Chapter 1

POLICY, REGULATION AND SUPERVISION

1. Introduction

The law related to banking embraces a wide variety of legal principles. It is not a discrete branch of law but rather an amalgamation of many areas law, particularly the law of contract, tort, companies and the rules of equity. Another feature of the law governing the banking industry is that it is heavily shaped by social and economic factors. Robust regulation and supervision are recognized as key requirements of any successful banking regime and since banking activity is closely related to economic performance a closely drafted banking policy is deemed essential to ensure a safe, sustainable and effective banking industry. **1.001**

Following the 2008 Global Financial Crisis sweeping changes to regulation have taken place on both an international and domestic level. Regulation encompasses the rules that control, govern, guide or restrict banking conduct. In Hong Kong, many of these rules are set out in legislation or subsidiary legislation. The banking industry in Hong Kong is regulated closely by the Hong Kong Monetary Authority (HKMA) in accordance with the Banking Ordinance (Cap.155)[1] and other related subsidiary legislation. The rules and directives issued by the HKMA and the Hong Kong Association of Banks are also relevant. **1.002**

Due to the diverse nature of banking activity and banking related operations there are many Ordinances that are relevant to banking in Hong Kong most notably the: (i) Securities and Futures Ordinance (Cap.571); (ii) Bills of Exchange Ordinance (Cap.19); (iii) Companies Ordinance (Cap.622); (iv) Personal Data (Privacy) Ordinance (Cap.486); (v) The Hong Kong Association of Banks Ordinance (Cap.364); (vi) Unconscionable Contracts Ordinance (Cap.458); and (vii) Control of Exemption Clauses Ordinance (Cap.71). **1.003**

(a) Importance of banking and finance industry

Hong Kong is a leading International Finance Centre and as such has one of the highest concentrations of banking institutions in the world. According to statistics collected by the HKMA over 70 of the largest 100 banks in the world operate in Hong Kong.[2] At the end of September 2016, 197 authorized institutions operated in Hong Kong, together with 59 other overseas banks with representative offices.[3] London and New York are the only other centres in the world that have a higher physical presence of banking institutions. Financial services, which include banking, insurance, stock brokerage, fund management, and other financial services are important contributors to Hong Kong's income. Representing one of the four pillars of the economic sector, **1.004**

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1 The first Banking Ordinance in Hong Kong was promulgated in 1948. The Banking Ordinance (Cap.155) is hereinafter referred to as the "Banking Ordinance".

2 Detailed information available from Hong Kong Monetary Authority (HKMA) online at http://www.hkma.gov.hk/eng/key-functions/banking-stability/banking-policy-and-supervision/three-tier-banking-system.shtml last visited on 10 October 2016.

3 Hong Kong Monetary Authority, Monthly Statistical Bulletin, October 2016 – Issue No. 266 available at http://www.hkma.gov.hk/eng/market-data-and-statistics/monthly-statistical-bulletin/table.shtml#section3 last visited on 10 October 2016.

financial services amount to almost $365.9 billion, or 16.6% of the Gross Domestic Product (GDP) in terms of value added.[4]

1.005 The success of the banking and finance industry in Hong Kong is partly attributable to the development of international trade and business.[5] Its socio-political environment has also attracted investors from overseas. Capital movements into and out of Hong Kong are unrestricted and both capital gains and dividends are not taxable.[6]

1.006 Over the past two decades Hong Kong has continued to remain competitive on a global and regional level. Data published by the Bank for International Settlements (BIS) places Hong Kong as the second largest offshore banking centre in the world measured by size of reporting banks' aggregate foreign claims,[7] and Asia's second largest International Banking Centre after Japan.[8] Hong Kong is currently ranked fourth (behind London, New York and Singapore) in the Global Financial Centres Index.[9] Recently, the Bank for International Settlements ranked Hong Kong as the fourth largest over the counter (OTC) foreign exchange derivative market in the world with a net-gross basis daily turnover reaching US$437 billion.[10]

(b) Development of banking

1.007 Shortly after the signing of the Treaty of Nanking in 1842 the British colony was established and trading began to flourish in Hong Kong.[11] At this point banking in Hong Kong was initially undertaken by large merchant firms such as Jardine Matheson & Co., Dent & Co and Russell & Co. whom financed trade by exchanging transactions and buying each other's bills for their remittances.[12] However, by 1866 finance was in demand, particularly by smaller companies who could not always seek finance from their larger competitors, and no fewer than 11 English and Indian joint stock banks had expanded their operations to Hong Kong. During this period of time banking was

[4] Latest figures up to 2014 available from Census and Statistics Department, The Government of the Hong Kong Special Administrative Region, Second Quarter 2016 (August 2016).

[5] See Berry Fong-Chung Hsu et al, *Financial Markets in Hong Kong: Law and Practice* (Oxford University Press, 2006) pp.16–38.

[6] See generally Inland Revenue Ordinance (Cap.112). For a comprehensive view of tax law in Hong Kong see Deloitte Touche Tohmatsu, *Hong Kong Master Tax Guide2014/15* (23rd edn, CCH Hong Kong, 2014).

[7] Bank for International Settlements, Consolidated Banking Statistics 'Consolidated claims of reporting banks – immediate borrower basis: On individual countries by maturity and sector/Amounts outstanding' End, September 2014 (January 2015).

[8] *Ibid.*

[9] 'The Global Financial Centres Index 19' (March 2016). The Global Financial Centres Index (GFCI) is published by the ZYen group and Long Finance and is a recognised instrument for gauging the attractiveness – both in absolute and in dynamic terms – of financial centres. See http://www.longfinance.net last visited on 10 October 2016.

[10] Bank for International Settlements, Triennial Central Bank Survey 2016: 'Turnover of OTC, foreign exchange derivatives' (April 2016).

[11] Accession to the Treaty of Nanking marked the end of the Opium War. In addition to the cession of Hong Kong Island, China also granted the British access to the ports of Xiamen (formerly Amoy), Fuzhou (Foochow), Ningbo (Ningpo), and Shanghai under the Treaty of Nanking (29 August 1842). Prior to this the British only had access to Guangzhou (Canton).

[12] Such companies were known as "agency houses". See Maurice Collis, *Wayfoong: The Hongkong and Shanghai Banking Corporation* (Faber and Faber Limited London, 1965) p.21.

purely limited to the financing of trade as opposed to providing the general public with retail banking services.[13]

1.008 The first bank to establish in Hong Kong was The Oriental Banking Corporation, which was established in 1842 in Bombay under the name of the Bank of Western India. In 1845 the bank moved its headquarters to London and established an unincorporated body with unlimited liability of its members in Hong Kong. It was eventually granted a charter in 1951 and served as the leading bank for many years. Later, in 1884 the bank was wound up as a result of heavy lending against failed coffee crop in Ceylon.[14]

1.009 Although a number of other banks were instrumental in the early days,[15] the Hongkong and Shanghai Banking Corporation has played a significant role in the development of the financial sector and economy of Hong Kong. In 1866, the Hong Kong Shanghai Bank was incorporated in Hong Kong under the new Companies Ordinance with the aim of supporting local and foreign trade.[16]

(c) Scope of chapter

1.010 Familiarity with the policy of banking in Hong Kong is essential to the understanding and application of laws relating to banking. A brief overview of the banking policy in Hong Kong is therefore the first issue that this chapter deals with. This chapter then identifies the relevant constitutional foundations relevant to banking in Hong Kong. It also introduces the legal and regulatory framework in addition to illustrating the basic concepts of supervision of the banking industry in Hong Kong. The main elements regarding authorized institutions in Hong Kong are also set out in this chapter followed by a short introduction to banking and banking business. This chapter then highlights the fundamental rules imposed upon local branches, offices, representative offices, overseas branches and representative offices. Finally, this chapter outlines the main standards imposed by the Basel Committee on Banking Supervision.

2. Policy

1.011 Banking policy is a term that refers to the overall approach to the operation and development of the banking sector. The Government of Hong Kong adheres to the principle of minimal market intervention to provide a favourable business environment. Banking policy is guided strongly by the laissez-faire economic model promoted by the government, however, Hong Kong also adopts international best banking practice due to HKMA's membership with Bank for International Settlements.

[13] Maurice Collis, *Wayfoong: The Hongkong and Shanghai Banking Corporation* (Faber and Faber Limited London, 1965) pp.6–17.

[14] TK Ghose, *The Banking System of Hong Kong* (Butterworths & Co Asia PTE Ltd Singapore 1987) p.3.

[15] Such banks include but are not limited to the following: The Chartered Mercantile Bank of India, London and China, The Chartered Bank, The Bank of China, see TK Ghose, *Ibid.*, at pp.6–17.

[16] See Frank HH King; David JS King; Catherine E King *The History of the Hongkong and Shanghai Banking Corporation,* Volume IV (Cambridge University Press, 1990).

1.012 The principal function of the HKMA, as the banking supervisor in Hong Kong, is to ensure the general stability and effective operation of the banking sector. In this respect the HKMA can be seen as the gatekeeper of banking policy. With regards to banking policy, the HKMA has stated that

> "…there is a need to enhance the level of competitiveness of the Hong Kong banking market in order to promote greater efficiency and innovation in the market. But at the same time it is important to strengthen the safety and soundness of the banking sector as a whole so that the benefits of increased competition and greater efficiency can be fully realised."[17]

1.013 This statement demonstrates that although a competitive banking regime is pursued in Hong Kong this is not to the detriment of a safe and stable banking system.

3. Constitutional Foundations

1.014 The rule of law, due process and judicial freedom are all major factors that have influenced the success of Hong Kong as an international finance centre. Although China resumed sovereignty of Hong Kong on 1 July 1997 the HKSAR Government has the lawful authority to implement its own laws under the 'One Country, Two Systems' policy, promoted by Deng Xioping.[18] Identifying the legal basis of the powers of the HKSAR Government to implement its own banking laws serves as the background to understanding the legislation that underpins banking in Hong Kong.

(a) Joint declaration

1.015 In 1984, The Joint Declaration between the People's Republic of China (China) and Great Britain on the Question of Hong Kong (the Joint Declaration)[19] was ratified by the British Parliament and the National People's Congress of China. This Joint Declaration sets out the agreed conditions upon which the sovereignty of Hong Kong was returned to China. Under the Joint Declaration, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, Hong Kong Special Administrative Region (HKSAR) was to be established upon the resumption of the exercise of sovereignty over Hong Kong. Accordingly, HKSAR would be directly under the authority of the Central People's Government of the People's Republic of China however, it shall enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government. The Joint

[17] Hong Kong Monetary Authority, *Policy Response to the Banking Sector Consultancy Study* (1999), 6.

