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The banker-customer relationship

1.1 Introduction

The banker-customer relationship has long been held to be based on a contract between the parties.¹ The English common law of contract permits the parties to reach any bargain they please with only a limited degree of interference but in recognition of the extent of inequality of bargaining power in the market place, statutory provisions have gradually been introduced² which can override the terms of any agreed contract in order to protect the interests of a party with weak bargaining power who enters into a contract with a party of greater power. Such protection is in particular brought in for the benefit of a party who is considered to be a 'consumer' when dealing with a party who is carrying on a business. More recently a further development has been the introduction of self-regulatory provisions³ which grant consumers certain rights which exist outside of the law and which are enforceable through alternative forums such as the Financial Ombudsman Service.

The contract which arises from a banker-customer relationship can take a number of forms but it can usefully be considered in three separate categories:

- (a) contracts between banks and large corporate customers of roughly equal bargaining power;
- (b) contracts between banks and smaller corporate or unincorporated business customers;
- (c) contracts between banks and consumer customers.

The statutory and self-regulatory provisions to be discussed below refer to these categories. A bank in a banker-customer contract should note that:

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- (i) it is never able to exclude liability for another's death or personal injury resulting from negligence;⁴
- (ii) it can only exclude liability for other loss arising from negligence if it is reasonable to do so.⁵ A major factor in determining whether it is reasonable to do so is the balance of bargaining power between the parties,⁶ thus in category (a) relationships, it is much more possible to exclude liability for this type of loss;
- (iii) when it deals with the customer on its written standard terms of business, it cannot exclude or restrict its liability for its breach of contract, nor can it claim to be able to render a performance substantially different from that which was reasonably expected of it.⁷ These restrictions apply to all contracts with consumers whether on standard terms of business or not.⁸ This rule thus applies to all category (c) relationships and to most category (b) relationships;
- (iv) in contracts with consumers which are not individually negotiated, any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations to the consumer's detriment is not binding on the consumer;⁹ This rule does not, however, apply to the main subject matter of the contract, nor to the adequacy of the price for the services supplied. It would appear to follow from this that the interest rate charged for a loan cannot be challenged as unfair on the consumer. A term in a consumer loan agreement that made the borrower liable to pay interest on monies outstanding up to and beyond the time of a court judgment against him was held not to be concerned with the adequacy of the price (as it was unlikely to affect the actual price in the usual case) but the term was considered to be fair and therefore valid in *Director General of Fair Trading v First National Bank*;¹⁰
- (v) in all contracts, an implied term is included which requires the bank to carry out its service to the customer with reasonable care and skill.¹¹ Any attempt to exclude the effect of this term will be subject to the Unfair Contract Terms Act and, in the case of contracts with consumers, to the Unfair Terms in Consumer Contracts Regulations;
- (vi) in contracts between banks and personal customers and small business customers, there is a requirement that banks' written terms and conditions will be fair.¹² This rule applies only to category (b) and (c) relationships and is directly enforceable only through the Financial Ombudsman Service. This rule does not apply to the few banks that have not signed up to the Banking Code and the Business Banking Code.

The recent history of proposals for change to the banker-customer relationship begins with the commissioning by the then Conservative government of the Review of Banking Services Law and Practice in 1987. This Review Committee reported in 1989¹³ with a great number of proposals for legislative change and a Code of

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Practice was also proposed. In March 1990 the Government published a White Paper entitled 'Banking Services: Law and Practice'.¹⁴ Only a small number of minor legislative changes survived from those recommended by the Review Committee and these related mostly to cheques, to electronic funds transfers and to payment cards. Fewer still of these have been enacted; the main examples include statutory recognition of the 'account payee' crossing on cheques and the permitting of truncation of cheques. The White Paper did, however, adopt the notion of a non-statutory statement of best practice and in December 1991 a Code of Practice entitled 'Good Banking' was published jointly by the British Bankers Association, the Building Societies Association and the Association for Payment Clearing Services. The governing principles of the Code were stated to include:

- (a) banks will act fairly and reasonably in all their dealings with their customers;
- (b) banks will help customers understand how their accounts operate and seek to give them a good understanding of banking services;
- (c) to maintain confidence in the security and integrity of banking and card payment systems.

The 2005 edition of the Code states that a bank will act fairly and reasonably in all its dealings with a customer. The key commitments are now stated to be:

- (a) to make sure that advertising and promotional literature is clear and that clear information about products and services is provided;
- (b) when an account or service has been chosen, to give clear information about how it works, its terms and conditions and the interest rates that apply to it;
- (c) to help the customer use his account or service by sending him regular statements and to keep him informed about changes to interest rates, charges, or terms and conditions;
- (d) to deal quickly and sympathetically with things that go wrong and to consider cases of financial difficulty sympathetically and positively;
- (e) to treat all personal information as confidential and to operate secure and reliable systems;
- (f) to publicise the Codes, have copies available, and ensure staff are trained to put it into practice.¹⁵

The requirement in the Codes to treat customers fairly is now reinforced by Principle for Business 6 issued by the FSA. This states that 'a firm must pay due regard to the interests of its customers and treat them fairly.'

A similar Business Banking Code was first published in March 2002 which protects the interests of all unincorporated business customers and small company customers with a turnover up to £1 million per annum, and addresses a number of specific areas of banking practice, the law relating to which is dealt with in this book, for example, opening an account, the incorporation of express terms and conditions in

the banker-customer relationship, the levying of charges, the duty of confidentiality, bankers' references, and various matters concerning the use of plastic cards. The provisions of the Codes on these matters are dealt with in the relevant parts of the following text. The latest editions of the Codes (both published March 2005) are also set out in full in Appendices 2 and 3.

It must be noted, however, that the Codes do not constitute law as such. Breach of them by a bank entitles the customer to make a complaint to his bank and failing satisfaction then to the Financial Ombudsman Service (FOS),¹⁶ assuming the bank concerned has signed up to the relevant Code. In *R v Financial Ombudsman Service*,¹⁷ it was held that as FOS is now a statutory body, when FOS interprets the Code it is subject to judicial review and when such review occurs, the court is ultimately the arbiter of how the Code should be interpreted. The court stated that the Code required a broad, purposive and commonsense approach and that it was to be interpreted according to its spirit and in a non-technical way, although ultimately it only had one correct interpretation. The FOS was established by the Financial Services and Markets Act 2000. FOS has compulsory jurisdiction over institutions that are acting in their capacity of authorized persons performing regulated activities under the Act. It hears complaints from individual and appropriate business customers.¹⁸ FOS can also entertain complaints from persons who were not customers of the bank concerned. This includes guarantors of loans, true owners of stolen cheques, payees of cheques backed by cheque guarantee cards, and recipients of a banker's reference.¹⁹

Complainants must firstly make their case to their bank and receive a 'final response'. For this purpose, banks are required to establish written complaints handling procedures. A copy of these procedures must be provided to a complainant within five business days of the receipt of the complaint, and to any customer on request.²⁰ The bank must issue a final response or a holding response within four weeks, and within eight weeks must issue a final response or notification that the complainant can take the case to FOS. The case can then be made to FOS.²¹ Further time limits apply. The complaint to FOS must be made within six months of receipt of the bank's final response and within six years of the events giving rise to the claim (or within three years of the time when he ought to have become aware of the relevant facts).²²

FOS will determine a complaint by reference to what it considers fair and reasonable in all the circumstances of the case. In doing so, FOS will consider the law, regulations, regulator's guidance, Codes, and good industry practice. FOS may make an award in the complainant's favour up to a maximum sum of £100,000 based upon the complainant's financial loss, and any pain and suffering, damage to reputation, or distress and inconvenience. It can also award costs to the complainant (this is not often done) and interest on the award. FOS is not restrained by judicial rules on the assessment of damages and it can thus be more (or less) generous than a court of law would have been on the same facts. The complainant can choose whether or not to accept the determination from FOS. If he does accept it, it becomes binding

and final; there is no appeal by either side. If he does not accept it, he is free to pursue his case in the courts. The bank has to accept the determination from FOS if the complainant accepts it, although it can challenge FOS's decision by judicial review through the courts. In *R v Financial Ombudsman Service*,²³ it was held that the court was in principle able to overturn a decision of FOS but declined to do so in this case as it considered that FOS's decision was within its discretion. The FOS award is enforceable by the complainant through the courts. FOS can also issue a direction that the bank take any such action as FOS considers just and appropriate. This would be enforceable through the courts by injunction (even if the courts would have had no power to grant such an injunction directly). FOS also has the power to enforce disclosure of documents.²⁴

In no circumstances can FOS award any money or costs against the complainant. It may, however, dismiss a case without consideration of its merits if it considers the complainant has suffered no loss, or the claim is frivolous or vexatious, or the bank has already made an offer which is fair and reasonable.²⁵

In summary, FOS will hear complaints from personal customers, all unincorporated customers and from small company customers. In determining the case, FOS will take into account the relevant law and the relevant Codes, ie the Banking Code and the Business Banking Code.

It is an interesting question whether the courts will apply the Codes in a case concerning the banker-customer relationship. They may be taken to be part of the implied terms of the contract even though they are not themselves of direct legal effect. It is assumed, however, that the express intention of the Codes to limit themselves to personal and small business customers would prevent them from being taken as an implied term of category (a) relationships.

1.2 Definition of a bank

The legal definition of a bank is relevant because certain rights and obligations attach to a bank at common law, eg a bank enjoys the right to exercise the banker's lien²⁶ and a bank is entitled to the protection of statute when paying and collecting cheques.²⁷ Similarly a bank is impliedly obliged to observe the duty of confidentiality.²⁸

The Financial Services and Markets Act 2000 establishes a framework whereby the Financial Services Authority (FSA) authorizes institutions to refer to themselves as banks and under this Act, the definition of a bank for the purposes of certain specific statutes (such as the Agricultural Credits Act 1928) is simply an institution authorized under the Act. For the purposes of what constitutes a bank when applying the protective provisions of the Bills of Exchange Act 1882 and the Cheques Act 1957, the definition of a bank is not based upon authorization under the Financial Services and Markets Act but upon common law. This common law definition of a bank is

provided by *United Dominion Trust Ltd v Kirkwood*.²⁹ It was held that there are three essential characteristics of a banking business:

- (a) collecting cheques for customers;
- (b) paying cheques drawn by their customers;
- (c) keeping current accounts for their customers.

It appears that all three must be satisfied in order for an institution to be considered a bank at common law.

1.3 Definition of a customer

A person becomes a customer of a bank when an account is opened for him, and at the same time a contract is formed.³⁰ In *Woods v Martins Bank*³¹ it was held that the contract can be formed well before an account is opened. The branch manager of M Bank advised W to invest in a company customer of the same branch. This advice was held to be grossly negligent but as this case predated the decision in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*,³² there was no question of liability on the part of the bank unless a contract existed between W and M Bank. It was held that W became a customer when the bank accepted his instructions to collect money from his account with another institution and to pay it to the company and to retain the balance to W's order.

Since the Hedley Byrne decision it is open to the courts to find a bank liable in tort for negligent advice to a non-customer. Indeed, as a matter of general law, a bank may be liable to any person against whom it commits a tort. A person may only become a customer, however, when a contract is formed with the bank.

The principal reason from a bank's point of view for determining when a person is a customer is for the purposes of section 4 of the Cheques Act 1957 where a bank may be protected in collecting a cheque when it does so for a customer. It is thus protected whenever it collects a cheque for someone who has an account with it. This is so even when the stolen cheque was the first and only cheque ever paid into the account.³³ Cashing a cheque for a person who does not have an account with the bank was not considered to be collecting a cheque for a customer in *Great Western Railway Co. v London and County Banking*.³⁴

It was suggested by Lawrence LJ in the *Court of Appeal in Lloyds Bank v E.B. Savory & Co.*³⁵ that a bank is not collecting a cheque for a customer when a person pays in a cheque at a different bank from the one where he has his account, and that this is so even where the cheque is paid in at a different branch of the same bank. If this is correct, the customer must be considered a customer of an individual branch, not of the whole bank.

1.4 The debtor-creditor relationship and other implied terms

In *Foley v Hill*,³⁶ it was held that when a customer pays money into his account, the bank becomes a debtor to the customer creditor. The money becomes the property of the bank and the bank has borrowed the money from its customer. In *Balmoral Supermarket Ltd v Bank of New Zealand*³⁷ the timing of the ownership of the money passing to the bank was considered. An employee of the plaintiff was depositing a substantial sum of cash with the defendant bank and had emptied his bag onto the counter midway between him and the cashier. The cashier had picked up one bundle of notes and counted them. At that moment robbers entered the bank and stole the uncounted cash. It was decided that this money was still the property of the customer as the bank had not indicated its acceptance of it. In *Chambers v Miller*³⁸, the payment was being made in the other direction in that the plaintiff was cashing a cheque drawn on the defendant. He was given the cash and was counting it when the defendant banker realized there were insufficient funds in the account to cover the transaction. The defendant asked for the money back, which the plaintiff refused to do. The defendant proceeded to detain him and take it from him by force. This resulted in liability for false imprisonment and assault.

Certain important matters flow from the principle that deposited money becomes the property of the bank. First, the bank is free to do what it likes with the money and is not bound to account to its customer for what it does with it. The customer does not own the money he has deposited, even in equity. He merely owns the right to be repaid the debt that the bank owes him. The bank is only liable to repay this money to the customer when he demands it. Unlike normal debtors, banks are not obliged to 'seek out their creditors'. Second, if the bank fails to repay on the customer's demand, the customer ranks only as an unsecured creditor in any claim against an insolvent bank. In these circumstances, however, a customer may benefit from the statutory set-off provisions of section 323 of the Insolvency Act 1986 so that, for example, if he owes a debt to the bank on another account which exceeds his credit balance, his loss may be nil.

