Responding to Challenges to a Bank's Duty of Confidentiality in Offshore Finance Centres: The Vanuatu Example

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Under the common law, a duty of confidentiality arises from the express or implied terms of the banker-customer relationship.[1] *However, banks in offshore financial centres are facing increasing demands from government authorities, such as tax offices, investigating tax evasion; and police, investigating offences such as money laundering, to disclose account information. In some cases, these demands have come from overseas authorities. Whether the demand comes for a domestic or foreign authority, these demands pose a threat to "the inviolability of secrecy and confidentiality".*[2] *This paper examines this problem in the context of Vanuatu, a tax haven in the South West Pacific. The paper commences with some brief background on Vanuatu and then gives an explanation of the sources of law in Vanuatu, which constitute a complex mixture of common law, civil law and indigenous law (known locally as "Customary Law" or "Kastom"). It then sets out the current legal position in Vanuatu regarding a banker's duty of confidentiality, including a discussion of relevant legislation. The paper explores the exceptions to the duty and analyses the approach of the courts in Vanuatu, with reference to decisions in other common law countries, including England and Wales and Australia. It goes on to discuss the competing arguments for and against compulsory disclosure and considers whether the Vanuatu regime offers any solutions for other small islands states.*

En common law, la relation banquier-client fait naître, de façon implicite ou expresse, une obligation de confidentialité.[3] *Toutefois, les autorités gouvernementales, tels les bureaux d'impôt en enquêtant sur la fraude fiscale, de même que les autorités policières, en enquêtant sur des infractions de blanchiment d'argent, pressent de plus en plus les banques situées dans des endroits extraterritoriaux de divulguer des renseignements sur certains comptes. Parfois, ces demandes sont formulées par des autorités extraterritoriales. Que les demandes proviennent d'autorités nationales ou étrangères, elles menacent « l'inviolabilité du secret et de*

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1 *Tournier v. National Provincial & Union Bank of England* (1923), [1923] All E.R. Rep. 550, 29 Com. Cas. 129, [1924] 1 K.B. 461 (Eng. C.A.) [*Tournier's Case*].

2 *Reference re Nassau and Trust Co Ltd.* (1977), 1 Bahamas Law Reports 1.

3 *Tournier v. National Provincial and Union Bank of England*, [1924] 1 KB 461 (CA).

la confidentialité »[4]*. L'auteure étudie ce problème dans le contexte du Vanuatu, paradis fiscal situé dans le sud-ouest de l'océan Pacifique. L'auteure commence par dresser un court portrait du Vanuatu, puis explique les sources diverses et complexes du droit à Vanuatu que sont la common law, le droit civil et le droit indigène (aussi connu sous le nom de « droit coutumier » ou de « Kastom »). Elle décrit ensuite l'état du droit du Vanuatu sur l'obligation de confidentialité d'un banquier et elle analyse les lois applicables. L'auteure examine les exceptions à l'obligation de confidentialité et l'approche adoptée par les tribunaux du Vanuatu, en regard des décisions de d'autres pays de common law, notamment de l'Angleterre, du Pays de Galles et de l'Australie. L'auteure présente les arguments pour et contre une divulgation obligatoire et cherche à voir si les solutions préconisées par le régime du Vanuatu pourraient convenir à d'autres petits États insulaires.*

1. VANUATU AND ITS LAW

(a) Vanuatu

Vanuatu is a small island country, in the South-West Pacific about three-quarters of the way from Hawaii to Australia.[5] It has a land area of 12,189 sq km, which is slightly larger than Connecticut, made up of more than 80 islands, which are mostly mountainous of volcanic origin, with narrow coastal plains. About 65 of the islands are inhabited.[6]

The indigenous peoples, known collectively as Ni-Vanuatu, form the majority of the population,[7] which totals about 230, 000.[8] The official languages are Bislama, English and French.[9] In addition, there are over 100 local languages.

Formerly known as the New Hebrides, Vanuatu became independent on 30 July 1980.[10] It has a Westminster style of State government,[11] co-existing with a traditional chiefly system.[12]

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4 *Nassau and Trust Co Ltd.* (1977), 1 Bahamas Law Reports 1.

5 "Vanuatu," online: The World Factbook <https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html>.

6 Vanuatu National Statistics Office, *2009 National Population and Housing Census, Basic Tables Report, Volume 1* (Port Vila: Vanuatu National Statistics Office, 2009) online: Vanuatu National Statistics Office (NVSO) <http://www.vnso.gov.vu/images/stories/2009_Census_Basic_Tables_Report_-_Vol1.pdf>.

7 About 95% of the population are Ni-Vanuatu.

8 S*upra*, n. 5.

9 *Constitution of Vanuatu, 1980* (Vanuatu), s. 3 [*Constitution*].

10 The *Constitution* was brought into force by an Exchange of Notes between the Governments of United Kingdom and France, 23 October 1979.

11 *Constitution*, *supra*, n. 9 at c. 4, 7 and 8.

12 *Constitution*, *supra*, n. 9 at c. 5, acknowledges the chiefly system and gives it a role in State government through a National Council of Chiefs.

(b) The Law

Since Independence, on 30 July 1980, the law in Vanuatu has been comprised of:

- The Constitution,[13] which is expressed to be the Supreme law;[14]
- Acts of Parliament of Vanuatu ("Parliament");[15]
- Decisions of the Vanuatu Courts;[16]
- Law in existence on 30 July 1980 (which continue in force until repealed by Parliament), that is:
  - *Joint Regulations*;[17]
  - British and French laws, including Acts of Parliament, subsidiary legislation and English common law and equity ("introduced law");[18] and
  - Customary Law.[19]

Neither the remaining *Joint Regulations* nor Customary Law is relevant to the duty of confidentiality, so they do not require further discussion.

On the other hand, the applicability of British and French laws is of relevance, and this is a matter of some debate. Whilst the Constitution clearly provides in Art 95(2), that such laws continue in force, it does not say to whom such laws apply. Prior to Independence, British laws applied to British citizens and "optants" and French laws applied to French citizens and "optants", optants being those present in the country who chose to be subject to British or French laws. The status of "optant" no longer exists in Vanuatu, as the Anglo-French Protocol 1914, which provided for this, was revoked at Independence.[20] According to *Pentecost Pacific Ltd v. Hnaloane*,[21] which involved an alleged breach of contract of employment, the nationality of the parties is a significant factor. The Court of Appeal held that, as there was no Vanuatu legislation relating to procedure, there was a choice between French and English law, which was to "be decided according to the nationality of the defendant", which in that particular case was French. In *Banga v. Waiwo*,[22] D'Imecourt, CJ held that English and French laws in force apply to everyone in Vanuatu, irrespective of nationality, and irrespective of whether they were indigenous ni-Vanuatu or not. This differs from the Chief Justice's earlier decision

13 *Supra*, n. 6.

14 *Constitution*, *supra*, n. 9, art. 2.

15 *Ibid.*, art. 16.

16 *Ibid.*, art. 47(1).

17 *Ibid.*, art. 95(1).

18 *Ibid.*, art. 95(2).

19 *Ibid.*, art. 95(3).

20 *Exchange of Notes on the Independence of the New Hebrides between Great Britain and France*, Great Britain and France 23 October 1979, [1979] PITSE 3.

21 (1984), [1980–1988] 1 Van LR 134 at 136.

22 [1996] VUSC 5 (Vanuatu SC) online: <www.paclii.org>.

in *Mouton v. Selb Pacific Ltd*,[23] where the Chief Justice appears to have been of the view that, normally, French laws would automatically apply to French citizens and "optants", and, by implication, that English laws would automatically apply to English citizens and "optants". Further, His Lordship appears to have been of the view that French law would automatically apply where a document in French required interpretation.

So, in a case where a bank or customer in Vanuatu is French, or the documentation relating to the account is in French, it would appear that, if introduced law is relevant to the question of confidentiality, it will be French rather than English law which applies. French law imposes a statutory duty of confidentiality,[24] but this article does not discuss the details of French law in any detail. It should be added that, in the case of disputes arising under the *Trust Companies Act*[25] the application of English law is supported by the requirement that the guarantee to be provided by every applicant for a licence to carry on business as a trust company must expressly provide that it is governed exclusively by "British law as applicable in Vanuatu".[26]

The existing law includes English statutes "of general application in force in England on the 1st day of January 1976".[27] The phrase "general application" is not defined by legislation. In *Harrisen v. Holloway No 2*,[28] the Court of Appeal of Vanuatu appears to have been of the view that to be an Act of general application, the subject matter of the Act must operate in the same way in Vanuatu as in England. Some English legislation relevant to banking has been accepted as applicable in Vanuatu. Thus, for example, the *Bankers Books Evidence Act*[29] has been accepted as applicable.[30] However, where the Parliament of Vanuatu has expressly or impliedly revoked English legislation of general application it will not apply.[31] In relation to confidentiality, whilst this is still largely a matter of common law in Vanuatu, there is some specific statutory provision on point. Where such local legislation does exist, it would appear that any potentially applicable English legislation will have been revoked by implication.

The application of English common law and equity is "subject to such qualifications as local circumstances render necessary".[32] There are two queries regarding the application of common law and equity which are of particular relevance. The

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23 [1995] VUSC 2 (Vanuatu SC) online: <www.paclii.org>.

24 Mohammed Ahmadu & Robert Hughes, *Commercial law and Practice in the South Pacific* (London: Cavendish, 2006) at 323.

25 [Cap 69] (Vanuatu) [*Trust Companies Act*].

26 *Trust Companies Act*, *ibid.*, at para. 5(2).

27 *High Court of the New Hebrides Regulation 1976*, SR & O. 1976/3, s. 3.

28 (1984), [1980–88) 1 VLR 147.

29 *1879* (UK), 42 & 43 Vict c. 11.

30 *Application for Summonses to be issued pursuant to Letters Rogatory* (1984), [1980-88] 1 Van LR 90 [*Application for Summonses*]. Fiji appears to be the only regional country to have its own Act: *Bankers Books Evidence Act* [Cap 45] (Solomon Islands).

31 *Constitution*, *supra*, n. 9 at art. 93.

32 *Western Pacific (Courts) Order in Council1961*, cl. 15. For a discussion of the uncertainties surrounding this phrase see Jennifer Corrin & Don Paterson, *Introduction to South Pacific Law* (Melbourne: Palgrave Macmillan, 2011).

first is whether they are subject to a cut-off date, *i.e.*, a date after which they will no longer apply. In contrast to English statutes, which are only in force if enacted prior to 1 January 1976, there is no express cut-off date for common law and equity. However, as it is English common law and equity "in force or applied in the New Hebrides immediately before Independence" which applies, this might be taken to mean that English decisions after the date of Independence, *i.e.*, 30 July 1980, will not be part of the law. There is little authority directly on point, but the general view appears to be that there is a cut-off date.[33] However, in practice, even if not binding, decisions of English courts made after 30 July 1980 will be regarded as highly persuasive. For example in *Union Electrique Du Vanuatu Limited v. The Republic of Vanuatu*,[34] a case involving an extension of time for making a claim for judicial review, the Vanuatu Court of Appeal relied on a number of English decisions including the House of Lords decision in *Yew Bon Tew v. Kenderaan Bas Mara*[35] and *R. v. Criminal Injuries Compensation Board; Ex Parte A*.[36]

The second question of relevance is whether it is the English common law which applies or the common law as developed anywhere in the Commonwealth. The use of the word "English" suggests the former, but it appears that this is not the view of the Court of Appeal of Vanuatu.[37] This is in accord with the view taken by the Samoan Supreme Court, which has interpreted an identical phrase as referring to "a system and body of law", rather than to the law as declared by English courts.[38] However, in, practice, the courts in Vanuatu generally tend to follow the English common law unless it is inapplicable to the circumstances of Vanuatu.

2. THE COMMON LAW DUTY OF CONFIDENTIALITY

Having explained the complexities of finding the law applicable in Vanuatu, the current law governing confidentiality will be explored. This section of the paper examines the common law duty and the applicable qualifications. The following section looks briefly at the duty in equity. This is followed by a section discussing the statute law in Vanuatu, which makes additional provision regarding the confidentiality of information relating to certain specific companies.

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33 See, *e.g.*, *Mouton v. Selb Pacific Ltd.*, [1995] VUSC 2 (Vanuatu SC) online: <www.paclii.org>.

34 [2012] VUCA 2 (Vanuatu SC) online: <www.paclii.org>.

35 (1982), [1983] 1 A.C. 553, [1982] 3 All E.R. 833 (Malaysia P.C.).

36 [1999] 2 A.C. 330 (Eng).

37 *Swanson v. Public Prosecutor*, [1998] VUCA 9 (Vanuatu CA) online: <www.paclii.org>.

38 *Olo v. Police*, [1992] WSSC 1 (Samoa SC) online: <www.paclii.org>.

At common law, a bank's relationship to a customer is regarded as contractual in nature.[39] This contractual relationship is complex, having its origins in the customs and usages of bankers.[40] It has been referred to as:

> A remarkable feature of the creation of the contract between banker and customer . . . that the terms of the contract are not usually embodied in any written agreement executed by the parties. Thus, there is no formal agreement which provides that a banker must maintain strict secrecy concerning his customers' accounts.[41]

Of course, where certain types of account are opened the parties, documents concerning specific terms will be executed by the bank and the customer, but even in those cases a comprehensive list of terms is rarely included.[42] In consequence of the lack of express terms, this is an area where implied terms are of fundamental importance. There is authority to suggest that terms are implied into the banker customer contract on the basis of business efficacy,[43] and more recently on the basis of necessity.[44]

The implied duty of confidentiality owed by a bank to its customers has been recognised by the English common law for some time.[45] The leading English case on this point is *Tournier's Case*.[46] In that case, the plaintiff's account with the defendant bank had become overdrawn. He entered into an agreement with the bank to pay off the debt by instalments, but did not honour it. The plaintiff was the payee of a cheque, but indorsed it to a third party, rather than paying it into his account. The bank found out about this as the drawer of the cheque was one of its other customers. The bank manager rang the third party's bank and learnt that the indorsee was a bookmaker. The bank then telephoned the plaintiff's employer, having obtained its address from the instalment agreement, and allegedly disclosed that the plaintiff's account was overdrawn and that the promise to repay had not be fulfilled. It was also alleged that the manager had revealed that the payee was a bookmaker. As a result, the plaintiff's employer refused to renew his contract of employment. The plaintiff sued for breach of an implied term that the bank would not disclose the state of his account or any transactions relating to it. At first instance judgment was entered for the bank, but an appeal was allowed by the Court of Appeal. All three members of the court held that a bank owes a duty of secrecy to its customers. However, there was some division of opinion concerning the extent of that duty.

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39 *Foley v. Hill* (1848), 2 HLC 28 (HL) (Eng).

40 J. Milnes Holden, *The Law and Practice of Banking*, 5th ed. (London: Pitman Publishing, 1991) at 50.

41 *Ibid.*

42 *Ibid.*

43 *Joachimson v. Swiss Bank Corp.*, [1921] All E.R. Rep. 92, [1921] 3 K.B. 110 (Eng. C.A.) [*Joachimson*].

44 *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.*, [1986] 1 A.C. 80 (Hong Kong P.C.).

45 See, *e.g.*, *Tassel v. Cooper* (1850), 9 C.B. 509.

46 *Tournier's Case*, *supra*, n. 1.

The duty clearly extends beyond the state of the customer's account to include all the transactions on the account, and any security held with respect to it.[47] It would also appear to extend to any other information which is referable to the contractual relationship.[48] Information which is already in the public domain is not covered. The obligation continues to apply even though the account has been dormant or has been closed.[49]

Tournier's Case[50] has been applied in Vanuatu in *Re Westpac Banking Corporation*.[51] The existence of a common law duty of confidentiality was also accepted by the Supreme Court of Vanuatu, in *Application for Summonses*,[52] albeit obiter and without reference to *Tournier's Case*.

There does not appear to be any direct authority on the nature and content of this obligation from the Vanuatu courts. However, as discussed above the English common law applies in Vanuatu and, accordingly the extent of the obligation and the exceptions recognised in *Tournier's Case*[53] and subsequent English cases, at least those decided before the "cut-off date", are likely to be recognised in Vanuatu.

Tournier's Case[54] has also been followed in every other common law jurisdiction.[55] For example, in the Australian case of *Smorgon v. Australia and New Zealand Banking Group Ltd.*,[56] the High Court reiterated that the duty of confidentiality was of a contractual nature,[57] and made it clear that it is not referable to any doctrine of professional privilege.[58] The case involved the application of a provision of Commonwealth Taxation legislation[59] allowing the Commissioner to request information. The issue was whether information of a customer's income or assessment could be requested by the Commissioner from bank officers. After some discussion and acceptance of the points of authority established in *Tournier's Case*,[60] the Court found that the legislative power of the Commissioner was not hindered by the contractual duty of confidentiality. The case can be understood as an example of the compulsion of law (with the duty of officers of the Commonwealth to follow law overriding the implied contractual duty) exception to the duty.

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47 *Ibid.*, at 473-74.

48 *Christofi v. Barclays Bank plc*, [1988] 2 All E.R. 484 (C.A.), at 489.

49 *Tournier's Case*, *supra*, n. 1 at 473, 475.

50 *Ibid.*

51 [1992] VUSC 7 (Vanuatu SC) online: <www.paclii.org> [*Re Westpac Banking Corporation*].

52 *Application for Summonses*, *supra*, n. 30.

53 *Supra*, n. 1.

54 *Supra*, n. 1.

55 David Chaikin, "Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime" (2011) 33 *Sydney Law Review* 265.

56 (1976), [1976] HCA 53, 134 CLR 475.

57 *Ibid.*, at 489.

58 *Ibid.*

59 *Income Tax Assessment Act 1936* (Cth), s. 264.

60 *Supra*, n. 1 at 487.

In many countries, the bank's duty of confidentiality is now confirmed in a code of practice. In Australia, for example, it is endorsed by the Banking Code of Practice.[61]

There is a strong argument that *Tournier's Case* is not limited to commercial banks, but is also applicable to other financial institutions with which customers deposit money. This point has not arisen in Vanuatu, but in Australia it has been held that the duty of confidentiality applies to merchant banks.[62] It has also been held to apply between credit unions and customers,[63] and that, arguably, a similar duty is applicable to building societies.[64]

(a) The Exceptions to the Duty

Tournier's Case[65] made it clear that the duty is not absolute, but that it is subject to exceptions falling under four heads:

1. where disclosure is under compulsion of law;
2. where there is a public duty to disclose;
3. where the bank's own interests require disclosure; and
4. where the disclosure is with the express or implied consent of the customer.