[18] See Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press, 1999); Ming Sing (ed), *Politics and Government in Hong Kong: Crisis Under Chinese Sovereignty* (Routledge, 2009).

[19] The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984 (Cap.2301). This instrument was not given a chapter number in the Loose-leaf edition of the Laws of Hong Kong. An unofficial reference number, however, is assigned to this instrument in BLIS for identification purposes. This also enables users to carry out a search in relation to this instrument by reference to the unofficial reference number.

Declaration provides that the aforementioned policies, amongst others, are to be set out in a Basic Law and they should remain unchanged for 50 years.

(b) Basic Law

1.016 The Basic Law of Hong Kong was duly enacted by the People's Congress on 4 April 1990 and was brought into effect on 1 July 1997.[20] Under the Basic Law the HKSAR is an inalienable part of the People's Republic of China and all powers are authorized by the National People's Congress. Article 2 of the Basic Law specifically provides that the HKSAR is authorized to "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication". With regard to the legal system, Article 8 of the Basic Law ensures that the laws that were previously in place prior to 1997, including the common law system, rules of equity, ordinances, subordinate legislation and customary law shall remain, other than those that contravene the Basic Law.[21] The degree of stability regarding banking laws and practices is secured under the Basic Law, Article 5, which states that "the previous capitalist system and way of life in place prior to 1997 shall remain unchanged for 50 years".

1.017 In accordance with Article 66 of the Basic Law, the Legislative Council of the HKSAR is denounced as the: "legislature of the Region". The powers and functions of the Legislative Council are set out in Article 73 of the Basic Law and include (amongst others) enacting, amending or repealing laws in accordance with the provisions of the Basic Law and legal procedures. This is relevant in that Article 73 of the Basic Law serves as the legal basis for the enactment, amendment or repeal of all laws pertaining to banking and finance.

1.018 The preservation of the status of Hong Kong as an international financial centre is clearly set out in Article 109 of the Basic Law. Accordingly, the Government of the HKSAR must "provide an appropriate economic and legal environment" to maintain Hong Kong's position. To enable the Government of the HKSAR to perform this obligation it is authorized under Article 110 of the Basic Law to "formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with the law."

1.019 Protection is afforded by the Basic law for the continuance of the Hong Kong Dollar as legal tender under Article 111 of the Basic Law. It is further provided in Article 111 of the Basic Law that the Government of HKSAR, if satisfied that Hong Kong currency will continue to be stable, can "authorize banks to issue or to continue to issue Hong Kong currency under statutory authority". The foreign exchange markets, gold, securities, futures and other like finance activities shall continue under Article 112 of the Basic Law and the Hong Kong dollar shall remain a freely convertible currency. Article 113 of the Basic Law authorizes the HKSAR Government to manage and control the Exchange Fund of HKSAR and to regulate the exchange value of the Hong Kong Dollar.

[20] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 ("Basic Law").

[21] Also see Article 18 of the Basic Law, which stipulates that: "The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region."

(c) Protection of property rights under the Basic Law

1.020 Article 105 of the Basic Law also provides additional rights for the protection of the private ownership of property that did not previously exist under colonial administration.[22] Accordingly, individuals and legal persons may acquire, dispose and inherit property. The right to compensation for the unlawful depravation of property is also protected under that Article 105. Such "property" includes not only real property in the form of land, real estate and personal property in possession such as physical goods/chattels but also choses in action, which include deposits in bank accounts, bonds, debentures, and shares.[23]

4. Legislative Sources

(a) Banking Ordinance

1.021 Banking is a closely regulated industry in Hong Kong.[24] The Banking Ordinance (Cap.155), enacted in 1986,[25] provides for the licensing and regulation of banks and other financial institutions in Hong Kong. The key features of the Banking Ordinance (Cap.155) are that it defines the term "banking business" and sets out the three types of financial institutions that are collectively defined as "authorized institutions" (AIs). The regulation of banks and banking activities under the Banking Ordinance (Cap.155) extends to overseas banks operating in Hong Kong in addition to local banks. In addition to the protection of depositors by the licensing of authorized institutions the aims of the Banking Ordinance are to also promote the general stability and effective working of the banking system and make provision for the supervision of money brokers.

1.022 A considerable amount of subsidiary legislation, in the form of rules and regulations, has been enacted to support the provisions set out in the Banking Ordinance (Cap.155) addressing a variety of matters and to implement international standards in accordance with the Basel Committee on Banking Supervision. In particular, the Banking Capital (Amendment) Rules 2012 (Cap.155L) implement the new regulatory capital standards promulgated by the Basel Committee on Banking Supervision, which are referred to as "Basel III". In the new Banking Capital Rules (Cap.155L), new standards of the minimum capital adequacy ratio applicable to authorized institutions are to be phased in from 2013 to 2019. A more detailed discussion regarding the Basel Committee on Banking Supervision is set out in part 1.8 below.

1.023 Under section 7(3) of the Banking Ordinance (Cap.155), the Hong Kong Monetary Authority (HKMA) is empowered to issue guidelines related to the operation of financial institutions. It is intended that such guidelines shall ensure the maintenance of proper banking standards in Hong Kong. Numerous guidelines have been issued

[22] Albert H Y Chen (1993) 'The Basic Law and the Protection of Property Rights', *Hong Kong Law Journal*, 23(1), pp.31–78.

[23] *Ibid.*, at 42.

[24] Prior to the enactment of the first Banking Ordinance of 1948, banking was unregulated in Hong Kong.

[25] The recent Banking Ordinance was enacted as Ordinance number 27 of 1986 and is now Chapter 155 of the Laws of Hong Kong.

by HKMA, which relate to a wide range of matter including but not limited to authorization, self-regulation and ethics, electronic banking and enforcement.[26]

(b) Exchange fund Ordinance

1.024 The establishment and management of the exchange fund and the employment of its assets in Hong Kong is governed by the Exchange Fund Ordinance (Cap.66). The Ordinance provides that the exchange fund shall be under the control of the Financial Secretary and shall be used primarily for such purposes as the Financial Secretary thinks fit. The control of the Financial Secretary shall be exercised in consultation with an Exchange Fund Advisory Committee of which the Financial Secretary shall be ex officio chairman. Section 5A of the Exchange Fund Ordinance (Cap.66) also deals with the appointment of the Monetary Authority.

(c) Other significant legislation

1.025 The Bills of Exchange Ordinance (Cap.19) is an enactment that governs negotiable instruments such as bills of exchange, promissory notes and cheques. The Hong Kong Association of Banks Ordinance (Cap.364); Clearing and Settlement Systems Ordinance (Cap.584); and the Protection of Investors Ordinance (Cap.335) also serve as important sources of Hong Kong banking law. In addition, contracts made between a banker and customer will be governed by key consumer legislation such as the Control of Exemption Clauses Ordinance (Cap.71); the Unconscionable Contracts Ordinance (Cap.458); and the bank must conduct business in accordance with the Supply of Services (Implied Terms) Ordinance (Cap.457).

1.026 To ensure that the bank does not assist its customers, either voluntary or involuntarily, in illicit practices such as money laundering, terrorist financing or harbouring the proceeds of other criminal acts or taxation banks must also comply with relevant legislation such as the: Anti-Money Laundering and Counter Terrorist Financing Ordinance (Cap.615); Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405); Organized and Serious Crimes Ordinance (Cap.455); and Inland Revenue Ordinance (Cap.112).

(d) Personal Data Privacy Ordinance

1.027 Since banks collect and retain a large amount of personal information pertaining to their customers they are bound by the Personal Data (Privacy) Ordinance (Cap.486) (PDPO). The PDPO does not set out specific requirements on the banking sector however; banks are caught by the PDPO since they qualify as data users. Further discussion regarding the application of data protection laws in the banking industry is set out in Chapter 4.

(e) Securities and Futures Ordinance

1.028 As a consequence of the proliferation of banking services, the modern bank also conducts other activities that are deemed to be outside of the scope of traditional

[26] Hong Kong Monetary Authority, Guidelines and Circulars, available online at http://www.hkma.gov.hk/eng/key-information/guidelines-and-circulars/guidelines/ last visited on 6 February 2016.

being an action for which a period of limitation is prescribed by any other provision of the Limitation Ordinance (Cap.347), must not be brought after the expiration of 6 years from the date on which the right of action accrued.

2.147 A 3-year limitation period applies in actions for negligence, nuisance or breach of duty where the damages claimed include damages in respect of personal injuries[197] or actions under the Fatal Accidents Ordinance (Cap.22).[198]

2.148 There is no period of limitation applicable to an action to an action by a beneficiary under a trust, being an action either in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.[199]

7. Termination of the Relationship

2.149 It is provided in the Code that the relationship between a customer and the bank may be terminated by mutual agreement, or unilaterally by either party. Such termination is however, subject to any specific terms and conditions set out in the banking agreement.[200] Specific terms may exist, for example, for the hire of a safe deposit box, which is usually for a fixed period of time. In the absence of any express terms, it is an implied term of the contract that the bank shall provide the customer with reasonable notice when terminating the relationship.[201] The Code further elaborates upon the common law by recommending a period of 30 days' notice, or upon the customer's request a longer period of notice where it is practicable.[202] In exceptional circumstances, for example, where the account is being used or is suspected of being used for illegal activities the account may be closed immediately.[203] In accordance with the Code institutions should, where appropriate and not against the law, also consider providing a reason to the customer for closing the account.[204]

2.150 When a customer's account has been closed, either by the customer or by the bank, the relationship will no longer exist, and neither party is under any remaining contractual obligation. The only exception to this rule is that the banker's duty of secrecy continues to exist after the closure of the account,[205] which is discussed further in Chapter 3.

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[197] Limitation Ordinance (Cap.347), s.27.
[198] *Ibid.*, ss.28 and 29.
[199] *Ibid.*, s.20.
[200] Code of Banking Practice (February 2015), para.17.1.
[201] See n.69 *N Joachimson (A Firm Name) v Swiss Bank Corporation*, per Atkin LJ, [127]. Also see discussion in this chapter 4 (a) (v) "implied terms" above.
[202] Code of Banking Practice (February, 2015), para.17.2.
[203] *Ibid.*
[204] *Ibid.*
[205] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.

Chapter 3

BANKER'S DUTY OF SECRECY

1. Introduction

The banker's duty of secrecy has evolved significantly over the past century. Initially, it was respected as customary practice[1] and gradually gained recognition as a distinct branch of the general law of confidence.[2] Briefly stated, bank secrecy is a principle often protected by law whereby confidential customer information held by a bank and other financial institutions must not be disclosed. The duty of secrecy and duty of confidentiality are used interchangeably by some other academic commentators, however this publication specifically refers to the current duty in Hong Kong as the "duty of secrecy".[3] As is the case in other common law jurisdictions, in Hong Kong, a banker owes a duty of secrecy to its customer based upon the existence of a commercial relationship. **3.001**

The purpose of this chapter is to set out the current legal framework of the banker's duty of secrecy in Hong Kong. The discussion focusses on the current nature and scope of the bank's duty as an implied or express contractual obligation. In Hong Kong, the duty is founded in the common law, and is supported by recommendations within the Code of Banking Practice (the Code).[4] Legislative provisions have also been enacted to regulate the official secrecy of information disclosed to the regulatory authority.[5] **3.002**

In some circumstances a fiduciary relationship may arise when the bank steps outside of its conventional role and provides specific advice to a customer, upon which the customer relies upon. Where a bank is placed in a fiduciary relationship it may owe additional duties as a fiduciary to keep certain information related to its customers confidential. **3.003**

According to a study conducted by the United Kingdom Payments Council in 2010 it was found that approximately 95% of the adult population in the United Kingdom (UK) operated a bank account.[6] Unfortunately, there has been no such study to date in Hong Kong, however, from the results of the UK study it can be inferred that a significant majority of the population operate a bank account in developed societies. Accordingly, the legal standard of the duty concerns a large percentage of the population and the duty therefore remains an issue of 'considerable public importance'.[7] **3.004**

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1 See comments of *Hardy v Veasy* (1868) L R 3 Exch 107: "though it may be thought that such a duty is rather moral than legal, I should hesitate much before setting aside the opinion expressed by the Chief Justice in *Foster v Bank of London*" (Kelly CB). For the development of bank secrecy in Switzerland see generally Henri B Meier, John E Marthinsen, and Pascal A Gantenbe, *Swiss Finance: Capital Markets, Banking and the Swiss Value, Swiss Bank Secrecy*, (John Wiley & Sons, 2013), p.99.

2 For early cases dealing with the law of confidence, see *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293. Lord Hoffmann referred to the decision in *Prince Albert v Strange* as a 'seminal' decision: *Campbell v Mirror Group Newspapers* [2004] 2 AC 457 [471]. See generally, T Alpin *et al* (eds) *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, Oxford University Press, 2012).

3 The "duty of secrecy" is the terminology that is adopted in the landmark case of *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 461.

4 The Code of Banking Practice (February 2015).

5 Banking Ordinance (Cap.155), s.120.

6 United Kingdom Payments Council & LINK ATM Scheme, *UK Payment Statistics 2010*, (June 2010), p.6.

7 In *Tournier v National Provincial and Union Bank of England*, n3 [482], Atkin LJ stated that: the implied contract not to divulge information concerning the plaintiff's transactions with the bank involved a question of "considerable public importance".

3.005 Expressed in simple terms, the banker's duty of secrecy is a legal duty under which banks, and/or specified persons, are not permitted to divulge information about their customers unless certain conditions apply. The duty is, however, a qualified obligation. No legal system in any jurisdiction, not even Switzerland, provides an absolute duty of secrecy. Still, it remains the case that some jurisdictions impose a stricter level of secrecy than others.[8]

3.006 In most jurisdictions, such as Hong Kong, the legal obligation of a bank to maintain the secrecy of its customer's information is well established. In the absence of an express agreement, the duty arises as a result of an implied term between the customer and banker.[9] The well-known qualifications to the duty are as follows: where disclosure is under compulsion by law, there is a duty to the public to disclose, the interests of the bank require disclosure; or, the disclosure is made with the customer's implied or express consent - however they are not always clear. As a result of the rapidly changing conditions that affect the modern banking industry the author opines that the *Tournier* qualifications need to be more specifically defined.[10]

3.007 This publication is principally concerned with the duty owed by retail banks. However, similar duties may be incurred upon other financial institutions including investment banks, deposit taking companies and other similar institutions. Such duties are equally significant but lay outside of the scope of this publication.

3.008 The duty of secrecy is not the only cause of action available to a complainant when a bank has misused their confidential information. The principles of equity can also be applied to enforce obligations of confidence even in the absence of a commercial relationship. The legal obligations that arise under the equitable law of confidence are discussed in further detail in section 8 below.

3.009 The bank is additionally required to keep certain customer information private under privacy legislation. In 2012, the Personal Data (Privacy) Ordinance (Cap.486) was significantly amended and this has had a considerable impact upon how a bank receives, stores, and discloses the private information of personal customers. Although privacy and secrecy are closely related, the bank's legal obligation of privacy is distinct from the duty of secrecy and as such is discussed in Chapter 4.[11]

3.010 The focus in this chapter is the nature and scope of the duty of bank secrecy in Hong Kong. After this introductory section, this chapter examines the duty as set out by the common law in the landmark case *Tournier v National Provincial and Union Bank of England*.[12] The following section discusses express terms. Thereafter, the remedies that are available for breach of the duty in Hong Kong are examined. The legislative provision in section 120 of the Banking Ordinance (Cap.155) pertaining to official secrecy is set out next. This chapter then proceeds

[8] See generally Gwendoline Godfrey (ed), *Neate and Godfrey: Bank Confidentiality* (6th edn, Bloomsbury, 2015).
[9] *Tournier* case, n3 [474] (Bankes LJ): 'the credit of the customer depends very largely upon the strict observance of that confidence'.
[10] For further discussion see Claire Wilson, "Bank Secrecy in Hong Kong" in Gwendoline Godfrey (ed), *Neate and Godfrey: Bank Confidentiality* (6th edn, Bloomsbury, 2015).
[11] See below Chapter 4, Privacy and Data Protection.
[12] *Tournier* case, n3.

to discuss the recommendations established in the Code of Banking Practice before setting out the duty of secrecy that the bank assumes when acting as a fiduciary. The penultimate section in this chapter discusses the legal obligations that arise under the general law of confidence and finally concludes with an evaluation of the duty of secrecy.

2. Common Law Duty

3.011 In most common law jurisdictions[13] including Hong Kong the *locus classicus* of the banker's duty of secrecy is the English Court of Appeal decision of *Tournier v National Provincial and Union Bank of England*.[14] Bankes LJ defined the duty in the *Tournier* case as 'a legal one arising out of contract'.[15] Essentially, the relationship is one of debtor and creditor[16] augmented by other relationships such as agency,[17] depending upon the nature of banking activity.[18] The intended purpose of the decision in the *Tournier* case was to rigorously protect bank secrecy, which is reflected in the four strictly defined qualifications as follows:

(a) disclosure under compulsion by law,

(b) duty to the public to disclose,

(c) the interests of the bank requires disclosure, and

(d) the customer has given express or implied consent for disclosure.[19]

3.012 In Hong Kong, like other common law jurisdictions, the banker's duty of secrecy exists both as a positive and a negative covenant. It is a negative covenant in that banks should not disclose information relating to the customer's account.[20] It can also be expressed as a positive covenant to maintain secrecy.

3.013 The purpose of this section is to explain the nature, scope and application of the banker's duty of secrecy arising out of the *Tournier* case.

[13] Including, Australia, England & Wales, New Zealand.
[14] *Tournier* case, n3.
[15] *Tournier* case, n3 [471] (Atkin LJ): "the question of what terms are to be implied in a contract is a question of law" and [480] (Scrutton J) applying *Re Comptoir Commercial Anversois and Power* [1920] 1 KB 868.
[16] *Foley v Hill* (1848) 2 HLC 28, in this classic case the House or Lords ruled that the banker-customer contract was essentially a contract between debtor and creditor. Lord Cottenham further referred to the special need for demand, contrary to the traditional debtor-creditor relationship. This decision was later affirmed in the English Court of Appeal case of *N Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.
[17] *Ung Eng Huat v Arab Malaysian Bank Bhd* [2003] 6 MLJ 1 [18]; for example agency relationship arises when bank undertakes to honour customer's cheques and other payment instructions, and to collect payments to due to the customer.
[18] The variety of services that is offered by the modern day bank is vast and give rise to a variety of legal relationships. Such services extend beyond the traditional deposit and repayment, and paying and collecting cheques that was anticipated in the scope of "banking business". For a definition of "banking business" see Banking Ordinance (Cap.155), s.2.
[19] *Ibid.*, [472] (Bankes LJ).
[20] *Lai Mei Chun Swana v Lai Chung Kong* [2011] HKCU 742, [para.60].

(a) The *Tournier* case

3.014 The *Tournier* case is still the main authority on the banker's duty of secrecy today and as such requires detailed consideration. A summary of the material facts of the case serve as an appropriate starting point.

(i) *Material facts*

3.015 Mr. Tournier, (the plaintiff) appealed to the Court of Appeal requesting a new trial on the ground that the trial judge had misdirected the jury. Tournier, was a customer of the defendant bank, National Provincial and Union Bank of England, and banked with the Finsbury Pavement branch. In April 1922, Tournier's account was overdrawn by a modest sum and he entered into an agreement with the bank to repay the debt by weekly payments. Since Tournier was just about to commence employment with a firm Kenyon & Co., the name and address of his future employers were written on the agreement.

3.016 Tournier failed to meet the repayments as agreed, which led Mr. Fennel, the acting manager of the branch, to telephone Kenyon & Co., to determine the private address of the plaintiff. Fennel spoke with two directors of the company, Mr. Wells and Mr. Kenyon. Tournier maintained that Fennel had informed Kenyon that the plaintiff's account was overdrawn, repayments had not been made as agreed, cheques that passed through his account were drawn on "betting men", and that the bank thought that Tournier was involved in heavy betting.

3.017 The plaintiff further maintained that Fennel had told Wells that he was concerned that Tournier was engaged with bookmakers, as the bank had traced Cheques passing from the customer's account to the account of bookmakers.

(ii) *Action*

3.018 Mr. Tournier brought an action against the defendant bank in respect of the words spoken by the manager of the branch under two heads: (1) slander, and (2) breach of an implied contract that the defendant bank would not disclose to third persons the state of the plaintiff's account or any transactions relating thereto. It is the second head, breach of implied contract, which this Chapter is concerned with.

(b) Scope of duty

3.019 The extent of the duty remains as defined by Atkin LJ in the *Tournier* case as follows:

> "It clearly goes beyond the state of the account, that is, whether there is a debit or credit balance, and the amount of that balance. It must at least extend to all transactions that go through the account, and to the securities, if any, given in respect of the account; and in respect of such matters it must, I think, extend beyond the period when the account is closed, or ceases to be an active account. I further think that the obligation extends to information obtained from other sources that the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers—for example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customers."

3.020 According to Atkin LJ and Bankes LJ, the information protected by the duty extends to information beyond that relating to the account and transcends to all information relating to the customer and the customer's account.[21]

3.021 One of the vital questions that the Court of Appeal judges were faced with in the *Tournier* case was whether the duty of secrecy extends to information related to the customer and his affairs derived not from the account but from other sources, such as the bank account of another customer. Bankes LJ responded cautiously when considering this matter since he was concerned that there was a lack of direct authority. However, the extent of the duty imposed on other professionals was considered.[22]

3.022 It was concluded by Bankes LJ that all information that a banker acquired "in the character of banker" would be protected by the obligation of secrecy.[23] Bankes LJ concluded that: "banks are liable for any disclosure of information which may have caused damage to the plaintiff unless the bank can bring the disclosure of information so derived under one of the classified qualifications…"[24]

3.023 Atkin LJ agreed on this point ruling: "the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was attained arose out of banking relations of the bank and its customers…"[25]

3.024 Scrutton LJ delivered the dissenting judgment on this point. He clearly stated that he found it impossible to imply an obligation of secrecy on a banker to keep information derived from a customer (customer A), not from that customer's account, but from another customer's account (customer B). This point was supported by the rationale that the bank would owe the obligation only to customer A but not to customer B, the other customer. Nevertheless, this argument was stated in the dissenting judgment and therefore, is not binding law.[26]

3.025 The English courts have subsequently preferred the majority view in the *Tournier* case with regard to whether information derived from other sources than the customer's account should be protected by the obligation of secrecy. In the recent Court of Appeal case of *Barclays Bank plc v Taylor*[27] Lord Donaldson MR ruled: "the banker-customer relationship imposes upon the bank a duty of confidentiality in relation to information concerning its customer and his affairs which it acquires in the character of his banker".[28]

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21 *Tournier* case, n3 [474].

22 *Tournier* case, n3 [475] (Bankes LJ) considered *Davies v Waters* (1842) 9 M & W 608 [613] and applied *Taylor v Blacklow* (1836) 3 Bing N C 235, [249].

23 The phrase "in the character of" was adopted by Bankes LJ from the judgment of Gurney B in *Davies v Waters* (1842) 9 M & W 608, [613].

24 *Tournier* case, n3 [475].

25 *Tournier* case, n3 [485].

26 *Tournier* case, n3 [482].

27 *Barclays Bank Plc v Taylor* [1989] 1 WLR 1066.

28 *Ibid.*, 1070. Also see *Royal Bank of Canada v IRC* [1972] 1 Ch 665 [660]; Megarry J stated that the obligation of secrecy: "is not confined to ordinary banking transactions but would extend to any banking transaction which is effected for a customer, whether ordinary or extraordinary".

3.026 According to Professor Ellinger, the ruling of Lord Donaldson MR appears to suggest that information that was acquired prior to the opening of the customer's account would not be protected by the duty.[29] This is an important point that requires clarification particularly with regard to the scope of the duty in Hong Kong.

3.027 At this point it is appropriate to consider whether other services offered by the bank, such as the safe deposit box service, are also included within the banker's duty of confidentiality. This issue is not clear in Hong Kong, but it is likely that the banker's duty of secrecy does not extend to the safe deposit box.

3.028 The reason for the exclusion of safety deposit boxes from the banker's duty of confidentiality is that generally, it is considered that the provision of a safe deposit box does not fall within the scope of banking business. A safety deposit box is provided as a separate service and is therefore governed by specific terms and conditions. Ordinarily, the relationship between the banker and the customer is deemed to be that of bailor and bailee under a contractual agreement to rent a safe deposit box.[30]

3.029 In Hong Kong, most terms and conditions set out by banks in the agreement to rent a safe deposit do not include an express clause dealing with confidentiality. It is however standard practice for the inclusion of a clause referring the customer to the Personal Data (Privacy) Ordinance (Cap.486).[31] Whilst the agreement between the customer and the bank does not set out any obligation of confidentiality it is common for the bank to include a clause, which prohibits the use of the box for an unlawful or illegal purpose.[32]

3.030 Generally, the renter undertakes not to use the box for any illegal or unlawful purpose, undertakes to keep the bank indemnified against any claims, damages or losses incurred as a result of a breach of such condition. In the event that the bank suspects that the aforementioned condition has been breached, the bank and further requires the renter to agree to allow the bank to inspect the box.[33]

3.031 On a practical level, this 'loop hole' in the law means that safe deposit boxes in Hong Kong can and are being used to store money related to money laundering and tax evasion. Banks in Hong Kong do not question the contents of safe deposit boxes

[29] EP Ellinger *et al*, Ellinger's Modern banking Law (5th edn, Oxford University Press, 2009), p.177. In the *Tournier* case, n3 [481] Scrutton LJ stated that the duty would not cover a position other than when the customer held an account with the bank. Atkin LJ [485] agreed with Scrutton LJ [481] that information received after the termination of the account would not fall within the duty.

[30] Bailment was defined by Pollock and Wright in their treatise An Essay on Possession in the Common Law (1888), 163 as follows: "…any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future on the other person". Six types of bailment were identified in *Coggs v Bernard* (1703) 2 Ld Raym 909, Court of King's Bench (Holt CJ) "The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a depositum". Holt CJ's first type of bailment explains the legal relationship between the banker and bailor when goods are deposited in a safety deposit box.

[31] For example see Shanghai Commercial Bank, Terms and Conditions for Safe Deposit Box, Clause 32, para.2 "The Customer further confirms that the Customer shall read and understand the Bank's Circular to Customers relating to the Personal Data (Privacy) Ordinance (as may be varied from time to time)". See Chapter 4, Privacy.

[32] For example see Shanghai Commercial Bank, Terms and Conditions for Safe Deposit Box, Clause 13, and Hang Seng Bank, Terms and Conditions for Renting of Safe Deposit Box ('Terms and Conditions'), Clause 11.

[33] *Ibid.*

and they are not subject to the same level of due diligence as money that is deposited within a bank account.

3.032 With regard to the limits of the duty as to time, Bankes LJ ruled: "the duty does not cease the moment that a customer closes his account".[34] Although, Atkin LJ agreed that the obligation should "extend beyond the period when the account is closed". He, however, did not entirely agree with the ruling of Bankes LJ in the instant case and stated that the same obligation should not be applied to all professionals. Alternatively, he opined that the extent of the obligation would vary according to the specific circumstances related to each profession.[35] The precise length of time has not been specified and remains unclear.

3.033 On the point related to the relation of the duty to other professionals Scrutton LJ agreed with Bankes LJ on this point stating that the duty 'equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient'.[36]

(c) Duty owed to joint account holders

3.034 The courts in Hong Kong have not specifically addressed the precise duty of secrecy that is owed to joint account holders. The matter was however considered in *obiter dicta* in the District Court case of *Lai Mei Chun Swana v Lai Chung Kong*.[37] It was first stated by Deputy District Judge R Yu ("Judge Yu") that in the absence of a specific mandate it would be assumed that the right to information and the property in the account would be deemed to be joint. The question that was considered by Judge Yu was whether the duty of secrecy by the bank to the account holders are joint or joint and several.

3.035 To assist the enquiry, Judge Yu referred to paragraph 15/4/12 of the Hong Kong Civil Procedure 2011, which states the following:

> "Where a husband and wife deposited funds in a joint account to the bank to whom they give a written mandate to honour all cheques and orders, if but only if, they were signed by both account holders the bank owes an obligation to the account holders jointly to honour their instructions, but it also owes an obligations separately to each of the account holders severally not to honour instructions unless signed by each of them. Therefore, the wife is entitled to sue the bank, in respect of the several obligations owe to her without joining her husband and she was entitled to declaration that the bank has wrongly debited the account in respect of funds transferred there from on instructions signed by the husband alone, and further entitled to damages and interest (*Katlin v Curprus Finance Corp London LTD*)."[38,39]

[34] *Tournier* case, n3 [472].

[35] *Tournier* case, n3 [486].

[36] *Tournier* case, n3 [481].

[37] *Lai Mei Chun Swana v Lai Chung Kong* [2011] HKCU 742, [para.58–60], (Deputy District Judge R Yu) [para.58]: "Before I move on, I should mention one side issue. Mr. Lam argues that the right to the confidential information of the account is the joint property of the Plaintiff and the Deceased".

[38] *Katlin v Curprus Finance Corp London LTD* [1983] QB 759.

[39] Hong Kong Civil Court Procedure (Hong Kong White Book), para.15/4/12.

3.036 Although paragraph 15/4/12 of the Hong Kong White Book as stated above does not directly address the issue, it was considered by Judge Yu to be authority to support the principle that the duty of the bank to holders of a joint account could be several, depending on the nature of the right to be protected. The duty of secrecy exists as a negative covenant and accordingly the bank should not disclose information in the account. As such, it should be a duty owed separately to the account holders. Practically, this means that any account holder may enforce the covenant. In the absence of express agreement such enforcement does not have to be joined by all of the account holders.

3.037 In the English case of *Gatt v Barclays Bank plc*[40] however, it was held that the bank was not liable to a spouse in contract (even though the plaintiff was a customer of the bank), negligence or defamation where it sent electronic information about her husband to credit reference agencies stating that an account, which was a joint account with her, was "delinquent" because the overdraft exceeded the agreed limit.

(d) Qualified duty

3.038 Although the earlier cases of *Foster v Bank of London* and to some extent *Hardy v Veasey* suggested that there were circumstances when the obligation of secrecy should not be enforced, the principle was not clearly established until the Court of Appeal heard the *Tournier* case. The duty of confidence that a bank owes to its customer is "not absolute but qualified".[41]

3.039 In the *Tournier* case, Bankes LJ identifies the limits of the obligation of secrecy in the context of a banker-customer contract as follows:

> "On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer."[42]

3.040 The rule in the *Tournier* case, as established by Bankes LJ, is such that if one of the qualifications applies, the duty of secrecy no longer exists.[43]

(e) Compulsion by law

3.041 In the event that the law compels the disclosure of information that is otherwise confidential the banker no longer has an obligation of secrecy. This qualification arises as a result of a court order as well as a provision within a statute. It is under the compulsion by law qualification, particularly compulsion by statute, that the duty of

[40] *Gatt v Barclays Bank plc* [2013] EWHC 2 QB [35].
[41] *Tournier* case, n3 [472].
[42] *Tournier* case, n3 [473].
[43] Conceptually, as a point of law, it is important to note that the qualifications are not to be regarded as exceptions to the duty. Rather, the duty shall not apply because an overriding duty applies. See *Parry-Jones v Law Society* [1969] 1 Ch 1[9] (Diplock LJ). Ross Cranston explains this point clearly as follows: 'if the law compels the disclosure of information otherwise confidential – the first qualification – it is hardly accurate to say that this is an 'exception' to the duty of confidentiality. Rather disclosure is the duty and that duty overrides duties which would otherwise obtain'.

secrecy has been weakened in many common law jurisdictions, including Hong Kong. At the time of writing, there are over 20 statutes, and pieces of subsidiary legislation in Hong Kong that contain provisions compelling the disclosure of customer information by a bank, which would otherwise be deemed to be confidential. This section first considers the circumstances in which a court in Hong Kong could compel the disclosure of confidential information before moving on to discuss the most relevant Hong Kong statutes that compel disclosure.

(i) *Compulsion by order of court*

3.042 In a Hong Kong context, compulsion by law means compulsion by a Hong Kong court as affirmed by the Court of Appeal in *FDC Co Ltd v The Chase Manhattan Bank N A*.[44] However, cross-border and extra-territorial issues are considered further below (see paragraph 3.077). Compulsion by an order of a Hong Kong court includes a mareva (freezing) injunction,[45] garnishee order (order to show cause),[46] and a writ of subpoena (witness summons).[47]

(A) Mareva injunction

3.043 A mareva injunction is an order to prohibit a customer from disposing of its assets and/or removing them from the jurisdiction. The power to grant a mareva injunction arises from the High Court Ordinance.[48] In Hong Kong, a mareva injunction may be granted in accordance with the principles set out by Lord Denning in *Mareva Compania Naviera SA v International Bulkcarries SA*[49] if 'there is a danger that the debtor may dispose of his assets so as to defeat it before judgment'. Additionally, the customer must have assets deposited within a Hong Kong bank;[50] there should be a 'good arguable case',[51] and the applicant must show a real risk of dissipation or removal.[52]

3.044 In the event that a court grants the mareva injunction it will be served on the respondent and also the bank as a third party. Although it is likely that the customer will already be aware of the mareva injunction, the bank should take reasonable steps to inform

[44] *FDC Co Ltd and Other v Chase Manhattan Bank, NA* [1990] 1 HKLR 277.
[45] High Court Ordinance (Cap.4), s.21L and Practice Direction 11.1 (application for ex-parte, interlocutory and interim injunctions) and Practice Direction 11.2 (mareva injunction).
[46] Rules of the High Court (Cap.4A), Ord 49, Garnishee Proceedings.
[47] See Evidence Ordinance (Cap.8), s.77A.
[48] High Court Ordinance (Cap.4), s.21L(3).
[49] *Mareva Compania Naviera SA v International Bulkcarries SA* [1980] 1 All ER 213.
[50] It is also possible to seek a worldwide mareva injunction where the assets lie outside of Hong Kong; see *Ka Wah International Merchant Finance Ltd v Asean Reources Ltd* (1987) HCA 386/1987; see also *Bank of India v Bhagwandas Kewalram Murjani* [1989] 2 HKLR 318; *Assets Investments Pte Ltd v United Islamic Investments Foundation* [1995] 1 HKC 560. However, since a Hong Kong court has no jurisdiction over third parties outside of Hong Kong the foreign party would not be bound by the order; see *RACP Pharmaceutical Holdings Ltd v Li Xiaobo* [2007] 2 HKLRD 331.
[51] *Hanjin Shipping Co Ltd v Grand King Shipping Ltd* [1998] HKLRD 706, (per Recorder Kotewall SC); *Ng Chun Fai, Stephen v Tamco Electrical and Electronics (HK) Ltd* [1994] 1 HKLR 289, [1993] 1 HKC 160; *Gainluxe Investment Ltd v Superstand Development Ltd* [1994] 3 HKC 641; *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of Republic of Indonesia Intervening)* [1978] QB 644, [1977] 3 All ER 324, CA (per Lord Denning MR).
[52] *Hornor Resources (International) Co Ltd v Savvy Resources Ltd* [2010] 4 HKC 50; *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG* [1983] 1 WLR 1412; *Hip Hing Construction Co Ltd v Holyrood Ltd* (unrep HCCT 6/2007), [2007] HKEC 752.

the customer in writing upon the receipt of a mareva injunction. On a practical level, if a bank is served with a mareva injunction it is certain to seek legal advice as to how the injunction applies, which can be costly. Additional expenses may also be incurred in the event that the bank is required to search its records to determine which accounts are affected by such an order.

3.045 A plaintiff should therefore ensure that they are forearmed with as much information as possible prior to the commencement of proceedings. However, there are other remedies available with a mareva injunction. In addition to the mareva injunction itself the court may order discovery to require the customer to disclose the location of their assets to allow the mareva injunction to operate more effectively. Usually, the mareva injunction will require the bank to freeze all assets belonging to a customer and the customer will only be entitled to a limited sum of money to cover ordinary living expenses, or limited trading expenses where the customer is a company. Under a mareva injunction the bank is only qualified to disclose information that is required under the order.[53] A breach of a mareva injunction is a contempt of court.

(B) Garnishee order

3.046 The garnishee order is a procedure whereby the court may order the bank as a third person (garnishee) to disclose information. Such an order operates on the basis that a plaintiff may enforce a judgment by attaching a debt to the customer. It is clearly stated in section 21(1) of the High Court Ordinance (Cap.4) that monies standing to the credit of deposit accounts in Hong Kong banks shall be deemed to be sums due and accruing due not withstanding that the right of withdrawal is subject to conditions as to the giving of notice, production of a deposit book, deposit receipt, or other conditions.

3.047 The practical effect of the garnishee order is therefore to compel the bank to disclose information relating to the customer's account since the garnishee order is deemed to be a demand on behalf of the customer. The garnishee order is limited in that the garnishee must be within the jurisdiction of Hong Kong.[54] A further limitation of the garnishee order is that the plaintiff must show that there is an attachable debt.

3.048 Upon the receipt of a garnishee order the bank should take reasonable steps to inform the customer. A bank is required to attach either a specified or an unlimited amount upon the receipt of a garnishee order. The bank is qualified to make a disclosure as to the existence of the account and confirmation of whether or not the attachable payment can be executed under the order. However, the banker must not disclose further information regarding other assets that are held by the customer with the bank.

(C) Writ of Subpoena

3.049 A writ of subpoena is an order of the court to compel a witness to attend a trail to give evidence on behalf of the party seeking the order, and is available under the Rules of the High Court (Cap.4A), order 38, rule 14–19.[55] For the purposes of disclosure, a writ

[53] High Court Ordinance (Cap.4), s.21L and PD 11.1 (application for ex-parte, interlocutory and interim injunctions) and PD 11.2.
[54] Rules of the High Court (Cap.4A), Ord.49, r.1.
[55] See Evidence Ordinance (Cap.8), s.77(A) concerning effect of subpoena.

of subpoena is the most likely method of acquiring confidential customer information held by a bank. It is not a defence for the bank to argue that the information is held in confidence, and accordingly the subpoena must be obeyed.[56]

3.050 Disobedience amounts to contempt of court and the court has jurisdiction to enforce compliance by committal.[57] The object of serving a subpoena on a banker, whether it be *ad testificandum* (to testify as a witness) or *duces tecum* (to produce documents) is to compel the banker to give oral evidence or produce material documents about the customer, or both.[58] If a subpoena *duces tecum* is sought a separate writ of subpoena must be issued and served on each witness whose attendance to produce records is being enforced.[59] The writ should specify the actual documents that need to be submitted, however if the witness is served with a subpoena and later admits possession of further documents the witness must produce the further documents in question.[60]

3.051 In the event that a writ for a subpoena is issued, the banker must comply and is under the same obligations as any member of the public. Practically, this means that the banker must attend at the specified court hearing to provide oral evidence and/or to provide the requested written documentation that is within the possession of the banker. Such information should be presented factually, not as an expression of opinion,[61] and where such disclosures are made the duty of secrecy will not apply. In most circumstances, bank evidence is usually provided by way of a written statement as opposed to an oral testimony.

3.052 According to the ruling of Diplock LJ in the English Court of Appeal case *Parry Jones v Law Society*[62] a court may compel a bank to disclose information relating to its customer's account provided such information is relevant to the legal proceedings in question.

3.053 In the case of an arbitration hearing, the tribunal has the power to 'direct' the attendance of a bank as a witness before the tribunal in order to give evidence or produce documentation or other relevant material, subject to any contrary agreement of the parties to the relevant proceedings.[63] However, with leave of the court, a direction by the tribunal to compel a witness to disclose information by giving evidence or producing documentation is enforceable in the same way as a judgment.[64]

(D) Bank party to civil proceedings

3.054 In the event that a bank is a party to litigation or arbitration it will be bound by the same rules of discovery or disclosure as any other party. If a bank is involved in civil

[56] *R v Daye* [1908] 2 KB 333.
[57] *Ibid.*
[58] Rules of the High Court (Cap.4A), Ord.38, r.17 – service of writ of subpoena.
[59] *Soul v IRC* [1963] 1 WLR 112, [1963] 1 All ER.
[60] *Overseas Trust Bank Ltd v Coopers & Lybrand* (unrep., HCA A5764/1986, March 1990, [1990] HKLY 948); *Re Emma Silver Mining Co* (1875) LR 10 Ch 194.
[61] A banker may only disclose information that is an expression of fact. An expression of opinion would still be subject to the duty of confidentiality.
[62] *Parry Jones v Law Society* [1969] 1 Ch 1.
[63] Arbitration Ordinance (Cap.609), s.56(8)(c).
[64] Arbitration Ordinance (Cap.609), s.55(2).

court proceedings in Hong Kong, the relevant rules of disclosure are set out in the Rules of the High Court.

3.055 Where the bank is a party to arbitration, the tribunal may make an order as to the discovery of documents in accordance with the Arbitration Ordinance (Cap.609) unless otherwise agreed by the parties.[65]

(E) Extent of disclosure

3.056 Where the bank is a party to litigation, the obligation to disclose will be limited to the group of companies deemed to be in the control of the bank that is a party to the proceedings. However, under the general powers of the court, the court may order a third party to provide oral or written evidence to the court as appear proper for the rights and liabilities of the parties to be determined.[66]

3.057 The arbitral tribunal has the discretion to exercise general powers to direct disclosure in the event that the bank is a party to arbitration under the Arbitration Ordinance (Cap.609).[67] Accordingly, the tribunal will be required to seek leave of the court to compel a third party company to disclose information. The information or material to be disclosed must be relevant to the matter to be arbitrated and necessary for the fair determination of the dispute.

(F) Pre-writ discovery

3.058 The judiciary in a number of circumstances has allowed disclosure of customer information under a pre-writ discovery order in England. The purpose of this type of discovery is to allow for a plaintiff to ascertain the identity of the wrongdoer so that appropriate remedies can be applied against the wrongdoer. In the landmark English case *Norwich Pharmacal Co v Customs & Excise Commissioners*,[68] it was held by the House of Lords that if an innocent person becomes involved in the wrongful acts of another, through no fault of their own, and thus inadvertently facilitated the wrongdoing, that person would not incur and personal liability; but the court may order that person to assist the victim by disclosing the identity of the person committing the wrong.

3.059 Following the *Norwich Pharmacal* principle, it was held by the English Court of Appeal in *Bankers Trust Co v Shapira*[69] that not only could the court order disclose the wrongdoer's identity but, could also order discovery of the bank accounts and records to assist the tracing of a claim.[70] A Norwich Pharmacal order may be granted to a bank against another bank (beneficiary bank) compelling it to disclose information in

[65] Arbitration Ordinance (Cap.609), s.56(1)(b).
[66] Rules of the High Court (Cap.4A), Ord.16, r.4(4).
[67] Arbitration Ordinance (Cap.609), s.55(2) or s.56(8)(c).
[68] *Norwich Pharmacal Co v Customs & Excise Commissioners* (1974) AC 133.
[69] *Bankers Trust Co v Shapira* [1980] 1 WLR 1274.
[70] For further guidance on the operation of a court order requiring disclosure under the *Norwich Pharmacal* principles, see *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048; see also *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911; *Bank of Crete SA v Koskotas (No 2)* [1993] 1 All ER 748; *Omar v Omar* [1995] 3 All ER 571; *Interbrew SA v Financial Times Ltd* [2002] Lloyd's Rep 542; *Koo Golden East Mongolia v Bank of Nova Scotia* [2007] EWCA Civ 1443.

relation to the identity of certain of its customers who were beneficiaries of electronic payments made as a result of the paying bank's own mistakes, for example by making duplicate payment, selection of an incorrect mandate or insertion of an incorrect account number.

3.060 Although there are many instances when a *Norwich Pharmacal* order has been applied in Hong Kong, the *Norwich Pharmacal* order has not yet been tested with regard to the banker's duty of secrecy.[71] It is however opined by Prof. Mark Hsiao that such an order may be granted by the Hong Kong courts if the information disclosed would be used solely for the purposes of an action to trace funds.[72]

(ii) *Compulsion by statute*

3.061 When the *Tournier* case was decided in 1924 it was envisaged by the Court of Appeal that disclosure by compulsion of statute would be rare. Bankes LJ stated that this first qualification might arise as a result of the duty to obey an order under the Bankers' Books Evidence Act 1879, section 7.[73] The only other law at that time that could have compelled a bank to release information was the Extradition Act.[74] This is no longer the case in Hong Kong and other common law jurisdictions. Today in Hong Kong there are over 20 Ordinances, and subsidiary legislation that set out provisions requiring disclosure under compulsion by statute.[75] Such statutory obligations are hidden amongst some 684 Ordinances and there is no comprehensive list setting out the precise Ordinances that compel a disclosure.[76]

3.062 In Hong Kong, the most significant compulsory statutory disclosures have been enacted for the purposes of providing court evidence, assistance in tax matters, criminal matters, the prevention of bribery and the prevention of corruption. However, recent statutory provisions have been enacted to comply with international standards for the prevention of money laundering, terrorist financing and the assistance of international tax evasion.

3.063 Due to the large quantity of statutory enactments compelling disclosure of customer information to a third party it is not possible to set out all of the provisions in this chapter. The following section below sets out the most important statutory provisions

[71] *Norwich Pharmacal Co v Customs & Excise Commissioners* (1974) AC 133.
[72] Mark Hsiao, *Principles of Banking Law in Hong Kong* (Sweet & Maxwell, 2013) 130; Mark Hsiao, *International Banking & Finance Law: Principles and Regulations* (Sweet & Maxwell, 2011) 46.
[73] *Tournier* case n. 3 [473] (Bankes LJ); Bankers' Books of Evidence Act (1879).
[74] Extradition Act (1873), s.5.
[75] Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615); Banking Ordinance (Cap.155); Bankruptcy Ordinance (Cap.6); Companies Ordinance (Cap.622); Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405); Evidence Ordinance (Cap.8); Financial Reporting Council Ordinance (Cap.588); Independent Commission Against Corruption Ordinance (Cap.204); Inland Revenue Ordinance (Cap.112); Ombudsman Ordinance (Cap.397); Organized and Serious Crime Ordinance (Cap.455); Personal Data (Privacy) Ordinance (Cap.486); Police Force Ordinance (Cap.232); Prevention of Bribery Ordinance (Cap.201); Securities and Futures Ordinance (Cap.571); United Nations (Anti-Terrorism) Measures Ordinance (Cap.575); United Nations Sanctions (Afghanistan) Regulation 2012 (Cap.537AX) - Made further to section 3 of United Nations Sanctions Ordinance (Cap.537).
[76] Eamonn Moran, Frances Hui, Allen Lai, Mabel Cheung & Angie Li 'Legislation about Legislation', Government Counsel, Law Drafting Division, Department of Justice, Hong Kong Special Administrative Region available online at http://www.doj.gov.hk/eng/public/pdf/2010/ldd20101118e.pdf last viewed on 24 March 2014.

CHAPTER 6

BANK AS DEPOSITORY

1. Introduction

Under the Banking Ordinance (Cap.155) there are two characteristics of "banking business": First, to receive from the general public money on current, deposit, savings or other similar account repayable on demand; and second, paying or collecting cheques drawn by or paid in by customers.[1] This Chapter focusses on the first characteristic where the bank acts as a depository in domestic transactions. **6.001**

Providing individuals and corporations with somewhere to deposit funds is one of the most important services that is offered by the bank. The customer benefits by having a safe place to deposit income and savings. Additionally, the bank offers a convenient service to the customer by handling financial transactions on their behalf. The bank, as an agent of the customer, is obliged to obey all mandates that are given by the customer.[2] One further advantage afforded to a customer holding a bank account in Hong Kong is that there are no restrictions of capital flow into or out of bank accounts. **6.002**

A bank is a commercial institution and benefits from their customer's service by attracting capital deposits, which can in turn be used to generate revenue for the bank. The term "deposit" is explicitly defined in the Banking Ordinance (Cap.155) as: **6.003**

> "a loan of money (i) at interest, at no interest or at negative interest; or (ii) repayable at a premium or repayable with any consideration in money or money's worth".[3]

In exchange for depositing the money with the bank the customer receives interest on sums standing to the credit of their account, unless the account is a non-interest bearing account. The rate of interest payable depends upon a variety of factors. For example, the interest rate could be payable at a rate according to the amount deposited. Or, alternatively the term of the deposit may be the determining factor. A higher rate of interest is payable for accounts which hold fixed long-term deposits as opposed to short-term deposit accounts that are repayable on demand. The reason for this is related to the certainty of funds available for the bank to use or to maintain as required capital. This is a particularly important consideration following the implementation of the Basel III regime, which requires the bank to maintain higher capital reserves. **6.004**

Usually, the general public holds their deposits with banks in the form of accounts. Although banks may offer a wide range of accounts the most commonly used type of bank accounts are variations of the deposit account and the current account. Banks also hold customer deposits in other forms such as funds, investment schemes and **6.005**

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1 Banking Ordinance (Cap.155), s.2 "banking business".

2 *DEX Asia Ltd v DBS Bank* (Hong Kong) Ltd [2009] 5 HKLRD 160, [2009] HKEC 1129.

3 Banking Ordinance (Cap.155), s.2 "deposit". It is further explicitly stated in s.2 that a "deposit" does not include a loan of money: (i) upon terms involving the issue, by any company, of debentures or other securities in respect of which a prospectus has been registered under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32); (ii) upon terms referable to the provision of property or services; or (iii) by one company to another (neither company being an authorized institution) at a time when one is a subsidiary of the other or both are subsidiaries of another company, and references in this Ordinance to the taking or the making of a deposit shall be construed accordingly.

insurance schemes. Although practically such services are similar to a bank account in law they are very different. For this reason such products are regulated under the Securities and Futures Ordinance (Cap.571).

6.006 The aim of this Chapter is to introduce some basic legal aspects related to different types of bank accounts and accounts held by different types of persons. Section 2 of this chapter begins by outlining issues related to the current account before moving on to discuss the deposit account. The subsequent Section deals with the nature of the joint account. The trust account is explored next before moving on to look at issues related to accounts held by minors. After which the discussion precedes to examine legal issues related to the combination of accounts and finally the appropriation of payments.

2. Current Account

6.007 The current account is a bank account that allows customers to make deposits and have easy access to their funds. It is available to both individual customers and business customers. Current accounts are repayable on demand,[4] which is effected either by the customer's withdrawal or instruction to the bank to make a payment to a third party. The current account is therefore the account that the customer uses to discharge financial liabilities. This can be carried out, for example, by setting up a payment system such as a 'standing order' or 'direct debit';[5] drawing a cheque in favour of the creditor; or, using a debit card facility that operates directly on the current account such as EPS.[6]

(a) Interest

6.008 Briefly stated, interest is a payment that is made by the bank to a customer of an account as remuneration for maintaining funds with the bank. The interest rate is calculated at a percentage of the principal, which is deposited over a specific period of time (typically one month or one year). The rationale behind interest payments is that the bank pays the customer for the use of the deposited funds. The purpose of the current account is to allow the customer to have easy and frequent access to funds, therefore the customer is free to draw against the account at any time. Traditionally, as a result of the aforementioned account activity, credit interest was not paid to the balance standing in credit of a current account since the balance of funds in the current account is subject to fluctuation.

6.009 However, more recently interest-bearing current accounts are becoming more popular in Hong Kong. Under such interest-bearing current accounts, deposit interest rates, which are calculated at a set percentage per annum (% p.a.) are applied to corresponding ranges of the deposit amount tier. Calculations are made according to

[4] *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.

[5] EP Ellinger, et al, *Ellinger's Modern Banking Law* (2010, Oxford Press), pp. 572–575.

[6] Electronic Payment Services (EPS) is offered by EPS Company (Hong Kong) Limited 易辦事(香港)有限公司, established in 1984, which is a consortium of 20 major banks in Hong Kong. It provides convenience for customers and merchants via the use of electronic fund transfers.

the daily closing balance on a 365-day annual basis. It is also standard practice that daily interest accrued shall be accumulated to the end of each month and credited into the account on the first business day of each subsequent month.

(b) Overdraft

6.010 A current account can also be operated by way of an overdraft. An overdraft occurs when withdrawals from a bank account exceed the available balance. This gives the account a negative balance and in effect means the account provider (the bank) is furnishing credit to the customer. An overdraft facility is a credit agreement made between the customer and the bank that permits an account holder to use or withdraw more than they have in their account, without exceeding a specified maximum negative balance.[7] If there is a prior agreement with the bank for an overdraft facility, and the amount overdrawn is within this authorised overdraft facility, then interest is normally charged at the agreed rate. If the balance exceeds the agreed facility then fees may be charged and a higher interest rate might apply.