Because of the fact that bank depositors are so vulnerable to the collapse of their banks, most jurisdictions operate a deposit protection scheme that will pay out in the event of a bank becoming insolvent. In the UK, the Financial Services Compensation Scheme will refund 100% of eligible deposits with an authorized bank, up to a maximum deposit of £2,000, and 90% of the next £33,000. Thus the maximum compensation is £31,700. Only personal customers and small business customers benefit from the scheme. Deposits in the same name with a bank are aggregated (ie the limit is calculated per person not per account) and joint accounts are normally divided equally between the account holders. Larger companies no longer enjoy protection.

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Deposits with banks whose home state is elsewhere in the European Economic Area (EEA)³⁹ are normally covered by the deposit scheme operated by their home country even if the deposit is made with a branch in the UK. Such banks can elect to top-up to the UK scheme protection levels, if they wish. The Credit Institutions (Protection of Depositors) Regulations 1995 direct all EEA-based institutions to implement a deposit protection scheme of a minimum standard; this is somewhat lower than the UK levels. Banks from outside the EEA with branches in the UK must join the UK scheme unless they can show that a scheme in their home country covers the deposits made with their UK branch.

The Financial Services Compensation Scheme will also pay out to investors and insurance policyholders who suffer from the failure of a bank or other authorized institution. Different levels apply. Investors receive 100% of £30,000 then 90% of £20,000 (maximum payout £48,000). Insurance policyholders receive 100% of the first £2,000 and 90% of the balance, on an unlimited basis (100% if the insurance was legally compulsory, such as motor insurance).

The earliest reported case to deal with the generality of implied terms in the banker-customer contract was *Joachimson v Swiss Bank Corporation*.⁴⁰ They included:

- (a) the bank will receive the customer's deposits and collect his cheques;
- (b) the bank will comply with written orders (ie cheques) issued by its customer, assuming there is sufficient credit in the account;
- (c) the bank will repay the entire balance on the customer's demand at the account-holding branch during banking hours;
- (d) the bank will give reasonable notice before closing a customer's account, at least if it is in credit;
- (e) the customer will take reasonable care when writing his cheques.

It was also stated that the relationship between bank and customer is contained in one contract which may encompass a variety of matters, as opposed to there being separate contracts for each service offered by the bank to a customer.

In *Libyan Arab Foreign Bank v Bankers Trust*,⁴¹ L had Eurodollar deposits amounting to over \$300 million with the bank. There were two accounts, one was held in New York and one at a London branch. The bank refused to repay the deposit on L's demand as a US Presidential order had sought to freeze the accounts. It became important to decide whether the contract was subject to English or to New York law. It was held that there was one contract between the parties, although the New York account was subject to New York law and the London account was subject to English law. It was also decided that, in the absence of any express agreement to the contrary and applying Joachimson term (c) above, L was entitled to demand the balance held on the London account in cash. This was despite evidence that it would involve seven plane journeys from New York to bring over the necessary dollar bills.

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In the English law of contract, any implied term can normally be negated or altered by an express agreement between the parties to the contract. This and other important issues arose in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank*,⁴² a case which underlines the implied term that a bank must only act on its customer's valid instructions and not on any forgery of those instructions.

T Ltd had a current account with three different banks in Hong Kong. It had mandated the banks to pay cheques which were signed by its managing director. L, the accounts clerk of T Ltd, forged the managing director's signature on 300 cheques which totalled \$HK 5.5 million and these were all paid by the banks. The forged cheques were payable to companies and L set up accounts into which these were paid. When L's fraud was exposed after five years, he fled to Taiwan and the money was not recovered from him. T Ltd therefore claimed recovery of the money from the banks.

Prima facie the banks were liable to T Ltd since the cheques were forged, T Ltd had given no authority to pay and no estoppel could arise since T Ltd as a company customer had no knowledge of the forgeries.⁴³ The banks raised a number of points in their defence, however:

- (a) they claimed there should be an implied term to the effect that a customer has a duty to take reasonable precautions to prevent forged cheques being presented for payment on his account. It was clear that T Ltd's accounting system was lamentably negligent in allowing L to cover his tracks in perpetrating his fraud;
- (b) they claimed there should be an implied term that a customer has a duty to check the statements of account which his bank sends him and where the unauthorized debits will appear. If the customer fails to raise queries, his claim against the bank should be prejudiced. Nobody in T Ltd, apart from L, had examined the bank statements for the five years that the fraud was going on;
- (c) alternatively to the above, they claimed the customer should be under a duty in the tort of negligence to take care to prevent forgeries and check his statements.

All of the above submissions were dismissed by the Privy Council who reiterated the principles established in *London Joint Stock Bank v Macmillan and Arthur*⁴⁴ and in *Greenwood v Martins Bank*⁴⁵ that a customer only has duties:

- (a) to exercise reasonable care when drawing cheques to prevent forgery and alteration; and
- (b) to notify the bank if he actually knows of forgeries on his account. A customer who wilfully shuts his eyes to the obvious is not considered to have actual knowledge. However, actual knowledge can be imputed to a customer if his agents have the knowledge.⁴⁶

A customer therefore is not liable if he walks along the street tearing off unsigned cheques from his cheque book and scattering them around. However, if he sees someone pick up a cheque and start to complete it, he then has a duty to inform his bank forthwith. If he fails to do this, he may be liable for the forgery.

Equally a customer is not liable simply because he ignores all statements of account which he receives from his bank even when a cursory examination would reveal unauthorized debits. If he does look at his statement and notices unauthorized debits but does not inform the bank then he may be estopped from claiming on the basis that he then knows of the forgeries.

In the White Paper⁴⁷ it is stated that the government considers this area of the law to be unfair to banks. It proposed legislative change to make the customer bear some of the loss where he has been negligent. This proposal has not been implemented but the Financial Ombudsman Service will apply contributory negligence rules against a complainant in the appropriate circumstances.

The duty on the customer to take reasonable care to prevent forgery and alteration of his cheques is limited. Where the sum payable is altered, this rule operates as an estoppel to reverse the principle that would otherwise apply. When a cheque is altered without the authorization of the customer, the cheque is treated in law as worthless and the bank cannot debit its customer's account.⁴⁸ Thus if the payee's name is deleted and a different name inserted, the loss will fall on the bank,⁴⁹ regardless of whether the alteration is detectable. Where the fraudster adds to the payee's name, it has been held that the paying bank is liable, whether or not the customer has drawn a line after the name.⁵⁰ Nowadays, some banks state on customer's cheque books that a line should be drawn after the payee's name to prevent alteration. It may be that this becomes a term of the contract and sets up an estoppel against the customer if he fails to comply with it.

The view of the Privy Council in *Tai Hing* that the banker-customer relationship was entirely a contractual one and its consequent rejection of the bank's argument that a customer owes a duty in tort not to act negligently has been put in some doubt by the decision in *Henderson v Merrett Syndicates Ltd*,⁵¹ where it was held that concurrent duties in contract and tort could co-exist in a relationship in the insurance industry.

1.5 Express terms

The banks in the *Tai Hing* case, in fact, had incorporated express terms into their contracts with their customer, which in various ways had sought to place an express duty on the customer to examine his statements of account and to raise queries within a given period, failing which the statements were to be deemed to be correct.

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It was held in *Tai Hing* that at common law there is nothing to prevent such terms being effective (they may be referred to as 'conclusive evidence clauses'), but as terms which seek to exclude rights which the customer would otherwise enjoy, they can only be effective if the effect of them is clearly brought home to the customer; it was held that the banks in *Tai Hing* had not done so. It is suggested that banks would be unwise to incorporate such a term in any case, since it may happen that the account is wrongly credited with a large sum which could also be treated as conclusive. A better term from the bank's point of view would be one which obliges a customer specifically to inform the bank of unauthorized debits within a certain period.

As explained above,⁵² any express term which seeks to exclude liability on the part of one party to a contract may be rendered void by the Unfair Contract Terms Act 1977 if it is considered to be an unreasonable exclusion of liability.

Different principles apply where the payment is electronic and authorization is made by keying in a personal identification number (PIN) or password. In this case, the bank may feel it can reasonably agree a term with the customer that the bank is not liable where an authorized person has gained access to the password and keys it in.

Special rules apply to consumer-activated cash cards. Here the Banking Code makes the customer liable only for a maximum of £50 unless his bank can show that he was grossly negligent⁵³ with the card and/or the PIN or that he acted fraudulently. Similar rules apply to debit cards where the customer can be liable for unauthorized use of his card even though in this case his signature was forged. Credit cards are regulated by the Consumer Credit Act and whilst customers can be liable for up to £50, negligence will not render them liable on an unlimited basis. Credit card holders are not liable if the card is still in their possession when the unauthorized use takes place, so the recent frauds of card details being misused on the Internet or for mail order, or duplicate cards being produced, do not present any legal risk to the credit cardholder. The Distance Selling Regulations 2000 have introduced further protection for holders of all types of card when the card is misused in a distance selling transaction.⁵⁴

Internet banking presents an additional risk for customers. Here a customer is able to authorize payments from his account by keying in a password and giving instructions by electronic means. His bank has no way of knowing whether it is its customer or an impostor who is entering the site and giving the instructions. The Banking Codes now deal with misuse of passwords to gain access to internet bank accounts. This is treated in a similar fashion to the misuse of plastic cards. Section 12.11 states that if the customer has acted fraudulently or with gross negligence, he may be unable to claim his losses from his bank. By implication, if he has not acted fraudulently or with gross negligence, the bank will have to suffer the loss. There is no £50 chargeable to the customer in the case of misused internet passwords. The Codes recommend

that customers do not tell anyone their passwords, do not write them down, and take reasonable steps to keep them secret. They also suggest that customers use up-to-date anti-virus and spyware software, and firewalls on their computers, and to resist invitations in emails or phone calls to reveal their passwords (this fraud is known as 'phishing')⁵⁵. The Guidance Notes to the Code point out that the Financial Ombudsman Service will not necessarily conclude that a customer has been grossly negligent if he has failed to follow the Codes's suggestions on good practice by customers.

Where a bank has not signed up to the Codes, or where the customer is a company with an annual turnover exceeding £1 million, the bank is free to lay down terms of its choosing. If those terms place liability on the customer for misuse of passwords (irrespective of gross negligence), this may be a reasonable position for a bank to take in law, as it would not constitute an attempt to exclude liability for negligence on the part of the bank.⁵⁶ It remains to be seen whether the Unfair Terms in Consumer Contracts Regulations would invalidate such terms and conditions in contracts with personal customers.⁵⁷

Large corporate customers are sometimes granted the means to make electronic payments by keying in a password or other more sophisticated security access. Once again the bank has no means of knowing whether an authorized person within the company has authorized a payment or some unauthorized person, and terms and conditions will place liability on the customer. In this case, the Unfair Terms in Consumer Contracts Regulations will have no impact on the efficacy of the terms and conditions which are therefore likely to be valid.

The Banking Codes declare that all written terms and conditions will be fair and set out the customer's rights and responsibilities clearly and in plain language, with legal and technical language used only where necessary.⁵⁸ They further provide that banks should tell new customers how any variation of the terms and conditions will be notified.⁵⁹ The Codes' requirements on notifying changes vary according to whether the change is beneficial or detrimental to the customer. Beneficial or neutral changes can be made immediately and notice given within the next 30 days.⁶⁰ Adverse changes must be notified personally 30 days in advance and the customer is allowed to switch or close his account without incurring any extra charge or interest within 60 days from the date of notice of the adverse change.⁶¹ It is worth noting that banks cannot unilaterally change the terms and conditions of their contracts unless a term permitting this is in the contract.⁶²

Banks must give customers an annual updated set of terms and conditions or a summary of the changes in the last year if there has been a major change or a lot of minor changes.⁶³

Other terms of the banker-customer contract such as the duty of confidentiality and charges to the account are discussed under separate headings.⁶⁴

1.6 The bank's duty of care

When a bank pays a cheque it does so as agent for its customer. Also, when it collects a cheque it does so as agent.⁶⁵ It has already been observed⁶⁶ that a bank may be liable to its customer if it pays a forged or altered cheque. There are also circumstances where a bank may be liable for paying a cheque which is drawn in accordance with the mandate from the customer and where there has been no alteration.

In *Lipkin Gorman v Karpnale Ltd*,⁶⁷ LG were a firm of solicitors who held a client account at a branch of Lloyds Bank. Any one partner of LG was mandated to operate the account. One of the partners (C) also had a personal account at the same branch. C withdrew and used over £200,000 of client account money in gambling at the Playboy Club (then owned by Karpnale Ltd). He had removed the client account funds largely by signing cheques payable to cash and sending a clerk to the bank to cash the cheques. LG made a series of claims against Karpnale Ltd and Lloyds Bank for recovery of the money. The Court of Appeal found against LG on almost all of its claims but recognized that there can be circumstances which make a bank liable even if it has complied with the written mandate.