Both the common law[66] and the statutory provisions include disclosure under compulsion of law as an exception to the duty of confidentiality. Apart from this commonality, the exceptions differ. As stated above, the common law duty is subject to three other exceptions: where there is a public duty to disclose; where the bank's own interests require disclosure; and where the disclosure is with the express or implied consent of the customer. There is no equivalent of the first two of these additional exceptions under the legislation and only the *Trust Companies Act* specifically provides that authorisation of the customer justifies disclosure.

(i) Disclosure under Compulsion of Law

Compulsion of law is a recognized exception to the duty of confidentiality owed by a bank to its customers.[67] If a banker is under a common law or statutory duty to disclose confidential information, then he or she must do so and any contractual duty to the contrary is illegal and void.[68] Accordingly, a bank would not be

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61 *Australian Banker's Association Code of Banking Practice* (2004), cl. 22.

62 *Winterton Constructions Pty Ltd v. Hambros Australia Ltd.* (1992), [1992] FCA 582, 39 FCR 97 at 115, Hill J.

63 *Bodnar v. Townsend* (2003), [2003] TASSC 148, 12 Tas R 232.

64 Alan Tyree, John O'Sullivan & David Cooper, "Does *Tournier* Apply to Building Societies?" (1995) 6 *Journal of Banking and Finance Law and Practice* 206.

65 *Supra*, n. 1.

66 *Ibid.*

67 *Ibid.*

68 *Parry-Jones v. Law Society* (1967), [1968] 1 All E.R. 177, [1969] 1 Ch. D. 1 (Eng. C.A.), at 9 [Ch.].

in breach of the obligation provided that it has disclosed only the information required to be disclosed in accordance with the statute or order concerned.

Compulsion of law may stem from a statute compelling disclosure to a particular official or in particular circumstances, and this is discussed further below. Compulsion of law may also arise under adjectival law. Good examples of this are where a bank is compelled to give evidence about a customer's affairs by an order for discovery[69] or where an officer is subpoenaed to give evidence in court about a customer's affairs.[70] However, there is controversy about whether the banker must inform the customer about the subpoena and as to whether a bank has a duty to object to disclosure of irrelevant parts of a document. It appears that there are no such duties in criminal cases,[71] but that they might exist in civil cases.[72] These points have not yet come before the Vanuatu courts, but the suggestion that a bank should object, presupposes that it would know what is and what is not relevant, which is unlikely to be the case.

Whilst the exception allowing disclosure under compulsion of law is common to all sources, it is not in identical terms and the breadth of its shield is far from clear. In practice, one of the most pertinent questions for a bank in Vanuatu or other off-shore centre is whether compulsion of law refers only to domestic law, or whether that compulsion may come from an overseas source. Under the English common law, in the absence of express agreement to the contrary, the law which governs the banker-customer contract is the law of the country in which the customer maintains his or her account.[73] It appears that the law which compels the disclosure must form part of the system of law which governs the account.[74] In *FDC Co Ltd v. Chase Manhattan Bank NA*[75] it was held that this exception did not include an order directed to the bank by a foreign court. Huggins VP stated that, "such a construction was never within the contemplation of the judges in *Tournier's Case* and . . . a term so construed would not be reasonable."[76]

This would also appear to be the case under the legislative provisions protecting secrecy. In the case of the *Trust Companies Act*, the compulsion of law exception[77] is expressly restricted to cases when disclosure is lawfully required "by any

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69 *Uthmann v. Ipswich CC*, [1998] 1 Qd. R. 435.

70 *Commr for Railways (NSW) v. Small* (1938), 38 SR (NSW) 564; *Dewley v. Dewley*, [1971] 1 NSWLR 264; *Lane v. Registrar of Supreme Court (NSW)* (1981), 148 CLR 245.

71 *Barclay's Bank P.L.C. v. Taylor*, [1989] 3 All E.R. 563 (Eng. C.A.); *Citibank Ltd v. FCT* (1988), 83 ALR 144 at 157.

72 *Robertson v. Canadian Imperial Bank of Commerce* (1994), 91 (41) L.S.G. 39, [1995] 1 All E.R. 824, [1995] E.C.C. 338, 138 S.J.L.B. 211, 11-16-1994 Times 1063388, [1994] 1 W.L.R. 1493 (Canada P.C.).

73 See, *e.g.*, *Joachimson*, *supra*, n. 43.

74 *R. v. Grossman* (1981), 73 Cr App. Rep. 302; *FDC Co Ltd v. Chase Manhattan Bank NA*, [1990] 1 HKLR 277.

75 *Ibid.*

76 *Ibid.*, at 283. See further Aitken, "The Bank's Duty of Confidence in Transnational Proceedings" (1994) 5 JBFLP 109.

77 See section 9.

court of competent jurisdiction within Vanuatu or under the provision of any law in force in Vanuatu".[78] This makes it clear the compellability is referable to Vanuatu laws only. The *Companies Act* is equally clear regarding court orders, permitting disclosure only "when lawfully required . . . by any court of competent jurisdiction within Vanuatu".[79] However the subsection continues "or under the provisions of any law",[80] thus leaving the question of the effect of an overseas statute more open for argument. The *International Companies Act* ("ICA") refers only to disclosure required by a "court of competent jurisdiction". Thus, it is necessary to look to the courts for guidance as to the extent of the exception, as it is under the common law.

In *Application for Summonses*[81] an order had been made by the Senior Magistrate, on an ex parte application by the Public Prosecutor, allowing evidence of officers of a Vanuatu bank be taken in Vanuatu, for the purpose of a case under the foreign exchange control regulations in Australia. On an application to the Supreme Court to set aside the order, Cooke CJ took into account the fact that the offence in respect of which the evidence was sought did not apply in Vanuatu. His Honour adopted the following words in the judgment of Knowles CJ in *Re Nassau and Trust C. Ltd*,[82] quoting extensively from a speech by D.M. Fleming, a former Minister of Finance in the Federal Government of Canada, which he described as "masterly":

> Call it what you will, the Bahamas is a "tax haven" or an "offshore financial centre" . . . What has brought the financial community to the Bahamas? What has attracted such a galaxy of banks and trust companies to Nassau? I would answer that there are five factors involved:
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> (a) The first is undoubtedly the tax structure of the country.
>
> (b) The second is confidence.
>
> (c) Third, the secrecy attached to relations and transactions between the financial institutions and their clients has been another essential factor in attracting financial business here. The statute law of this country, superimposed upon the wisdom of the English Common Law, has strengthened the inviolability of secrecy and confidentiality of this sphere . . . any weakening of this guarantee would be harmful to the interest of the Bahamas, any strengthening of it would be reassuring.
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> . . .
>
> The secrecy provision is one of the pillars of this part of our economic structure, the destruction of which would lead to the collapse of the whole structure which it supports.

(The other two factors discussed in the speech are not relevant here). On this basis the Supreme Court set aside the Order.

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78 See section 9(1).

79 [Cap 191] (Vanuatu), s. 381(3).

80 *Ibid.*

81 *Supra*, n. 30 at 92-93.

82 (1977), 1 Bahamas Law Reports 1, 4-5.

Similarly, in *Re Westpac Banking Corporation*, the Supreme Court of Vanuatu held, in a case where the bank applied for clarification of its duty to comply with an order from the Family Court of Australia to supply details of a customer's account, that the law compelling disclosure must be a law effective in Vanuatu.[83] From this it seems clear that the Vanuatu courts will not compel disclosure by a bank on the basis of a law which is not part of the law in Vanuatu.

(ii) Statutes Compelling Disclosure

As explained earlier in this section, the common law duty of confidentiality is undoubtedly overridden by a Vanuatu statute compelling disclosure. Further, the statutory duty of confidentiality has been made subject to such Acts. In countries other than tax-havens, the most important instance of a statutory power to compel disclosure is under income tax legislation. For example, in Australia, under the *Income Tax Assessment Act*[84] an officer authorised by the Commissioner of Taxation may obtain certain records and documents.[85] The Federal Court has recently ruled that ANZ Bank must comply with a notice from the Commissioner to supply information stored in Australia about bank accounts of its Vanuatu subsidiary's customers who had a link to Australia, such as an Australian address.[86] There are also broad powers to the compel disclosure under corporations[87] and securities[88] legislation. Other important encroachments on the contractual duty of confidentiality come from trade practices and consumer protection laws.[89] More recently, privacy legislation[90] and anti-terrorism and legislation dealing with serious crime[91] have added further powers to demand disclosure.

In Vanuatu, the desire to maintain a safe haven for off-shore investment obviously influences government policy. Accordingly, legislation compelling disclosure is very limited. There is no income tax, and hence no income tax legislation. Nor is

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83 *Re Westpac Banking Corporation*, *supra*, n. 51.

84 *Income Tax Assessment Act 1936* (Cth).

85 *Ibid.*, at ss. 263 and 264.

86 *ANZ v. Konza*, [2012] FCA 196.

87 *Corporations Act 2001* (Cth).

88 *Australian Securities and Investments Commission Act 2001* (Cth).

89 See *e.g.*, in Australia, *Competition and Consumer Act 2010* (Cth); *Fair Trading (Consumer Affairs) Act 1973* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1999* (Vic); *Fair Trading Act 1987* (WA).

90 *Privacy Act 1988* (Cth), s. 18N(1)(h), permits disclosure of personal info contained in a report relating to creditworthiness where the credit provider believes, on reasonable grounds, that the individual has committed a serious credit infringement and given to another credit provider or a law enforcement authority.

91 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *Criminal Assets Recovery Act 1990* (NSW), ss. 51 and 52. Section 51(1) lists a highly qualified and conditional set of circumstances in which a financial institution "may" give certain information to the New South Wales Drug Crime Commission. See also, *e.g.*, *Criminal Proceeds Confiscation Act 2002* (Qld), s. 249.

there a trade practices Act. However, Vanuatu has ratified the International Convention for the Suppression of the Financing of Terrorism[92] and has as a consequence had to fulfil its obligation to adopt regulations imposing on financial institutions the obligation to report unusual transactions.[93] Such legislation includes the *Financial Transactions Reporting Act*[94] which compels financial institutions to report suspicious transactions, which may relevant to serious crimes or terrorism,[95] and the *Counter Terrorism and Transnational Organised Crime Act*[96] which compels financial institutions to report the existence of any property owned by an entity linked with terrorism[97] or any dealing suspected of being related to a terrorist act.[98]

(iii) Interests of the Bank

The extent of this exception to the duty of confidentially has not been discussed in Vanuatu. At common law it clearly extends to circumstances where the bank is suing the customer and reveals information to substantiate its claim. A question of some importance, given that, as discussed above, the compulsion of law exception is restricted to domestic law, is whether a bank can rely on its own interests as reason for disclosing information required by a foreign subpoena. In *X AG v. A Bank*,[99] it was held that it cannot. However, in that case it was accepted that the duty in *Tournier's Case*[100] would constitute a defence to a charge of contempt in the foreign court.

This exception may be particularly pertinent to Vanuatu banks which are subsidiaries of off-shore companies. It is frequent practice for banks in Vanuatu and many other tax-havens to send customer information electronically to the off-shore holding company. To protect confidentiality, the information is sent in a form which does not identify the account holder by name. This is imperative given the views of the court in *Bank of Tokyo v. Karoon*,[101] where information was passed by a bank to its subsidiary. In that case, the own interest defence was rejected.[102] In the light of the recent case of *ANZ v. Konza*,[103] subsidiaries of Australian banks in off-shore centres will also have to consider masking other information, such as Australian addresses, in record sent to Australia. The question also arises whether a foreign bank can be compelled by a government authority in its own country to

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92 *International Convention for the Suppression of the Financing of Terrorism Act* [Cap 279] (Vanuatu).

93 *International Convention for the Suppression of the Financing of Terrorism*, GA Res 54/109, UNGAOR, 1999, UN Doc A/RES/54/109 (1999), Art 18, 1 (b)(iii).

94 [Cap 268] (Vanuatu), passed in 2000.

95 *Ibid.*, s. 5.

96 [Cap 313] (Vanuatu), passed in 2005.

97 *Ibid.*, s. 26(1).

98 *Ibid.*, s. 26(4).

99 [1983] 2 All E.R. 464.

100 *Supra*, n. 1.

101 (1984), [1987] A.C. 45, [1986] 3 All E.R. 468 (Eng. C.A.).

102 See also *Bhogal v. Punjab National Bank*, [1988] 2 All E.R. 296 (Eng. C.A.).

103 [2012] FCA 196.

obtain the information necessary to identify account holders from a subsidiary in an off-shore tax haven, and to reveal the account information to a government authority. This question is was not decided in *ANZ v. Konza*.[104] In the absence of a statutory duty of confidentiality applying to the recipient of information outside Vanuatu, whether such third party is bound is largely a matter of contract law. The doctrine of privity is not governed by statute in Vanuatu. Under the common law, in the absence of assignment, a trust or agency relationship, a third party would not be bound in law. However, a third party recipient might be bound in equity by a duty of confidence.[105]

(iv) Consent of the Customer

The fourth of the exceptions in *Tournier's Case*[106] permits disclosure where the customer has given implied or express consent. Only the *Trust Companies Act* specifically provides that authorisation of the customer justifies disclosure, and it must be express,[107] rather than express or implied as under common law.[108] However, the legislative provisions allowing disclosure for the purposes of the exercise of functions under the Act in question or where disclosure is necessary for the carrying on of business of the company, and many cases where express authorisation has been given would no doubt fall within these exceptions. In any event, such express consent would be likely to amount to a waiver, even though not also stated as an exception in the Acts.

(v) Duty to the Public

The duty to the public is the most poorly defined of the exceptions.[109] In *Tournier's Case*, danger to the State seems to have been viewed as within this category.[110] A clear example is where the customer's dealings indicate trading with the enemy in war time. In *Initial Services Ltd v. Putterill*,[111] Denning LJ stated that,

> The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always — and this is essential — that the disclosure is justified in the public interest.

Given the lack of authority, a bank would be unwise to rely on this exception in all but clear cut cases.

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104 *Ibid.*

105 *Seager v. Copydex Ltd.*, [1967] 2 All E.R. 415, [1967] R.P.C. 349, [1967] 1 W.L.R. 923 (Eng. C.A.) at 931 [W.L.R.].

106 *Tournier's Case*, *Supra*, n. 1.

107 See section 9.

108 *Tournier's Case*, *supra*, n. 1.

109 Allan Tyree, *Banking Law in Australia*, 6th ed. (Chatswood, NSW: LexisNexis Butterworths, 2008) [5.18].

110 *Supra*, n. 1, Banks LJ, citing Findlay LJ in *Weld-Blundell v. Stephens*, [1920] A.C. 956, [1920] All E.R. Rep. 32 (U.K. H.L.), at 965 [A.C.].

111 (1967), [1967] 3 All E.R. 145, [1968] 1 Q.B. 396, [1967] 3 W.L.R. 1032 (Eng. C.A.), at 148 [All E.R.].

3. EQUITABLE DUTY OF CONFIDENTIALITY

As noted above, Vanuatu inherited the doctrine of equity, alongside the common law. Equity imposed a duty of confidentiality on banks, and this may be important in cases where no contract exists. An example is where information has been supplied by a prospective customer, who may be under the impression that such information is confidential.[112] It may also be important because the contractual duty may be amended by contract, that is, it may be qualified or abrogated by consent. The duty of confidence arises where confidential information is imparted by the customer in circumstances importing an obligation of confidence.[113] However, it is unclear exactly when the circumstances will import an obligation of confidence. To decide the question an objective test is taken.[114]

4. STATUTORY DUTY OF CONFIDENTIALITY

To date, there is no privacy legislation in Vanuatu. In a number of other Commonwealth countries, such legislation regulates rights of access to personal information,[115] and organisations must not engage in any practice which breaches the applicable privacy code.[116] It is not entirely clear how privacy legislation and codes interact with the common law duty of confidentiality.[117] However, that question is, as yet, academic in the context of Vanuatu. In some cases, a statutory obligation of secrecy has been imposed in favour of certain types of companies established in Vanuatu. These statutes are framed in broad terms to prohibit disclosure by "any person", but appear to be aimed primarily at banks and trust companies. They differ from the common law duty in that they impose criminal sanctions on unauthorised disclosure of banking information. The statutory obligation of secrecy arises where the customer is a company within the terms of the ICA,[118] or established under the *Trust Companies Act*.[119] In limited circumstances, a duty of secrecy also arises under the *Companies Act*.[120] These provisions will now be discussed in more detail.

(a) ICA

The ICA contains a very broad provision preventing "any person" from divulging certain "information concerning or respecting" an international company,

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112 *Attorney General v. Guardian Newspaper Ltd. (No. 2)* (1988), [1990] 1 A.C. 109, [1988] 3 All E.R. 545, [1988] 3 W.L.R. 776, [1988] 2 W.L.R. 805 (U.K. H.L.), at 806 [W.L.R.].

113 *Coco v. AN Clark (Engineers) Ltd.*, [1969] RPC 41.

114 *Ibid.*

115 See, *e.g.*, *Privacy Act 1988* (Cth), applying to private sector organisations from 21 December 2001.

116 In Australia, this is the National Privacy Principles ("NPP"): *Privacy Act 1988*, sch 3.

117 *Tyree*, *supra*, n. 109 at 190.

118 [Cap 222] (Vanuatu), s. 125.

119 *Supra*, n. 25, s. 9.

120 *Supra*, n. 81, s. 381.

being a private company which does not carry on business in Vanuatu. Confidential information includes "any of the business, financial or other affairs or transactions of the company". The term "person" is not defined, but "person resident in Vanuatu" is defined and the definition makes it clear that a person includes a company.[121] In any event, "person" is defined by the *Interpretation Act* to include, "any statutory body, company or association or body of persons corporate or unincorporate".[122] Inducing or attempting to induce other persons to divulge such information is also prohibited.[123] The penalty for breaching these provisions is fine of up to US$100,000 and/or imprisonment for up to five years.[124]

Like the common law, the statutory duties of confidentiality are subject to exceptions. Under the ICA disclosure is permitted where it is required,

- by a court of competent jurisdiction;
- for the purposes of the administration of the Act; and
- for the carrying on of the business of the company in Vanuatu or elsewhere.[125]

Court of competent jurisdiction is not defined. However, as discussed above, under the common law, the Supreme Court of Vanuatu has held that the court order must be one effective within the jurisdiction.[126]

Section 125 was briefly examined in *Barrett v. McCormack*.[127] In that case, the appellants were partners in a Vanuatu accounting firm. They had incorporated a company in Vanuatu for a client and were signatories to that company's bank accounts. The respondent had paid money into the account to acquire shares in a separate company, which turned out to be a scam. The Court of Appeal upheld the Supreme Court's decision that the appellants had knowingly assisted in dishonest and fraudulent activity as trustees and de facto directors,[128] in respect of shares purchased with the Respondent's funds. The appellants claimed a defence of confidentiality, relying on the *Companies Act* and the ICA. They submitted that in a tax haven such as Vanuatu, where secrecy laws were imposed, it was not business practice to undertake an investigation as to the source of shares to be bought. In response to this argument, the Court briefly discussed the aim and effect of s 125, stating:

> The provisions provide a guarantee against disclosure of the specified information about the affairs of companies and the transactions of companies, but the legislation assumes that those affairs and transactions will be carried on in accordance with the general law of the Republic of Vanuatu. It is

121 *ICA*, s. 1.

