Neutral Citation Number: [2008] EWHC 875 (Comm)

Case No: 2007 Folio 1186

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2008

Before :

MR JUSTICE ANDREW SMITH

- -

Between :

The Office of Fair Trading	**Claimant**
- and -	
Abbey National PLC and 7 others.	**Defendants**

- -
- -

Brian Doctor QC, Jemima Stratford, Richard Coleman 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

Iain Milligan QC, Andrew Mitchell and Simon Atrill
(instructed by Simmons & Simmons) for Barclays Bank plc

Richard Salter QC, John Odgers and Adam Kramer
(instructed by Addleshaw Goddard LLP) for Clydesdale Bank plc

Robin Dicker QC, Timothy Howe QC, Jeremy Goldring and James McClelland
(instructed by Allen & Overy) for HBOS plc

Richard Snowden QC, Mark Hoskins, Daniel Toledano and Patrick Goodall
(instructed by Freshfields Bruckhaus Deringer) for HSBC Bank plc

Bankim Thanki QC, Richard Handyside and James Duffy
(instructed by Lovells LLP) for Lloyds TSB Bank plc

Geoffrey Vos QC and Sonia Tolaney
(instructed by Slaughter and May) for Nationwide Building Society.

Laurence Rabinowitz QC, Malcolm Waters QC, David Blayney and Benjamin Pilling
(instructed by Linklaters LLP) for The Royal Bank of Scotland Group plc

Hearing dates: 17, 18, 21, 22, 23, 24, 28, 29, 30, 31 January and 4, 5, 6, 8, February 2008

- -

Judgment

MR JUSTICE ANDREW SMITH :

Introduction

1. This action is about charges made by banks to their customers who have personal current accounts with them when they are requested or instructed to make a payment for which they do not hold the necessary funds in the account and which is not covered by a facility arranged with the customer. I shall refer to such requests or instructions as "Relevant Instructions", and to the charges as "Relevant Charges". I shall refer to the terms in the standard form contracts between bank and customer providing for the Relevant Charges as "Relevant Terms".

2. The Relevant Terms and Relevant Charges are being challenged on two fronts: the Office of Fair Trading (the "OFT") is investigating under the Unfair Terms in Consumer Contracts Regulations 1999 (the "1999 Regulations") the fairness of the terms under which banks make such charges, and cases have been brought by individual customers in county courts disputing charges levied by banks, many of them relying not only on the 1999 Regulations but also on common law rules about the unenforceability of penalties.

3. The claimant in these proceedings is the OFT. It is a "general enforcer" under section 213(1) of the Enterprise Act 2002, and therefore entitled under section 215(2) of the Act to apply for an enforcement order in respect of a domestic or a Community infringement (a Community infringement being 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 process of a state belonging to the European Economic Area), and specifically the Office of Fair Trading has a duty under the 1999 Regulations (subject to irrelevant exceptions) to consider any complaint made to it that any contract terms drawn up for general use are unfair. In March 2007 the OFT announced that it was to conduct "a formal investigation into the fairness of bank current account charges", and is considering whether to exercise its function under the 2002 Act to seek an enforcement order. It is perhaps worth emphasising that the OFT has not reached any conclusions about the fairness of the Relevant Charges or other matters that it is investigating. Mr Cavendish Elithorn, the OFT's Senior Director of Service Sectors, explained in his evidence that among the questions that the OFT is considering and wishes to continue to consider are (i) whether the Relevant Charges are sufficiently transparent and predictable for consumers; (ii) whether the Relevant Charges are too high; and (iii) whether the Relevant Charges operate fairly in relation to the individual customer (given that, as Mr. Elithorn says, the charges are borne by a minority of customers and bear no relationship to the costs of providing corresponding overdrafts but support the profitability of the current account service generally). He emphasises that the OFT is not only looking at the amount of the Relevant Charges, but at how they apply, how they are presented to the individual customer and their impact on customers. The objection has been raised that the Relevant Charges are not subject to assessment under the 1999 Regulations.

4. These proceedings are against seven companies who, themselves or through one or more subsidiaries, operate banks and against the Nationwide Building Society, a mutual building society. I shall refer to the eight defendants simply as "the Banks". They represent, I was told, nine of the twelve members of the Cheque and Credit

Clearing Company, and all operate large numbers of personal current accounts. Clydesdale, who, I understand, has the smallest share of the market, has some 2.4 million personal customers in the United Kingdom.

5. The proceedings were brought on 27 July 2007 after the OFT and seven of the Banks had made a Litigation Agreement dated 25 July 2007, to which the Financial Services Authority ("FSA") was also party, and The Royal Bank of Scotland Group plc ("RBSG") had made a separate but similar agreement with the OFT and the FSA on 26 July 2007. The recitals to the Litigation Agreement refer to the OFT's investigation into "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", and the proceedings brought by customers against the Banks. They go on to record the belief of the OFT and the Banks that the legal issues that have been raised in relation to the Banks' terms need to be resolved expeditiously and in a fair and orderly way, and to express concern about the scale of the litigation brought by customers. The OFT recognises the "desirability of achieving a fair and orderly resolution of the relevant issues" and agrees not to object to any request or application for a stay of other court proceedings between the Banks and their customers about the charges made by banks. I understand that, at least for the most part, the customers' litigation has not been proceeding pending the determination of issues raised in these proceedings.

6. The OFT identifies four basic categories of Relevant Charges about which it is concerned: Unpaid Item Charges; Paid Item Charges; Overdraft Excess Charges; and Guaranteed Paid Item Charges. An Unpaid Item Charge is, as the OFT pleads, "levied when the customer gives an instruction for payment or, in some cases at least, withdrawal, that the bank declines to honour because the customer does not have sufficient funds in his account" or, I would add here and in relation to other charges, an arranged facility which covers it. A Paid Item Charge is "levied when the customer gives an instruction for payment or, in some cases at least, withdrawal, for which he has insufficient funds in his account and which the bank honours". An Overdraft Excess Charge is "levied if, during a specified period (typically a day or a month) … an account is and/or goes overdrawn (and there is no overdraft facility), or… the debit balance is and/or goes above the limit on an existing overdraft facility, and in both cases irrespective of the reason why the excess has occurred". A Guaranteed Paid Item Charge refers to a charge distinct from a Paid Item Charge which some of the Banks levy when they honour "in accordance with the guarantee, a cheque issued in conjunction with a cheque guarantee card (or, in the case of some banks, a debit card payment made under a guaranteed debit payment system) for which the customer does not have sufficient funds".

7. The relief that the OFT seeks in these proceedings is directed to establishing whether the investigation falls within the ambit of the 1999 Regulations. Specifically, it seeks a declaration that

> "the Relevant Terms and Charges in Current Agreements (and to the extent relied on by the banks, in Historical Agreements) are not excluded from an assessment for fairness under the 1999 Regulations by reason of Regulation 6(2)(a) and/or (b) thereof: …"

8. The focus of the OFT's concern is upon the Banks' current agreements, the standard form terms that the Banks now use when a customer opens an account with them and that they have introduced into their contracts with existing customers.

9. The Banks bring counterclaims in the proceedings which (i) are directed not only to current terms but also to standard form terms which they have used in the past, "historical terms" as they have been called; (ii) are directed not only to the application and effect of the 1999 Regulations but also to whether their (current and historical) terms include penalties and so to that extent are unenforceable at common law; and (iii) are concerned with the proper approach to the assessment contemplated by the 1999 Regulations of whether a term is to be regarded as unfair and in particular the reference in Regulation 5(1) to a term being "contrary to the requirement of good faith". The Banks hope that these proceedings might not only determine whether the OFT's investigation is proper but also provide guidance about the law applicable to the claims brought by individual customers.

The 1999 Regulations

10. The 1999 Regulations were made under section 2(2) of the European Communities Act 1972. Their purpose is to give effect in the United Kingdom to Council Directive 93/13/EEC (OJ 1993 L95, p.29) on unfair terms in consumer contracts (the "Directive"), article 10 of which required Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by no later than 31 December 1994 and the provisions were to apply to all contracts concluded after 31 December 1994. The United Kingdom government first sought to give effect to the Directive in the Unfair Terms in Consumer Contracts Regulations 1994 (the "1994 Regulations"), but the 1994 Regulations were revoked and replaced by the 1999 Regulations, which make provision for a number of "qualifying bodies" to apply to the courts for injunctive relief against the use or recommendation for use of unfair terms. The 1994 Regulations were replaced because the Commission brought infringement proceedings against the United Kingdom on the basis that the 1994 Regulations had failed to implement certain provisions of the Directive, but the infringements alleged do not relate directly to matters that I have to consider.

11. The 1999 Regulations apply "in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer" (Regulation 4(1)), and provide that 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(1)). The expression "consumer" means "any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession" (Regulation 3(1)), and so many of the Banks' customers are "consumers". The expression "seller or supplier" is also defined in Regulation 3(1), but it suffices to say that there is no dispute that the Banks fall within the definition. Regulation 5(2) is concerned with when a term is to be regarded as not having been individually negotiated: I am to proceed on the assumed basis that none of the terms with which I am concerned has been "individually negotiated" (as, no doubt, is generally the case, notwithstanding that customers sign individual mandates).

12. Regulation 6 is headed "Assessment of unfair terms" and it reads:

> "(1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> (2) 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."

13. Regulation 7 is headed "Written contracts" and it provides:

> "(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.
>
> (2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12."

14. Regulation 8 provides that if a term is unfair, it is not binding on the consumer but "the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term".

15. The duty upon the OFT to consider (with certain exceptions) any complaint made to it that any contractual term drawn up for general use is unfair is stated in Regulation 10. The 1999 Regulations go on to provide for powers and obligations of the OFT and others in dealing with complaints. Regulation 12 provides that the OFT (and other bodies) may apply for a (final or interim) injunction in respect of apparently unfair terms drawn up for general use.

16. Thus, the 1999 Regulations establish what was described by Lord Steyn in The Director of Fair Trading v First National Bank Ltd., [2001] UKHL 52, [2002] 1 AC 481 at para 33 as "a dual system of ex casu challenges and pre-emptive or collective challenges by appropriate bodies". But whatever the form of the challenge, the assessment is of the fairness of terms in an individual contract made by a seller or supplier with a customer (in the case of ex casu challenges in an actual contract with the customer challenging it or in the case of pre-emptive or collective challenges in a notional contract with a hypothetical customer), and not the fairness of the standard terms used by a seller or supplier as against the body of consumers who enter into contracts with the seller or supplier on his standard terms.

17. Schedule 2 to the 1999 Regulations is also of some relevance. It is, as Regulation 5(5) puts it, "an indicative and non-exhaustive list of the terms which may be

regarded as unfair". It, and the similar list in the Directive, are sometimes referred to as a "greylist" because it is not a "blacklist" of terms that are necessarily to be regarded as unfair, but they are illustrations of the sort of terms that might be found to be unfair: see the seventeenth recital to the Directive, which states that the terms in the list "can be of indicative value only". The list in paragraph 1 of the Schedule includes these terms:

> (e) Terms which have the object or effect of "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation";

This is the only term in the list which is specifically concerned with the amount of a payment to be made by the consumer, and it is directed to a secondary obligation to pay when a primary obligation has been breached.

> (h) Terms which have the object or effect of "automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early";
>
> (l) Terms which have the object or effect of "providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded."

This is concerned with payment as a primary obligation but it is not concerned with the amount of the price or when it is payable but with clauses that allow a late determination of the price at the time of delivery or a variation in the price with no concomitant right for the consumer to cancel the contract.

18. Paragraph 2 of the Schedule provides that the illustrative term in paragraph 1(l) does not apply to "transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control", nor to "contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency"; and is "without hindrance to price index clauses, where lawful, provided that the method by which prices vary is explicitly described".

19. I have not set out all the terms in the "greylist", but it was rightly pointed out that they are not terms that provide for any obligation upon the seller or supplier but (with the possible exception of that in paragraph (i), terms with the object or effect of "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract") terms which provide for the seller or supplier to enjoy some right or immunity. The list includes limitation or exclusion clauses; termination, extension and remedial provisions; terms conferring a discretion on the seller or supplier with no corresponding right for the consumer; and

terms conferring on the seller or supplier a right to assign. It includes no term that suggests that an obligation on the seller or supplier can be assessed as to whether it is insufficiently onerous upon him and unfair for this reason.

The Directive

20. The 1999 Regulations were, as I have said, introduced in order to give effect to the Directive. Accordingly, the 1999 Regulations are, so far as possible, to be interpreted so as to give effect to the terms and purpose of the Directive, and resort may properly be had to the Directive in order to interpret them. Although the Directive is intended only to set minimum requirements for the control of fairness of terms in consumer contracts, and, as article 8 makes clear, Member States may adopt or retain more stringent measures to protect consumers, in fact the 1999 Regulations largely mirror the Directive. As was said by Lord Steyn in Director General of Fair Trading v First National Bank plc, (loc cit) at para 31, "As between the Directive and the domestic implementing the Regulations, the former is the dominant text. Fortunately, the 1994 Regulations, and even more so the Unfair Terms in Consumer Contracts Regulations 1999, appear to have implemented the Directive in domestic law in a manner which ought not to cause serious difficulty".

21. The Directive was made under what is now article 95 (then article 100a) of the EC Treaty. Article 95(3) makes particular mention of (inter alia) proposals concerning consumer protection and states that the Commission, in its proposals under this article, will "take as a base a high level of protection". The Directive's immediate focus is on protecting consumers, as the Banks, I think, acknowledge and as is clear from the recitals. The tenth recital includes among the purposes of the Directive, for example, that of providing more effective protection to the consumer "by adopting uniform rules in the matter of unfair terms". The eighth recital refers to two Community programmes "for consumer protection and information policy" which were initiated by resolutions of the Council and which "underlined the importance of safeguarding consumers in the matter of unfair terms of contract", and states that "this protection ought to be provided by laws and regulations which are either harmonised at Community level or adopted directly at that level". These programmes, adopted by Council resolutions of 1975 and 1981, granted to consumers basic rights, including the right to protection of economic interests and the right to information and education.

22. Article 100a (now Article 95) provides that its provisions are to apply "for the purpose of the objectives set out in Article 8a", and that the Community should adopt measures with the aim of progressively establishing the internal market. The recitals to the Directive show that the aims also include the reduction of distortions in competition between sellers of goods and suppliers of services caused by differences in rules governing terms in consumer contracts and stimulation of competition. However, I accept the OFT's submission that the Directive's dominant purpose is that of consumer protection, albeit promoted in the context of the internal market: see R (Khatun) v London Borough of Newham, [2004] EWCA Civ 55 at para 57 per Laws LJ.

23. The position was explained as follows by Lord Steyn in the First National Bank case (cit sup) at para 31:

> "The purpose of the Directive is twofold, viz the promotion of fair standard contract forms to improve the functioning of the European market place and protection of consumers throughout the European Community. The Directive is aimed at contracts of adhesion, viz "take it or leave it" contracts. It treats consumers as presumptively weaker parties and therefore fit for protection from abuses by the stronger contracting parties. This is an objective which must guide the interpretation of the Directive as well as the implementing Regulations."

24. The nature of the protection that the Directive gives to consumers is indicated in its sixteenth recital:

> "Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;"

25. Other recitals also make plain the purpose of the Directive to protect consumers from unfair terms. Thus, for example, the fourth recital reads, "Whereas it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms"; and the sixth recital reads "Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts".

26. However the regime for consumer protection required by the Directive and established by the 1999 Regulations stops short of intruding upon parties' freedom of contract to the extent of introducing a mechanism of quality or price control: see Treitel, Law of Contract, (2007) 12th Ed. para 7-101, the 10th edition of which was cited with approval by Lord Bingham in the First National Bank case (cit sup) at para 12. The policy adopted in the Directive, the history of which is explained by Professor Hugh Collins in "Good Faith in European Contract Law" (1994) 13 OJLS 229 as reflecting a tension between the European Commission, which favoured a policy of consumer protection, and a determination on the part of the Council of Ministers to protect a basic principle of allowing freedom of contract provided that consumers were properly informed, was expressed in the nineteenth recital of the Directive in these terms:

> "Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer; "

27. This purpose finds expression in Article 4(2) of the Directive (which is given effect in Regulation 6(2) of the 1999 Regulations):

> "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies (sic) in exchange, on the other, in so far as these terms are in plain intelligible language."

28. Thus, as it was put by Professor Sir Roy Goode QC in Consumer Credit Law and Practice, para IJ 124.35

> "… the Directive is not intended to be used to assess the extent to which the contract represents value for money, or a fair price for a particular service or item. Thus, terms which define the main subject matter of the contract or concern the price or remuneration for goods or services will not be subject to assessment for fairness in so far as they are in plain intelligible language."

29. This is a point emphasised by the Banks, who argue that the nineteenth recital contemplates two distinct categories of terms being excluded from an assessment of fairness: those that describe the "main subject matter of the contract" and those that describe "the quality/price ratio of the goods or services supplied". However, it is also important to emphasise that this does not mean that the price/quality ratio must be left out of account when assessing the fairness of other terms or that an assessment is necessarily precluded because it involves account being taken of the price/quality ratio. (Curiously the recital refers variously to the "quality/price ratio" and the "price/quality ratio" but it is not suggested that this difference is of any significance.)

30. The reference to plain intelligible language in Article 4(2) reflects the twentieth recital: "Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail".

31. In the 1994 Regulations, the wording that was directed to giving effect to Article 4(2) was different from that in the 1999 Regulations. The 1994 Regulations provided (at Regulation 3), "In so far as it is in plain, intelligible language, no assessment shall be

made of the fairness of any term which – (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied". The wording in the 1999 Regulations tracks more closely the wording of the Directive, although the wording of Regulation 3 of the 1994 Regulations had not been the subject of the Commission's complaint that led to the introduction of the new Regulations.

32. It will be necessary to return to the application of Regulation 6(2) to the Relevant Terms, but it is convenient at this point to say something of the proper approach to giving effect to it. The OFT points out that Regulation 6(2) is a limitation on or derogation from secondary Community law and submits that as such it must be interpreted narrowly (Commission v Spain, [2001] ECR I-455 at para 19), the more so because it is legislation for the protection of consumers (Heininger, [2001] ECR I-9945 at para 31). Undoubtedly the Regulation must be given an interpretation that does not allow the purpose of consumer protection to be frustrated by allowing it to apply to cases that do not fall squarely within it (see Lord Bingham in the First National Bank case (cit sup) at para 12), and its interpretation must be restricted accordingly (see Lord Steyn's speech at para 31 and also Bairstow Eves London Central Ltd v Smith, [2004] EWHC 263 at para 25). However, the point cannot be taken so far that due respect is not paid to the language of the Regulation. The Banks cited easyCar (UK) Ltd v OFT, [2005] ECR I-1947 to support their submission that, even in a case where Community legislation includes an exception to a provision for consumer protection, it does not follow that the legislation will always be given the narrowest interpretation or that most favourable to consumers. The court will not impose upon legislation an interpretation that its wording cannot properly bear where there is another interpretation which does not defy common sense. To my mind, the easyCar case illustrates no more than that.

The issues

33. The issues that I am to decide fall into three categories. First there are questions about whether Regulation 6(2) applies to the Relevant Terms, and if so with what consequences. More specifically, questions arise as to -

    i) Whether assessment of fairness of the Relevant Terms is prohibited because it would "relate … to the adequacy of the price or remuneration, as against the goods or services supplied in exchange".

    ii) Whether the Relevant Terms are "in plain intelligible language", and if not, what are the consequences of that.

    iii) Whether, if and in so far as Regulation 6(2) applies, the protection afforded to the Banks is that the particular term is not to be assessed for fairness (referred to as the "excluded term" construction) or whether the Banks are protected against a particular type of assessment (the "excluded assessment" construction).

34. The second category of issues is about the meaning and effect of Regulation 5(1), and specifically the meaning of the provision about "the requirement of good faith" and its relationship to judging fairness by reference to a term causing "a significant imbalance in the parties' rights and obligations arising under the contract, to the

detriment of the consumer". I am not, however, to determine whether the Relevant Terms or the Relevant Charges are fair under the 1999 Regulations. Nor am I to decide what the consequences upon contracts between the Banks and their customers are or what the rights of the Banks are under the contracts or otherwise if any of the Relevant Terms are unfair.

35. The third category of issues concerns the common law relating to penalties.

36. Although the Litigation Agreement was concerned with Relevant Terms and Relevant Charges in the Banks' historical terms as well as their current terms, I made it clear during the hearing that, for case management reasons, generally this judgment would consider only current terms. However, in order for my judgment to cover a more representative sample of terms as far as the issues about penalties are concerned, I deal with some terms which were used by Clydesdale Bank plc ("Clydesdale") and RBSG but have recently been superseded. My conclusions might well be readily applicable to other historical terms, and when I have delivered this judgment I shall hear submissions about the nature and extent of the relief that I should grant on the basis of this judgment.

37. For similar reasons I have not considered in this judgment the terms of all the personal current accounts offered by the Banks. Generally I have not considered so-called "basic" accounts, which offer a more limited range of services than conventional current accounts and upon which Banks do not allow customers to arrange an overdraft facility. (These accounts reflect the proposals in the Cruickshank report to the Chancellor of the Exchequer on Competition in UK Banking of March 2000 and other Government initiatives designed to encourage wider access to banking services, particularly money transmission services, and to have them available to less affluent customers. The Banks offer or have offered these accounts which I have regarded as "basic": Abbey's Instant Plus account and now its Basic account; Barclays' Cash Card account; Clydesdale's ReadyCash account; HBOS's Easycash account; Lloyds TSB's Cash account; and RBSG's Key account and its Step account. HSBC has a "Basic Bank account" but it levies no Relevant Charges on it.) The only qualification to this approach is that Nationwide Building Society ("Nationwide") provides what is essentially a basic account as a category of its FlexAccount and since October 2007 as its Cash Card account. All categories of FlexAccount and its Cash Card account are governed by the same terms. (When I refer in this judgment to the FlexAccount, I should be understood also to be referring to the Cash Card account.)

38. Further I have not considered in this judgment two accounts of HBOS plc ("HBOS"): (i) the Cardcash account, which has not been offered to new customers since March 2005 – in November 2007 HBOS announced that customers with a Cardcash account were being transferred to a mainstream current account or an Easycash account; and (ii) the Intelligent Finance account, which has few customers and is essentially a mortgage offset account.

39. Barclays Bank plc ("Barclays") floated a further argument based upon the requirement in Regulation 5(1) that in order to be regarded as unfair, a term must cause "a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer". Barclays says, citing Lord Bingham's speech in the First National Bank case, that the question whether such an imbalance is caused is

one of law and depends upon the effect of all the terms in the contract at the time when it is made. It is unarguable, it is said, that an imbalance is caused by the very existence of a right to charge in circumstances where the Relevant Charges are levied: the only matter that could give rise to a significant imbalance might be that the charges were excessive, but that assessment is what is precluded by Regulation 6(2)(b).

40. Whatever the merits of this argument, Barclays acknowledges that it was not included in the issues which it was directed be heard at this hearing. It applied for a determination of this question: "Even if the Relevant Terms may be assessed for fairness, do they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer?" (and possibly, depending upon the answer to the issues about good faith, the determination of a further question, "If and in so far as there is any significant imbalance, is it such as to constitute a want of good faith, without more?")

41. As I have said, this was not a question that had been directed for determination at this hearing, and no party had applied before the hearing for this question to be included. Understandably, the OFT had not prepared submissions to answer Barclays' contentions, and I made it clear that in these circumstances I would not add it to the questions for determination in this judgment. The point does, however, impinge upon the issue as to whether an "excluded term" construction or an "excluded assessment" construction of Regulation 6(2) is to be adopted, and I refer to it in this context at paragraphs 433-434 below.

The nature of current accounts

42. It is convenient before going further to say something about the general nature of current accounts such as those that are the subject matter of these proceedings, although each of the Banks has (as is common ground between the parties before me and I am to assume) standard terms which govern its contractual arrangements with its personal current account customers and those terms define the parties' rights and obligations.

43. It is a basic characteristic of a customer's current account with a bank that the bank is under an obligation to receive money, cheques and payments by other methods into the customer's account and to effect repayment to the customer and payments to third parties to the customer's order and as the customer's agent. This observation reflects the classic description of the relationship between a bank and a customer with a current account given by Atkin LJ in N Joachimson v Swiss Bank Corp., [1921] 3 KB 110 at p.127 and the description by Lord Atkinson in Westminster Bank Ltd. v Hilton, (1926) 43 TLR 124. It applies to all of the accounts with which I am concerned.

44. It is inherent in the nature of such an arrangement that the account between the bank and the customer will show at any time either a credit for the bank and debit for the customer or a debit for the bank and a credit for the customer (or, I suppose, perchance, a nil balance). Thus, in Rolls Razor Ltd. v Cox, [1967] 1 QB 552 at p.574E-F, Winn LJ said:

> "… the relationship of banker and customer upon a current account implies from its very nature an intention on the part of

> both parties that debits and credits arising between them shall be brought into a running account on which by reason of the customary method of keeping such account, there will at any given moment be an outstanding debit or credit balance."

45. The customer is not obliged, in the absence of contrary agreement, to maintain or increase a credit balance in the account – that is to say, to lend to the bank. Nor is the bank under an obligation to lend to a current account customer or to allow him overdraft facilities unless it has agreed to do so: Bank of New South Wales v Laing, [1954] AC 135 at p.154.

46. Banks provide a variety of facilities by which money can be paid into current accounts and payments or withdrawals made from them. Thus, customers or third parties can deposit or pay money (by way of cash or by way of cheques or other payment instructions) into accounts at a branch, by post or by electronic means. Cash can be withdrawn at a branch, through automatic teller machines ("ATMs") or through "cash-back" arrangements between banks and retailers. Payments to third parties can be made in a variety of ways, by standing order and direct debit, by cheque, by bank draft, through CHAPS (the Clearing House Automated Payment System), by use of a debit card and through arrangements made by telephone or internet banking. Cheques are generally cleared by the Banks through the clearing house system, a rule of which, I understand, is that, if a cheque is not returned through the system, it is to be paid.

