition relating to personal data:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

In Murray v Express Newspapers Ltd [2007] EMLR 583 Patten J held at [76]:

“It seems to me that ‘necessary’ in this context means no more than that the processing should be required to be proportionate to the legitimate interests pursued by the data controller and I accept [the] submission that the pursuit of a legitimate business is a legitimate interest for these purposes. This condition seems to me to replicate the considerations which the Court has routinely to take into account under Article 8 and Article 10...”

Patten J’s decision was subsequently reversed on appeal: see Murray v Express Newspapers plc [2009] Ch 481. However, the Court of Appeal did not discuss this aspect of his judgment, saying only that it considered the privacy claim in that case should go to trial, and that, in these circumstances, so also should the DPA claim.

Paragraph 6 of Sch 2 involves a balancing exercise. If that is taken (as held by Patten J) to replicate the balancing exercise where both Art 8 and Art 10 rights are involved, then the correct approach is to apply the guidance given by the House of Lords in Re S [2005] 1 AC 593 (Lord Steyn at [17]). This has already been set out above, within the passage that is quoted from the judgment of Tugendhat J.

The relevance of the above provisions to disclosure of an individual customer’s confidential information by a bank is self-evident from the provisions themselves. In sum, where express exemptions do not apply, the bank must comply with conditions which in part replicate the law of misuse of private information but in part provide specific additional protections for the data subject, for example in the 8th DPP.

CONCLUSION

In future cases the courts can and should take the opportunity to consider the Tournier principles in a broader context than has occurred to date, and to shape the law of banker’s confidentiality so that it accords with the general law of confidence and developments such as the evolution of claims for misuse of private information.