In this helpful decision for banks, May LJ declared:

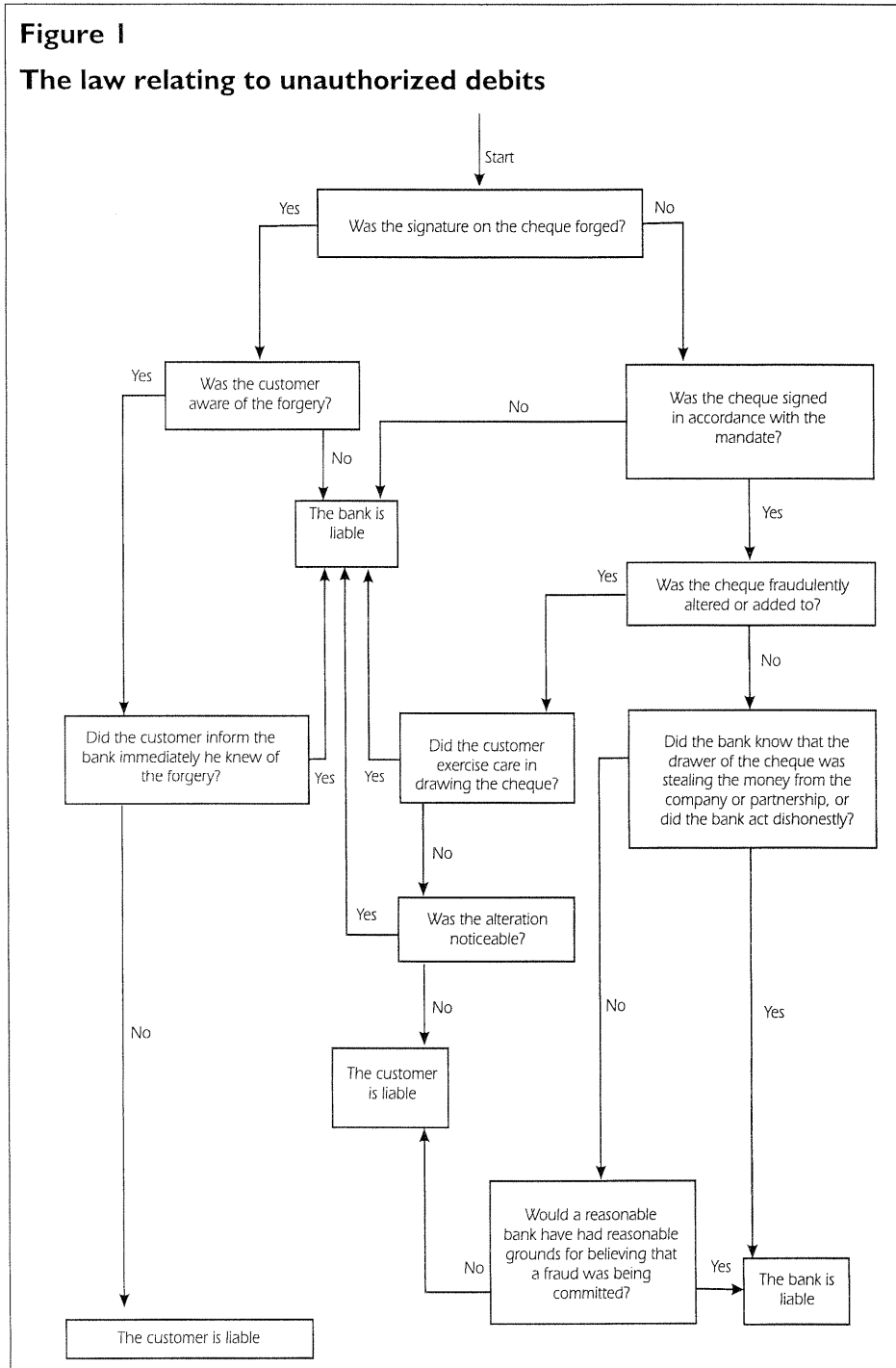
'In the simple case of a current account in credit, the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate. Having in mind the vast numbers of cheques which are presented for payment every day in this country . . . it is my opinion only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once . . . that a cheque should not be paid immediately upon presentation.'

The court conceded that just one telephone call by the bank manager to the senior partner in Lipkin Gorman to inform him of C's gambling would have put a stop to the fraud but held that this would have been a flagrant breach of the bank's duty of secrecy to its customer C.

The test to be applied to determine whether a bank is in breach of its duty as agent was stated by Parker LJ as follows:

'If a reasonable banker would have had reasonable grounds for believing that C was operating the client account in fraud, then, in continuing to pay the cash cheques without enquiry the bank would, in my view, be negligent and thus liable for breach of contract, albeit neither Mr Fox (the bank manager) nor anyone else appreciated that the facts did afford reasonable grounds and was thus innocent of any sort of dishonesty.'

Figure 1
The law relating to unauthorized debits



Later he stated:

'The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility that C was drawing on the client account and using the funds so obtained for his own . . . purposes.'

Another case which was decided in favour of the bank is *Barclays Bank v Quincecare Ltd.*⁶⁸ S approached the bank for a loan of £400,000 in order to purchase some chemist shops. An account was opened in the name of Q Ltd and a guarantee for the loan was obtained from Unichem Ltd. S asked the bank to transfer a large sum of money from Q Ltd's account to the firm of solicitors which (he said) was acting in the purchase of the shops. This was done, whereupon S instructed the solicitors to transfer the money to the USA from where it was never recovered. The bank sued Q Ltd for the debt and Unichem Ltd on their guarantee. It was held that there had been no suspicious circumstances which should have alerted the bank before it transferred the money to the solicitors and that it was not liable. The law relating to unauthorized debits is summarized in Figure 1.

There are other cases of interest concerning a bank's liability to its customer. In *Box v Midland Bank*,⁶⁹ B approached the bank for a loan facility in order to finance an export contract. The bank manager explained that the regional head office would have to approve the facility but that this would be a mere formality if an ECGD policy was obtained. B acted on this assurance and incurred expenses setting up the contract. In fact the regional head office would not have granted the facility under any circumstances and the facility was not granted. B sued for his loss and succeeded on the basis of the bank's liability for tortious negligent misstatement under the principle established in *Hedley Byrne v Heller*.⁷⁰

In *Redmond v Allied Irish Banks*,⁷¹ R was a customer of the bank. G approached R, asking him to put two cheques through R's account; G said he did not want to put the cheques through his own account for tax reasons. The cheques were payable to individuals who appeared to have indorsed them in blank; they were crossed 'not negotiable'. They had been obtained by fraud. R did pay them into his account, withdrew the funds when they cleared and paid G, whereupon G disappeared. R did not acquire good title to the cheques because of the fraud and the 'not negotiable' crossing. R contended that his bank owed him a duty to warn him of the risks of paying in indorsed cheques which were crossed 'not negotiable'. The court dismissed this argument and found in favour of the bank.

In *Verity and Spindler v Lloyds Bank*,⁷² the plaintiffs obtained a loan from the bank which was used to renovate a property which was eventually sold at a loss. The manager of the bank had advised the plaintiffs that the project was viable. It was held that the bank had assumed the role of financial adviser in this case because

of the obvious financial naivety of the plaintiffs, the business nature of the project, the bank's marketing leaflet which had offered free financial advice, and the fact that the manager had inspected the property and pronounced it viable after having inspected others which he advised the plaintiffs against buying. The case appears to establish that where a bank assumes the duty of financial adviser (which does not automatically follow from the fact that it has lent money for a particular project) then it must be sure that any advice it gives is not negligent. A mere approval of a loan could constitute negligent advice if the duty to advise has been assumed.⁷³

An interesting question of a bank's duty of care to a non-customer arose in *Gold Coin Joailliers SA v United Bank of Kuwait*.⁷⁴ A fraudster devised a scam whereby he would impersonate a wealthy customer of the defendant bank as a means of obtaining valuable goods on credit. He telephoned the bank (impersonating their customer) and instructed it to give a telephone reference to the victim of the scam. The victim duly phoned the bank for a reference and was given a favourable reply. He therefore released watches priced at \$450,000 to the fraudster, accepting payment in the form of a payment instruction signed by the fraudster but in the name of the customer of the defendant bank who had been impersonated. The bank dishonoured the payment instruction as a forgery and the victim sued it for causing his loss by their misrepresentation. It was held on appeal by the bank that the bank owed no duty of care to the victim.

In *Yorkshire Bank v Lloyds Bank*,⁷⁵ the defendant bank was acting as banker to the Norwich Union share offer. Members of Norwich Union sent in applications for shares. One cheque, drawn on the claimant bank for £90,000 and payable to the share offer, was stolen from Lloyds Bank. The payee's name was changed, and it was paid into an account at another bank. Applying the assumption of responsibility test for liability in negligence laid down in *Williams v Natural Life Health Foods Ltd*,⁷⁶ the court decided that Lloyds Bank owed no duty to the claimant bank to take care of the cheque. The loss in this case therefore fell on the claimant bank since the material alteration to the cheque rendered it void and it could not debit its customer's account. The collecting bank could not be liable as it had collected a void (and therefore worthless) cheque.⁷⁷

In *Suriya and Douglas v Midland Bank*,⁷⁸ it was held that a bank has no duty to inform its customers of the availability of new accounts and a customer was therefore unable to sue for substantial lost interest resulting from his ignorance of a new account. On the other hand, the Banking Code now requires banks to protect customers' interests if their account has become superseded.⁷⁹

The Banking Code and the Business Banking Code contain provisions to facilitate switching accounts. A bank should give the new bank information on standing orders and direct debits within three working days.⁸⁰

1.7 The bank as trustee

A bank's liability under an express trust

Banks commonly act as trustees appointed as such under an express trust set up by a customer. In this event the bank is subject to all the general law concerning powers, duties and liabilities of trustees and this includes the duty to take care of the trust property to the standard of a prudent business person. It has been held, however, that a bank trustee is under a greater duty as it holds itself out as a trustee with a special degree of care and skill.⁸¹ This duty appears to extend only to preserving the fund and not to the achievement of growth.⁸² The Trustee Act 2000 requires trustees to show such skill and care as is reasonable in the circumstances of the case making allowance for their special knowledge, experience or professional status.⁸⁴

Constructive trusts

The constructive trust is a general principle which is not confined to banking law. It arises when a person who has not been appointed to act as a trustee becomes involved in the affairs of the trust and thus becomes liable to the beneficiaries of the trust in the same way as an appointed trustee who acts in breach of trust. It can also arise when there is no formal trust but a fiduciary duty is owed, for instance by a partner to his other partners.

A bank may be liable as constructive trustee if it either:

- (a) receives trust funds with actual or constructive notice that they are trust funds and that the transfer of the funds to the bank constitutes a breach of trust; or
- (b) knowingly assists a trustee of the trust to dishonestly misapply trust funds.⁸⁴

In the banking context, it has been seen that a bank is liable as a debtor to a customer for the balance on his account⁸⁵ and it is not normally liable as trustee unless it has been appointed as such. It might become a constructive trustee if it permits an authorized signatory to withdraw funds from an account in circumstances where it knows that the funds are being misapplied. This was an alternative ground of claim in the *Lipkin Gorman* case.⁸⁶

In *Lipkin Gorman*, the Court of Appeal came to the conclusion that there is no possibility of a bank being liable as a constructive trustee of funds which have been fraudulently misapplied with the knowing assistance of the bank, without it also being liable in simple breach of contract for not conducting a customer's account with sufficient care. On the other hand, it might be liable in breach of contract for conducting the account negligently, in circumstances when it had insufficient knowledge to make it liable as a constructive trustee. In other words, liability to

a customer in breach of contract is more extensive than liability as a constructive trustee. This renders the constructive trust remedy irrelevant to a customer claiming in respect of funds misapplied from his account by an authorized signatory, such as occurred in *Lipkin Gorman*.

However, it could arise that the bank is accused of assisting in the misapplication of funds which in equity belong to a third party (ie to a non-customer). In *Agip (Africa) Ltd v Jackson*,⁸⁷ Z, the chief accountant of A Ltd fraudulently altered the payee's name on payment orders validly signed by a director of A Ltd. One such payment order (payable for over \$500,000) was altered to be payable to B Ltd, which held an account at Lloyds Bank, to which the funds were paid by A Ltd's bank. J was a director of B Ltd and he authorized Lloyds Bank to transfer the money through a network of companies so that eventually little of the money remained under J's control. It was held that a fiduciary relationship existed between Z and A Ltd and that strangers to this trust could be liable in equity if they knowingly received trust property or knowingly assisted in its fraudulent misapplication. In this case, J was held to have so assisted and to have had the requisite degree of knowledge; he was thus fully liable for A Ltd's losses on the transaction. No action was brought against Lloyds Bank but it is clear that in principle a bank could find itself in the same position as did J in this case (ie if it paid away the money with a sufficient level of knowledge). It would then similarly be liable as a constructive trustee for the third party's losses even though the third party is not a customer of the bank.

The question of liability as a constructive trustee on the basis of knowing assistance is clearly of vital importance to banks and can render them liable whenever stolen money is laundered through them. Recent cases have settled that the defendant can only be liable as a constructive trustee if he has acted dishonestly.⁸⁸ Thus previous cases which hinged upon the necessary degree of knowledge⁸⁹ now appear to be of less significance. Dishonesty is judged in both objective and subjective terms. The court asks: was the defendant's conduct dishonest by the ordinary standards of reasonable and honest people, and did the defendant realize that by those standards his conduct was dishonest? Thus it is no defence to say that an action was subjectively regarded as honest if most people would have seen it as dishonest.

The nature of the dishonesty test was also discussed in *Heinl v Jyske Bank (Gibraltar) Ltd*.⁹⁰ The managing director of the defendant bank perpetrated a fraud on his employer to the tune of £71 million. H had provided practical assistance to the fraudster. The issue was whether H did so with the necessary dishonesty. The court found that H might from time to time have had his suspicions but that there was no evidence that he had shut his eyes to the obvious. H would not be liable on the basis that a reasonable man would have drawn the inference that a fraud was going on, it had to be shown that H himself drew this inference. On the other hand, H could not escape liability by saying that he knew what was going on but that he regarded those actions as honest, if the reasonable man would have regarded those actions as dishonest. On the evidence (the hearing lasted 89 days) the court held that H had not acted dishonestly.

The banker-customer relationship

As will become clear,⁹¹ it is easier for a bank to become criminally liable under the money laundering regulations (which only require suspicion) than it is for it to be liable for civil damages (which requires dishonesty). Usually civil liability arises well before criminal liability. Laundering of stolen money is an exception to this.

The circumstances which would render a bank liable as constructive trustee for assisting in a breach of trust may be listed as follows:

- (a) there must have been a breach of some fiduciary duty. This might be a partner's duty to his fellow partners or a company director's duty to his company. It could also be a breach of trust by an appointed trustee. Note there is no requirement that the trustee was acting dishonestly; he might have committed the breach innocently;
- (b) the bank must have assisted in the breach, such as by accepting money into an account and subsequently paying it away;
- (c) the bank must have acted dishonestly.

The House of Lords recently extended the constructive trust principle to a life insurance policy in *Foskett v McKeown*.⁹² A developer of land misappropriated deposits from purchasers and used them to fund some of his premium payments into a £1 million unitized life policy. He soon afterwards committed suicide and thus the policy matured. His family inherited his estate but the defrauded purchasers contended that the appropriate share of the proceeds of the life policy were held by the family on constructive trust for them. The court upheld this, even though it produced a substantial windfall gain for the purchasers.

'Quistclose' trusts

Somewhat similar to the constructive trust is the 'Quistclose' trust, which arises when money is paid to a bank which, to the bank's knowledge, is to be used for a special purpose. In *Barclays Bank v Quistclose Investments Ltd*,⁹³ RR Ltd had a large overdraft with the bank. The company borrowed a sum of money from Q Ltd in order to meet a dividend it had declared. Q Ltd lent this money to RR Ltd on condition that it was used to pay the dividend. The money it lent was placed in a special account opened in RR Ltd's name with the bank. The bank was aware of the condition attached to the loan. RR Ltd went into liquidation before the dividend was paid; the bank claimed that the money in the special account had belonged to RR Ltd and could therefore be set-off against the company's overdraft debt. It was held that, because of the mutual intention of Quistclose and RR Ltd, the money was held on trust primarily to pay the dividend, but if that purpose failed, then secondarily for the benefit of the lender, Q Ltd. Thus the bank was unable to set off the money against the overdrawn account and had to return it to Q Ltd.

Barclays Bank knew of the purpose of the loan in the Quistclose case, but it seems that it would have made no difference to the result if it had no knowledge of the purpose. It is open to a lender to specify in the loan agreement that the funds are being lent for a specified purpose and that they will be held on trust until that purpose has been achieved. Documentation to this effect was upheld in *R v CPE Board*.⁹⁴ Banks, as lenders rather than as holders of deposits, can clearly benefit from the Quistclose trust principle.

The Quistclose trust was analysed in the *Twinsectra v Yardley case*.⁹⁵ It was acknowledged that lenders often stipulate that funds are being lent for a particular purpose and it was stated that this alone does not render the funds subject to a trust. The crucial question is whether the lender and the borrower intended the funds to be at the free disposal of the borrower. When it is agreed that the funds will be used only or exclusively for a particular purpose, such an intention is present and the Quistclose trust will arise.

It was also stated in *Twinsectra* that the Quistclose trust is an entirely orthodox example of the resulting trust (a type of trust long established in English law). The lender pays the money to the borrower, parting with the legal title to the money, but he retains the beneficial interest in the money. This retained beneficial interest in the money is the subject of the resulting trust. The borrower acquires no beneficial interest in the money, and he has a power and a duty to apply the money according to the purpose that the lender specified. If this purpose fails, the borrower must return the money to the lender, ie he must return the legal title to him as the lender always had the beneficial interest.

The analysis in *Twinsectra* is difficult to apply to the scenario where the borrowed funds are deposited with a bank, as happened in the Quistclose case itself. The bank presumably has legal title to the funds in the same way it usually has in the case of a deposit. If the lender retains the beneficial interest in the funds, the bank does not have this interest (it normally would). The bank then must hold the funds on resulting trust for the lender. The important question for banks then is whether they can be said to be holding the funds on resulting trust for the lender in circumstances where they have no idea of the special purpose that the lender has agreed with the borrower. The analysis in the *Twinsectra* case seems to reaffirm the view that the creation of the Quistclose trust is not dependent on the bank's knowledge of the purpose, but that such knowledge (for instance through the fact that the funds are held in a special account) merely lends evidential strength to the existence of the appropriate intention on the parts of the lender and the borrower. The issue is of some significance to banks because they often regard a deposit as security for a loan to the depositor on a separate account. It could even happen that the borrowed money is deposited into the borrower's sole account; the bank seems then obliged to permit withdrawals from the account whilst it has a credit balance, but all the while (unknown to the bank) it is treated in law as holding a substantial amount on resulting trust for a lender of whom it knows nothing.⁹⁶ The risks for banks are

clearly substantial if the law does not require the bank's knowledge that it is holding the funds in trust for such a trust to exist.

1.8 The bank's right to interest and to charges

Interest

A bank may compound interest on a longstanding debt, ie it will add the interest to the capital at intervals so that interest is charged on unpaid interest. This right to compound is an implied contractual right arising from the custom and usage of banks.⁹⁷ The right to compound interest survives the making of demand by the bank and the closure of the overdrawn account.

The Banking Code and the Business Banking Code oblige banks to tell new customers what interest rates apply to their account, on both the credit and debit sides. Banks must also tell new customers the website address and helpline telephone number which can be used to get current information on interest rates, and the other means used to notify changes in rates.⁹⁸

When a bank changes any of its interest rates, it must update its telephone helpline and website within three working days; the old rate must also be shown. Customers affected by the change in interest rates must be personally notified within 30 days. If the account is mainly run through the bank's branches (as opposed to a postal or Internet account) customers can instead be notified of the change by a notice in branches coupled with a notice in the newspapers the bank normally uses. These non-personal notices must appear within three days of the change.⁹⁹

Savings account customers must be provided with an annual summary of the interest rates payable on all the bank's savings accounts. The summary must clearly show which accounts are no longer available. It must also remind customers of the bank's helpline telephone number and website address. The summary should also tell customers what interest rates have applied to their savings account over the previous year and any changes to the Bank of England base rate.¹⁰⁰

The rules on superseded savings accounts have been revised. Both Codes now state that if variable rate savings or deposit accounts with at least £250 in credit suffer a significant fall in rates compared to base rate, the bank must tell the customer that this has happened, tell him about other accounts he can switch to, tell him he can withdraw all his money from the account, and give him a reasonable period of time to switch accounts or withdraw his money with no notice period or charges applying.¹⁰¹

Customers have the right to a full explanation of how the interest on their accounts is worked out.¹⁰² Business customers enjoy further rights in the Business Banking Code connected to checking the accuracy of charges and interest. A query from

a customer should be acknowledged within five days. This should be followed by an explanation of how the amounts were calculated, and the calculations should be shared with the customer. Details of charges and interest should be provided on request; the customer should be told if there is a charge for this service. Any refund that results from the exercise should be credited directly to the customer's account, unless he asks for payment of it in some other way. The Code declares that if the customer has used an agency to check his charges, the bank may not pay the agency's fees.¹⁰³

These provisions in the Codes go far beyond the position in law. It is usually agreed that the bank can set a variable rate at its discretion. It has been held that in setting the rate of interest, a bank must not act dishonestly, for an improper purpose, capriciously or arbitrarily.¹⁰⁴ Where there is an agreement on a given rate of interest, the law would normally uphold this, except in certain circumstances such as the extortionate credit bargain provisions in loans regulated by the Consumer Credit Act.¹⁰⁵ In *Emerald Meats v AIB*,¹⁰⁶ a business customer contended that it had been overcharged interest by its bank because the bank had operated a three-day clearing cycle for cheques paid into an overdrawn account, thus leading to a higher sum of interest being charged to the customer than if the bank had operated the two-day clearing cycle used by most banks. There had been no agreement between bank and customer on the length of the clearing cycle. It was held that in the absence of express agreement on the matter, a customer was deemed to have consented to his bank's own standard terms, except where these terms were extortionate or contrary to all approved banking practice.

The Banking Code requires a bank to tell its customers when an introductory promotional interest rate on a credit card is about to expire.

Charges

It is nowadays common for banks to express the circumstances in which customers may be charged and both Codes require that new customers be given details of the charges for the day-to-day running of the account they have chosen.¹⁰⁷ Where a tariff has been provided, it will form part of the express terms of the contract. Where no tariff has been issued or where the bank seeks to charge for a service which is not listed on the tariff, it could rely on custom and usage.¹⁰⁸ The Supply of Goods and Services Act 1982 provides that where, under a contract for the supply of a service, the price for the service is not expressed, there is an implied term that the party contracting with the supplier will pay a reasonable charge.¹⁰⁹ The Codes state that charges for the day-to-day running of accounts will be available from the bank's telephone helpline and website.¹¹⁰ Charges for other services or products must be notified to the customer before they are provided, or at any time the customer asks.¹¹¹ If a bank wishes to increase any of its charges for the day-to-day running of an account, or to introduce a new charge, it must inform the customer personally at least 30 days in advance.

The Codes require banks to give customers at least 14 days' advance notice of any charges that will be deducted in respect of standard account services provided on current or savings accounts.¹¹² The Guidance Notes to the Code¹¹³ state that charges that are debited at the time a service is provided (such as that for stopping a cheque) need not be notified 14 days in advance. The Guidance Notes also say that the 14-day period runs from the day the notification is posted (or e-mailed), not from the day it is received.

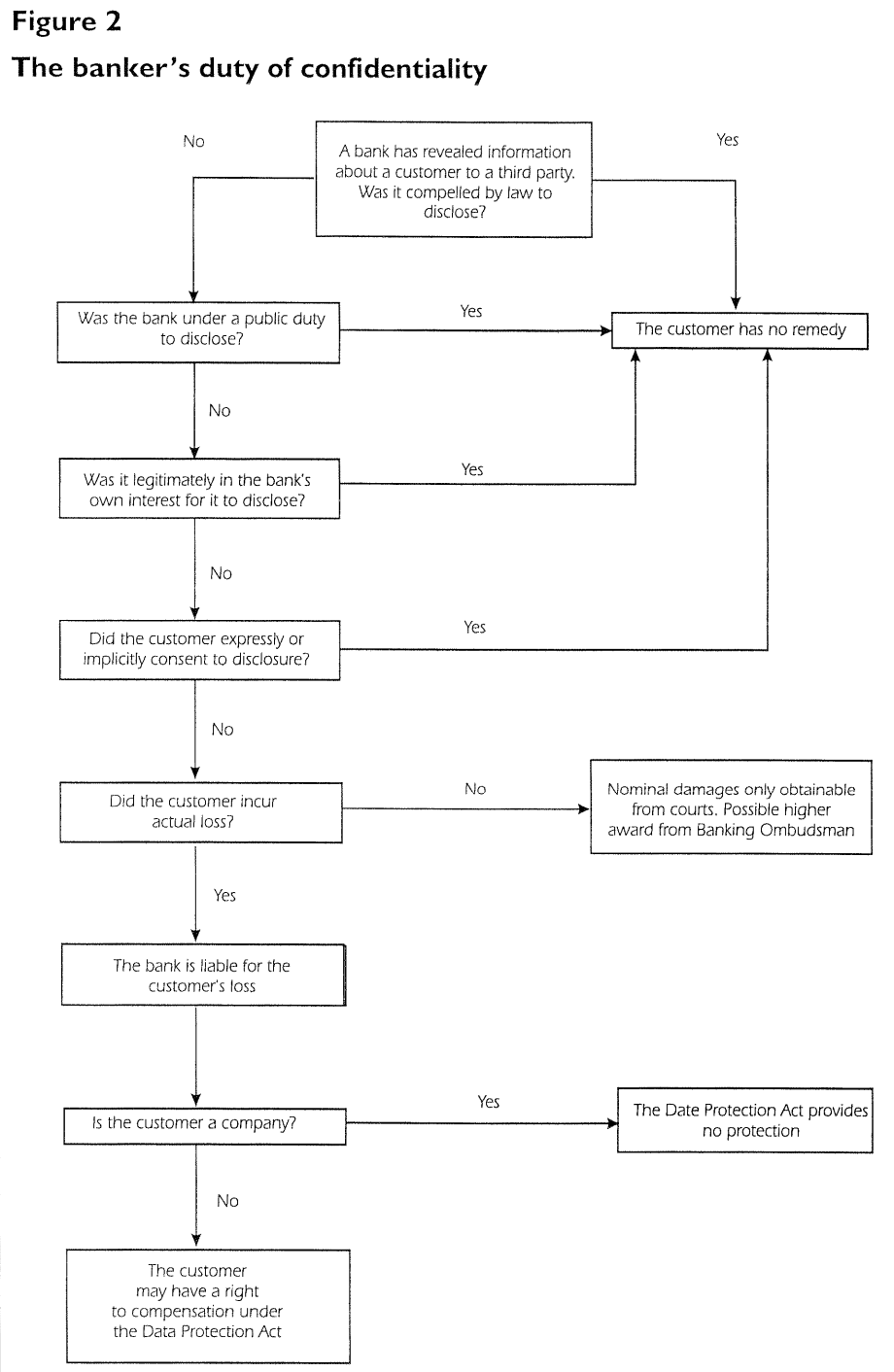
Banks should give customers details of any charges for using an automated teller machine (ATM or cash machine) when the card is issued.¹¹⁴ Cardholders must not be charged more than once for any transaction at an ATM.¹¹⁵ The ATM must inform cash card users in advance of their transaction what charge will be made and who is making the charge.¹¹⁶ Double charges are permitted when another type of card is used to obtain cash, but again the ATM must tell the user about any charges before the transaction.¹¹⁷ All ATM charges must be shown on the cardholder's statement of account.¹¹⁸ The statement must also show the charge applied to foreign currency card transactions.

Neither the Codes nor the law limit the amount of any charge which a bank may wish to make, although an excessively high charge might be considered to offend the Codes' general requirement that banks' dealings with customers be fair and reasonable. The Codes follow the spirit of the Jack Report which supported the notion of banks being required to give information to customers who can then shop around for the best deal, rather than directly controlling the behaviour of banks.¹¹⁹

1.9 The bank's duty of confidentiality

It is an implied term of the banker-customer contract that the bank owes a duty not to divulge information about its customer to third parties. In *Tournier v National Provincial and Union Bank of England*,¹²⁰ T had an overdrawn account with the bank. The branch manager spoke to T's employers in order to find out T's home address. In the process the manager revealed that T had defaulted on his obligation to the bank and was suspected of being a heavy gambler. T was dismissed from his job and successfully sued for his losses.

It was stated in *Tournier* that the duty of secrecy commences when the banker-customer relationship (presumably the contract) is formed. The duty extends to information which the bank has obtained from other sources whilst acting as banker to the customer, eg information about its customer which it obtained from a reference on him provided by another bank.¹²¹ It was also stated that the duty does not cease on termination of the banker-customer contract. Once the contract has been terminated, however, the bank is free to divulge information that came from external sources.



The banker-customer relationship

Liability for breach of the duty of confidentiality will be based upon general principles of liability for breach of contract and therefore the customer will usually have to prove actual loss in order to obtain more than nominal damages. In both the *Sunderland* and *Libyan Arab Foreign Bank* cases,¹²² the court considered there had been no such loss and that only nominal damages would be awarded even if the plaintiff established a breach of the duty. It would appear therefore that in the majority of situations where an unjustified disclosure occurs there will be no significant damages awarded against the bank. This is not always the case, however. In *Jackson v Royal Bank of Scotland*¹²³, the claimants had been supplying goods to another firm which also happened to be customers of the same bank. The bank in error disclosed documents that revealed to the other firm the high level of profits that the claimants were making on the transactions between them. The other firm thereupon declined to purchase further goods from the claimants. The House of Lords held that the loss of profitable repeat orders was within the contemplation of the bank and the claimants and lost profits over a four year period was not too remote.

The *Tournier* case also lays down four exceptions to the duty of secrecy:

- (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 disclosure occurs with the express or implied consent of the customer.

Figure 2 illustrates a banker's duty of confidentiality.

Disclosure under compulsion of law

The law in this area has been affected by the measures introduced after 11 September 2001. Obligations to report suspicions to the National Criminal Intelligence Service (NCIS) no longer vary according to which type of crime is suspected. Accordingly, the law is described in generic terms, and as amended by the Proceeds of Crime Act 2002.

It is helpful to subdivide this exception into four parts.

- (a) Where the compulsion takes the form of a court order to disclose. Examples of this include (amongst others):
 - (i) an order to permit the inspection of entries in a banker's book¹²⁴ under section 7 of the Bankers' Books Evidence Act 1879 on the application of a party to any legal proceeding;
 - (ii) an order under section 9 of the Police and Criminal Evidence Act 1984 to assist police in the investigation of a criminal offence;

- (iii) discovery orders made in aid of a party seeking a Mareva injunction;
 - (iv) an order for obtaining evidence in a foreign trial under the Evidence (Proceedings in Other Jurisdictions) Act 1975;
 - (v) a writ of subpoena or a witness order compelling a bank employee to give evidence in a civil or criminal trial.
- (b) Where the compulsion takes the form of a valid request from an official and no court order is necessary. Examples include:
- (i) information required by the Inland Revenue under the Taxes Management Act 1970 and the Income and Corporation Taxes Act 1988, eg concerning interest credited to customers' accounts;
 - (ii) information required about a company by the Department of Trade and Industry acting under powers granted in the Companies Act 1985;
 - (iii) under the Criminal Justice Act 1987, the Director of the Serious Fraud Office may require a person to attend to answer questions.
- (c) Where there is no direct compulsion to divulge information about a customer but the bank is in danger of committing an offence and immunity from prosecution can be obtained by informing the authorities, and there is specific statutory protection from an action for breach of confidentiality if information is divulged.

Under section 328 of the Proceeds of Crime Act 2002, it is an offence for someone to enter into or become concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person. Property is criminal property if it is the benefit from criminal conduct (or if it represents such benefit) and the offender knows or suspects it is or represents such a benefit. Criminal conduct includes UK offences and actions which would be an offence in the UK if committed in the UK. A defence is available if the person makes an authorized disclosure and (if the disclosure is made before he does the act mentioned above) he has the appropriate consent. A defence is also available if he intended to make such a disclosure but had a reasonable excuse for not doing so.

This section does not necessarily involve the movement of money. The mere holding of criminally sourced funds in a dormant account would constitute an offence under this section, ie facilitating the retention of funds. It is considered that funds obtained from tax evasion would be within the scope of this section. Note that for an offence to be committed the person must know or suspect the facts that give rise to the offence.

Under section 337 of the Proceeds of Crime Act 2002, statutory protection from an action by the customer for breach of confidentiality and protection from any breach of the Data Protection Act is available to the bank if three conditions are satisfied. The first condition is that the information or other

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matter disclosed came to the person making the disclosure in the course of his trade, profession, business or employment. The second condition is that the information or other matter causes the discloser to know or suspect, or gives him reasonable grounds for knowing or suspecting, that another person is engaged in money laundering. The third condition is that the disclosure is made as soon as is practicable after the information comes to the discloser.

- (d) Where the law compels a bank to disclose information and an offence is committed if it does not do so.

Under section 330 of the Proceeds of Crime Act 2002, it is an offence to fail to report a person's engagement in any kind of illegal money laundering (and money laundering is defined to include mere facilitating of the retention of criminal property – no movement of funds is necessary) when the information is acquired in the course of a business, if the defendant has knowledge or suspicion, or reasonable grounds for knowledge or suspicion. No offence is committed if the information is disclosed as soon as is reasonably practicable after it came to the defendant's attention. No offence is committed if there was a reasonable excuse for not disclosing. Legal advisers enjoy a defence if the matter arose in privileged circumstances. Bank staff actually make the disclosure to a person in their bank who is nominated to receive disclosures. That nominated person is in turn bound to make a disclosure to the NCIS. The same protection from breach of any non-disclosure rule is provided by section 337.

Other money laundering provisions include the following:

- (i) Under section 333, it is an offence to tip off a person that he knows or suspects that a disclosure to NCIS has been made, if the tip off is likely to prejudice any investigation which might be conducted following the disclosure. It is a defence that the person tipping-off did not know that it would prejudice the investigation.
- (ii) The Money Laundering Regulations 1993¹²⁵ make it an offence for banks not to set up procedures for identification, record-keeping, internal reporting, internal control and communication. They must also train staff to be familiar with the procedures and with the law on money laundering and to enable them to detect money laundering operations.
- (iii) The FSA is empowered to issue rules and lay down guidance on the prevention of money laundering. Such rules and guidance do not have the status of criminal law but breach of them can lead to the disciplining of firms and individuals. An example of FSA guidance has been to require firms to improve their 'know your customer' procedures.
- (iv) The Anti Terrorism Crime and Security Act 2001 contains powers enabling forfeiture and freezing of funds in certain named accounts, and powers to enable judges to make account monitoring orders (these can last up to 90 days).

There is an interesting interrelationship between the money laundering law and the constructive trust. When a financial fraud has taken place, the money laundering law can render a bank liable for criminal penalties when it has assisted a money launderer. Exactly the same facts can render a bank liable in civil law as constructive trustee to the victim of the fraud. For criminal liability to exist, the test is whether the bank was suspicious of the customer (or had reasonable grounds to be suspicious). For civil liability, the test is whether the bank acted dishonestly (a stronger test). It is unusual for English law to permit a situation where behaviour gives rise to criminal liability but is insufficiently culpable to give rise to civil liability. Note that this comparison only arises when stolen money is laundered. When drugs or terrorist funds are laundered, a bank cannot be sued as constructive trustee because the funds are not stolen and there is no victim who can sue the bank.

A bank can find itself in a difficult position when it becomes suspicious about a customer's deposit. The bank will notify NCIS. If NCIS does not sanction payment out of the account, and the customer seeks to withdraw the deposit and the bank refuses, the bank can be criminally liable for tipping off the customer if it explains why it is refusing to pay. It can also be sued by its customer for refusing to pay. On the other hand if it pays out, it can be liable as a constructive trustee to the victim of any fraud which may have taken place (as explained, this is not a problem if the funds come from drugs activities or otherwise have not been stolen).

This situation arose in *Bank of Scotland v A Ltd*.¹²⁶ The court set out what a bank should do in these circumstances. It said that the bank should try to agree with the relevant authority, in this case the Serious Fraud Office (SFO), what information can be revealed to the customer. If agreement cannot be reached, the bank should seek an interim declaration from the court, making the SFO a defendant to the case. The SFO would thus have an opportunity to make its case to the court. The customer would not be a party to this case and would not be aware of it. The declaration would clarify what the bank could say to its customer. If the bank decides not to pay its customer and the customer sues, the bank can defend the claim using such information as the interim declaration permits. The court said it was almost inconceivable that a bank which followed this procedure would be liable for tipping off its customer. In *Bank of Scotland v A Ltd*, the bank had gone to court for a freezing order on its customer's account without the customer being represented at the hearing. The Court of Appeal disapproved of this course of action.

In *Tayeb v HSBC Bank*¹²⁷, the defendant bank became concerned about a large deposit that it had credited to the claimant's account following a CHAPS transfer in. The bank was not satisfied with the claimant's explanation for the source of the funds and it then transferred the money back to the paying bank and immediately closed the account. No money laundering report was made. It subsequently became clear that the funds were entirely legitimate but the claimant then faced difficulty obtaining payment again as he had released the goods on the initial payment being credited to his account. It was held that a bank had an implied duty to accept CHAPS transfers for a customer if the customer holds an account into which it is normally possible to

make a CHAPS transfer and the transfer is in compliance with CHAPS rules and the terms of the account. Money laundering law did not provide the bank with a reason to decline such a transfer. The bank would safely comply with money laundering law if it reported its suspicions as soon as it received the funds. It was also stated in *Tayeb* that a bank had no grounds to fear an action in constructive trust if it merely accepts a CHAPS transfer into a customer's account. If the bank is concerned that the funds may be stolen, it can refuse to let the customer withdraw against the funds by withholding authentication of the CHAPS transfer, or it can inform NCIS and discuss what action should be taken if the customer tries to withdraw. In *Tayeb*, a decision to return suspected funds was described as a course which would be most unlikely to protect the rightful beneficiary of the funds and which might well involve tipping off those criminally responsible.

Duty to the public to disclose

This has not been a well used exception to the duty of secrecy and its parameters are unclear. It has been suggested that it might apply to permit disclosure in wartime when a customer has dealings with the enemy.¹²⁸ In *Libyan Arab Foreign Bank v Bankers Trust*¹²⁹ the court neither confirmed nor denied that the exception applied where immediately prior to the making of a US presidential order freezing Libyan assets in the hands of US persons in 1986, the US authorities requested and obtained information about Libyan government accounts with the defendant bank.

In *Pharaon v BCCI*,¹³⁰ the court considered that the exception extended to the divulgence of documents to legal proceedings in the USA if this was reasonably necessary to uncover potential fraud.

Disclosure in the bank's interest

This exception was successfully invoked by a bank in *Sunderland v Barclays Bank*.¹³¹ S telephoned her bank to complain about its dishonour of her cheques. The bank was justified in dishonouring the cheques as there were insufficient funds but it was also concerned about S's gambling. S's husband took the telephone from S to add his views whereupon the bank informed him of his wife's gambling. The court held the bank was entitled to disclose in its own interest and expressed the view that it would also be justified under this exception for disclosure in the common situation of it suing a customer for the balance of an overdrawn account. This is necessary as legal action in these circumstances will reveal to the public the balance on the customer's account. For similar reasons, a bank may claim from a guarantor of the customer's debt without breaching the duty of confidentiality, although if the guarantee is limited and the debt exceeds the limit the guarantor should only be informed he is fully liable up to his limit. Where the loan agreement is regulated

by the Consumer Credit Act 1974, the guarantor has a statutory right to know the state of the bank's account with the customer.¹³²

The Banking Code declares that information about personal debts owed to a bank may be disclosed to credit reference agencies where the loan is in arrears and the amount is not in dispute and the customer has not made proposals satisfactory to the bank for repayment following formal demand and the customer has been given 28 days' notice of the bank's intention to disclose.¹³³ It appears that any such disclosure could only be justified under this exception to the duty of secrecy.

Both the Banking Code and the Business Banking Code reiterate the common law duty of confidentiality and declare that banks will not attempt to use the third exception to justify the disclosure of information for marketing purposes, including to companies in the same group.¹³⁴ They further provide that new customers will have the opportunity to give instructions that they do not wish to receive any marketing approaches and that all customers will be reminded of this right at least every three years.¹³⁵

Disclosure with the customer's consent

In *Tournier* it was stated that if a customer gives his bank as a reference, there is implied consent to disclosure of information. The court in *Sunderland* also considered that the disclosure in that case was justified on the basis of implied consent as well as being in the bank's interest.

The traditional system of bankers' opinions operates whereby one bank may make a status enquiry to another bank concerning the credit standing of a customer of the second bank.¹³⁶ In some cases the customer will not be aware that the status enquiry has been made nor even that a system for giving information in this way exists. It is difficult to argue that a customer impliedly consents to something of which he is not aware. This traditional practice has yielded to a modern system where a customer's consent must be sought before a banker's reference is given.¹³⁷

1.10 The Data Protection Act

The Data Protection Act 1998 was introduced in order to comply with the European Union Data Protection Directive (95/46/EC). Data processors are obliged to notify the Data Protection Registry. Data processors are obliged to process data concerning individuals fairly and lawfully and for purposes they have notified to the authorities. Data processing is only legitimate where one of the following criteria applies:

- (a) where the individual has consented;
- (b) where it is necessary for the performance of a contract with the individual;

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- (c) where it is required under a legal obligation;
- (d) where it is necessary to protect the vital interests of the individual or to carry out public functions;
- (e) where it is necessary to pursue the legitimate interests of the business (unless prejudicial to the individual).