122 [Cap 132] (Vanuatu), Sch.

123 *Ibid.*, s. 125(1).

124 *Ibid.*, s. 125(2).

125 *Ibid.*, s. 125(1).

126 *Re Westpac Banking Corporation*, *supra*, n. 51.

127 [1999] VUCA 11 (Vanuatu SC) online: <www.paclii.org> [*Barrett v. McCormack*].

128 The claim was essentially under *Barnes v. Addy* (1874), LR 9 CH App 244.

noted that s 125 excludes from the secrecy requirement that it imposes information that is "for the carrying on of the business of the company".[129]

(b) Trust Companies Act

The *Trust Companies Act* imposes a duty of confidentiality, but not in such broad terms at the ICA. It provides that "no person shall . . . disclose to any other person any information entrusted to him in confidence, or acquired by him, in his capacity or in the course of his duties as public officer, employee, agent, liquidator, receiver or in a professional or similar fiduciary relationship, respecting the affairs of any trust company whatsoever".[130] As with the ICA, the term "person" is not defined, but the definition in the *Interpretation Act* set out above would apply. It seems clear that the duty of confidentiality would extend to a bank, as the customers information is entrusted to it in "a professional or similar fiduciary relationship". The penalty for breaching these provisions is much less than under the ICA, being VT 100,000 (about US$1,100) and or imprisonment for up to six months.[131]

As under the ICA, there are exceptions. Disclosure under the *Trust Companies Act* may be made:

- when lawfully required by any court of competent jurisdiction within Vanuatu or under the provisions of any law in force in Vanuatu;
- under express authorisation by the trust company concerned; or
- in the case of any public officer, for the purpose of the performance of duties or the exercise of functions under the Act.[132]

To date, the courts in Vanuatu do not appear to have been called on to discuss this provision. However, it is of interest that, unlike the ICA, the *Trust Companies Act* restricts the compulsion of law exception to orders of courts within Vanuatu. It follows that the order of an overseas court will not justify disclosure on the basis of compulsion of law.

(c) Companies Act

The *Companies Act*[133] imposes a much more limited duty of secrecy, and only in favour of exempted companies,[134] being companies that carry on business outside Vanuatu.[135] Section 381 states that "no person shall disclose to any other person or body any information acquired by him respecting the affairs of any, exempted company whatsoever in the course of the administration of this Act, or any information furnished to the Minister [in relation to an application to form an exempted company]. The section is clearly aimed at preventing disclosure of informa-

129 *Barrett v. McCormack*, *supra*, n. 127 at 36-37.

130 *Trust Companies Act*, *supra*, n. 25, s. 9.

131 *Ibid.*, s. 9(2).

132 *Ibid.*, s. 9.

133 *Companies Act*, *supra*, n. 79, s. 376.

134 Exempted companies are essentially those which carry on business or pursue their objects outside Vanuatu: *Companies Act*, *supra*, n. 79, s. 376.

135 *Ibid.*, s. 381.

tion obtained by persons carrying out functions under the Act, including officers in the Ministry dealing with applications for registration.[136] This interpretation is supported by the fact that the section goes on to say that it extends to persons acting "while employed in any official capacity or after he has ceased to be so employed".[137]

As is the case with the other two Acts, there are exceptions, and disclosure may be made:

- for the purpose of the performance of his duties or the exercise of his functions under this Act;
- when lawfully required by any court of competent jurisdiction within Vanuatu or under the provisions of any law; or
- for the purpose of audit of government accounts.

Unlike the ICA, but in keeping with the *Trust Companies Act*, the compulsion of law exception is limited to orders of a Vanuatu court.[138]

Disclosure may also be made by a court appointed liquidator at the written request of a public officer in any country of relevant information respecting the affairs of a company which is the subject of winding-up proceedings. The consent of the Attorney General is required.[139]

Auditors of exempted company are also prohibited from disclosing to any other person any information respecting the affairs of an exempted company which he or she acquires while acting in the capacity of the company's auditor. In addition to the normal exceptions, where disclosure is required by a court of competent jurisdiction, an auditor may disclose information in his or her report to the members or in order to fulfil other functions and duties under the Act.[140]

A further provision to safeguard confidentiality of exempted companies is made in respect of evidence is admitted in court proceedings. Where such evidence would otherwise result in the public disclosure of information about the company's affairs the court must direct that the evidence be heard in camera and must order that the relevant part of the proceedings be not made publically available.[141]

A penalty of up to VT 1,000,000 (about US$11,500) and/or imprisonment for up to five years may be imposed for breaching this duty.

In addition to the secrecy relating to an exempt company, the *Companies Act* contains another provision protecting a bank's customer from disclosure of information. The Act empowers the relevant Minister to appoint inspectors to investigate ownership of a company[142] or to require any interested person or any legal representative or agent, to provide information as to persons interested in shares or debentures of the company.[143] Section 181(b) exempts a company's bankers from

136 *Ibid.*, s. 381(1).
137 *Ibid.*, s. 381(3).
138 *Ibid.*, s. 381(3),
139 *Ibid.*, s. 381(3), proviso.
140 *Ibid.*, s. 381(4).
141 *Companies Act*, *supra*, n. 79, s. 381(5).
142 *Ibid.*, s. 178.
143 *Ibid.*, s. 179.

the duty of disclosure to the Minister or an inspector in respect of any information as to the affairs of any of their customers other than the company.

The courts have only discussed these provisions briefly in *Barrett v. McCormack*,[144] which is discussed above.

5. RATIONALE FOR RETAINING THE DUTY OF CONFIDENTIALITY

In assessing the current position and considering the need for reform of the law relating to a banker's duty of confidentiality to its customer, it is necessary to consider the rational for this duty.

