

**This Agreement is made on 25 July 2007**

**BETWEEN**

(1) **The Office of Fair Trading** of Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX (the *OFT*);

**AND**

(2) **Abbey National plc** of Abbey National House, 2 Triton Square, Regent's Place, London NW1 3AN;

(3) **Barclays Bank plc** of 1 Churchill Place, London E14 5HP;

(4) **Clydesdale Bank plc** of 30 St Vincent Place, Glasgow G1 2HL;

(5) **HBOS plc** of the Mound, Edinburgh EH1 1YZ;

(6) **HSBC Bank plc** of 8 Canada Square, London E14 5HQ;

(7) **Lloyds TSB Bank plc** of 25 Gresham Street, London EC2V 7HN;

(8) **Nationwide Building Society** of Nationwide House, Pipers Way, Swindon SN38 1NW

(together, the *Banks*)

(each a *Party* and together, the *Parties*)

**AND**

(9) **The Financial Services Authority** of 25 The North Colonnade, Canary Wharf, London E14 5HS, (the *FSA*).

**WHEREAS**

A. The *OFT* has initiated an investigation under s.224 of the Enterprise Act 2002 (the *Investigation*) into the fairness or otherwise for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 (the *1999 Regulations*) of certain terms contained in each Bank's personal current account arrangements providing for charges to be imposed upon customers who seek to make payments for which they do not have available funds (the *Relevant Terms* and the *Relevant Charges*).

B. Whilst the Investigation continues, large numbers of individual customers are pursuing claims against the Banks (and other banks) alleging, inter alia, that the Relevant Terms applicable to them are and/or have been unfair within the meaning of the 1999 Regulations and/or the Relevant Charges constitute and/or have constituted unenforceable penalties at common law.

- C. The Banks and the OFT believe that, consistently with CPR Part 1 (the overriding objective), the relevant legal issues need to be determined expeditiously and, in light of the complexity and importance of the issues, in a fair and orderly way. The scale of the customer litigation causes increased expense for all litigants as well as the Courts and presents significant administrative problems for the Courts in handling such cases. Further, the risk exists that the issues currently being investigated by the OFT will be brought before the High Court (and/or the Court of Appeal) before the OFT is in a position to adopt a considered position on the fairness of such terms, and in circumstances where the Court will not have all the relevant materials available to it to determine all relevant issues.
- D. In the Investigation, the Banks have contended, as a preliminary point, that (1) the Relevant Terms and Relevant Charges fall within Regulation 6(2) of the 1999 Regulations and do not fall to be assessed for fairness, (2) if the Relevant Terms or Relevant Charges do fall to be assessed for fairness, then the Banks must as a precondition be shown to have contravened the requirement of good faith, and (3) the Relevant Charges are for services, rather than for breach of contract, and are not capable of amounting to a penalty at common law.
- E. Although the OFT would have preferred to issue any proceedings in relation to all relevant issues at the same time, including the Preliminary Issues (as defined in paragraph 1.4 below) and any Substantive Issues (as defined in paragraph 3.1 below), following the conclusion of the Investigation, the Banks and the OFT believe that it is desirable to begin now the process of determining the legal issues. The Banks and the OFT believe that the Preliminary Issues are capable of determination as preliminary issues and that to do so would materially assist with the expeditious and orderly resolution of the issues concerning the Relevant Terms. Both the OFT and Banks seek an outcome to all relevant issues as soon as reasonably practicable.
- F. Accordingly, to ensure that matters relating to current and historic and intended Relevant Terms and Relevant Charges are brought before the Courts in accordance with CPR Part 1, in an efficient, expeditious, and orderly way, the OFT and the Banks have agreed that the OFT should commence proceedings against the Banks in the High Court as soon as possible, and notwithstanding the fact that the Investigation is not yet complete, in relation to the Preliminary Issues.
- G. The Parties intend that, depending on the outcome of the Investigation and the Court's determination of the Preliminary Issues, the substantive issues of fairness and penalty will be determined subsequently in these proceedings. The Parties also envisage that other issues flowing from those issues (such as customer restitution and limitation) would come to be determined concurrently with the said substantive issues.

In consideration of the mutual promises contained herein, the Banks, the OFT and the FSA hereby agree as follows:

## 1. COMMENCEMENT OF PROCEEDINGS

1.1 The OFT will, by 27 July 2007, file and serve a Claim Form under CPR Part 7 in the Commercial Court (the *Proceedings*) for a declaration that the Relevant Terms and/or Relevant Charges are not excluded from an assessment for fairness under the 1999 Regulations by reason of Regulation 6(2)(a) and/or (b) thereof.