6.011 In Hong Kong, most banks provide current accounts with a pre-agreed overdraft facility the size of which is based upon predicted income and credit history. This overdraft facility can be used at any time without consulting the bank and can be maintained indefinitely (subject to ad hoc reviews). Although an overdraft facility may be authorised by the bank, legally the money is repayable on demand by the bank. Practically, this is a rare occurrence since overdrafts are authorised by the bank on payment of an overdraft fee, which is profitable for the bank.

(c) Title of funds

6.012 The current account represents the funds that have been paid into the account by the customer, other payments by third parties minus any money that is paid out. The pooling of finances into the current account are regarded as one debt to the customer, unless the funds are pooled with trust funds.[8]

6.013 It is a well established general legal principle that property in money passes with possession.[9] On this point, Viscount Haldane LC clarified that: "When sovereigns or bank notes are paid over as currency… chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property".[10] However, equity will intervene to prevent a person from acting unconscionably. Accordingly, money may be followed into the hands of the banker by any person who has an equal or superior right in equity to the money or the chose or thing in action.[11]

[7] See *Re Hone (a bankrupt), ex parte Trustee v Kensington Borough Council* [1951] Ch 85, [89], [1950] 2 All ER 716, [719] per Harman J.

[8] *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 Ch D 696.

[9] *Sinclair v Brougham* [1914] AC 398.

[10] *Ibid.*, at 418.

[11] *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318; *Banque Belge Pour l'Etranger v Hambrouck* [1921] 1 KB 321; *Agip (Africa) Ltd v Jackson* [1991] Ch 547; *Bank Tejarat v Hong Kong and Shanghai Banking Corporation (Cl) Ltd and Hong Kong and Shanghai Bank Trustee (Jersey) Ltd* [1995] 1 Lloyd's Rep 239; *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR328; *Bank of America v Arnell* [1999] Lloyd's Rep Bank 399.

6.014 Different rules operate, however, in the event of mistaken payment. Where money, or other property, is transferred under a mistake as to a matter fundamental to the transferor's intention to pass ownership, the intention to transfer ownership is revoked and title to the money does not pass to the recipient.[12]

3. Deposit Account

6.015 A deposit account is an account with a bank from which deposits are repayable only to the depositor. This means that the customer has no right to draw cheques. The main purposes of such a deposit account is to allow the customer to make a secure deposit and earn interest on the sums standing to the credit of the account. Similar to current accounts, funds paid into a deposit account are treated as credit provided by the customer to the banker and not as a special fund held by the banker as a fiduciary.[13] However, unlike the current account, a stand-alone deposit account cannot be overdrawn at law.[14] This was explained clearly by Mocatta J in *Barclays Bank Ltd v Okenarhe* as follows:

> "I am quite unable to accept that an overdrawn deposit account is a concept known to the law. It seems to me to be a contradiction in terms since the mere name, apart from any other consideration, postulates that a deposit of money or moneys' worth shall have been made to the bank by a customer at some time before any question of withdrawals could arise."[15]

6.016 The three main types of deposit account are as follows: (1) repayable on demand or at call;[16] (2) withdrawable on specific notice;[17] or (3) for a fixed period.[18] In the event that a notice or maturity period is imposed, and the customer wishes to withdraw funds without waiting for the notice or maturity period to expire the precise terms of the agreement on this point would govern such a situation. In practice, the bank will usually allow the customer to withdraw and impose a penalty charge equal to a specific number of months of interest on the deposit.

4. Joint Account

6.017 A joint account is a bank account that is opened in the name of two or more individuals who are neither partners, executors, administrators nor trustees. In practice, joint accounts may be opened by married couples, non-married couples, related persons

[12] *Norwich Union Fire Insurance Society Ltd v Wm H Price Ltd* [1934] AC 455, 462–463. Also see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961. For a detailed discussion regarding the recovery of money paid by mistake see EP Ellinger et al, *Ellinger's Modern Banking* Law (Oxford University Press, 2010), pp.514–556.

[13] *Peace v Creswick* (1843) 2 Hare 286; *Akbar Khan v Attar Singh* [1936] 2 All ER 545.

[14] *Barclays Bank Ltd v Okenarhe* [1966] 2 Lloyd's Rep 87. It is however possible for the bank to combine the current account with the deposit account and such an account as a whole may become overdrawn.

[15] *Barclays Bank Ltd v Okenarhe*, n14 [94].

[16] For example, a savings account.

[17] For example, a notice of 24 hours, 7 days or three months must be served before the withdrawal can be made.

[18] For example, a fixed term deposit account here the money must remain in the account for that period of time.

and non-related persons. In law, there is no restriction on the maximum number of persons that can exist as account holders under a joint account. However, in practice a bank will usually limit their services of joint accounts to no more than five persons.

6.018 In contract law, where there are several parties on one side of a contract with another party, the several parties can be liable either jointly, severally, or joint and severally. In a commercial transaction, the extent of liability will depend upon the terms that the parties negotiate.

6.019 Joint liability means that two or more persons are bound by the same obligation. As such, those two or more persons are responsible for a debt, claim or judgment. This is important to the person making the claim, as well as to the joint account holders, since anyone with joint liability for any alleged debt or claim for damages can be joined in a demand for a debt or legal action with them.[19]

6.020 Several liability involves two or more persons making separate promises to the same party. Such obligations give rise to individual liability not joint liability.

6.021 If liability is joint and several this means that each individual remains responsible for payment of the entire liability, so long as any part is unpaid. In practice, this means that a creditor can sue one or more of the parties separately, or all of them together, at their discretion.

6.022 In the context of bank accounts, all obligations and liabilities of joint account holders shall be joint and several where the parties did not expressly state that the liability of a person owing money to others was to be any different.[20] This principle is also affirmed in the Conveyancing and Property Ordinance (Cap.219) which provides:

> "Any agreement or covenant relating to land or other property, express or implied, with 2 or more persons jointly to do any act for their benefit shall be deemed, unless the contrary intention is expressed, to include an obligation to do that act for the benefit of the survivor or survivors of them and for the benefit of any other person to whom the right to sue on the agreement devolves; and shall be construed as being made with each of them."[21]

6.023 It accordance with the Code of Banking Practice (the Code)[22] it is common practice of most banks in Hong Kong to include a specific clause in the standard terms and conditions for accounts to state that the nature of liability shall be joint and several.[23] The Code also requires institutions to make readily available to customers of joint

[19] Further provisions in the Civil Liability (Contribution) Ordinance (Cap.377), s.5 state that: "Judgment obtained against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage."

[20] *Hong Kong and Shanghai Banking Corporation Ltd v Attorney General* [1982] HKLR 211 [213].

[21] Conveyancing and Property Ordinance (Cap.219), s.43.

[22] Code of Banking Practice (February, 2015), para.18.2(d).

[23] See for example, Standard Chartered, Conditions for Accounts (Hong Kong) (2015) available online at https://www.sc.com/hk/sme-banking/_document/en/terms-conditions/conditions_for_accounts.pdf last viewed on 24 July 2015.

accounts general descriptive information about the operation of their accounts including the following specific information:

i. the rights and responsibilities of each customer of the joint account;

ii. the implications of the signing arrangements to be specified in the account mandate for the operation of the joint account, particularly that any transactions entered into by the authorized signatory or signatories will be binding on all account holders;

iii. the manner in which such authorized signatory or signatories or signing arrangements can be varied; and

iv. any rights of set-off claimed by the institution in respect of joint accounts.

5. Trust Account

6.024 A trust is not deemed to be a separate legal entity from a trustee. The general position is that the trustees holds the legal title to the trust property and the beneficiary of the trust holds an equitable interest.[24]

6.025 A trust account is an account that is opened on behalf of a customer acting as a trustee or a fiduciary. They are opened mainly by executors under a will and by professional persons such as solicitors or trust companies responsible for administering family or charity trusts. Such accounts are designated specifically as trust accounts or are labelled in some other specific way to indicate their fiduciary nature.[25]

6.026 The designation of the account as a trust account is sufficient to give notice of the existence of the trust to the bank.[26] The practical effect of this is that it establishes the necessary element in any claim to render the bank liable as a constructive trustee.[27] In most circumstances the bank would not be held liable as a constructive trustee in the event that proceeds are simply paid into an account without any specific indication of the origin of the funds.[28]

6.027 Further, the demarcation of an account as a trust account limits the right of the bank to combine accounts.[29] The scope of such limits were explored in *Saudi Arabian Monetary Agency v Dresdner Bank AG* where the English Court of Appeal stated that a bank could combine accounts when it had clear and undisputable evidence that the beneficiary of that account was a customer who was overdrawn on their personal account with the bank.[30]

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24 PH Pettit, *Equity and the Law of Trusts* (11th edn, Oxford University Press, 2009).
25 *Re Gross, ex parte Adair* (1871) 24 LT 198.
26 *Rowlandson v National Westminster Bank Ltd* [1978] 1 WLR 798.
27 *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798; *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340.
28 *Thompson v Clydesdale bank Ltd* [1893] AC 282.
29 *Royal Brunei Airlines v Tan* [1995] 2 AC 378, [1995] 3 All ER 97; *Wealthy Central Investment Ltd v DBS Bank (HK) Ltd* [2010] 4 HKC 514.
30 *Saudi Arabian Monetary Agency v Dresdner Bank AG* [2005] 1 Lloyd's Rep 12.

6. Minors

A minor is any person that has not yet reached the age of full legal responsibility. The age of majority is the chronological moment when minors cease to legally be considered as children and assume independent control over their personal actions, and decisions, which terminates the legal control and legal responsibilities of their parents or guardians. In accordance with the Age of Majority (Related Provisions) Ordinance (Cap.410), a person shall attain full age on attaining the age of 18 years.[31] 6.028

There are three specific issues that require consideration when a minor deals with a bank. First, the capacity of a minor to operate a current account; second, the enforceability of loans to a minor; and, thirdly, guarantees of minor's contracts. All three issues are considered in more detail below. 6.029

(a) Capacity to operate a current account

The law seeks to protect minors from the consequences of entering into unfavourable contracts as a result of a lack of understanding or decision making. The general principle of contract law is that contracts entered into by minors are voidable at the option of the minors either during their minority or within a reasonable time period after obtaining majority. Once a minor repudiates they cannot be held liable for the contract.[32] Contracts for necessary goods or beneficial contracts of service or employment, however, will be deemed to be enforceable.[33] 6.030

There is no legal provision to prevent a minor from opening or operating a bank account. In practice, banks welcome minors as customers and offer a deposit account saving service to persons under the age of 18. Generally, the opening balance for customers aged under 18 years is HK$500 with no minimum balance service fee. Some banks also target the younger age group and specifically market kid's savings accounts. A current account may legally be opened and operated by a minor at the discretion of the bank, provided that the account remains in credit. 6.031

The Bills of Exchange Ordinance (Cap.19) provides that: "the capacity to incur liability as a party to a bill is co-extensive with capacity to contract".[34] With regard to the position of minors with regard to drawing or indorsing a cheque: "the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto".[35] Practically, this means that a bank is not accountable for cheques drawn or indorsed by a minor. The effect of section 22 of the Bills of Exchange Ordinance (Cap.19) is that such cheques must be honoured by the minor. 6.032

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31 Age of Majority (Related Provisions) Ordinance (Cap.410), s.2(1). Further guidance regarding the time at which a person attains the age of 18 years is set out in s.5.
32 *Steinberg v Scalia (Leeds) Ltd* [1923] 2 Ch 452.
33 For a full discussion on the contractual liabilities and obligations of minors see Michael J Fisher and Desmond Greenwood, *Contract Law in Hong Kong* (2nd edn, Hong Kong University Press, 2011), pp.136–146.
34 Bills of Exchange Ordinance (Cap.19), s.22(1).
35 Bills of Exchange Ordinance (Cap.19), s.22(2).

(b) Enforceability of loans to a minor

6.033 Under the common law, an overdrawn account cannot be enforced against a minor. It was held in *R Leslie Ltd v Sheill*[36] that even where a minor has acquired a loan or financial advance by making a false representation as to their true age repayment cannot be enforced against that minor. Practically, it is unlikely that banks will grant an overdraft or loan to a minor without a guarantee.

6.034 The Age of Majority (Related Provisions) Ordinance (Cap.410) does however provide a remedy against a minor based on the restitution of property by minors. Accordingly, section 4 provides that:

> (1) Where-
>
> (a) a person ("the applicant") has after the commencement of this Ordinance entered into a contract with another ("the respondent"); and
>
> (b) the contract is unenforceable against the respondent, or he repudiates it, because he was a minor when the contract was made, the court may, if it is just and equitable to do so, and on such terms as it may think fit, require the respondent to transfer to the applicant any property acquired by the respondent under the contract, or any property representing it.

6.035 In practice, this would allow an adult party or a bank to apply to the courts to seek repayment of any loan advanced to a minor. The action is at the discretion of the courts which means that there is no need to prove fraud. Alternatively, the court may order restitution if it is "just and equitable" to do so. Each case will be judged upon its merits.

(c) Guarantees of minor's contracts

6.036 In the rare event that a bank advances a loan or grants an overdraft to a minor it is usual practice for the bank to secure a guarantee from a person who has attained the age of majority. In practice, a bank would consider a minor's application for a loan or overdraft based upon the strength of the guarantor. As a result of statutory intervention a guarantor executed by a person who has attained the age of majority would be enforceable even though a loan or overdraft granted to a minor would be rendered void as a result of the minor's incapacity. Accordingly, section 3 of the Age of Majority (Related Provisions) Ordinance (Cap.410) provides the following:

> Where-
>
> (a) a guarantee is given in respect of an obligation of a party to a contract; and
>
> (b) the obligation is unenforceable against the party, or he repudiates the contract, because he was a minor when the contract was made (whether before, on or after the date of commencement of this Ordinance), the guarantee shall not for that reason alone be unenforceable against the guarantor.

[36] *R Leslie Ltd v Sheill* [1914] 3 KB 607.

6.037 The above provisions in the Age of Majority (Related Provisions) Ordinance (Cap.410) clarifies the position in Hong Kong ensuring the enforceability of guarantees executed by persons of majority on a loan or overdraft to a minor and supersedes all previous common law rules on the issue.[37]

7. Combination of Accounts

6.038 The bank's right to combine the customer's accounts or "set-off"[38] is a common-law right.[39] It is an exclusive privilege conferred by law on the bank, which is not available to other creditors. The right of set-off arises automatically from the banker-customer relationship.[40] The common law permits banks to merge the accounts of the same customer.[41] More specifically, this allows the bank to apply a credit balance in favour of the customer on any account against a debit balance on any other customer account held with the bank. The practical effect of this is that it allows the bank to recover a debt without recourse to litigation.

6.039 The common law right of the combination of accounts was established in the landmark case of *Re European Bank, Agra Bank Claims*.[42] In this case the English Court of Appeal confirmed that securities were available to cover the indebtedness of a general account. James LJ stated that:

> "It was only for the convenience that the loan account was kept separately… In truth, as between banker and customer, whatever number of accounts are kept in books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account."[43]

6.040 The Code of Banking Practice provides specific guidance to banks regarding the right to combine customer accounts. Accordingly, the bank must ensure that any descriptive information made available to customers includes a clear and prominent notice of any rights of set-off claimed by the bank over credit and debit balances in different accounts of the customer.[44] The terms and conditions must contain the circumstances under which banks would exercise their rights of set-off.[45]

6.041 More specifically, the Code requires the bank to ensure that customers of a joint account are clearly informed about whether the bank claims the right to set off the

[37] Specifically, the Age of Majority (Related Provisions) Ordinance (Cap.410) overrides the rule established in *Coutts & Co v Brown-lecky* [1947] KB 104.

[38] In the context of Banking Law, the terms "combination of accounts" and "set off" have the same meaning and are interchangeable.

[39] This is quite distinct from the statutory right of set-off under the Bankruptcy Ordinance (Cap.6), s.35(1) and Companies Ordinance (Cap.32), s.264.

[40] *Barclays Bank Ltd v Okenhare* [1966] 2 Lloyd's Rep 87.

[41] *Re European Bank, Agra Bank Claims* (1872) LR 8 Ch App 41.

[42] *Re European Bank, Agra Bank Claims* (1872) LR 8 Ch App 41.

[43] *Ibid.*, [44].

[44] The Code of Banking Practice (February 2015), para.19.1.

[45] The Code of Banking Practice (February 2015), para.19.3.

credit balance in that account against the debit balance in other accounts which may be held by one or more of the holders of the joint account.[46]

6.042 The Code requires that banks should inform the customer promptly after exercising any rights of set-off.[47]

8. Appropriation of Payments

(a) General rule

6.043 The rule of appropriation of payments is a common law rule that relates to the distribution of money from a bank account. More specifically, it deals with the right of a customer or a bank to apply a particular deposit to pay a particular debt. The general rule is that the person that makes the payment has the right to apply it to any debt or account that they select. Where the payer does not specify the debt to be settled, the right is assumed by the payee customer.[48] In the event that the payee customer does not appropriate then the right to appropriate falls on the bank.[49]

6.044 In *Canton Trust and Commercial Bank Ltd v Ho Pui Shue*[50], it was held that a customer of a bank who holds more than one account with that bank may direct a lodgment to be credited to any account. If they not do so, and no prior arrangement has been made or there is no indication as to the destination then the bank may appropriate it to such account as it wishes.[51] In this case, the court concluded that the bank had acted in accordance with such legal principles in paying the funds into a current account and not a trust account.[52]

(b) Clayton's case

6.045 The leading authority dealing with the appropriation of payments is the English case *Devaynes v Noble* ("Clayton's Case").[53] The rule in Clayton's case is based upon the simple notion of 'first-incurred, first-discharged' to determine the effect of payments from an account, and will normally apply in the absence of evidence of any other intention. The rule is one of convenience since payments are presumed to be appropriated to debts in the order in which the debts are incurred.[54]

6.046 In Clayton's Case, one of the partners of the bank with which Clayton had an account died. Although the partnership was dissolved, upon the death of that partner, the bank continued to trade. The amount then due to Clayton was £1,717 British Pounds. The surviving partners thereafter paid out cheques drawn by Clayton in excess of that

[46] The Code of Banking Practice (February 2015), para.19.2.
[47] The Code of Banking Practice (February 2015), para.19.4.
[48] *Deeley v Lloyds Bank Ltd* [1912] AC 756.
[49] *Mills v Fowkes* [1893] 5 Bing NC 455.
[50] *Canton Trust and Commercial Bank Ltd v Ho Pui Shue* [1973] HKLR 485.
[51] *Ibid.*, para.30.
[52] *Ibid.*
[53] *Devaynes v Noble* (1816) 1 Mer 529.
[54] See *Re Diplock* [1948] Ch 465; *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22; *Re Ahmed & Co* [2006] EWHC 480 (Ch).

amount sending his account overdraw however, Clayton continued to make further deposits with the bank so that the account balance exceeded the amount due to Clayton at the time of the death of the partner. At this point the bank became insolvent and Clayton sought to recover the balance of his account that he held with the bank at the time of the partner's death from the partner's estate.

6.047 It was held that the estate of the deceased partner was not liable to Clayton, as the payments made by the surviving partners to Clayton must be regarded as completely discharging the liability of the bank to Clayton at the time of the partner's death. In giving judgment for the partner's estate, Sir William Grant MR stated that:

> "In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the first sum paid in, that is the first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."[55]

6.048 The rule is based on the legal fiction that, if an account is in credit, the first payment deposited will also be the first to be drawn out and, if the account is overdrawn, the next deposit is allocated to the earliest debit on the account, which caused the account to be overdrawn. It also goes further by providing that if the customer did not make known any intention as at how the funds should be appropriated, the bank would be entitled to do so.[56]

(c) Exceptions to the Clayton's case rule

6.049 The rule in Clayton's case is a presumption in law only and may be rebutted by evidence to show that the parties did not intend that the rule should be applied.[57] In this context, it is standard practice for banks to include clauses within banking contracts to exclude the operation of the rule in Clayton's case.

6.050 Where there is no evidence as to the payment order into and out of a current account Clayton's case does not apply.[58] The opening of a fresh account will also displace the rule of the appropriation of payments.[59] Additionally, the rule in Clayton's case is restricted since it only applies to current accounts[60] or other 'running accounts'.[61]

6.051 The rule does not apply to payments made by a fiduciary out of an account, which combines trust funds and the fiduciary's personal funds. Accordingly, in the event

[55] See n53 [608].
[56] See *West Bromwich Building Society v Crammer* [2002] EWHC 2618 (Ch); *Advocate General for Scotland v Montgomery* 2008 SCLR 1, [58].
[57] *Deeley v Lloyd's Bank Ltd* [1912] AC 756.
[58] *Cooper v PRG Powerhouse Ltd* [2008] EWHC 498 (Ch) [27].
[59] *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1972] 2 Lloyd's Rep 142 [164].
[60] The Mecca [1897] AC 286.
[61] For example, a 'running account' between a customer and trader. See *Barlow Clowes International v Vaughan* [1992] 4 All ER 22.