Recognition of the duty of confidentiality follows from the historical banker and customer relationship, founded on the custom and usages of bankers.[145] There are a variety of more specific reasons for the existence of the duty. In *Tournier's Case* the court suggested that the duty was required to protect the customer's credit.[146] Certainly, the bank's duty of confidentiality protects the customer from "unwarranted attempts by outsiders to enquire into his affairs".[147] The disclosure of a customer's financial affairs to "the wrong person or at the wrong time, could do the customer harm",[148] and in the past has resulted in awards of damages against banks.[149]

From a legal perspective, it has been said that although the banker/customer relationship is that of debtor and creditor,[150] in many instances the bank acts as an agent.[151] An agent has historically been viewed as in a position of trust in relation the principal's interests. This position of trust carries with it a duty of confidentiality by the agent to its principal with regard to information obtained during the agency.[152]

From a commercial perspective an implied term of confidentiality has been justified on the basis of business efficacy.[153] Confidentiality is required in order for

144 *Supra*, n. 127.

145 J. Milnes Holder, *The Law and Practice of Banking: Banker and Customer*, vol. 1, 5th ed. (London: Pitman Publishing, 1991) at 50.

146 *Tournier's Case*, *supra*, n. 1 at 474.

147 E.P. Ellinger, Eva Lomnicka & Richard Hooley, *Ellingers Modern Banking Law*, 4th ed. (Oxford: Oxford University Press, 2006) at 166.

148 *G S George Consultants and Investments Pty Ltd v. Datasys Pty Ltd* (1988), (3) SA 726 (W) 726, 736.

149 See, *e.g.*, *Jackson v. Royal Bank of Scotland plc*, [2005] 1 W.L.R. 377.

150 *Foley v. Hill* (1848), [1843–60] All E.R. Rep. 16, 9 E.R. 1002, 2 H.L. Cas. 28 (U.K. H.L.), 1005; *Laing v. Bank of New South Wales* (1952), 54 SR (NSW) 41; *Bank of New South Wales v. Laing* (1953), 54 SR (NSW) 76; *Croton v. The Queen* (1967), 117 CLR 326; *Grant v. The Queen* (1981), 147 CLR 503.

151 For example, a bank acts as the customer's agent when collecting cheques: see Tyree, *supra*, n. 109 at 43.

152 *Parry Jones v. Law Society*, [1969] 1 Ch 1, 9; *Regal (Hastings) Ltd v. Gulliver*, [1942] 1 All E.R. 378; Ellinger, Lomnicka & Hooley, *supra*, n. 147 at 165.

153 *Joachimson*, *supra*, n. 43.

the customer to retain confidence in the bank.[154] The duty ensures that the bank can rely on their customer giving them all the detailed knowledge that the bank requires in order to deal with their affairs efficiently. In other words, the law encourages the client to engage in full and frank disclosure in relation to their finances, which is beneficial to the bank's business.[155] Further, to abolish this duty could result in a loss of customer confidence.[156] The recent global financial crisis provides a graphic example of what can happen when confidence in the banking system is lost and nervous investors demand their money.

More recently the duty of confidentiality has been justified on the basis of necessity.[157]

On the other hand, there are some arguments against the continuing existence of the duty, at least in its present form. As discussed above, the duty can sometimes clash with the duty to the public. Whilst, disclosure in the public interest is an exception to the duty of confidentiality the boundaries of this exception are particularly obscure. This creates a situation of uncertainty, particularly in cross-jurisdictional requests of disclosure, resulting in costly litigation.[158]

The other argument against the current law on confidentiality is that they may encourage a culture of secrecy and lower the standard of honesty in the management of companies. Although legislation such as the *ICA, Trust Companies Act, Companies Act* in Vanuatu, is not intended to do this, as was discussed in *Barrett v. McCormack*,[159] the statutory duties may discourage proper investigation into business practice.

Finally, there is the argument that confidentiality and secrecy is a barrier to combating transnational crimes such as drug trafficking, money laundering and human trafficking.[160]

6. CONCLUSION

The current position in Vanuatu and in most other common law countries is that a duty of confidentiality is implied into a contract between banks and their customers. This duty and the exceptions are outlined in *Tournier's Case*,[161] which has been applied in most common law countries, including Vanuatu[162] and Austra-

154 Ellinger, Lomnicka & Hooley, *supra*, n. 147 at 167.

155 *Ibid.*, at 165.

156 *Ibid.* See also Review Committee on Banking Services Law (UK), *Banking Services: Law and Practice Report* (London: HMSO, 1989) at [5.26].

157 *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.*, [1986] 1 A.C. 80 (Hong Kong P.C.).

158 In Australia, the Martin Committee Report recommended clarification of the duty and exceptions: Austl, Commonwealth, House of Representatives Standing Committee on Finance and Public Administration, *A Pocket Full of Change* (Canberra: Australian Government Publishing Service, 1991), Recommendation 84 at 412.

159 *Supra*, n. 127.

160 Chaikin, *supra*, n. 55 at 266.

161 *Supra*, n. 1.

162 *Supra*, n. 51.

lia.[163] In Vanuatu, the common law is bolstered by statutory obligations of secrecy applying in favour of certain companies. However, there is no privacy legislation in force, as there is in some other parts of the Commonwealth.

Exceptions to the duty, both at common law and under statute, provide for disclosure in limited circumstances, in particular where required by law, ensuring a bank is not held liable for disclosure where it is legally obliged to disclose information. In Vanuatu, this legal obligation must stem from Vanuatu law. However, other aspects of the duty and the exceptions to it are unclear. In some countries, considerable inroads have been made into the duty by legislation empowering various authorities to demand the release of a customer's information by the bank. To date, such legislation is fairly limited in Vanuatu. In particular, there is no income tax or trade practices legislation compelling disclosure.

The courts in Vanuatu have taken a robust stance on protection of confidential information.[164] They have refused to compel disclosure demanded by overseas authorises under foreign legislation. However, beyond accepting the existence and general inviolability of the duty of confidentiality, the courts have not taken the opportunity to expand on its precise boundaries, leaving some aspects of its scope unclear. There is an urgent need to define the exceptions to the duty of confidentiality in order to instil some certainty in this area of law. Until this is done banks are at risk when disclosing confidential information and may be forced to pursue costly litigation to protect themselves. From the customers' perspective, they are at risk of losing their right to privacy regarding their financial affairs. Loss of confidence in banks may ensue, with a consequent risk to the off-shore banking sector in countries such as Vanuatu.

163 *Smorgon v. Australia and New Zealand Banking Group Ltd.* (1976), 134 CLR 475.

164 See, *e.g.*, *Application for Summonses*, *supra*, n. 30 at 92-93.