

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

BETWEEN:

THE OFFICE OF FAIR TRADING

Claimant

-and-

(1) ABBEY NATIONAL PLC
(2) BARCLAYS BANK PLC
(3) CLYDESDALE BANK PLC
(4) HBOS PLC
(5) HSBC BANK PLC
(6) LLOYDS TSB BANK PLC
(7) NATIONWIDE BUILDING SOCIETY
(8) ROYAL BANK OF SCOTLAND GROUP PLC

Defendants

PARTICULARS OF CLAIM

Introduction

- 1 The Claimant is the Office of Fair Trading (“the OFT”):
 - 1.1 The OFT is a general enforcer under section 213 of the Enterprise Act 2002 (“the Act”).
 - 1.2 As such, the OFT has the function under the provisions of Part 8 of the Act of seeking an enforcement order from the court where it thinks that a person has engaged, is engaging, or is likely to engage in conduct which constitutes a Community infringement under section 212 of the Act.

- 1.3 A Community infringement is an act or omission which harms the collective interests of consumers and which inter alia contravenes a listed Directive as given effect by the laws, regulations or administrative provisions of an EEA State (section 212 of the Act).
- 1.4 The Unfair Terms in Consumer Contracts Regulations 1999 (“the 1999 Regulations”) give effect to Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (“the Directive”). In the premises, an act or omission which harms the collective interests of consumers and which contravenes the provisions of the 1999 Regulations is a Community infringement within the meaning of Part 8 of the Act and the OFT is empowered to apply for an enforcement order in respect thereof.
- 1.5 Under section 224 of the Act, the OFT has power to require any person to provide it with information for the purpose, inter alia, of enabling the OFT to exercise or consider whether to exercise any function it has under Part 8 of the Act.
- 1.6 Under Regulation 12 of the 1999 Regulations, the OFT also has power to apply for an injunction (including an interim injunction) against any person appearing to the OFT to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with “consumers”. A “consumer” for these purposes is defined in Regulation 3 of the 1999 Regulations. In the present context, and throughout these Particulars, the word refers to natural persons acting, in relation to the contracts containing the Relevant Terms and Charges (referred to in paragraph 10 below), for purposes which are outside that person’s trade, business or profession.
- 1.7 Under Regulation 12(4) of the 1999 Regulations, an injunction may relate not only to the use of a particular contract term drawn up for

general use but to any similar term, or a term having like effect, used or recommended for use by any person.

- 1.8 Under Regulation 13 of the 1999 Regulations, the OFT has power to demand copies of documents used as a standard form contract and require persons to supply information about the use of such documents.
- 2 Each of the Defendants is or operates a bank or building society or is the holding company of one or more subsidiaries each of which is or operates a bank. These banks provide current account facilities to their customers who are consumers (and others). The two schedules hereto contain, inter alia, the name of each such bank. All of these banks, whether or not possessing separate corporate identity and whether or not part of a greater business, will hereafter collectively be referred to as “the Banks”, and each individual bank as “the Bank”.

The 1999 Regulations and their application

- 3 The 1999 Regulations, implementing the Directive, revoked and replaced the Unfair Terms in Consumer Contract Regulations 1994.
- 4 The 1999 Regulations apply in relation to terms in contracts concluded between a seller or a supplier and a consumer (Regulation 4(1)).
- 5 Regulation 5(1) provides: “*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.*” Regulation 5(5) provides that Schedule 2 to the 1999 Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.
- 6 Regulation 8(1) provides that an unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

Regulation 8(2) provides that the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

- 7 The only material exception to the applicability of the test of fairness set out in 1999 Regulations is contained in Regulation 6(2) relating to what are called, for short, “core terms”:

“In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange”.