1.2 The Banks will be cited in the OFT's Claim Form as Defendants to the Proceedings.

1.3 The Banks and the OFT agree that the Proceedings will encompass:

- (a) a representative selection of the historic Relevant Terms and Relevant Charges of each Bank of a kind which are in dispute in the county court claims referred to in paragraph B of the recital;
- (b) the Relevant Terms applicable to each Bank's personal current account arrangements currently in force with its customers and/or each Bank's current Relevant Charges; and
- (c) in cases where any such Relevant Terms or Relevant Charges are due to be replaced, the replacement Relevant Terms and/or Relevant Charges.

1.4 The Banks will counterclaim against the OFT for declarations that:

- (a) the Relevant Terms and/or Relevant Charges are in plain intelligible language, and
  - (i) relate to the definition of the main subject matter of the contract, and/or
  - (ii) provide for payment of remuneration for services supplied by the Banks in exchange, rather than payment of a sum by the customer for breach of a contractual duty owed to the Banks

and accordingly, are excluded from assessment for fairness under the 1999 Regulations by reason of regulations 6(2)(a) and/or (b) thereof, and, by reason of (ii) above, are not capable of amounting to a penalty at common law.

- (b) Alternatively, if the Relevant Terms and/or Relevant Charges fall to be assessed for fairness under the 1999 Regulations, a declaration that it is a necessary (but not sufficient) precondition to such terms and/or charges being shown to be unfair within the meaning of regulation 5(1) of the 1999 Regulations that they be shown to be contrary to the requirement of good faith, and a declaration as to the true meaning of "good faith" for the purposes of the 1999 Regulations.

The issues set out in sub-paragraphs 1.4(a) and (b) and paragraph 1.1 above are referred to herein as "the Preliminary Issues".

1.5 The OFT and the Banks hereby agree on the following proposed timetable, which all Parties will invite the Court to endorse:

- (a) Each Bank to file and serve an Acknowledgement of Service within 7 days of service of the OFT's Claim Form;
- (b) Each Bank to provide the OFT, by 1 August 2007, with a copy of its personal current account agreements and price lists in relation to the Relevant Terms and Relevant Charges encompassed within the Proceedings pursuant to clause 1.3 above, together with:
  - (i) in relation to any historic Relevant Terms or Relevant Charges, a statement of the dates on which such Relevant Terms or Charges applied; and
  - (ii) in relation to any replacement Relevant Terms or Relevant Charges, a statement of the date of such change;
- (c) The OFT to serve one composite set of Particulars of Claim relating to the Relevant Terms or Relevant Charges of each Bank by 31 August 2007;
- (d) Each Bank (or, if considered appropriate, the Banks together) to serve a Defence and Counterclaim by 28 September 2007;
- (e) The OFT to serve a Reply and Defence to Counterclaim by 26 October 2007;
- (f) The first Case Management Conference (CMC) to be held on the first available date after service of the Defence and Counterclaim of the Banks; if the Court permits, the date of the CMC will be arranged through the normal channels as soon as the Claim Form has been issued;
- (g) Directions to be sought at the first CMC to deal with the following matters (unless dealt with earlier, if the Court should so decide):
  - (i) extent and/or timing of evidence by way of witness statements or otherwise;
  - (ii) extent and/or timing of any disclosure;
  - (iii) listing of trial, including time estimate, with the Parties aiming for a trial as soon as reasonably practicable;
  - (iv) if appropriate, intervention by any other banks desiring to join the Proceedings;
  - (v) if unresolved, the stay of other proceedings in the Courts which raise the Preliminary Issues and related issues.

1.6 The OFT recognises the desirability of achieving a fair and orderly resolution of the relevant issues and will not object to any request or application for a stay of

other court proceedings between the Banks and their customers concerning the Relevant Terms and/or Relevant Charges.

## **2. THE OFT INVESTIGATION**

2.1 The Investigation will continue unaffected by the commencement of the Proceedings.

2.2 The OFT and the Banks agree to cooperate to ensure that the Investigation is carried out and completed expeditiously.

2.3 The Banks undertake:

- (a) not to contend during the course of the Investigation that the Investigation should be suspended and/or not to contest any step therein by reason of the Proceedings being afoot and/or judgment on the Preliminary Issues being awaited; and
- (b) to co-operate with the OFT in its conduct of the Investigation and in particular expeditiously to provide documents and information sought by the OFT in so far as practicable and not to contend that such documents or information are only liable to production if the Preliminary Issues are decided in favour of the OFT.

## **3. AMENDMENTS**

3.1 If, at any time, the OFT (i) concludes the Investigation, and (ii) forms a view which is or includes an assessment that the Relevant Terms or Relevant Charges of any Bank are unfair within the meaning of the 1999 Regulations, and (iii) as a result requires the Banks (or any of them) to do anything which they are not prepared to undertake to do in connection with the Relevant Terms and/or Relevant Charges, then:

- (a) the OFT may amend its Statements of Case in the action so as to include a claim against the Banks (or any of them) for a declaration and/or an undertaking to the Court (and/or such other relief as the OFT may consider appropriate, including a final injunction or enforcement order) (and the issues raised by those amendments (and any consequential amendments made by the Banks) are hereafter referred to as the *Substantive Issues*);
- (b) the Banks will not oppose such amendment being made whether or not they could have argued that such amendment is late in the day, or seeks to introduce a claim that was not in existence at the time the original claim form was issued, or that one or more of them have an appeal pending in relation to the Preliminary Issues, or is in any other way inconvenient or undesirable;
- (c) if the OFT applies to amend its Statements of Case prior to the trial of the Preliminary Issues the Parties will seek the consent of the Court to the adjournment of the trial so as to permit the proposed amendment to be effected, provided that if the OFT applies to amend its Statements of Case as

aforesaid less than 60 days before the date fixed for such trial the Banks may decline to agree to adjourn the trial;

- (d) the Parties will seek new directions from the Court for further pleading and as necessary for the preparation for and/or holding of a trial or trials of the Preliminary Issues and/or the Substantive Issues.

#### **4. APPEALS BY THE BANKS**

4.1 If (i) the Preliminary Issues are determined prior to the Substantive Issues, and (ii) any Bank appeals any part of the Court's determination, then:

- (a) Subject to (b) below, the Bank/s in question will seek to have any such appeal, whether to the Court of Appeal or beyond (including a reference to the European Court of Justice, if any), heard on an expedited basis, and undertake to take all reasonable steps to ensure that the said appeal is conducted and determined on an expedited basis as soon as is reasonably practicable;
- (b) but the OFT reserves the right to apply at any stage for the trial of the Substantive Issues to be held before any appeal (at any level) is heard, or for any appeal to be stayed pending the trial of the Substantive Issues.

4.2 If:

- (a) the Court holds, in relation to the Preliminary Issues, that the Relevant Terms and/or Relevant Charges are not susceptible to an assessment of fairness under the 1999 Regulations; and
- (b) at that time the OFT has not yet concluded the Investigation; and
- (c) the OFT appeals that decision, and continues to conduct its Investigation,

then the Banks agree to continue to cooperate with the Investigation to enable it to be completed expeditiously notwithstanding the finding of the court of first instance.

#### **5. COSTS**

Each Party is to pay its own costs of and associated with the Proceedings and of any appeals by any Party, and accordingly no Party will seek an order for costs against any other.

#### **6. FSA**

6.1 If, at any time after the completion of the trial at first instance of the Preliminary Issues, the FSA wishes to join in the Proceedings, then the Parties agree not to oppose such joinder and clauses 3.1(b) to (d), 4.1 and 5 above shall apply to the FSA *mutatis mutandis*.

6.2 In the meantime, the OFT and the Banks will keep the FSA informed of the progress of the Proceedings and, in particular, will serve on the FSA copies of any

Statements of Case, evidence and other documents that they serve on each other as if the FSA was a party to the Proceedings.

6.3 The Banks agree that the OFT may share with the FSA any information that the OFT receives from the Banks during the course of the Investigation and the FSA agrees to hold such information subject to section 348, Financial Services and Markets Act 2000.

## **7. GENERAL**

7.1 Subject to paragraph 7.4, this Agreement comes into effect at 7.00am on 27 July 2007 and not before.

7.2 Nothing in this Agreement shall affect the market study of personal current accounts which the OFT is presently conducting.

7.3 It is intended that this Agreement shall be a public document.

7.4 This Agreement may be executed in any number of counterparts and by the Parties and the FSA on separate counterparts, but is not effective until each of the Parties and the FSA has executed at least one counterpart.

7.5 A copy of the signature page to this Agreement that is sent by facsimile shall constitute adequate proof of the execution of this Agreement by the relevant party.

Signed for and on behalf of the Office of Fair Trading

By:

Signed for and on behalf of Abbey National plc

By:

Signed for and on behalf of Barclays Bank plc

By:

Signed for and on behalf of Clydesdale Bank plc

By:

Signed for and on behalf of HBOS plc

By:

Signed for and on behalf of HSBC Bank plc

By:

Signed for and on behalf of Lloyds Bank plc

By:

Signed for and on behalf of Nationwide Building Society

By:

Signed for and on behalf of the Financial Services Authority

By: