



Neutral Citation Number: [2009] EWHC 36 (COMM)

Case No: 2007-1186

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 21/01/2009

Before :

MR JUSTICE ANDREW SMITH

Between :

THE OFFICE OF FAIR TRADING

Claimant

- and -

(1) ABBEY NATIONAL PLC

Defendants

(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) THE ROYAL BANK OF SCOTLAND

GROUP PLC

Jonathan Crow QC, Jemima Stratford and Sarah Love
(instructed by The Office of Fair Trading) for **The Office of Fair Trading**

Ali Malek QC and Richard Brent
(instructed by Ashurst LLP) for **Abbey National PLC**

Bankim Thanki QC and James Duffy
(instructed by Lovells) for **Lloyds TSB Bank PLC**

Malcolm Waters QC and David Blayney
(instructed by Linklaters LLP) for **The Royal Bank of Scotland Group PLC**

Hearing date: 9 December 2008

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW SMITH

MR JUSTICE ANDREW SMITH :

1. In my judgment in this action dated 24 April 2008, [2008] EWHC 875 (Comm) (my “April judgment”), in particular at paras 295 to 331, I considered the common law relating to penalties, and I made a declaration in an order dated 12 June 2008 that certain Relevant Terms giving rise to Relevant Charges are not penalty clauses at common law. (In this judgment, I use the same abbreviated terms I have used in my other judgments in this case.) The OFT accepted that my reasoning applied to some other Relevant Terms, and that I should make declarations about them. There remained dispute about other Relevant Terms and I heard argument about them in July 2008. I gave a judgment on 8 October 2008 (my “October judgment”), [2008] EWHC 2325 (Comm). In that judgment I invited further submissions to assist me to decide whether to make declarations in relation to (i) Abbey’s May 2005 conditions, (ii) Relevant Terms of Lloyds TSB, and (iii) Relevant Terms of RBSG. I heard further submissions on 9 December 2008.
2. I explained in my October judgment the ambit of the argument between the parties and my approach to deciding whether to make the declarations sought. I shall not repeat what I said in my October judgment except where this is necessary in order to explain the further submissions that I have heard and my further conclusions.

Abbey

3. The relevant provisions of Abbey’s May 2005 conditions are these:
 - i) Condition 13.3(b): “You must not use your card to guarantee a cheque for more than the available funds on your account”.
 - ii) Condition 24.2: “An unauthorised overdraft occurs if without our agreement you overdraw your account. If you overdraw your account when we have not given you an overdraft you are in breach of these Conditions and must immediately pay sufficient money into your account to put it into credit, taking account of any interest and charges you will have incurred.”.
4. Abbey sought a declaration that its May 2005 conditions are not capable of being penal at common law. My concern about making a declaration along these lines was not that the May 2005 conditions are capable of being penal. I agree with Abbey’s contention that my conclusions in respect of other Relevant Terms would mean that they are not, and the OFT did not, in light of my other conclusions, pursue before me the argument that they are. The question was whether I should exercise my discretion to make a declaration.
5. Abbey’s May 2005 conditions relate to its Instant Plus account. Abbey did not provide a cheque book or a cheque guarantee card to customers who had an account of this kind. The only Relevant Charge that was levied in respect of Instant Plus accounts was an Unpaid Item Charge. If an Instant Plus account was being operated as Abbey contemplated, there would be no question of the customer using a cheque guarantee card, and so no question of him contravening condition 13.3(b).

6. Mr. Ali Malek QC, representing Abbey, submits that a customer with an Instant Plus account might be said to have been in breach of condition 24.2 in these circumstances: he might have given a direct debit instruction or a standing order, payment might have been refused because he had insufficient funds in the account and he might thereby have incurred an Unpaid Item Charge that led his account to be overdrawn. However, in those circumstances no Relevant Charge would be incurred because of breach of condition 24.2. Even if it could be said that the customer overdrawn his account (rather than that he allowed his account to become overdrawn), the Unpaid Item Charge would not have been charged because of that. On the contrary, the Unpaid Item Charge would have been the cause of the account becoming overdrawn.
7. Accordingly, I do not see when a Relevant Charge might have been levied upon an account to which the May 2005 conditions applied because of a breach of condition 13.3(b) or 24.2, unless for some reason Abbey had allowed it to be operated in a way that was contrary to its practice. If any such case were to arise (and that seems unlikely), it should be examined in light of its own facts.
8. Abbey argues that nevertheless I should grant declaratory relief because the OFT pleads in its Defence to Counterclaim (at paragraph 87.1(b) and Annex G2 thereto) that conditions 13.3(b) and 24.2 are capable of being penalties, and, that assertion having been made by the OFT, the question should be determined by the court. I am unable to accept that this would justify a declaration about Abbey's May 2005 conditions. I agree, however, that it is inappropriate in these circumstances that the assertion made by the OFT remain in its pleading. I propose to make an order striking out from Annex G2 to the OFT's defence to counterclaim the references to Abbey's May 2005 conditions.

Lloyds TSB

9. As I explained in my April judgment (at para 240) Lloyds TSB differed from the other Banks in that before November 2007 it did not have full written terms for its current account services. It seeks declaratory relief about terms in leaflets that set out "Terms and Conditions" issued for current account customers who had a bank card governing use of the card. They were what I have called the "Lloyds TSB 2007 card conditions" and the conditions in earlier versions of the leaflet. (In this judgment, for the sake of simplicity I refer only to the Lloyds TSB 2007 card conditions.)
10. As I explained in my October judgment, as in the case of Abbey, my concern about making the declaration sought by Lloyds TSB was not that the Lloyds TSB 2007 card conditions were capable of being penal if all the provisions set out in the leaflet were incorporated into the contracts that Lloyds TSB had with its current account customers (or with those customers who had a bank card). It seemed to me that because Lloyds TSB did not have full written terms, particular consideration needed to be given to Lloyds TSB's contracts with its customers before any declaration was made, and in particular that I should not exercise my discretion to make any declaration that might appear to determine whether the Lloyds TSB 2007 card conditions were incorporated into contracts. After the hearing in July 2008, Mr. Justice Morgan gave his judgment in The Office of Fair Trading v Foxtons Limited, [2008] EWHC 1662 (Ch), which had some relevance to this. He identified difficulties

inherent in the court granting relief upon what Lord Steyn described in the First National case ([2002] 1 AC 481 at para 33) as “pre-emptive or collective” challenges under the 1999 Regulations, and comparable questions might arise here. I therefore invited further argument.

11. I have been assisted by further written submissions from Mr. Bankim Thanki QC on behalf of Lloyds TSB and from Mr. Jonathan Crow QC representing the OFT. They persuade me that, given the nature of this litigation and the purpose to provide guidance that might assist the disposal of claims made by individual customers against the Banks, I should make a declaration in terms that make it clear that it does not prejudice the position of any individual customer who wishes to raise an additional question as to the terms incorporated into his contract with Lloyds TSB. As Mr. Thanki recognised, the determination of a question of this kind would require what he called “a fact-sensitive and customer-specific enquiry”. This in itself is not a reason to refuse a declaration: see the judgment in the Foxtons Limited case (loc cit) at para 64. Indeed, the customers of other Banks who generally had written terms with their current account customers might properly raise a question of incorporation of terms in relation to the particular circumstances of their case. In the end it is a question of degree: Lloyds TSB customers *might* have more scope to raise a question of this kind. But I have concluded that I should nevertheless give Lloyds TSB declaratory relief.
12. The precise terms of the order have been discussed between the parties, and it appears likely that they will now be agreed without difficulty. I am content to adopt the form of order that I understand from a note that I have received since the hearing both Lloyds TSB and the OFT suggest would be satisfactory, using language of this kind:

“The declaration set out in paragraph [] of this order applies to the terms which make provision for the charges identified above to the extent that any contract between Lloyds TSB and a personal current account customer included the terms and conditions contained in the documents below or any of them (as applicable from time to time).”

RBSG

13. The application of RBSG concerned four documents that the OFT says include provisions that are capable of being penal: the NatWest 2001 conditions, the NatWest 2004 conditions, the RBS 2005 conditions and the NatWest July 2003 leaflet. As I explained in my October judgment, I was not persuaded that the Relevant Terms in the first three documents were not capable of being penal, but I allowed RBSG to advance further argument about them in light of my conclusion that condition 9.2.2 of the HSBC 2001 current account conditions and condition 4.5.2 of the First Direct 2001 conditions are not capable of being penal, because it was submitted that these terms were indistinguishable from RBSG’s terms. In the case of the NatWest July 2003 leaflet, I was not prepared to make a declaration because its contractual standing was not clear, and I provided the opportunity for the position about this to be clarified.

14. I consider first the NatWest 2001 conditions. The Relevant Term is the words that I have underlined in the following provision, which is included against the side-note “Using your Card”:

“You must only use your Card in accordance with these Conditions of Use and any operating instructions including the User Guide which we or our agents give you at any time. Such instructions form part of the contract between you and the Bank ... You must not use your Card to go overdrawn on your Account unless we have previously agreed this with you. If you do go overdrawn without our agreement, you will be liable to pay interest for each day you are overdrawn on the total amount of the unauthorised borrowing together with our normal account charges. Full details of the interest and charges can be obtained from any branch of the Bank or from the reverse of your Account statement ...”

15. In my October judgment I considered condition 9.2.2 of the HSBC 2001 current account conditions, which provides as follows:

“You must not use your debit card to borrow from us on your Bank Account unless you are 18 and over and an overdraft has been agreed separately. You must not use your Solo debit card or your Switch debit card (if applicable) to borrow on your Bank Account if you are aged 16 and 17. You must not use your Basic Bank Account Card to borrow on your Basic Bank Account. You must not use your savings card to borrow on your Instant Access Savings account or your Livecash card to borrow on your Livecash account. If your account goes overdrawn or, for Bank Accounts held by customers who are 18 and over, it goes overdrawn without an agreed overdraft or goes over any agreed overdraft limit, we may charge interest at our Standard Debit Interest Rate. We may also charge our applicable fee for overdrafts not agreed in advance on Bank Accounts. Please see 7.9 and 7.11.”

I concluded that this term was not capable of being penal, and I reached a similar conclusion with regard to condition 4.5.2 of the First Direct 2001 conditions, which stated: “You must not use your card to borrow from us unless an overdraft has been agreed separately. You must not use your savings card to borrow from us at all. Unauthorised overdrafts will be charged interest at our Unauthorised Overdraft Interest Rate. We will also charge our usual fees for unauthorised overdrafts”. I accepted HSBC’s contention that these conditions did not evince an intention to create a contractual prohibition upon the customer using a card to borrow from the Bank. In this context I observed that the account could become overdrawn only if the Bank accepted the customer’s instruction to pay although he did not have the requisite funding to do so, and concluded that the wording of the conditions did not justify interpreting them as directed to an *attempt* by the customer to effect a transaction that would (if executed) bring about an overdraft that had not been arranged with the Bank.

16. At the hearing in July 2008 RBSG argued that the Relevant Term in the NatWest 2001 conditions was directed to attempts to use a card in circumstances in which, if the customer's instructions were honoured, the account would become overdrawn: that it was directed to the intended or likely consequences of use of the card rather than the actual consequences. I rejected that submission as not reflecting the language of the provision. Mr. Malcolm Waters QC, who did not appear at the July 2008 hearing but represented RBSG at the December 2008 hearing, did not seek to re-argue that point of construction, but he submits that the consequence of my conclusion is that the same reasoning as was successfully advanced for HSBC applies to the NatWest 2001 conditions.
17. In support of this submission, RBSG points first to the similar wording in the Relevant Term in its own conditions and in the HSBC 2001 current account conditions and the First Direct 2001 conditions. RBSG also says that the context of the provisions is similar: the conditions relate to the use of cards that can be used (depending upon the particular card) for one or more of these purposes: to obtain cash, to pay for goods or services and to guarantee cheques. Thirdly, RBSG points out that elsewhere in the NatWest 2001 conditions, as in the HSBC 2001 current account conditions, terminology about what the customer "must not" do does not always mark a contractual prohibition.
18. I accept all these points as far as they go, but I still consider the Relevant Term in the NatWest 2001 conditions to be contractual and to impose a contractual prohibition on the customer. Although the language of the particular sentence that states the prohibition itself has some similarity to that in the HSBC and First Direct conditions, its context within the NatWest 2001 conditions is significantly different, and that context, to my mind, evinces the intention that it should operate as a prohibition on the customer with contractual effect. It is in a section of the document that is concerned, as is stated in a side-note, with "Terms and Conditions for NatWest Servicecards, Cashcards & First Reserve Cashcards". The section starts with some definitions which give this part of the document a contractual appearance, and the language of the definitions shows the precision to be expected in a contract. (For example, the definition of "the Card" includes not only the categories of cards listed in the side-note but also "any card which renews, replaces or supplements it".) Immediately under the definitions is the sentence, "You have asked the Bank to issue you with a Card. Please read these Conditions of Use carefully, as they represent the terms of the contract between you and the Bank". The provisions against the side-note "Using your Card", which I have set out and which includes the Relevant Term, immediately follow the definitions and this statement. The first sentence of the "Using your Card" section reinforces the previous statement about the Conditions of Use being contractual, both by using the term "Conditions of Use" and by itself referring to the contract between the Bank and the customer. As the OFT observed, the contractual tone is further reinforced by the use of the term "unauthorised borrowing" in the sentence immediately following the words that, it submits, state the contractual prohibition on the customer (although it is right to point out that the First Direct 2001 conditions use similar language).
19. In these ways, the NatWest 2001 conditions are different from the HSBC and First Direct conditions. While the HSBC and First Direct conditions are introduced by a statement that the terms and conditions are a contract between bank and customer, this

does not have the same impact upon the Relevant Term as the references to a contract in the immediate context of the particular term, such as are found in the NatWest 2001 conditions.

20. I therefore remain unpersuaded that the Relevant Term in the NatWest 2001 conditions is not capable of being penal.
21. Although the submissions before me both in July and in December 2008 proceeded on the basis that my conclusion about the NatWest 2001 conditions would determine whether the Relevant Terms in the NatWest 2004 conditions and the RBS 2005 conditions were capable of being penal, in my judgment each set of terms required separate consideration. I come therefore to the NatWest 2004 conditions.
22. In section 1 of the NatWest 2004 conditions it is stated, "Please read these Terms and Conditions carefully and retain them for future reference. They will tell you important information about your NatWest Account and represent the terms of the contract between you and National Westminster Bank Plc. When you sign the account application form, you accept these Terms and Conditions...". The document is in part for information and in part contractual.
23. The Relevant Term is in section 3, which is headed, "Service/Cashcard Conditions of Use". At the start of the section, as with the NatWest 2001 Conditions, there are some definitions. The Relevant Term itself is at sub-paragraph 1c), but I should set out paragraph 1 in its entirety:

"The card

a) You (and any additional cardholder) must do the following:

- Sign the card when you or the additional cardholder receive it.
- Keep the card secure at all times and do not allow any other person to use it.
- On receiving the PIN advice slip memorise the PIN and then immediately destroy the PIN advice slip.
- Never write down the PIN in any way which could be understood by someone else.

b) You (and any additional cardholder) must not use the card before or after the period it is valid for or after you receive notice that we have cancelled or withdrawn the card.

c) You (and any additional cardholder) must not use the card if to do so would overdraw the account without our prior agreement, or would increase any borrowing on the account to more than we have agreed.

d) We own the card and if we ask, you must return it to us immediately (cut in half through the signature box and magnetic strip, and if you have a chip card

ensure the chip is cut in half). We, or anyone acting for us, may keep the card at any time. For example, we may withdraw a card and instruct any third party to keep hold of it if you try to use it.”

24. Although the wording of the Relevant Term itself is not significantly different from the Relevant Term in the NatWest 2001 conditions, to my mind its context is. It does not have those features that I have identified as giving the Relevant Term in the NatWest 2001 conditions its contractual connotation apart from the fact that it follows definitions. Moreover, the other directions to the customer in paragraph 1 are not, in my judgment, such that the customer would be in breach of contract if he did not observe them. Similarly I do not consider that the customer would be in breach of contract with the Bank if he contravened the direction in sub-paragraph 1c), the Relevant Term. In reaching this conclusion, I do not overlook that sub-paragraph d) refers to the ownership of the card and the customer’s obligation to return it if requested. However, this does not, in my judgment, detract from the fact that read as a whole the paragraph is informative and advisory. Sub-paragraph d) advises the customer of the legal position: it does not *create* contractual rights for the Bank or contractual obligations for the customer.
25. I have therefore concluded on reflection that the Relevant Term in the NatWest 2004 conditions is not capable of being contractual.
26. The RBS 2005 conditions are closely similar to the NatWest 2004 conditions. They include a general statement similar to that in section 1 of the NatWest 2004 conditions. The Relevant Term in the RBS 2005 conditions is in section H and sub-paragraphs H.1 to H.4 are the same as section 3, paragraph 1 of the NatWest 2004 conditions set out above. I similarly conclude that the Relevant Term in the RBS 2005 conditions is not capable of being contractual.
27. I explained in my October judgment (at para 128) that the evidence then before the court did not demonstrate the contractual standing of the NatWest July 2003 leaflet (which on its face was a “guide” for customers), and I considered that in these circumstances I should not exercise my discretion to grant declaratory relief in relation to its provisions. RBSG has now put before the court a witness statement dated 2 December 2008 of Mr. Simon Granleese, the Head of Current Account Strategy within the Retail Banking Division of RBSG. From his evidence it appears, and I accept that, when the NatWest July 2003 leaflet was issued, the Bank used in respect of current accounts (that is to say, the accounts called Current Plus accounts, Current Accounts, Step accounts, Advantage Gold accounts and First Reserve accounts) a set of terms and conditions printed in February 2003 which stated that they had applied since 7 October 2002. The terms and conditions incorporate provisions in what is called the “promotional leaflet insert”, that is to say the leaflet. (As was noted during the hearing, one implication of this is that although the leaflet stated that the Bank would give customers 30 days’ notice of any increase in fees, this did not entitle the Bank to increase its fees otherwise than in accordance with the terms and conditions, which allowed the Bank to review its charges annually.) Accordingly, RBSG submits, and I now accept, that the court should make a declaration that the Relevant Term in the NatWest July 2003 leaflet is not capable of being penal, if it is indeed satisfied that it is not.

28. The OFT submits that the words that I have underlined in the following provision, which is under the heading “Fees for overdrafts you have not arranged”, are capable of being penal:

“You must always have an agreed overdraft or Credit Zone Overdraft before you spend or withdraw any amounts that may cause your account to go overdrawn. If you exceed your arranged overdraft facility, or if you go overdrawn without prior arrangement you will be charged...”

(As I understand it, a Credit Zone Overdraft was simply an arranged facility to overdraw.) The leaflet then referred to an Overdraft Excess Charge called a “£20 Unarranged Borrowing Fee”, an Unpaid Item Charge called an “Unpaid Fee”, a Guaranteed Paid Item Charge under the heading “Card Misuse”, and a Paid Item Charge under the heading “Paid Referral”.

29. The OFT relies upon the language of the first sentence that is set out above (in particular the use of “must”) and also submits that, since the second sentence is contractual in providing for fees to be charged, it is natural that the first sentence should be taken to be similarly contractual.
30. I am unable to accept this argument. The terms and conditions incorporated information about the fees charged by the bank from the “promotional leaflet insert”. There is nothing in the terms and conditions that was apt to incorporate into them contractual obligations or prohibitions upon the customer. In any case I do not consider that the leaflet is to be read as seeking to do so. The sentence upon which the OFT relies is under the heading “Fees for overdrafts you have not arranged”: the heading would not be apt to introduce a contractual prohibition upon the customer about overdrawing.
31. Mr. Waters put forward further arguments based on the language and context of the Relevant Term in the Nat West July 2003 leaflet that to my mind support the conclusion that it is not capable of being penal, and that it is designed to inform the customer what the charges will be (and maybe, as Mr. Waters suggested, to advise customers how to avoid paying unnecessary charges). The language to which Mr. Waters specifically refers is the inexact phrase, “that *may* cause your account to go overdrawn” (observing that no Relevant Charge is levied because an instruction to the Bank *may* have this effect). The context of the Relevant Term to which he particularly draws attention is this passage in the immediately preceding section of the leaflet that is, as he submits and I accept, of advisory or hortatory effect and not contractual:

“We encourage our customers to agree an overdraft limit in advance of any borrowing in order to avoid any unnecessary excess charges. If you have not contacted us to arrange an overdraft limit in advance and there is not enough money in your account, we may not allow you to withdraw money. We may not be able to pay your cheques, standing orders or direct debits, including those to a NatWest loan account and we will charge a fixed fee for each item we do not pay. You will also

pay a higher rate of interest on the unarranged amount. Details of interest and fees payable for unarranged borrowing are given later in this leaflet.”

32. I conclude that the Relevant Term in the NatWest July 2003 leaflet is not capable of being penal.

Conclusions

33. Therefore,
- i) I shall strike out from the OFT’s pleading (Annex G2 to its Defence to Counterclaim) the references to Abbey’s May 2005 conditions.
 - ii) I shall grant Lloyds TSB the declaratory relief that it seeks.
 - iii) I shall grant RBSG declaratory relief in respect of the NatWest 2004 conditions, the RBS 2005 conditions and the NatWest July 2003 leaflet, but not in respect of the NatWest 2001 conditions.