Terms and conditions of the Banks

- 8 Each of the Banks has personal current account agreements between themselves and their customers who are consumers, containing the terms and conditions relating to the operation of those current accounts by such customers.
- 9 In so far as any of these terms and charges are contained in documents which are described as notices to, guides to, or communications with, customers, they are nevertheless to be considered as terms of a contract between the Bank and its customers for the purposes of the 1999 Regulations, whether or not they are described as terms or as “policies of the bank” or as anything else.
- 10 The Banks’ current account agreements typically provide or provided for three types of payments to be demanded from customers in connection with unauthorised overdrafts:
- 10.1 A fee charged by Banks:
- (a) when a customer seeks to operate his current account in a way that will result in the account being debited despite there being insufficient available funds to support the debit but the Bank nevertheless agrees to effect payment, causing the account to go

into overdraft or further overdraft, or to exceed, or further exceed, an already agreed overdraft limit;

- (b) when a customer moves into or is in an unauthorised overdrawn position within a specified period.

10.2 A returned item fee, e.g. as in the previous case, a cheque is presented but in this case the Bank declines to authorise payment because there are insufficient funds, and the cheque has to be returned to the payee marked “R/D” or “RDPR” or “Effects uncleared”.

10.3 An increased rate of interest charged on unauthorised overdrafts granted in the circumstances set out in paragraph 10.1 above.

The provisions in the current account agreements which entitle or historically entitled the Banks to demand the charges referred to in paragraphs 10.1 and 10.2 above are referred to herein as “the Relevant Terms and Charges”, and are more particularly described in the two schedules hereto.

11 Pursuant to an agreement entered into between the OFT, each of the Defendants, and the Financial Services Authority, dated 25 July 2007 (as amended by an agreement dated 29 August 2007) each Bank has provided the OFT with a copy of relevant personal current account agreements and tariffs that are currently in force or are to be in force as at 1 October 2007 (“the Current Agreements”) and a representative selection of previous terms, conditions and tariffs contained in earlier agreements (“the Historic Agreements”) that are in dispute in the county courts between individual customers and the Banks.

12 The two schedules hereto, prepared on the basis of the information provided by the Defendants, set out particulars of the Relevant Terms and Charges, and, in column (f), the relevant increased rate of interest referred to in paragraph 10.3 above. The first schedule (Schedule A) sets out the Relevant Terms and Charges contained within the Current

Agreements (“the Current Terms Schedule”) for each Bank; the second schedule (Schedule B) sets out Relevant Terms and Charges contained within the Historical Agreements (“the Historical Terms Schedule”) (Schedule B) for each Bank. The Historical Terms Schedule also contains terms currently in force. This is pursuant to certain Banks’ indications that, in respect of certain current account agreements, relevant terms currently in force do not differ materially from those used previously, and on the basis of which indications those Banks did not provide the OFT with the previous terms.

Current terms and tariffs

- 13 The Current Terms Schedule refers to:
 - 13.1 (column B) clauses entitling the relevant Bank to payment by a customer of an amount, whenever the customer’s current account goes into, or remains in, unauthorised or unarranged overdraft (charging clause);
 - 13.2 (column C) clauses setting out the amount of the charge, i.e. the precise amount payable pursuant to the provisions referred to in paragraph 13.1;
 - 13.3 (column D) clauses providing for charges whenever a customer issues a guaranteed cheque without sufficient funds to meet it, and the amount of such charges;
 - 13.4 (column E) clauses setting out the relevant Bank’s entitlement to charges whenever a customer issues a payment instruction without sufficient funds to meet it and that instruction is returned unpaid, and the amount of such charges;
 - 13.5 (column F): the applicable increased rate of interest on unauthorised overdrafts as described in paragraph 10.3 above.

Historical terms, conditions and tariffs

- 14 The Historical Terms Schedule contains details of the following:
- 14.1 (column B) clauses entitling the relevant Bank to payment by a customer of an amount, whenever the customer's current account goes into, or remains in, unauthorised or unarranged overdraft (charging clause);
 - 14.2 (column C) clauses setting out the amount of the charge, i.e. the precise amount payable pursuant to the provisions referred to in paragraph 14.1;
 - 14.3 (column D) clauses providing for charges whenever a customer issues a guaranteed cheque without sufficient funds to meet it, and the amount of such charges;
 - 14.4 (column E) clauses setting out the relevant Bank's entitlement to charges whenever a customer issues a payment instruction without sufficient funds to meet it and that instruction is returned unpaid, and the amount of such charges;
 - 14.5 (column F): the applicable increased rate of interest on unauthorised overdrafts as described in paragraph 10.3 above.

Application of a test of unfairness

- 15 Each of the Relevant Terms and Charges:
- 15.1 is not in plain intelligible language; and/or
 - 15.2 does not relate to the definition of the main subject matter of the contract; and
 - 15.3 does not relate to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.
- 16 Accordingly, in so far as these terms form part of the contract between the Banks and their respective customers who are consumers, such terms fall to be assessed for fairness under the 1999 Regulations.

- 17 If any of the Banks' respective Relevant Terms and Charges are "unfair" within the meaning of the 1999 Regulation, the continued use by the Bank in question of such terms and charges in relation to its customers who are consumers could constitute a Community infringement under section 212 of the Act.

The OFT's investigation

- 18 The OFT is considering complaints that the Relevant Terms and Charges are unfair under Regulation 10(1) of the 1999 Regulations. In March 2007, the OFT commenced a formal investigation into the fairness of Relevant Terms and Charges in Current Agreements. The OFT is considering whether to exercise the function it has under Part 8 of the Act to seek an enforcement order if it thinks that a Community infringement has taken or is taking place.
- 19 As part of this investigation, on 15 June 2007, the OFT gave notice to the Defendants under section 224 of the Act requiring them to provide the OFT with information and documents relevant to the fairness of the Relevant Terms and Charges in Current Agreements . The OFT has received information and documents pursuant to that request which include the management profit and loss accounts of each of the Banks.
- 20 The OFT's current investigation into bank overdraft charges seeks to determine whether such terms in Current Agreements are "unfair" and contravene the 1999 Regulations, and if they harm the collective interests of consumers. It is anticipated that the investigation will report by the end of the year. If it is found that they are unfair and do harm the collective interests of consumers, the OFT would be entitled, after consultation and if suitable undertakings are not forthcoming, to seek an enforcement order under section 217 of the Act. If the terms are unfair, the OFT would also be entitled to seek an injunction under Regulation 12 of the 1999 Regulations.

- 21 In the course of the current investigation, the Banks have raised the preliminary objection that the Relevant Terms and Charges in Current Agreements and also in Historic Agreements are core terms within the meaning of Regulation 6(2) of the 1999 Regulations because they are a charge for a service, and are therefore not subject to an assessment of fairness at all.
- 22 The issue of whether the Relevant Terms and Charges in Current Agreements fall within Regulation 6(2) of the 1999 Regulations is fundamental to the question whether the OFT's investigation should continue, and, if the investigation should conclude that any of the Relevant Terms and Charges are "unfair", whether that conclusion is soundly based, and whether the OFT would be entitled to take enforcement action or seek an injunction in reliance on such decision.

In the premises, the OFT therefore seeks a declaration against each of the defendants that the Relevant Terms and Charges in Current Agreements (and to the extent relied on by the Banks, in Historic Agreements) are not excluded from an assessment for fairness under the 1999 Regulations by reason of Regulation 6(2)(a) and/or (b) thereof.

BRIAN DOCTOR QC

JEMIMA STRATFORD

31 August 2007

The Claimant believes that the facts and matters stated in these Particulars of Claim are true.

SIGNED:

OMAR YAQUB

POSITION:

DATED:

Claim No. 2007 Folio 1186

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Claimant

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Defendants

PARTICULARS OF CLAIM

Omar Yaqub
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX