

Legal Opinion

Contractual Duty of Secrecy

The main issues that have been considered and are being addressed include the contractual duty of secrecy implied in the customer and creditor relationship, which are more onerous on bankers than on others. This relationship is limited, and qualified in the following situations:

- (a) Where disclosure is required by law;
- (b) Where there is a duty to the public to disclose;
- (c) Where the interest of the bank requires disclosure (for example, the contents of a writ claiming a debt due to the bank);
- (d) Where the disclosure is made by the express or implied consent of the customer. (This is most significant for the purposes of this opinion since authorized disclosure clearly absolves the bank of its duty. That authorized disclosure should however include divulgence of information obtained by the bank from other sources than the customer's actual account to cover the period leading up to the establishment of the formal banker relationship.)

The release of customer's credit information

Where the customer, preferably in writing, authorizes such a reference to his bankers, the issue then under Barbados law is not so much the nature of the statement issued by the bank, but whether or not the bank owes a duty of care in making that representation. This is a duty to not be negligent, and not being negligent has often been placed on equal status to the obligation of being honest. A duty of common honesty met by the bank will likely displace most claims by customers.

Significance of written consent

We have found no particular preposition for this assertion except the common sense perspective of certainty, for in the absence of express consent it would have to be imputed from the particular banker/customer relationship. It appears that when consent is not obtained (and we contend that it should be obtained in most cases), and consent cannot be imputed in a particular case, the banker might be liable.

A clause consenting to the obtaining and disclosure of payment history and credit rating information provides sufficient legal authority to disclose and obtain information, as long as that information is relevant and correct. We recommend to all subscribers to insert a clause similar to the following in their credit applications.

***“I/We
hereby authorize «Company» to obtain any information required relative to my/our credit history or application for credit and any such source is hereby authorized to provide the requested information. «Company» is further authorized to disclose to any credit bureau, reporting agency, business or person such information regarding my/our credit history as is appropriate and lawful in the circumstances. I/we jointly and severally agree to indemnify and save «Company» from any and all claims in damages or otherwise arising from any disclosure”.***

It is generally assumed that when one applies for credit, his/her past payment history will be reviewed and considered as part of the application process, and that the creditor will also disclose the payment history to those having a bona fide interest. It can therefore be deemed that consent to obtain and disclose credit rating information is implied when applying for credit.

We offer our credit rating information service only for the purpose of determining credit worthiness. We are of the opinion that this is not in violation of any secrecy

or fiduciary obligations that a bank may have. In addition, a reference number as opposed to the name of our subscriber identifies the credit rating information, and additional information is only released after the consumer has produced satisfactory identification and completed and signed the Credit Inquiry Form. The following disclaimer is contained in the Inquiry Form to provide additional legal protection to subscribers:

*"I request that you disclose to me the information contained in my **Credi-Check** file and would like details of the records identified by the reference number(s) listed above. I agree to indemnify Caribbean Credit Bureaus Ltd. and the reporting subscriber(s) against and save you, the aforementioned companies and the reporting subscriber(s) from any and all claims in damages or otherwise arising from the requested disclosure".*

The legal opinion referred to earlier suggests that if an honest mistake is quickly corrected, and the parties that received and acted on that wrong information are immediately notified, potential damages could be avoided. We therefore have a Dispute/Change Form (exhibit B) that can be issued expeditiously in such instances. If a consumer successfully challenges his/her credit rating, they are asked to complete the form and indicate their position, which is forwarded to the reporting subscriber for investigation.

In actuality, there have only been a few instances where the subscriber and consumer have not been able to agree on a correct rating, in which case the change deemed most equitable to all parties was made by us. Disputed ratings are identified by the status code "DR" – Disputed Rating.