Appropriate measures must be taken to prevent the unlawful or unauthorized processing or disclosure of data.

Individual data subjects have the right to a description of any data concerning them, a description of the purposes for which it is being processed, a description of any potential recipients of the data and information as to its source. Where the data is processed automatically and is likely to be the sole basis for a decision significantly affecting the data subject, he can request the logic involved in that decision. In this way, a lender may be obliged to give reasons for refusing a loan application which was processed by computer. The data subject also has the right to prevent processing which will cause damage and distress and a specific right to prevent processing for the purposes of direct marketing. The courts are able to award compensation to data subjects following any breach of the Act.

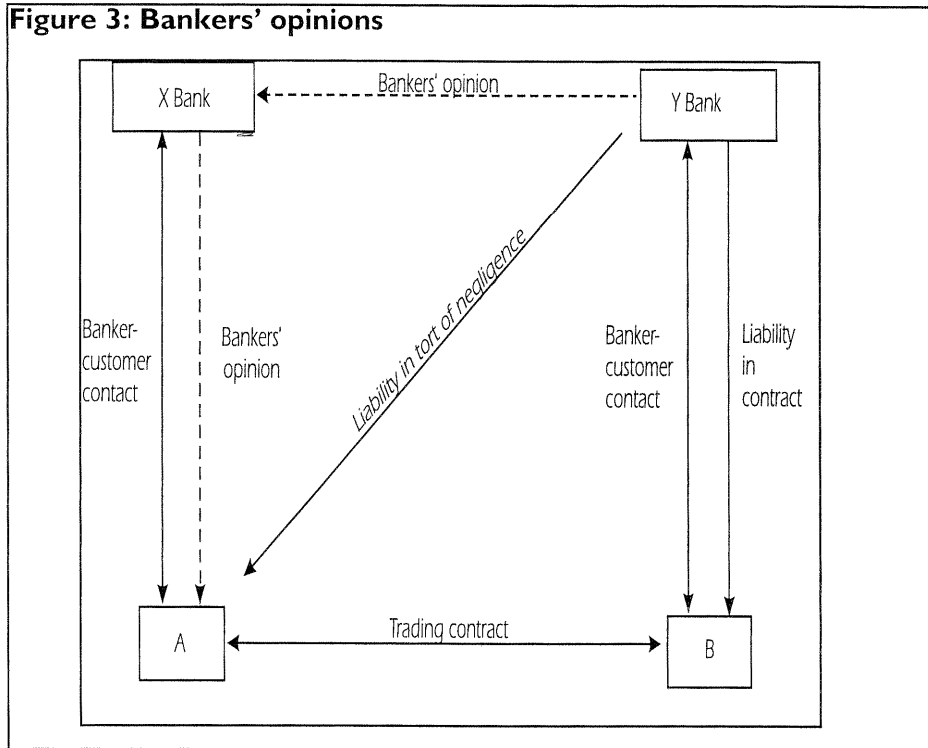
The Act extends coverage to manual filing systems where information on an individual is readily accessible. Following the judgment in *Durrant v FSA*^{137a}, the Information Commissioner applies the 'temp test' to determine whether information is readily available, ie would an office temp be able to extract specific information about an individual.

A bank's common law duty of confidentiality (ie the rule of *Tournier's case*) applies only to the disclosure by a bank to a third party of information known by the bank about both its personal and corporate customers. In contrast, the Data Protection Act regulates the obtaining by and use within a bank, as well as the disclosure to third parties, of information about non-corporate customers only.

An interesting result is produced by a combined effect of the data protection principles and the rule in *Tournier*. A bank must process personal information fairly and lawfully. This presumably means it must not breach its duty of confidentiality to its customer. If a bank uses computers to pass personal information about customers to another company in its group, this would be an unlawful processing of information and thus a criminal offence under the Data Protection Act.

1.11 Banker's opinions

A banker's opinion is a reference which a bank provides about its customer. The traditional practice is that the reference is requested by and given to another bank who then pass it on to the ultimate recipient (a customer of the requesting bank). This customer of course has no contractual relationship with the bank giving the



reference unless he is charged by it for the service. Figure 3 illustrates the legal relationships involved when a reference is given. In the diagram, Y Bank is providing the reference on its customer (B) after a request is made by A, through his bank (X).

A banker must give a reference on the basis of facts actually known to him at the time; he is not obliged to make enquiries to ascertain new facts or other people's opinions.¹³⁸ He is required to conform to the standard of skill and competence and diligence which is generally shown by persons who carry on the business of providing references of that kind.¹³⁹ The bank giving the reference is concerned about potential liability to two different parties:

- (a) the ultimate recipient of the reference; and
- (b) its own customer.

Liability to the ultimate recipient

This may arise because the bank has given an unduly favourable reference about its customer, and the recipient, relying on this, extends credit to the customer who defaults. Liability may occur in fraudulent misrepresentation and in negligence.

Fraudulent misrepresentation

Liability under this head requires that the misrepresentation by the bank was made knowingly or recklessly, that the bank intended to deceive and that it intended that it should be acted upon by someone and that someone did act upon it and as a result suffered loss.¹⁴⁰ This will always be difficult to prove in practice. In any case, section 6 of the Statute of Frauds Amendment Act 1828 provides that no liability arises from a fraudulent misrepresentation as to someone's credit standing unless the statement is in writing and signed by the maker. By the simple expedient of not signing opinions, therefore, banks are able to exclude any possibility of liability under this head. If the statement is signed by an employee of the bank acting within his authority, liability is not excluded.¹⁴¹

Negligence

Liability under this head was the issue in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*,¹⁴² where a negligent banker's opinion was given, causing loss to the recipient.

The court opened up the possibility of liability for negligence in these circumstances, but it had to be established that the bank, when giving its opinion, was willing to accept responsibility for its statement. The bank had followed the usual practice of incorporating a disclaimer of liability in its opinion, which made it clear it was not prepared to assume responsibility for its statement.

The law would thus be clear were it not for the subsequent enactment of the Unfair Contract Terms Act 1977, which renders ineffective any attempt to exclude liability for negligence unless the exclusion can be justified as reasonable.¹⁴³ A bank's liability therefore now depends on whether its exclusion of liability is deemed to be reasonable. Reasonableness hinges partly on the relative economic power of the parties, thus a disclaimer might be effective in a reference given to a large company but ineffective when given to a small business. The Unfair Terms in Consumer Contract Regulations may invalidate a disclaimer in a reference given to a consumer (but not one given to a business).

Liability to the customer

There are two areas of potential liability here. One is for breach of secrecy and the second is for damaging the customer by giving an unduly poor reference. It is now standard practice for a bank to seek and obtain the express consent of its customer before it provides an opinion. The Banking Code and the Business Banking Code both require express consent.¹⁴⁴

The banker's duty of secrecy to its customer has been discussed in 1.9 above. The giving of information in the form of a banker's opinion has to come within one of

the exceptions in *Tournier*, if it is not to amount to a breach of contract. The only exception which can apply is that of the customer's consent, express or implied. Where the customer is unaware that the opinion is being given or that the system of status enquiries exists, it cannot be argued that he impliedly consents.¹⁴⁵ However, assuming there is a breach of contract, the customer will have to establish loss if he is to be entitled to more than nominal damages.

In order to sue his bank for libel, the customer would have to establish that his bank gave an unduly unfavourable reference which reduced his standing in the eyes of right-thinking people. It appears, however, that the bank can claim privileged statement as a defence if it gave the opinion bona fide.¹⁴⁶ In order to sue his bank for breach of contract, the customer could rely on the implied term brought in by the Supply of Goods and Services Act 1982 that the bank should carry out its service with a reasonable degree of care and skill.¹⁴⁷

1.12 Repayment on demand and limitation

Where a bank permits a customer to borrow by overdrawing his current account, the bank is entitled to require repayment on demand. Where, however, the bank has expressed that the facility is available for a specific time period then the bank will not be able to demand repayment before this period has expired. There may be conflicting provisions in the facility letter, so that in one place it says that the overdraft is repayable on demand and in another that it is the bank's present intention to keep the facility available for a certain period. On these facts in *Lampert v Lloyds Bank*,¹⁴⁸ the repayment on demand clause was held to be paramount.

The Limitation Act 1980 statute-bars legal actions in simple contract when the cause of action arose more than six years previously. When the debt is secured by a legal mortgage, the limitation period extends to twelve years. In the case of a bank overdraft on a current account, the cause of action arises in respect of each debit entry on the account and time runs from the date of each debit.¹⁴⁹ If the account is active, however, the limitation period runs from the date of the last movement on the account.¹⁵⁰ Thus there is a greater limitation risk for banks in respect of dormant overdrawn accounts.

A customer who wishes to sue for recovery of a credit balance owed to him by a bank can do so within six years of his demand for repayment from the bank. In *National Bank of Commerce v National Westminster Bank*,¹⁵¹ the defendant bank made some debit entries on the plaintiff bank's account with them between 1978 and 1980. These were disputed by the plaintiff bank in 1988 and the legal action began in the same year. It was held that the claim was not statute-barred since, irrespective of the debiting of the accounts at an earlier stage, the demand was not made by the customer until 1988 and the six years started running then.

Once a customer has made a demand, however, the six years will start to run and he cannot set a fresh six years running by simply repeating the same demand.¹⁵² Depending on the phrasing of the second demand, it may be possible to imply a withdrawal of the first demand so that a fresh six years does start to run.

1.13 Appropriation of payments

Appropriation of payments may arise in two distinct situations:

- (a) where a customer has two or more accounts with the same bank and he (for example) pays money in. The money will be appropriated to one of the accounts;
- (b) where a customer has one account and he pays money into it as well as drawing cheques on it. Appropriation will settle the issue of which payment in relates to which payment out.

In the vast majority of situations it will not matter in the least what appropriation takes place. Where there are two or more accounts, the bank normally enjoys a right to combine the accounts, and the only relevant issue is the combined balance. In the case of a single account, the relevant matter will normally be the bottom-line balance, and the issue of which debits relate to which credits will be quite academic.

There are a number of situations where the appropriation is crucial, however. For instance, where there are two accounts, one of which is a wages account and entitles the bank to claim as a preferential creditor, the bank will be keen that a payment in is appropriated to the general account. This will reduce the bank's unsecured claim without reducing its preferential claim.

In the case of a single account, there are a number of situations where the appropriation that takes place will have an impact.

First, a statement of the general law on appropriation. When a customer pays money in, he has the first right to appropriate the payment.¹⁵³ It follows from this that a customer with an overdrawn account is entitled to pay in a cheque and appropriate it to a cheque he has drawn, and his bank will not be able to use the credit to reduce the overdraft.

If the customer does not appropriate, the bank may make an appropriation. In the case of appropriating between two accounts, the bank will normally make an appropriation simply because it has to make a credit entry somewhere.

If, in the single account case, the bank also does not appropriate, the rule in Clayton's case¹⁵⁴ is used to determine the issue. This rule essentially says that the first payment in relates to the first payment out. In Clayton's case, Devaynes was a

banking partnership. One of the partners, D, died. The surviving partners continued the business for a year, at which point it became bankrupt. D's personal estate, however, was solvent. Clayton had an account with the partnership which had always been in credit. Clayton was obviously keen to claim against the estate of D. As a matter of partnership law, the estate of a deceased partner is jointly liable for debts existing at the date of death but not for subsequent debts. The credit balance on Clayton's account at the date of D's death was £1,713. Subsequent to the death, Clayton had paid in and withdrawn sums exceeding £1,713, and the ultimate credit balance was greater than £1,713. Neither Clayton nor the banking partnership had expressed any appropriation when debits and credits occurred.

It was held that D's estate was not liable at all. This was because each debit was deemed to have been set against the earliest available credit. Thus on an active account, the credit items which predated D's death were extinguished by debits, and the ultimate credit balance was represented by the most recent credits, all of which postdated D's death, and for which D's estate was therefore not liable. It can help to understand the rule if one thinks of its effect as simply moving forward the date of the debt, which is always represented by the most recent items on the relevant side of the account. Where the date of the debt does not matter, which will be the usual case, Clayton's case will be quite irrelevant. Where a partner has died, however, and his estate is therefore not liable for debts incurred after his death, the date of the debt will be crucial.

Other examples of the operation of Clayton's case

In *Deeley v Lloyds Bank*,¹⁵⁵ the bank had taken a second mortgage from a customer to secure an overdrawn current account. The bank subsequently received notice from D that she had taken a third mortgage over the same property. The current account continued to be operated, and by the time the bank sought to enforce its mortgage, the total credits on the account had exceeded the debit balance as at the date it received notice of the third mortgage. The bank's mortgage covered the later debits since it contained a continuing security clause, but the sale of the property did not achieve sufficient funds to repay D. The issue therefore was, which had priority? It was held that D had priority, because the payments into the running account had extinguished the debt owed at the time notice of third mortgage was given and the ultimate debt was represented by the latest debits, all of which arose after the notice was received. This was so even though the account had never moved into credit. In other words there is a notional repayment of the earlier debt.

The operation of the rule can also prejudice a bank's claim when a partner dies or retires and the bank continues the partnership account, and later it wishes to claim against the deceased or retired partner. Once again, even though the account has remained in debit, there is a notional repayment of the debt that existed at the relevant time. This situation is, of course, the reverse of the facts in Clayton's case itself. Instead of a bankrupt bank, there is a bankrupt customer.

