Banking Secrecy – Legislative Anchoring Here and Now

Shaul Kotler, Advocate*

* *The author specializes in representing bank clients*

Banking secrecy is the heart and soul of the trust the client attributes the banker. The act of depositing a client's money in the hands of the banker can be deemed in this day and age as the most tangible, dominant, even unique, statement of such person's assets; even more, it is an expression of confidence unparalleled in normal commercial relations.The basis of this trust the client gives the banker is largely based on the existence of the obligation to banking secrecy.

The client trusts that his account, that intangible creation which quantifies the accumulated funds and rights he entrusted the banker (or borrowed from him), will be exposed to the banker's eyes only, and that its disclosure to other bank officials and those acting on the bank's behalf, will be for the purpose of acting in his account, and will be limited to those engaged in that activity only. The activity under which the client engages with the bank reveals and conceals a lot about the client, such as: his activity, business, finances, and more. Many personal details can also be culled from the client's account, such as: his habits, acquaintances, expenses, hobbies, and much more.

No one would agree to deposit such personal information and such sensitive information, in the hands of another, unless he knew that the securing party is subject to obligations of trust and confidentiality. The client-banking relationship was recognized in judicial ruling as a relationship of borrower-lender. The client's money held by the bank as deposits was recognized as a loan given by the client to the bank, and vice versa, as credit provided to the client by the bank.

This type of relationship conceals abundant and sensitive information regarding the client, which without the existence of the obligation to secrecy, may be abused. For example, the structural position of the client, the manner in which he finances his business, the bodies or companies acting on its behalf to receive credit, or make deposits, the security balance of this client's business, and more.

Frequently, the account will include sensitive information which may affect the person's status as well as his actions in a completely different area; i.e., his public or legal status; for example, activity carried out in security portfolios by generals when on the brink of war, and more. Such information can also give a rival party the ability to track the client's assets and finances and use this issue to influence foreclosures and the like.

In summary, information in the hands of bankers concerning the client is not only sensitive, but extends over many areas of the client's life, affects all the client's business activities, both commercial and personal; and without the presence of obligation of banking secrecy – the client is exposed to misuse, or abuse of this information.

Although banking secrecy and the necessity of its existence is clear to those engaged in this field, it is difficult to pinpoint its origin in Israeli law. Precisely because Israeli law is blessed

with an almost paternalistic compliance with respect to client-bank relations – in this basic and important area, the duty of banking secrecy lacks clear a legislation source.

Bank secrecy is: "The duty of the bank not to disclose to any unauthorized third party, information it has received as part of its handling of a client's account. With respect to maintenance of secrecy, a client is any person who has a bank account."

[D. Pilpel, "Banking secrecy: its Scope and Exceptions", Law Studies K (5754), 125]

Clause 15(A) of the Banking Ordinance provides that:

> "(A) A person shall not disclose information given him and shall not show a document submitted to him under this Ordinance or under the Banking (Licensing) Law, 5741-1981; however, it is permitted to disclose information if the Governor deems it necessary for purposes of criminal prosecution, or if the information or document was received from a banking corporation with its consent. (B) On matters of disclosure of documents and information received by the courts under this Ordinance, the laws applying to the Bank of Israel or to the Governor and his staff are the same laws applicable to State public officials. (C) The person contravening this Section or the provisions of Section5(6) is liable to one year's imprisonment or a fine of 10,000 Lira."

Although the implied reference to banking secrecy in this section, courts rightly interpret this section as addressing the relationship between the bank and the Bank of Israel, not as a clause applicable to the relationship between client and his banker. Thus, apart from inference, nothing in this section helps to establish the obligation of banking secrecy between bank and client in the law.

Section 2(8) of the Protection of Privacy Law, 5741-1981, states that:

> "Infringing an obligation of secrecy is breach of a duty of secrecy with respect to a person's private affairs, set forth by express or implied agreement."

It was therefore determined in this matter, that:

> "Characterization of the Bank's contractual obligation of secrecy, its integration with the statutory duty of secrecy set forth in Section8(2) of the Protection of Privacy Law, and the status of the right to privacy as a fundamental right, must cast meaning and significance to the obligation to secrecy in question, over and beyond the contractual obligation of secrecy lacking any public foundation, and thereby establish new meaning to Section 39 of the Evidence Ordinance. The privilege given the bank under the Protection of Privacy law, is 'a natural result of the essence of the matter'…" [Request for Appeal 1917/92, **Skooler v. Jarabi**, Judgments 47(5) 764].

But again, in Section 8(2) of the Protection of Privacy Law as well, there is no direct address to the specific issue of the bank's obligation to secrecy towards the client.

[Regarding the Protection of Privacy Law and its implementation, in regards to contractual secrecy obligations between bank and client, see: Civil Appeal 5893/91 **Tefahot Mortgage Bank v. Sabah**, Judgments 48(2) 573. Further, regarding the obligation of secrecy, see: Civil

Appeal 1570/92 **Mizrahi Bank Ltd v. Prof. Zvi Ziegler**, Judgments 49(1) 369); Request for Appeal (Tel Aviv - Yafo) 13688/97 **John Doe v. Anonymous et al**, Takdin 97(4) 450.]

This issue, namely, the absence of clear obligation – created by the law and not by court decision, worsens in unclear cases or those close to theoretical boundaries of conceptual practice of the duty of secrecy; for example, when the bank itself makes use of the information, but does it in front of one of his clients.

In Civil Case 1756/03 (Tel Aviv District Court), Various Motions 12883/03, a motion of Bank Leumi was discussed to apply a mareva injunction over foreign assets of the defendant. During the proceedings the bank argued that it had learned about the existence of assets from an item in the newspaper. In practice, during cross-examination, it became clear that the source of the information had been a document (agreement) delivered to the bank, for a totally other purpose, to another client's account.

