BANKING SECRECY IN MALAYSIA: A LEGAL MYTH

by

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Submitted in partial fulfilment of the requirements for the Diploma in Law in the Institute Technology Mara, Shah Alam.

April 1983.

FOREWORD

Banking secrecy has been a recognized practice since the early days of the banking era. Malaysia too, by virtue of the Malaysian Banking Act 1973, recognizes the practice. Despite the principle being a well established one, not many writers have commented or discussed it in great detail. As regards its practice in Malaysian banks, only Myint Soe [(a)] has commented on it. However, the discussion only touches the surface, i.e as provided by S.36 (2) of the Malaysian Banking Act. This article will attempt to explain the practice in Malaysian banks by way of describing the scope of the principle as practised here.

Banking secrecy is an all important aspect in the law of banking. Lawyers and doctors provide confidentiality of transactions and relationships between them and their clients or patients. In the same way, a banker has to maintain secrecy of all transactions between him and his customers. But the question is how far does it extend? Does it override all other matters? Or are there any exceptions to it? If there are, what is the scope of its application? These are the questions that need to be answered here.

(a) Myint Soe, A Sourcebook on Banking Law in Singapore and Malaysia. Institute of Banking & Finance, 1977.

ABSTRACT

This article intends to prove that banking secrecy in Malaysia is a legal myth, and not being greatly emphasized during every day banking practice and not being treated as sacred by the government. The discussion begins with a discussion about the practice in the Malaysian banks and the provisions of the Malaysian Banking Act 1973. Case law study too is done in order to have a better understanding of the principle. To prove the hypotheses, exceptions from the Malaysian Banking Act 1973 and also explanations from case law will be analysed. Tournier v National Provincial and Union Bank of England (1924) 1KB 461 gives the best account on the principle and its exceptions. So, this case can be said as the core of this discussion. The case gives a number of qualifications and limitations to banking secrecy and its broadness helps to prove the hypothesis. Other normal practices which deviate from the rule are looked into. To provide for a better view of the practice in Malaysia, comparisons are made with practices in countries like Switzerland, which is well known for its exercise of the principle, and also Singapore, which though basically have a similar banking law with Malaysia, has a special feature in that it has implemented the system of numbered accounts which emphasize on confidentiality. From all these facts a conclusion will be made and a discussion for its justifiability will be done.

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Introduction.

To talk about banking secrecy in Malaysia or in any other country in the world professing this rule, there must be an understanding as to what the term "banking secrecy" means. In Switzerland and most of the Common Law countries, it is described as a contractual obligation owed by the banker to the customer.(1) Also, the member states of the European Economic Community regard banking secrecy in the same way Switzerland and the common law countries do.(2)

The contractual obligation is implied(3) and it is "unlike the ordinary debtor and creditor(4) relationship"(5). The contract is "unwritten and undefined by the parties"(6) and it entails on the bank to ensure that confidentiality concerning the condition of the customers' are maintained. Thus, the banker owes a special

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1. Katrin Cutbush, "Swiss Banking Secret", Journal of Business Law, 1976, 197, at pg. 198; cf. Tournier v National Provincial and Union Bank of England (1924) 1KB 461

2. ibid

3. Tournier v National Provincial and Union Bank of England (1924) 1KB 461, at pp. 472-473

4. Foley v Hill (1848) 2H.L Cas. 28

5. Kelvin Williams, "Privacy and the Private Bank Account", N.L.J July 4, 1974

6. Maurice Megrah, Paget's Law of Banking, 7th Ed., London Butterworths, 1966, at pg. 55