The rule can improve a bank's claim in some circumstances where it is beneficial for the bank that the date of the debt is moved forward. These situations are explained in 1.6.6 below,¹⁵⁶ and 2.7 below.¹⁵⁷ Where, however, the bank wishes to prevent the date of the debt moving forward in time, it may freeze the debt in time by simply ruling-off the account and continuing the account by starting with a nil balance. It is therefore standard practice to rule-off a partnership account when a partner retires or dies, or a secured account when notice of second mortgage is received.

It is also possible for a bank to insert a clause in a security document, to the effect that there will be deemed to be a ruling-off of the account when the relevant event occurs. For example, in a mortgage form, a clause may say that if notice of second mortgage is received, there will then occur an automatic ruling-off of the account. Such a clause has not been tested in the courts, however. A somewhat similar clause in a guarantee form has been upheld.¹⁵⁸

Limitations to the operation of the rule

- (1) The rule only applies to a running account.¹⁵⁹
- (2) The rule does not apply when a customer mixes his personal funds and funds he holds on trust in the same account. In this event the rule in *Re Hallett's Estate*¹⁶⁰ applies. The effect is that the personal funds are deemed to be withdrawn first.

1.14 Combination of accounts and set-off

A banker's right to combine accounts

Where a customer has two different accounts with the same bank, the bank has a common law right to combine them without giving notice to the customer. This is so even if the accounts are with different branches of the bank.¹⁶¹ To give an example, if the credit balance on a customer's account at branch A is £100 and his debit balance at branch B amounts to £90, branch A can refuse payment of more than £10. The first the customer need know is that his cheque has been dishonoured.

On the other hand, a customer has no such right to instantly combine accounts. Therefore a customer who has a credit balance at branch A of a bank and nil balance at branch B, has no right to demand payment at branch B.

If there are three or more accounts, the bank is free to combine any accounts of its choice and to leave others intact. For example, where an employer customer has three accounts, one in credit, one overdrawn wages account and one overdrawn general account, the bank will choose to combine the credit account and the overdrawn general account, leaving the overdrawn wages account intact, as this enables the bank to claim as a preferential creditor.

Limitations on the bank's right to combine accounts prior to insolvency

- (1) Where the debit balance account is not yet a debt due and payable by the customer. Therefore a loan account which is repayable at a future date cannot be combined. Nor may a contingent liability, such as a customer's potential liability as a guarantor.¹⁶²
- (2) Where the debit balance is on a loan account which is presently due and payable, there will still be no right to combine instantly due to an implied agreement to keep the accounts separate.¹⁶³ The rationale behind this is that a customer in these circumstances should not have his cheques dishonoured without any warning. This implied agreement does not extend to the case of an overdrawn current account which has been frozen.¹⁶⁴ In the usual case the bank will still be able to combine after giving a short period of notice. This may of course defeat the object of the combination if, during the notice period, the customer quickly withdraws the balance of the account in credit. It has also been suggested that the customer has the right to withdraw, at any time, the credit balance as at the date he received notice to combine.¹⁶⁵
- (3) Any express agreement not to combine the accounts will negate the bank's right to do so.
- (4) Where one account represents funds held on trust by the customer. If the bank is aware that the funds are held on trust, it is unable to combine. This principle extends to the case where the funds have been lent to the customer for a special purpose – the Quistclose trust.¹⁶⁶

The equitable right of set-off

Two cases have dealt with this issue: *Bhogal v Punjab National Bank*¹⁶⁷ and *Uttamchandani v Central Bank of India*.¹⁶⁸ They had similar facts which essentially were as follows. The bank holds two accounts, one in the name of X which is in credit and one in the name of Y which is overdrawn. The bank believes that both accounts are nominee accounts operated on behalf of a third party, Z. The bank therefore seeks to combine X's and Y's accounts and refuses to honour X's cheques, whereupon X sues. In both cases the bank lost. The relevant general principles are:

- (a) a bank has a duty to pay within a reasonable time all cheques properly drawn by its customer; and
- (b) an equitable set-off is available only if there is clear and indisputable evidence of the nominee ship. An arguable case of nominee ship is insufficient as whilst the case is pending trial, the customer is denied his funds.

The banks in these cases could have protected their positions by having X sign a letter of set-off expressly permitting his account to be used as security for any debt owed to the bank by Y or Z.

Set-off following insolvency

All of the above comments are based on the assumption that neither the customer nor the bank has become subject to the insolvency regime. If one or other is insolvent then the following principles apply.

- (1) At the relevant time there will be a statutory set-off under the provisions in section 323 of the Insolvency Act 1986 (individuals) or rule 4.90 of the Insolvency Rules 1986 (companies).
- (2) The statutory set-off is automatic and unexcludable so any express or implied agreement not to set-off or combine will become void.¹⁶⁹
- (3) Any agreement to extend the right of set-off will also become void; the assets of the debtor must be distributed in accordance with insolvency law.¹⁷⁰
- (4) Debts which were not yet due and payable become due and payable on the onset of insolvency and are therefore subject to statutory set-off. Contingent debts are also included; the amount can be estimated if the contingency has not occurred by the time the debtor's account is taken.¹⁷¹
- (5) Where debits on a customer's account take place after the bank had notice of a petition for bankruptcy of an individual customer, or a petition for winding-up or the summoning of a meeting of creditors of a company customer, then these debits will not be set-off. Equally, where a customer has notice of a petition to wind-up the bank or of the summoning of a meeting of its creditors, any subsequent credits into his account will not be set-off when he proves against the bank's liquidator.
- (6) Where the customer has three or more accounts, the statutory set-off will take place to effectively combine all the accounts. If there is one credit balance account and two debit balance accounts, one of which is a wages account, the credit balance will be allocated rateably to the two debit balances in proportion to their respective sizes.¹⁷² For example, if account No. 1 has a credit balance of £100, account No. 2 a debit balance of £100 and the wages account a debit balance of £100, statutory set-off will apply so that the bank will claim in the insolvency of the customer for £100. It will claim £50 as a preferential creditor and £50 as an unsecured creditor. If the wages account balance had been £300, the bank would claim a total of £300, £225 as a preferential creditor and £75 as an unsecured creditor.
- (7) Part VII of the Companies Act 1989 sets up a new set of insolvency rules which apply when a member of a 'recognized investment exchange', such as the Stock Exchange, becomes insolvent. The relevant exchanges are obliged to have default rules dealing with the insolvency of any member. In a complete reversal of the British Eagle principle (point (3) above) these default rules then take precedence over the general insolvency law. The effect is that when a member becomes insolvent, the first stage is a set-off exercise involving that member's debts to and credits from other members of the exchange. Any

credit balance resulting can be used for the insolvent member's liabilities to the outside world. Any debit balance resulting is provable by the liquidator. There are also provisions conferring special rights on an exchange holding a charge over a member's assets.

1.15 The banker's lien

A lien generally is a type of security which carries the right to retain property belonging to another pending satisfaction of a debt owed by the owner of the property. For example, when goods are put in for repair, the repairer has a lien over the goods until the repair is paid for. The goods remain the property of the original owner but the repairer has rights over them. In *R v Turner*,¹⁷³ it was held that the owner of a car who removed it from the repairer's workshop without paying the bill and without permission, could be guilty of theft of his own car. The repairer's lien does not carry a power of sale at common law, although a statutory power can arise under the Torts (Interference with Goods) Act 1977.

A pledge is a different type of security which is more akin to a mortgage. For example, a pawnbroker has a pledge over goods deposited with him. The pledge carries a power of sale of the goods, which in the pawnbroking example will be deferred pending possible repayment of the debt.

The banker's lien is a special type of lien which is equivalent to an implied pledge. It therefore carries a power of sale.¹⁷⁴

Property which may be the subject of the banker's lien

In *Brandao v Barnett* it was stated that the lien could apply to 'securities' in the possession of a bank. Other cases restrict this to 'paper securities'. Share certificates are included¹⁷⁵ as, it seems, is an insurance policy.¹⁷⁶ A dearth of modern cases and a degree of contradiction in the older cases make it somewhat uncertain what other assets are capable of being subject to the lien. It would seem that government stock, Eurobonds, commercial paper and certificates of deposit would qualify. It seems doubtful that the lien can apply to documents of title to land.

Limitations on the operation of the banker's lien

- (1) Cheques and bills paid into the bank for collection. The bank may in fact have a lien over cheques paid into an overdrawn account but it is also under a contractual duty to collect the cheque and credit the proceeds to the customer's account. In practice this hardly matters as the proceeds of the cheque will reduce the overdrawn balance. If there are multiple accounts, the

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bank usually has rights both to appropriate the cheque to a specific account¹⁷⁷ and to combine accounts.

- (2) The lien does not apply to securities which are deposited with the bank for safe custody.¹⁷⁸
- (3) The lien does not apply to securities which, to the bank's knowledge, are held in trust by the customer.¹⁷⁹
- (4) The lien does not arise if there is any agreement to the contrary between bank and customer.

In *Halesowen Presswork and Assemblies Ltd v Westminster Bank*,¹⁸⁰ it was held that a lien does not apply to an in-credit bank balance in the customer's name. This was because the money in question in fact belongs to the bank and it is not possible to have a lien over one's own property. This view is now doubtful since the decision in *Re BCCI (No. 8)*.¹⁸¹ In any case, a bank may of course enjoy a right to combine the relevant accounts and there are alternatives to taking a charge over a customer's bank balance.¹⁸²

1.16 Safe custody

It is a long-established part of a bank's business to accept property from customers for the purposes of safe custody. When one party has possession of property belonging to another in this way, the law describes this as a voluntary bailment. The law further categorizes this into a bailment for reward and a gratuitous bailment, depending on whether the bailee (the person accepting the property) is paid by the bailor. It is established, however, that a bank is always to be regarded as a bailee for reward when taking its customer's property for safe custody, whether or not it is specifically paid for this service.¹⁸³ This is because the safe custody arrangement is seen as part of the broader contract between bank and customer.

Liability of a bank bailee

A bank accepting property for safe custody is under a duty to take proper care of it. A bank will be liable in breach of contract if it negligently allows the item to be stolen and it will be liable in conversion if it hands the item to the wrong person.

Other points in relation to safe custody

- (1) Where an item has been deposited by two or more bailors jointly, delivery should be made only on the authority of all the bailors.¹⁸⁴ On the death of one bailor, a right of survivorship may accrue to the survivors. Otherwise the personal representative of the deceased should give a receipt.

- (2) Where the bank is under some bona fide doubt as to who has title to the goods, it may refuse to hand them over on demand and may detain them for a reasonable time in order to clear up that doubt.¹⁸⁵
- (3) Where the items are stolen by an employee of the bank, there are cases which suggest the bank will only be liable if the employee was acting in the course of his employment in the sense that he was performing his normal duties, albeit dishonestly. This is the test of vicarious liability in tort. The effect of this doctrine is that a bank will only be liable for a theft by an employee whose duties included looking after the property and not for a theft by an employee whose duties did not include supervision of it.¹⁸⁶ It is suggested, however, that a bank will in any case be liable in breach of contract for negligently permitting an unauthorized employee access to the property or for negligently employing a dishonest employee.
- (4) A bank is free to take a mandate from joint bailors to the effect that any one may give a receipt for the property. Even so, by analogy with the cases on duty of care when making payment of cheques, a bank will presumably be liable if it hands over the property with knowledge that a breach of trust is being committed.
- (5) A bank is free to disclaim liability for negligence and this was found to be effective in *Coldman v Hill*.¹⁸⁷ The Unfair Contract Terms Act 1977, however, requires that such an exclusion of liability has to be justified as reasonable. Liability for fraudulent conversion may not be excluded.
- (6) Items deposited for safe custody are not subject to the banker's lien.¹⁸⁸

1.17 Termination of the banker-customer contract

It is considered that it is preferable to refer to termination of the banker-customer contract, rather than termination of the banker-customer relationship because the relationship may survive indefinitely, eg the bank's duty of secrecy.

Termination by customer

The customer may at any time demand full repayment of his credit balance.¹⁸⁹ It is suggested that if the customer reduces the account to a nil balance, the account should not be closed without confirmation from the customer that this is his intention. It would seem that a customer with an overdrawn account may not terminate the banker-customer contract without repaying the debt. The Banking Code and the Business Banking Code, however, state that a bank must close an account when asked to do so.¹⁹⁰

Termination by bank

It was stated in *Joachimson* that a bank may only close an account after giving reasonable notice and making provision for outstanding cheques. In *Prosperity Ltd v Lloyds Bank*,¹⁹¹ it was held that one month's notice was insufficient, but here the customer's banking arrangements were unusually complex. The Banking Code and the Business Banking Code declare that under normal circumstances a customer should be given at least 30 days' notice before his account is closed¹⁹² – and this appears to include overdrawn accounts.

It has been observed that a bank's duty of secrecy survives the termination of the contract. The customer may make claims arising from unauthorized debits (such as forged cheques), which the customer raises for the first time after termination of the contract.¹⁹³

Termination by operation of law

The following events will terminate the contract:

- (a) death of the customer;
- (b) mental incapacity of a customer;
- (c) bankruptcy or insolvency of bank or customer.

Notes

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- 1 *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.
 - 2 Commencing with the Unfair Contract Terms Act 1977.
 - 3 The Code of Banking Practice (first edition) was introduced in 1991. See G. Roberts (1995) 8 JIBFL 385.
 - 4 Unfair Contract Terms Act 1977, section 2(1).
 - 5 Section 2(2).
 - 6 Schedule 2.
 - 7 Section 3.
 - 8 Section 3(1).
 - 9 Unfair Terms in Consumer Contracts Regulations 1999.
 - 10 [2002] 1 AC 481 HL. Making the borrower pay interest on sums owed post-judgment has a disruptive effect on a tailored schedule of arrears payments designed by a court.
 - 11 Supply of Goods and Services Act 1982 section 13.
 - 12 Section 6.2 of The Banking Code, and the Business Banking Code.
 - 13 Known as the 'Jack Report', 1989, Cm 622.

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- 14 Cm 1026.
- 15 The Banking Code Key Commitments, section 2. The Business Banking Code contains similar provisions.
- 16 FOS was established in November 2001. Complaints were previously dealt with by the Office of the Banking Ombudsman scheme, which was established in 1986.
- 17 [2003] 1 All ER (Comm) 65.
- 18 FSA Handbook, DISP 2.4.3.
- 19 FSA Handbook, DISP 2.4.11.
- 20 FSA Handbook, DISP 1.2 and 1.3.
- 21 FSA Handbook, DISP 1.4.
- 22 FSA Handbook, DISP 2.3.
- 23 [2003] 1 All ER (Comm) 65. The decision concerned superseded savings accounts, the Banking Code's rules on superseded accounts have themselves been superseded, see 1.8 below.
- 24 FSA Handbook, DISP 3.9.
- 25 FSA Handbook, DISP 3.3.
- 26 See 1.15 below.
- 27 See chapter 5.
- 28 See 1.9 below.
- 29 [1966] 2 QB 431 CA.
- 30 *Commissioners of Taxation v English, Scottish and Australian Bank* [1920] AC 683 PC.
- 31 [1959] 1 QB 55.
- 32 [1964] AC 465 HL, see 1.11 below.
- 33 *Commissioners of Taxation v English, Scottish and Australian Bank* [1920] AC 683 PC.
- 34 [1901] AC 414 HL.
- 35 [1932] 2 KB 122 CA; on appeal to HL [1933] AC 201 where this point was not considered.
- 36 (1848) 2 HL Cas 28 HL.
- 37 [1974] 2 NZLR 155.
- 38 (1862) 13 CBNS 125.
- 39 This includes all of the EU and Norway, Iceland and Liechtenstein.
- 40 [1921] 3 KB 110 CA.
- 41 [1989] QB 728.
- 42 [1986] AC 80 PC.
- 43 See 5.9 below.
- 44 [1918] AC 777 HL.
- 45 [1933] AC 51 HL.
- 46 *Price Meats Ltd v Barclays Bank* [2000] 2 All ER (Comm) 246.

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- 47 Cm 1026, see 1.1 above.
- 48 Section 64 of the Bills of Exchange Act 1882.
- 49 *Smith v Lloyds TSB Bank* [2000] 2 All ER (Comm) 693 CA.
- 50 *Slingsby v District Bank* [1932] 1 KB 544 CA.
- 51 [1995] 2 AC 145 HL.
- 52 In 1.1.
- 53 Reasonable care is used in the Codes as a euphemism for gross negligence, see the Guidance Notes to the Codes and 8.3 below.
- 54 These issues are discussed more fully in chapters 7, 8 and 9.
- 55 Sections 12.5 and 12.9 of both Codes.
- 56 So the Unfair Contracts Terms Act 1977 would not invalidate the terms.
- 57 The Banking Ombudsman suggested they may; see the Annual Report of the Banking Ombudsman Scheme 1999-2000, p.20.
- 58 Section 6.2 of both Codes.
- 59 Section 6.3 of both Codes. Subject to section 6.4, the bank is free to choose any method of notification. The Guidance Notes to the Code say that placing a notice in branches would not be appropriate for Internet banking customers.
- 60 Section 6.5 of both Codes.
- 61 Section 6.4 of both Codes.
- 62 It invariably is included.
- 63 Section 6.6 of both Codes.
- 64 See 1.8 and 1.9 below.
- 65 See 5.4 below for a bank's duties in this event.
- 66 See 1.4 above.
- 67 [1989] 1 WLR 1340 CA; varied but not on this point [1992] 2 AC 548 HL.
- 68 [1992] 4 All ER 363.
- 69 [1979] 2 Lloyd's Rep 391.
- 70 See 1.11 below.
- 71 [1987] 2 FTLR 264. See also *Schioler v National Westminster Bank* [1970] 2 QB 719.
- 72 [1995] CLC 1557.
- 73 *Williams and Glyn's Bank v Barnes* [1981] Com LR 205. See the Encyclopaedia of Banking Law at C100.
- 74 [1997] 7 Bank LR 60 CA.
- 75 [1999] 2 All ER (Comm) 153.
- 76 [1998] 1 WLR 830 HL.
- 77 *Smith v Lloyds TSB Bank* [2000] 2 All ER (Comm) 693 CA.
- 78 [1999] 1 All ER (Comm) 612 CA.
- 79 Section 4.9, see 1.8 below.

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- 80 Section 7.1 of the Business Banking Code and section 7.2 of the Banking Code.
- 81 *Bartlett v Barclays Bank Trust Co. Ltd* [1980] 2 WLR 430.
- 82 *Nestle v National Westminster Bank* [1993] 1 WLR 1260 and *N. Clayton* [1994] JIBFL 352.
- 83 Section 1.
- 84 *Belmont Finance Corp'n v Williams Furniture Ltd* [1980] 1 All ER 393 CA.
- 85 See 1.4 above.
- 86 See 1.6 above.
- 87 [1989] 3 WLR 1367; affirmed [1991] 3 WLR 116 CA.
- 88 *Royal Brunei Airlines v Tan* [1995] 2 AC 378 PC and *Twinsectra v Yardley* [2002] 2 AC 164 HL.
- 89 Such as *Belmont Finance Corp'n v Williams Furniture Ltd* [1979] Ch 250, *Baden v Societe General* [1983] BCLC 325 and *Agip (Africa) Ltd v Jackson*, [1989] 3 WLR 1367; affirmed [1991] 3 WLR 116 CA.
- 90 [1999] Lloyds Rep Bank 511 CA.
- 91 See 1.9 below.
- 92 [2000] 3 All ER 97 HL.
- 93 [1970] AC 567 HL.
- 94 [2000] *The Times*, 2nd May CA.
- 95 [2002] 2 AC 164 HL.
- 96 Lord Millett in *Twinsectra v Yardley* specifically rejects the notion that the borrowed money must go into a segregated account in order for it to be subject to a resulting trust, see para 70 of the judgment.
- 97 *National Bank of Greece SA v Pinios Shipping Co.* [1990] 1 AC 637 HL.
- 98 Sections 4.1 and 4.2 of both Codes.
- 99 Sections 4.4 and 4.5 of both Codes and the Guidance Notes.
- 100 Sections 4.6 and 4.7 of both Codes. The requirement to send an annual summary does not apply to accounts with less than £500 in credit.
- 101 Section 4.8 of both Codes.
- 102 Section 4.3 of both Codes.
- 103 Business Banking Code section 5.8.
- 104 *Paragon Finance v Staunton* [2001] 2 All ER (Comm) 1025 CA.
- 105 See 3.8 below.
- 106 [2002] 2 All ER (D) 43 CA.
- 107 Section 5.1 of both Codes.
- 108 See M. Hapgood-Paget's *Law of Banking*, 11th edition at p187.
- 109 Section 15.
- 110 Section 5.2 of both Codes.
- 111 Section 5.4 of the Banking Code and section 5.5 of the Business Banking Code.

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- I12 Section 5.5 of the Banking Code. Standard account services are defined in the Glossary to the Banking Code as opening, maintaining and running accounts for transmitting money (for instance by cheque or debit card). The Business Banking Code contains a similar provision in section 5.6.
- I13 The Banking Code Guidance Notes for Subscribers, produced by the British Bankers Association.
- I14 Banking Code section 5.6, Business Banking Code section 5.9. It seems this applies only to cash cards. The Guidance Notes observe that the basis for charging for use of the card abroad must be stated.
- I15 Banking Code section 5.7, Business Banking Code section 5.10 qualifies this.
- I16 Banking Code section 5.8. In this section, the Code specifically limits its application to cash cards. The Business Banking Code contains a similar provision in section 5.11.
- I17 Banking Code section 5.9. This appears to apply in practice mainly to credit cards as debit cards typically have a double function as cash cards. Business Banking Code section 5.12.
- I18 Banking Code section 5.10, Business Banking Code section 5.13.
- I19 Cm 622, recommendation 13(2).
- I20 [1924] 1 KB 461 CA.
- I21 The duty does not, however, restrain a bank from passing information to a trustee in bankruptcy if the latter already has official notice of the information. *Christofi v Barclays Bank* [2000] 1 WLR 937 CA.
- I22 See below.
- I23 [2005] UKHL 3
- I24 This includes microfilm, magnetic tape or any other data retrieval mechanism, section 9(2).
- I25 Regulation 5. This is discussed further in 2.2 below.
- I26 [2001] 1 WLR 751 CA.
- I27 [2004] 2 All ER Comm 880.
- I28 Lord Chorley, *Law of Banking*, 6th edition 1974 at p.23.
- I31 [1989] QB 728.
- I32 [1998] 4 All ER 455.
- I33 (1938) 5 Legal Decisions Affecting Bankers 163.
- I34 See 3.5 below. This must come under the compulsion of law exception.
- I35 Section 13.6 and 13.7.
- I36 Section 11.1. The Mortgage Code contains an identical provision (section 7.1).
- I37 Section 8.5.
- I37a [2003] EWCA Civ 1746 and see the guidance on www.informationcommissioner.gov.uk. It is worth noting that anyone can demand information from a 'public body' (subject to certain exceptions) under the Freedom of Information Act 2000. Banks do not constitute public bodies but public bodies may hold information supplied by banks.
- I38 See 1.11 below.

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- 139 *Turner v Royal Bank of Scotland* [1999] 2 All ER (Comm) 664 CA and the Banking Code, section 13.7.
- 140 *Parsons v Barclay & Co* (1910) 103 LT 196 CA.
- 141 *Mutual Life and Citizens Assurance Co v Evatt* [1971] AC 793 PC.
- 142 *Derry v Peek* (1889) 14 App Cas 337 HL
- 143 *UBAF Ltd v European American Banking Corp'n* [1984] QB 713 CA.
- 144 [1964] AC 465 HL.
- 145 Section 2(2). Despite the name of this Act, it does cover exclusions of liability in non contractual relationships.
- 146 Section 11.2 of both Codes.
- 147 *Turner v Royal Bank of Scotland* [1999] 2 All ER (Comm) 664 CA.
- 148 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 HL.
- 149 Section 12.
- 150 [1999] 1 All ER (Comm) 161 CA.
- 151 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460 CA.
- 152 This is the effect of section 29(5) of the Limitation Act 1980. The inclusion of a debt within a Sundry Creditors figure contained in a company's balance sheet was held to constitute acknowledgement of the debt and accordingly time ran from the date of acknowledgement, *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 CA.
- 153 *Bank of Baroda v Mahomed* [1999] 1 Lloyds Rep Bank 14 CA.
- 154 (1990) *Financial Times*, 16 March.
- 155 *Deeley v Lloyds Bank* [1912] AC 756 HL.
- 156 *Devaynes v Noble, Clayton's case* (1816) 1 Mer 529 and 572 CA.
- 157 [1912] AC 756 HL.
- 158 See *Re Yeovil Glove Co. Ltd* [1965] Ch 148.
- 159 See *Re Primrose Builders Ltd* [1950] Ch 561.
- 160 See *Westminster Bank v Cond* (1940) 40 Com Cas 60, discussed in 12.7 below.
- 161 *Re Sherry* (1884) 25 ChD 692.
- 162 (1880) 13 ChD 696.
- 163 *Garnett v McKewan* (1872) LR 8 Exch 10.
- 164 *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674.
- 165 *Bradford Old Bank v Sutcliffe* [1918] 2 KB 833 CA.
- 166 *Halesowen Presswork and Assemblies Ltd v Westminster Bank* [1972] AC 785 HL.
- 167 *Halesowen Presswork and Assemblies Ltd v Westminster Bank* [1972] AC 785 HL.
- 168 See 1.7 above.
- 169 [1988] 2 All ER 296 CA.
- 170 [1989] NJLR 222 CA.
- 171 *Halesowen Presswork and Assemblies Ltd v Westminster Bank* [1972] AC 785 HL.

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- 172 *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 1 WLR 758 HL.
- 173 *Stein v Blake* [1995] 2 WLR 710 HL.
- 174 *Re Unit Two Windows Ltd* [1985] 3 All ER 647.
- 175 [1970] 2 All ER 281 CA.
- 176 *Brandao v Barnett* (1846) 12 Cl & Fin 787 HL.
- 177 *Re United Service Co., Johnstone's Claim* (1870) 40 LJ Ch 286.
- 178 *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586.
- 179 Unless the customer has already appropriated, see I.13 above.
- 180 *Brandao v Barnett*, (1846) 12 Cl & Fin 787 HL.
- 181 *Brandao v Barnett*, (1846) 12 Cl & Fin 787 HL.
- 182 [1972] AC 785 HL.
- 183 [1998] AC 214 HL.
- 184 See chapter 17.
- 185 *Port Swettenham Authority v TW Wu and Co. (M) Sdn Bhd* [1979] AC 580 PC.
- 186 *Brandon v Scott* (1857) 7 E&B 234.
- 187 *Hollins v Fowler* (1875) LR 7, HL 757.
- 188 *Morris v Martin & Sons Ltd* [1966] 1 QB 716 CA.
- 189 [1919] 1 KB 443.
- 190 *Brandao v Barnett*, see above.
- 191 *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 CA.
- 192 Section 7.2 of the Banking Code and section 7.1 of the Business Banking Code, the latter adds the words 'without necessary delay'.
- 193 (1923) 39 TLR 372.
- 194 Section 7.5.
- 195 *Limpgrange Ltd v Bank of Credit and Commerce International SA* [1986] FLR 36.