According to the bank, when client “A” handed over documents or information for purpose of said client’s account, information was disclosed as to the business activity of client “B” and thus, the bank could use such information and transfer it to relevant officials of the bank, and even present it to law courts within the framework of business disputes between the bank and client “B“. .The District Court, at first stage – the Honorable Registrar Azar (of blessed memory) accepted the motion and dismissed the defendant’s opposition to the mareva injunction while ruling that said client “B“ could not argue breach of privacy and violation of privacy, whereby if such was made, it was made against client “A“ and, as stated, the latter did not appear in court nor claim such violation.

Beyond the problems of the legal ruling, where it was clear that the interests of client “B” were prejudiced due to disclosure of documents presented by client “A“, a conceptual problem also arises which is the lack of definition of the scope of obligation of banking secrecy. Should the court have had a clear definition in law, it is doubtful whether it would have been necessary to discuss the issue of violation of privacy; in this case, the court would have based its decision on the clear statement of the legislator.

Is the bank permitted to use information received from client “A“ as part of management of the account of client “A” in a business dispute against client “B“ of the same bank? In the undersigned’s opinion the answer is negative. As it is inconceivable that the bank should use information received during the management of the account of client “A” to help another client of the bank, client “B“ or a third party in a business dispute of such third party or of client “A“ versus client “B“, hence it is inconceivable that the bank would not set up "Chinese walls" between different divisions, branches and accounts and allow free flow of information as mentioned above. The concentration and extent of the information, including the centralized nature of the banking system and its significant economic force in the Israeli market, also contribute to the concern that failing to block such information would render it very difficult for a client to conduct business with his banker.

In a similar case, in an appeal on the Registrar’s decision, the District Court (the Honorable Justice Dotan) accepted the client's position, but again, not using a clear definition of the border lines relating to banking secrecy duties, but rather by virtue of the Protection of Privacy Law and the burden of proof regarding consent to disclose information. Whereas the client in that case (client “B“) argued that client “A“ did not consent and even gave an order not to use the information for any other purposes except for management of the account of Client “A’, and the bank did not provide any evidence that such consent had been given, the

court concluded that the bank did not meet the burden of proof, and therefore ruled against it and canceled the order. A request to appeal to the Supreme Court on this issue was denied.

Although the above judicial decisions were not based on the boundaries of the obligation of secrecy, created by court law, the judgments include statements that illustrate urgent need for legislative action, clear and conclusive, on this issue.

Although the Honorable Justice Arbel based her ruling, as did the Honorable Justice Dotan, on the fact that the bank did not satisfy the burden of proof whereby the information was disclosed by consent (of said client "A"), she ruled with respect to the obligation of banking secrecy:

> "Finally, I will note, though it is not required as set forth in the framework of this motion to reach conclusive statements, that I see a problem with the bank's claim that it is entitled to make any use it desires with information obtained from any client, particularly for use in proceedings taking place between it and the client. It is not a secret that banks have vast databases. Opening the possibility before the bank to take advantage of this database in claims against their clients, even if, according to the bank in this case, the information did not reach the bank from the client with whom it is conducting the proceedings, would give an unfair advantage to the bank, and raise serious questions regarding the right to privacy and the privacy of the individual, a fundamental right of our system set forth in Section 7 of the Basic Law: Human Dignity and Liberty.

[Civil Appeal Request 8873/05 **Bank Leumi Le'Israel Ltd. v. Danny Alhadeff** (unpublished)]

In the previous instance on the same case, the Honorable Justice Sara Dotan incidentally stated, not for the purpose of ruling in the specific case:

> "Beyond that, I will note that the bank's use of the agreement it obtained through the management of the client's account raises wonder and discomfort; in my view, the court should avoid using information of this kind, unless the client's consent to the bank's additional use of this information was well proven; and this by reason that a third party presenting the bank teller a document relating to his account is correct in assuming that the bank has been commanded to safeguard the secrecy of the information, and thus has no reason to explicitly request no further use such information. It seems that in the special relationship between the bank and its clients, it is to be implicitly assumed that information is disclosed only for a certain purpose and any deviation from that purpose requires explicit permission. However, in view of the conclusion I have reached, as detailed above, I leave this question undecided. [Civil Appeal 2220/04 **Alhadeff v. BLL** (unpublished)]

On this issue, a bill was proposed by MK Moshe Kahlon with the assistance of the undersigned, proposing:

Adding Section 2A	1.	In the Banking Law (Customer Service), 5748-1981, after Section 2 it shall be written:	
		Obligation of Secrecy	2A (a) A banking corporation shall not disclose details it obtained from managing a client's account, without

the consent of the client.

(b) The banking corporation shall neither – by act or omission, in writing or orally or in any other way – carry out any act which could violate the obligation of secrecy as stated under subsection (a); without derogation from the aforementioned, the following information shall be deemed privileged:

(i) Client's accounts, assets or liabilities;

(ii) Client's business affairs, including business carried out with another client or another person; in this respect "another person" includes another entity in the same banking corporation handling the case of another client."

[Banking Law Bill (Client Service) (Amendment – Obligation of Secrecy), 5766 -2006]

Without clear legal anchoring setting forth the existence of the bank's obligation to maintain secrecy with respect to information acquired from its clients, courts will continue to handle this issue through "judicial legislation," which will increase ambiguity and contribute to commercial uncertainty of those dealing in the field. The obligation of banking secrecy is a *fait accompli*, its anchoring into main legislation is imperative. It is to be hoped that the legislative process will be expedited.