47. Banks receive two kinds of instructions from customers for withdrawals or payments from current accounts. There are "live" transactions, which are received by banks when they are given by the customer, and include withdrawals at a branch or an ATM, some payment instructions given by telephone or by internet, and CHAPS payments. There are also "off-line" transactions, where banks receive the customer's payment instructions in batches, often through a clearing house in the case of cheques or through BACS (Bankers Automated Clearing Services) in the case of standing orders or payments by direct debit.

48. Banks generally provide further facilities to current account customers, including arrangements whereby customers can readily monitor their accounts in various ways (by sending bank statements, by providing information at ATMs, and by telephone and by internet arrangements).

49. Often banks provide their customers with cheque guarantee cards and debit cards. Many retailers will not accept cheques unless they are guaranteed by a card. Cheque guarantee cards have a limit upon the amount of the cheque which can be supported by them. In the case of debit cards, sometimes a retailer must have a transaction specifically authorised by the bank that has issued the card if its value exceeds the retailer's "floor limit", and payments by debit card may be either "live" or "off-line", depending upon whether or not the payment is authorised by the bank when the customer uses his debit card.

50. I have not set out an exhaustive list of the facilities that banks provide to current account customers, but this general description applies to all the defendant Banks and is sufficient for present purposes. The precise facilities provided by different banks vary, albeit in relatively minor respects, and also vary depending upon the type of

current account that the customer has or, for example, the customer's age or status: for example, there are accounts directed to students or graduates, and some banks refuse to allow overdraft facilities to customers who are not aged 18 years.

51. The systems required to provide these facilities are complex and sophisticated, and are expensive to operate. It is not necessary to describe them in detail. Although they have been in large degree automated, there is still significant direct involvement by members of the Banks' staff.

52. In so far as I cannot properly take judicial notice of these matters, they are proved by evidence served by the Banks, which I accept. I should explain that evidence by way of witness statements was served on behalf of the OFT and all of the Banks. No party required cross examination of any witness, and the statements were presented at the hearing before me without any witness being called to give oral evidence. While the evidence is not formally admitted, there is no specific challenge to the truth or accuracy of any part of the statements, but, as I made clear during the hearing, it seems to me that they include passages that are inadmissible either because they are irrelevant or for other reasons.

53. The charging structure adopted by the Banks in relation to current accounts is commonly known as "free-if-in-credit banking". There is evidence that this has evolved since the 1970's and more markedly the 1980's, and has done so in response to the preferences of customers. However that may be, under this structure customers do not pay bank charges for the day-to-day operation of the account while it is in credit (although there are often charges for additional services such as, for some banks, stopping cheques written by the customer or supplying additional bank statements). The Banks do, however, have the benefit of customers' credit balances (referred to by at least RBSG as "credit net interest income" or "credit NII") and also interest will be incurred and fees may be incurred if the customer's account goes into debit or in other circumstances. These fees include the Relevant Charges.

54. In his submissions on behalf of RBSG (which were adopted by the other Banks), Mr Laurence Rabinowitz QC described this charging structure as "both composite and integrated", because it comprises a number of components which are interdependent. Some facilities are provided free, and none of the facilities has its own source of revenue exclusively associated with it. The Banks' evidence shows that the Relevant Charges are not set by reference to the cost of activities which give rise to them but at a level designed to support the personal current accounts service as a whole.

Overdrawing on current accounts

55. Although, unless the bank and customer have otherwise agreed, customers are not entitled to overdraw upon a current account or to have the bank lend them money, in practice customers do overdraw on their current accounts, in some cases having arranged an overdraft in advance and in some cases without having done so. At times, the expression "arranged overdraft" has been used to refer to borrowing under a facility arranged in advance between the bank and the customer, and "unarranged overdraft" has been used to refer to the borrowing created when a customer gives an instruction for a payment which the bank honours although the customer does not have funds in his account to cover it and has not arranged in advance a sufficient facility to cover it. Although this terminology can properly be criticised as imprecise

in that by paying in accordance with the instruction the bank does permit (or arrange for) the customer to overdraw on the account, I adopt these expressions as convenient and readily understandable labels.

56. It is clear from the evidence that a substantial number of customers with current accounts have an arranged overdraft facility and use it. Specifically, just under half of the eligible customers of Abbey National plc ("Abbey") have a facility and about half of those with a facility use it in any year. In the case of Barclays, in 2006 about 56% of their personal current account customers had arranged overdraft facilities. About half of Clydesdale's current account customers have an overdraft facility, and at any one time about 16% of their current account customers are using an arranged overdraft facility. In 2006 over two thirds of HBOS's current account customers (other than those with basic accounts) had an overdraft facility and almost two thirds of those with an arranged facility used it. As for HSBC Bank plc ("HSBC"), leaving aside customers with a basic account or other account that does not allow overdrafts, about 60% of its current account customers and about 96% of First Direct customers have an agreed overdraft facility. The evidence does not distinguish between the HSBC customers who overdraw under an arranged facility and those who do so without arrangements in advance, but in 2006 more than half of customers with a current account under HSBC's own name and more than three quarters of those with First Direct accounts overdrew on their accounts. The majority of Nationwide's FlexAccount customers have an overdraft facility. Two thirds of RBSG's eligible current account customers have arranged overdraft facilities, and in 2006 more than a quarter of those facilities were used.

57. The evidence also shows that it is not unusual for current account customers to overdraw without an arranged facility. Again, I refer to the evidence about individual Banks (which I accept). Abbey's evidence is simply that the number of customers who do so and incur fees is "significant", and that a large proportion of those customers so overdraw a number of times a year. About 20% of Barclays' customers overdrew on their account without prior arrangement over a 12 months period. At any one time some 7% of Clydesdale's customers have an unarranged overdraft and about 17% of their customers overdraw without prior arrangement at some time. About 10% of HBOS's current account customers had unarranged overdrafts at some time in 2006. In September 2007, 13% of HSBC's customers and 7% with First Direct personal current accounts had unarranged overdrafts. About 22% of the current account customers of Lloyds TSB plc ("Lloyds TSB") had unarranged overdrafts at some time in 2006. In the case of RBSG in 2006 almost one in four current accounts was at some time overdrawn without or beyond any arranged overdraft facility.

58. Mr George Graham, the Head of Strategy Development at RBSG, stated (and I accept) that often customers expect to have payment instructions honoured even when this means that their accounts go into unarranged overdraft, and that RBSG receives complaints from some who consider that a Relevant Instruction should not have been rejected. I infer that the experience of other Banks is similar.

59. The OFT asks me to infer that the number of payment and withdrawal instructions given by customers without having funds and facilities to cover them is a very small proportion of all payment and withdrawal instructions given by personal current account customers. There is little evidence about this, but the RBSG has indicated

that for both its National Westminster Bank customers and its Royal Bank of Scotland customers with "active" personal current accounts, there was perhaps an average per customer of more than three such instructions in 2006, and the Bank explained that this figure is likely to be a considerable underestimate because it does not include instructions (such as attempts to withdraw money from ATMs) for which no central records are kept. Nevertheless, although the evidence is exiguous, I see no reason that this does not present in general terms a representative picture of how frequently such instructions are received by the Banks, and it justifies, in my view, the OFT's submission that they are a very small proportion of all payment instructions.

60. The OFT also contends that "the circumstances that may legitimately give rise to an unauthorised overdraft are narrow", and expresses the belief that in many instances Relevant Charges are incurred as a result of error or inadvertence on the part of the customer, rather than conscious choice. Indeed, it pleads that where (as will typically be the case) the payee under a Relevant Instruction is a creditor or supplier of the customer, no payment instruction giving rise to a Relevant Charge could lawfully arise except where the customer has made an error. I cannot accept that this is a fair description of the position, and there is no evidence that provides proper support for it. Of course it is the case that Relevant Instructions can be given without the customer knowing that the payment would bring about an overdraft, and can be given in circumstances giving rise to a criminal offence of dishonesty, but, for example, if a long-standing customer knew that over the years his bank had always paid upon his instructions although from time to time his account went into an unarranged overdraft on a modest scale (perhaps towards the end of the month), the suggestion that typically such a customer would be being dishonest when giving a Relevant Instruction seems to me far-fetched.

61. That said, I do accept that unarranged overdrafts are an expensive way of borrowing from the Banks: that is well established by the evidence of Mr Lopez Jimenez, a Financial Analyst in the Chief Economist's Office of the OFT. Indeed, some of the Banks advise customers in their documentation that it is cheaper to arrange an overdraft in advance. Two examples suffice (and in them the expressions "informal overdraft" and "unplanned overdraft" refer to unarranged overdrafts): HSBC states in its terms and conditions, "If you do require an overdraft or an increase to an existing overdraft, it would be in your interests to contact us to discuss your borrowing requirements as it would probably be cheaper for you to have a formal overdraft than several informal overdrafts". Lloyds TSB tells its customers, "Unplanned overdrafts are intended to be used for short-term borrowing. You will find it cheaper to ask for a new or increased Planned Overdraft that meets your needs, rather than requesting and using Unplanned Overdrafts".

62. Moreover, until recently all of the Banks included in their documentation statements indicating that unarranged overdrafts on current accounts are not permitted (and indeed Nationwide still does so). It does not necessarily follow that if a customer gave a payment instruction that would cause his account to be overdrawn, he would be in breach of his contract with the bank, but the OFT argues that this indicates the true nature of a current account, how the Banks regard overdrawing in this way and how they encourage customers to look upon unarranged overdrafts. I again confine myself to two examples of such statements (although not all the Banks included such assertive language in their documents). Barclays said in its standard terms and

conditions of May 2002 (which were used until replaced by the current terms in February 2007), "You must keep your account(s) in credit unless we agree an overdraft with you". In its standard terms and conditions of January 2007 Abbey included this clause:

> "An unauthorised overdraft occurs if without our agreement you overdraw your Account or exceed the limit of an overdraft which we have agreed. 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. Similarly, if you exceed the limit of an overdraft which we have given you, you must immediately pay sufficient money into your Account to bring yourself within your overdraft limit."

63. The OFT also submits that the Banks make no active attempts to publicise unarranged overdrafts or to deploy them in marketing activities as a facility available to customers with current accounts. I accept that this is generally the position, but it is not invariably so: for example (although admittedly this statement is rather more emphatic than some others), Abbey has a leaflet available in its branches called, "The Abbey Bank Account – the facts", which includes this under the heading "The account that's fair":

> "If you find yourself spending a bit more than you thought and accidentally go over your Advance Overdraft limit, we guarantee to give you an Instant Overdraft of up to £50 (Service Fees will be payable). This also applies if you don't have an Advance Overdraft."

Unarranged overdrafts

64. Prima facie a customer is not in breach of his contract with his bank if he gives instructions to make a payment without having the necessary funds or facility to cover the payment (whether at the time when the instructions are given by the customer or when they are received by the bank or both). He is taken to be requesting overdraft facilities: Lloyds Bank plc v Independent Insurance Co Ltd, [2000] 1 QB 110 at p.118G per Waller LJ. The nature of the contractual rights and obligations that arise in these circumstances was authoritatively explained by Goff J in Barclays Bank v W.J. Simms & Cooke (Southern) Ltd, [1980] 1 QB 677 at p.699 C-H as follows:

> "It is a basic obligation owed by a bank to its customer that it will honour on presentation cheques drawn by the customer on the bank, provided that there are sufficient funds in the customer's account to meet the cheque, or the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, and further that the bank's payment is effective to discharge the

> obligation of the customer to the payee on the cheque, because the bank has paid the cheque with the authority of the customer.
>
> In other circumstances, the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque.
>
> In other cases, however, a bank which pays a cheque drawn or purported to be drawn by its customer pays without mandate. A bank does so if, for example, it overlooks or ignores notice of its customer's death, or if it pays a cheque bearing the forged signature of its customer as drawer, but, more important for present purposes, a bank will pay without mandate if it overlooks or ignores notice of countermand to the customer who has drawn the cheque. In such cases the bank, if it pays the cheque, pays without mandate from its customer; and unless the customer is able to and does ratify the payment, the bank cannot debit the customer's account, nor will its payment be effective to discharge the obligation (if any) of the customer on the cheque, because the bank had no authority to discharge such obligation."

65. If a bank does pay in accordance with the customer's instructions in these circumstances, the customer is taken to have agreed to accept the bank's relevant standard terms, unless the parties have otherwise agreed and unless the terms are unreasonable or, as it was put by Pill LJ in Emerald Meats (London) Ltd v AIB Group (UK) Plc, [2002] EWCA Civ 460 at para 14, "extortionate or contrary to all approved banking practice".

66. The contractual position between bank and customer is not affected by the customer using a cheque guarantee card provided by the bank to support a payment made to a third party. The effect of its use is simply that the bank, through the agency of the customer, undertakes to the third party (not strictly by way of guarantee) that it will not dishonour the cheque on presentation for want of funds in the account; effectively, that, if need be, it will advance the customer the funds necessary to pay it: see Re Charge Card Services Ltd, [1987] Ch 150, 166C-F.

67. This analysis is, of course, subject to the terms of the contract between the bank and the individual customer. Nationwide accepts that nothing in its standard form terms affects the position, and I agree that this is so. The other Banks' terms are expressed in terms of the customer making a request of his Bank for an unarranged overdraft, to which the Bank responds either by granting the request or by refusing it when it does not make the payment.

68. Thus, Abbey's terms say that the customer may "request an overdraft" by giving a Relevant Instruction, and refer to such a request as an "Instant Overdraft Request"; and they say that the customer will be "treated" by Abbey as making an Instant Overdraft Request in such circumstances: if, for example, without the necessary funds in his account he tries to use a debit card or cheque to buy goods or services, or to withdraw cash. The terms say that Abbey may give the customer an Instant Overdraft or may refuse the request, but otherwise they say nothing about how Abbey will consider or otherwise deal with the request (or deemed request). The fee called an Instant Overdraft Request Fee is said to be for "using" the Instant Overdraft Service.

69. Barclays' terms refer to the customer requesting overdraft facilities by giving a Relevant Instruction. They say that it is entirely within Barclays' discretion whether to process it, but refer to the Bank "considering" whether to process it.

70. Clydesdale's terms similarly refer to the customer making a request for "Unplanned Borrowing". They say that the Bank does not "have to agree" to such a request and that if it does not do so, a Returned Item Fee is charged for "dealing with your request and returning the Payment Item unpaid".

71. HBOS's terms refer to the customer "making an informal request for an overdraft" and say that when such a request is made, the Bank will "consider it and decide whether or not to comply with it", making it clear that there is no obligation to comply with it unless payment has been "guaranteed" to a third party.

72. HSBC similarly refers in its terms to the customer making an informal request for an overdraft or an increase in an overdraft, and says that it will "consider" the request.

73. Lloyds TSB says that it will "treat" an attempt to make a payment for which there are not available funds as a request for an Unplanned Overdraft (or an increase in an Unplanned Overdraft) and that it will "consider" whether it agrees to the request "taking into account your personal circumstances".

74. RBSG's terms say that the Bank will "treat" Relevant Instructions as an "informal request for an unarranged overdraft", and that, unless obliged to accept the request because a commitment has been given to a third party, it will "decide, at our discretion, whether to accept it or not".

75. Thus, apart from Nationwide, the Banks' terms and conditions are couched in terms of the customer making a request of the Bank and the Bank responding to it, and in some cases they refer to the Bank considering the request. The OFT criticises this terminology as an artificial device recently introduced which disguises the true nature of the parties' dealings when a customer gives his bank an instruction which would, if paid, take the account into debit. Similarly, the OFT suggests that the use of the term

"overdraft" to describe the debit balance created in these circumstances has misleading connotations, and emphasises the differences between the debit balance resulting from such a payment and an overdraft facility that a bank and a customer might agree should be available on an account.

76. Certainly, this terminology has been introduced by the Banks into their documentation relatively recently. However, I am unable to accept that the references to the customer making a request for an overdraft when he gives a Relevant Instruction are inappropriate or create a fiction. On the contrary, they spell out what is, as a matter of legal analysis, implicitly done when a customer gives a Relevant Instruction. Of course, there are differences between any resulting overdraft and a facility arranged by a specific agreement between a customer and his bank. A facility for an overdraft typically, and as provided by the Banks under their current terms (to which I refer below), commits the bank to allow the customer to overdraw on his account for as long as the facility is in place and within its limits, and, while of course it is possible for a facility to be confined to use for a stipulated purpose, it does not typically cover only a specific payment by the customer. If a fee is charged, it is generally for the facility itself, regardless of whether it is in fact used by the customer to borrow or how much it is so used. (None of the Banks charges a customer for requesting a facility in advance if the request is refused.) However, none of this means that it is misleading to use the expression "overdraft" to refer either to a facility or to borrowing under a facility or to unarranged borrowing. To my mind the expression is flexible enough naturally to encompass all these usages.

77. However, the request which customers are taken to have made to their banks in the absence of any relevant agreement and also that which is made, or taken to be made, by customers under the standard terms of the Banks other than Nationwide, is for an overdraft to cover the particular payment. If the bank responds by considering the request and declining it, it has not provided what the customer was requesting. It is true that the customer might have realised that his request would necessarily have involved the bank considering it in order to decide whether to agree to it and that the bank might refuse payment, but that is very different.

78. It was submitted by some of the Banks that whether or not the terms governing the relationship between the Bank and the customer include express provision that the Bank will consider the request, the Banks are under an obligation to consider it, and that they are not to consider it on an arbitrary or capricious basis. I am not convinced that, in the absence of express contractual provision, banks are obliged to "consider" a request for an overdraft when they receive a request of this kind. If a bank simply paid in accordance with the customer's mandate without considering it as a request to borrow (as it might if, for example, it programmed its automated procedures to allow any account to have a debit balance of a modest amount or if it simply overlooked that the payment would result in the customer being overdrawn), the bank would not be in breach of any duty to the customer. I do not think that this position is altered by the references in some of the terms before me to the Bank considering the request. It is natural to read the references to the Bank considering the request as subject to this implied qualification, and something more specific than anything in these terms would, in my judgment, be required to put a Bank in breach of contract if it simply makes a payment as instructed by the customer. (In taking this view, I do not overlook that all the Banks, as I understand it, subscribe to the Banking Code, under

which the Banks expressly state, "Before we lend you any money or increase your overdraft, or other borrowing, we will assess whether we feel you will be able to pay it". There is not a contractual commitment to protect the customer with such an assessment.)

79. This does not mean that the Banks are under no contractual obligation to customers when they receive a Relevant Instruction. The terms of the seven Banks which make reference to a customer making a request in these circumstances, also refer to the Bank's response to it, and it seems to me that the implication of their terms is that they are obliged to deal with Relevant Instructions in accordance with proper banking procedures. They have a discretion whether or not they should pay in accordance with a Relevant Instruction, but they would be in breach of contract if they rejected it arbitrarily or capriciously or in bad faith. This is because, as it was put by Leggatt LJ in Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd, [1993] 1 Lloyd's Rep 397 at p. 404:

> "Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provision of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably."

(The limits of this principle have been discussed in subsequent authorities: see Paragon v Nash Finance, [2001] EWCA Civ 1466, [2002] 1 WLR 685 at para 38 per Dyson LJ, Lymington v MacNamara, [2007] EWCA Civ 151, [2007] 2 All ER (Comm) 825 at paras 44-45 per Arden LJ, Socimer International Bank Ltd v Standard Bank London Ltd, [2008] EWCA Civ 116 at para 66 per Rix LJ. The precise ambit of any obligation of this kind is not important, nor is it necessary to explore in this judgment what is required in order for a bank to deal with a Relevant Instruction in accordance with proper banking procedures.)

80. Although the terms applicable to Nationwide's FlexAccount do not refer to the customer making a request for an unarranged overdraft, its position when it receives a Relevant Instruction is not, to my mind, materially different from that of the other Banks. Nationwide submits that its terms, and its contract with its current account customers, do not oblige it even to consider extending an overdraft before declining to pay upon a Relevant Instruction given by the customer. Its obligation is simply to process payment instructions, and the Unpaid Item Charge that is incurred when payment is refused is, it is submitted, a fee for processing the Relevant Instruction, not for considering it. It disputes that it is under any obligation such as was described in the Abu Dhabi National Tanker Co case (cit sup). In my judgment, however, Nationwide is obliged to deal with Relevant Instructions in accordance with proper banking procedures, and to my mind that amounts to the limitation upon the exercise of a discretion that Leggatt LJ described.

81. When a Relevant Instruction is received, some of the processes whereby the Banks deal with it are the same as for handling an instruction for which there are funds or an arranged facility. However, in the case of a Relevant Instruction some additional processes are involved. In the case of Abbey, for example, Relevant Instructions are

handled by its Reject Referrals database, and both manual and automated processes are involved. The decision whether to pay or to reject the instruction involves an assessment by Abbey's "risk personnel" using information from its "risk databases". The other Banks have comparable arrangements.

82. If the Banks decline to pay a Relevant Instruction, they notify the counterparty – BACS in the case of a direct debit and the presenting bank in the case of cheques. It is also their usual practice to inform customer in these circumstances, generally in writing, but in the case of HSBC (and possibly some other Banks) this is sometimes done by telephone.

Plain intelligible language - introduction

83. All the Banks include in their standard terms and conditions provisions about the parties' rights and obligations in respect of both arranged and unarranged overdrafts, and also about the position when a customer gives a Relevant Instruction which the Bank declines to pay. The OFT argues that parts of these provisions are not in plain intelligible language. I must examine separately for each of the Banks its current terms, but before doing so I consider the meaning of "plain intelligible language", which itself, ironically, gave rise to a great deal of debate.

84. Regulation 6(2) provides that, in the case of a term that has not been individually negotiated, the term is exempt from assessment of fairness only in so far as it is in plain intelligible language. This does not mean that a term which is not in plain intelligible language is necessarily unfair. Its clarity might be relevant to the assessment of its fairness, but that is a different matter.

85. The 1999 Regulations also require that a seller or supplier shall ensure that any written term of a contract is in plain intelligible language: Regulation 7(1). It is to be observed that Regulation 6(2) and Regulation 7 apply in different circumstances. Regulation 6(2) applies only where a term has not been individually negotiated but it does not have to be a written term. On the other hand, Regulation 7 applies to written terms, whether or not they have been individually negotiated.

86. Regulation 7(1) is expressed in mandatory language. The OFT, as I was told by Mr Brian Doctor QC who represented it, takes the view that it is entitled to bring proceedings against sellers and suppliers to require them to put their written terms into plain intelligible language. If this is so, the power to do so is not in Regulation 12 (which is concerned only with when it appears that unfair terms are used or recommended for use), but it was suggested that the OFT might have such power under section 215 of the Enterprise Act. This question was not fully argued before me and I was urged not to express any view upon it. It is not necessary to do so, and therefore I say no more about it.

87. I should, however, say something about the relationship between Regulation 7(1) and Regulation 7(2). If the language of a term is not plain and intelligible, this might give rise to doubt about its true meaning, and in these circumstances the interpretation most favourable to the consumer is to be adopted. However, it does not follow that a written term is necessarily in plain intelligible language unless there is doubt about its true meaning. A term might be obscure and difficult to understand at all, but bear only one meaning for anyone who manages to fathom what it is saying. It was not

suggested, as I understand the parties' submissions, that the meaning or application of the expression "plain, intelligible language" is restricted to where Regulation 7(2) applies, and in my judgment no such restricted meaning is required by Regulation 7 or by the 1999 Regulations as a whole.

88. The OFT says that in order for terms to be in plain intelligible language, their meaning, effect and application must be apparent to the typical consumer, and that the terms should not be liable to mislead the typical consumer. It argues that the purpose of the qualification to Regulation 6(2) about plain intelligible language reflects the intention that assessment as to fairness is to be excluded only if the consumer is in a position to make a fully informed choice about whether to enter into a contract on the standard terms of the seller or supplier.

89. There is no real dispute between the parties that the question whether terms are in plain intelligible language is to be considered from the point of view of the typical consumer or the average consumer. The concept of an "average consumer … who is reasonably well informed and reasonably observant and circumspect" is a familiar concept used by the European Court of Justice in applying and interpreting European consumer law (see Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV, Case C-356/04, [2007] 1 CMLR 9 p.269 at para 78), and it provides an appropriate yardstick guide to whether a term is in plain intelligible language.

Plain intelligible language – non-contractual documents

90. Banks often provide customers or prospective customers with leaflets and other documentation which introduce customers to the accounts that are available, and provide explanations and advice which, upon proper analysis, are not of contractual effect. Sometimes the same brochures or leaflets that contain the contractual provisions also include non-contractual material and often contractual terms and statements of a non-contractual nature are intermingled. It is not always easy even for a lawyer to distinguish them and sometimes there is room for dispute as to whether a statement is contractual or not.

91. This, it seems to me, leads to two questions:

    i) When deciding whether a term is in plain intelligible language, is it relevant that the customer has been provided with non-contractual information?

    ii) What is the position if it is unclear whether or not a statement is or is not of contractual effect?

92. If information, advice or explanations of a non-contractual nature are provided to customers, the typical customer might well (depending on the facts) be supposed to have read them and be seeking to understand the contractual terms having done so. The non-contractual material might assist him to understand the contractual terms, so that their language might the more readily be taken to be plain and intelligible to the typical consumer. Contrariwise, if the typical customer is taken to have read non-contractual material that is confusing, the terms might well have to be the clearer for their language to be sufficiently plain and intelligible.

93. The Banks submit that the provision in Regulation 6(2) about plain intelligible language is concerned only with the clarity of contractual terms. If it is unclear whether or not a statement is a contractual term, that is a question of law and is to be decided without reference to the typical consumer. I accept this submission as far as it goes. However, if as a matter of law a statement is a contractual term but it might not clearly be so to the typical consumer, the term is, to that extent at least, not in plain and intelligible language. Equally, if as a matter of law a statement is non-contractual but its status is unclear, the typical customer might well find it obscure whether or not the contractual terms are to be applied subject to, and qualified by, the statement and so contractual terms might be the less intelligible. In reality, it will not be easy for a seller or supplier to answer a complaint that statements in his documentation are unclear by arguing that, obscure though they might be to the typical customer, as a matter of law those statements are not of contractual effect.

94. I add this: since the fairness of the terms of a contract is to be determined when it is made (see the First National Bank case (cit sup) at paras 13 and 20 per Lord Bingham), it follows, I think, that it is only non-contractual material made available to the consumer when or before the contract is made that can bear upon any question whether the language of a term is plain and intelligible.

Plain intelligible language – previous dealings between bank and customer

95. It seems to me in principle, just as it is potentially relevant that the typical consumer is to be taken to read and seek to understand the contractual terms in light of information, advice or explanations in non-contractual material, so too it might be that, when considering a contract made by a consumer who has a history of dealings with the seller or supplier, the typical consumer is to be taken to read and seek to interpret the contractual terms against the background of such a previous contractual relationship and history of dealings. If the terms differ from previous terms or an established pattern of dealing, they might have to be the clearer if in those circumstances they are to be held to be in plain intelligible language. The question whether terms are plain and intelligible is still to be considered from the position of the typical customer, and it was not suggested that the particular relationship between an individual customer and his Bank is relevant to this. (I leave aside any question about whether it might otherwise be relevant, for example because it gives rise to an estoppel by convention.) It does not follow, however, that the typical bank customer is to be taken to have no history of dealings with his bank.

96. The Relevant Terms have recently been introduced by the Banks into their contracts with established customers, many of whom will have had a current account with their Bank for some considerable time. The terms of all eight Banks now provide that the Banks may introduce changes, generally by giving notice to their customers. Apart from Lloyds TSB, the evidence is that the Banks had comparable provisions in their previous terms, and it seems likely that they introduced the present terms into their contracts with existing customers by exercising that contractual power. However, the evidence about that is not entirely satisfactory, my decision does not depend upon this question and I make no finding about it. As far as Lloyds TSB is concerned, there is (perhaps understandably in view of the issues raised in the pleadings) no evidence before me whether it had any contractual power to introduce changes to its contracts with its existing customers.

97. However this might be, I have concluded that the questions about whether the Banks' terms are in plain intelligible language that are in issue between the parties do not depend upon whether any previous banking relationship might be relevant. In these circumstances, I do not decide whether it would be proper to bring this into account in deciding whether the Banks' terms are in plain intelligible language.

Plain intelligible language and "informed choice"

98. The OFT says that the Directive and so the 1999 Regulations are about informed choice: that they were intended, as it was put by Advocate General Tizzano in Commission of the European Communities v Netherlands, Case C-144/99, [2001] ECR I-3541, "to require the seller or supplier to make sure at the outset that the contractual terms are plain and intelligible, thus ensuring that, before entering into the contract, the consumer has access to all the information needed to arrive at his decision in full knowledge of the facts" (at para 31). The eighth recital to the Directive, as I have said, refers to programmes for a "consumer protection and information policy" and these programmes in turn said that consumers should be "capable of making an informed choice of goods and services and conscious of their rights and responsibilities". (The OFT also refers in this context to the twentieth recital, but that is about the language of the terms presented to the consumer and the consumer having an opportunity to examine them rather than about the consumer being given further or full information.) I am not persuaded that either the opinion of Advocate General Tizzano or the eighth recital supports the OFT's submission. To my mind, the eighth recital cannot bear the weight that the OFT would put upon it. As I read his Opinion, the point being made by Mr Tizzano is simply that if the terms are plain and intelligible to the consumer, he will have the information that he needs to make his contractual choice.

99. The Banks take issue with the OFT's contention that the provision in Regulation 6(2) that the exemption applies only in so far as a term is in plain intelligible language is directed to the consumer being in a position to make a fully informed choice about whether to enter into a contract on the standard terms of the seller or supplier. They emphasise that Regulation 6(2) is concerned only with contractual terms and only with the language in which they are expressed, and say that what is left unsaid by the contractual terms is relevant only if the omission renders unclear or unintelligible what is expressed in them. The 1999 Regulations do not require that the consumer be given all the information that he needs to make an informed choice whether to make the contract or information about how the contract will work out in practice.

100. I agree with this submission. There is nothing in the travaux preparatoires for the Directive that suggests that the intention was that a seller or supplier should give the consumer advice about the contract that he is offered. This would represent a significant change in the conventional approach of English contract law, and it appears that no such radical change was envisaged. I note that the Economic and Social Committee in its Opinion on the proposal for a Council Directive on unfair terms in consumer contracts (91/C 159/13) said at paragraph 2.2.3:

> "… the Committee considers that the Directive, rather than introducing new legal principles into the national legal systems, constitutes, at least partially, an approximation of existing

national legislation and practice and harmonizes technical approaches to the problem of unfair contract terms."

101. Moreover, the suggestion that a term is not in plain intelligible language for the purpose of the 1999 Regulations unless the consumer is advised about its effect is not consistent with what was said in the House of Lords in the First National Bank case. For example, Lord Rodger said (cit sup at para 66), "…condition 8 cannot be regarded as unfair simply because the bank do not draw the borrower's attention to the remedies that may be available under the [Consumer Credit Act 1974]": see too at para 23 per Lord Bingham.

Plain intelligible language: implied terms and language

102. I therefore accept that the first clause of Regulation 6(2) is directed to the language used in contractual terms, and it follows that it is concerned with the express terms and not with whether the consumer is likely to understand what terms will be implied into the contract: see Chitty on Contract, 4th Supp. (2007) to 29th Ed. (2004), para 15-32B, which provides cogent reasons for this view, and Baybut v Eccle Riggs Country Park Ltd, [2006] All ER (D) 161 (Nov) per HHJ Pelling QC, sitting as a judge of the High Court. This is unlikely to be a limitation on the application of the 1999 Regulations which is of any practical importance because it is difficult to suppose that any implied term would be other than reasonable, or, I would add, other than fair (either generally or as defined in Regulation 5(1)). (The Banks also cited in support of the contention that the 1999 Regulations are not concerned with implied terms the decision of the Court of Appeal in The County Homesearch Company (Thames & Chilterns) Ltd v Cowham, [2008] EWCA Civ 26 in which Longmore LJ said, at para 21, "The fact that it may be arguable whether a term should be implied … does not mean that there is a doubt about the meaning of a written term". However, that observation was about Regulation 7, and therefore concerned only with written terms. I do not consider that it really assists about the meaning and application of Regulation 6.)

103. Regulation 6(2), as the OFT submits and as I accept, requires not only that the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract. It might be said that in Regulation 6(2) the expression "term" does not refer to a particular clause or condition in the seller's or supplier's documentation, but is directed to how the contract sets out a particular obligation or right, whether that obligation or right is contained in a single clause or condition or whether it is to be found by drawing together elements of it found in different places in the contractual documentation; and so that if the Regulation is to exclude an assessment of the fairness of that right or obligation, it is that which must be set out in the contract in plain, intelligible language. Or it might be said that in Regulation 6(2) the expression "term" connotes the wording of a particular clause or condition, and that the wording cannot be said to be "intelligible" unless the consumer can understand from the contract both what the clause and condition actually says and how it affects the parties' rights and obligations. Whichever approach to construing the first clause of Regulation 6(2) be preferred, in my judgment the Regulation does not exclude an assessment of fairness unless not only can the typical consumer understand the actual wording used in the contractual documentation but also its effect. To that extent, I reject the submission

of at least some of the Banks that the question whether a term is in "plain intelligible language" is concerned only with whether the wording is clear. This would deprive "intelligible" of any effect and does not properly recognise that the purpose of the first clause of Regulation 6(2) is that the consumer should understand the contract that he is making if he is not to be protected by its terms being subject to assessment as to their fairness.

104. There was some discussion whether the expression "plain intelligible language" was to be interpreted widely enough to include the clarity of the presentation of the terms. For my part, I would consider it proper when assessing whether terms are in plain intelligible language to take into account clear and accessible presentation with, for example, useful headings and appropriate use of bold print, which can contribute to the intelligibility to the typical consumer of the language. However, none of the conclusions that I reach about the OFT's complaints depend upon this.

Plain intelligible language – the OFT's complaints

105. I therefore come to the OFT's criticisms of the clarity of the Banks' terms and their language. It originally put forward three general contentions, although it directed only the first of these to Nationwide's terms: the second and third contentions were associated with the criticism that the terms of the other Banks present a Relevant Instruction as a request from customers for an overdraft.

    i) First, the OFT complains that it is not made sufficiently clear how the Banks' terms apply.

    ii) Secondly, it is said that the Relevant Terms falsely "give the customer the impression that there is nothing wrong with paying for goods and services, or with obtaining property, services or pecuniary advantages by making payments for which he has insufficient funds". The thrust of this point is that criminal offences can be so committed and civil liabilities so incurred by the customer and that, by presenting Relevant Instructions as requests, the Relevant Terms appear "to treat such conduct as acceptable or proper".

    iii) The Relevant Terms are also said to be misleading in that they use similar terminology (such as "overdraft", "overdraft facility" and "overdraft service") both when referring to pre-arranged borrowing and when referring to overdrawing resulting from a Relevant Instruction.

106. The OFT made clear in its written opening submissions that the second and third objections are not pursued in these proceedings as separate complaints. It acknowledges the force of an argument made by HBOS that these proceedings concern only those terms whereby the Banks claim to be entitled to charge for dealing with Relevant Instructions (that is to say, those terms imposing the Relevant Charges), and not terms which are concerned with the customer giving Relevant Instructions. I need refer to these two criticisms only in so far as they bear upon other issues between the parties.

107. However, the OFT still contends that, in the case of the seven Banks other than Nationwide, the position about when Relevant Charges are incurred is obscured by the so-called "request machinery": that is to say, because a Relevant Instruction is

presented in the terms as a request for an overdraft. The thrust of the OFT's point, as I understand it, is that the relevant time for the purpose of determining whether there are funds available to cover a payment is the time when the payment instruction is processed. The OFT suggests that the focus on the customer's request might give the impression that what matters is whether there are funds either at the time when he issues the payment instruction or when it is received by the Bank.

108. I am not persuaded by this criticism. It must be obvious to a customer that it cannot matter whether he has available funds in his account before his Bank receives his payment instruction and that the instruction will not necessarily be read and dealt with at the instant moment that his Bank receives it. I do not consider that references in the Banks' terms to, for example, a customer seeking to make a payment by writing a cheque or to the Bank "receiving" a payment instruction would confuse the typical customer and I do not consider that on this account the terms of any of the Banks are not in plain intelligible language.

109. In general terms, the OFT's contention is that the application and effect of the Relevant Charges is unascertainable to the typical consumer. This submission was supported by the evidence of Mr Jimenez which illustrates by examples the difficulties that, the OFT says, face customers in practice if they seek to predict what charges apply to the operation of their account. The evidence was helpful in crystallising the OFT's complaints but it is not necessary to extend this judgment by going through his examples.

110. The OFT gathered into seven categories its complaints that it is uncertain how the Relevant Terms will apply. The categories are not precisely defined and there is sometimes scope for debate about the appropriate category for a complaint, but I adopt the categories as a useful structure for considering the issues between the parties.

111. The first category includes complaints that the terms leave the customer uncertain about what funds his Bank will treat as being available in his account to cover a payment instruction that he has given ("available funds uncertainties"). The availability of funds can be affected by what debits and credits are taken into consideration at the time when an instruction is processed, by the complexities of the banking system, including clearing cycles, and sometimes by a Bank's internal policies. The OFT says that these matters are not explained to customers.

112. Secondly, the OFT complains of uncertainty "as to the time as at which available funds are taken" ("timing uncertainties"). (The first and second categories are closely related.) It is said that the funds available to meet a payment are not necessarily the funds calculated at the time when the particular instruction is processed. They might, for example, be calculated at the close of business the previous day.

113. Thirdly, there is said to be uncertainty about the order in which transactions are processed ("order of processing uncertainties"). As I have said, the Banks process some instructions in batches, and the order in which they are processed may affect whether there are funds available to meet a particular instruction, and may therefore in turn affect what Relevant Charges are incurred. The Banks do not specify for customers the order in which they will process instructions, and so if on a particular

day there are funds available to meet some but not all of a customer's instructions, the customer cannot tell in advance which, and perhaps how many, of his instructions will be treated as "Relevant Instructions".

114. Fourthly, there is sometimes uncertainty, it is said, about what constitutes a Relevant Instruction: more specifically, uncertainty as to whether Relevant Charges are incurred only when the customer gives a payment or withdrawal instruction or whether they are also incurred when fees or interest are debited to the account; and uncertainty as to the position when a previous credit to the account is reversed ("Relevant Instruction uncertainties"). In particular, the OFT says that in some cases, because the Banks' terms and conditions are couched by reference to the customer being treated as having made a request for an unarranged overdraft, it is not clear whether a Relevant Instruction requires some communication between the Bank and the customer.

115. Next it is said that there is uncertainty as to the criteria by which the Banks decide whether to honour or refuse a Relevant Instruction ("criteria uncertainties"), and that as a result, the customer has no means (apart, possibly, from his experience in operating his account) of knowing which Relevant Instructions are likely to be accepted and which refused, and so what charges he is likely to incur.

116. Sixthly, the OFT says that in some cases the "scope" of a Relevant Charge is uncertain ("scope uncertainties"). This really amounts to various miscellaneous uncertainties in wording relating to the levying of Relevant Charges.

117. Finally, the OFT complains of uncertainties about the Relevant Charges because of the policies or practices adopted by Banks of waiving or refunding them, and not fully enforcing their contractual rights ("enforcement uncertainties"). The Banks do not always levy the Relevant Charges for which their contractual terms provide. For example, Abbey places a cap on the number of Relevant Charges payable on any one day and a monetary cap on the amount of Relevant Charges levied in any statement period, and also exercises discretion in relation to Relevant Charges in cases of financial hardship. Clydesdale's practice is to waive some Unpaid Item Charges. HBOS and Nationwide have what are described as "internal buffers", of which customers are not made specifically aware and which prevent customers being charged unless their unauthorised borrowing exceeds particular levels. HSBC's unpublished waiver policies include a cap on Arrangement Fees of £150 in any charging period and of £60 on Unpaid Item Charges on any day. RBSG does not charge a Paid Item Charge if the amount of the unarranged overdraft is less than £26 and waives other charges in some circumstances.

118. Mr Doctor, while not going quite so far as to concede that this complaint cannot be sustained, did not press it, and in my judgment he was right not to do so. I accept the Banks' submission that the question of plain intelligible language is directed to the contractual provisions, not to how the parties do or are likely to conduct themselves under the contract, to how and whether the parties do or are likely to exercise their rights or fulfil their obligations or to how precisely the contract will operate. This does not mean that the contract between the bank and the customer is not in plain intelligible language.

<u>Plain intelligible language – the standard to be achieved</u>

119. The question of plain intelligible language is, as it seems to me, directed to whether the contractual terms put forward by the seller or supplier are sufficiently clear to enable the typical consumer to have a proper understanding of them for sensible and practical purposes. The procedures required to operate a current account are undoubtedly complex, and it would require a long explanation to cover them fully. The Banks submit with some justification that many customers would not welcome so detailed an explanation, and if this were attempted it would probably detract from explaining clearly what the customer does need to know. The application of the 1999 Regulations, it seems to me, calls for a more practical and moderate approach to what affords appropriate protection for the consumer. The current account customer of the Banks is entitled to understand essentially the types of charges which his Bank is entitled to levy, the circumstances in which it is entitled to levy them and for how much he will be liable. He does not need an education in the full complexities of banking systems, and the 1999 Regulations do not, in my judgment, require a supplier such as the Banks to provide it.

120. Moreover, even if a customer had a detailed understanding of how banking systems operate, it would not mean that he could be certain of what funds he would have in his account at any particular time in as much as this depends upon when payees present instructions for payment. The payee of a cheque may present it at any time within six months of its date: see Byles on Bills of Exchange and Cheques, 28th Ed. (2007) para 21-040. The payee of a direct debit has a window of three working days during which to collect a payment under the instruction: see Brindle & Cox, The Law of Bank Payments 3rd Ed (2004) para 3-031. Similarly, it is in the hands of the payee of an "off-line" debit card payment instruction (that is to say, a payee who has not specifically had the bank authorise the payment when the card-holder used it) when he presents the payment instruction (subject to any time limits for the relevant system).

121. The Banks seek to take this point further. They say that a term is in plain intelligible language for the purpose of Regulation 6(2) if, given the nature and complexity of the subject matter, it is expressed as clearly as is reasonably possible. I am unable to accept this. A term is exempt from assessment as to its fairness only if it is in plain intelligible language. A seller or supplier does not earn exemption from assessment of his terms by making a commendable effort to make them plain and intelligible. This would, it seems to me, leave a gap in the protection for consumers that the 1999 Regulations are intended to provide: that any contractual term can be assessed unless the typical consumer is able to understand it.

122. I recognise that in theory this might mean that terms relating to the adequacy of the price are not exempt from assessment although the seller or supplier has made them as clear as is possible, and the seller or supplier cannot prevent assessment under the 1999 Regulations of the "price/quality ratio". However, this consideration must give way to the primary purpose of consumer protection. In saying this, I do not overlook the Banks' argument that the duty upon sellers and suppliers in Regulation 7(1) to ensure that any written term of a contract is expressed in plain, intelligible language is stated in mandatory terms. As I have said, it is not clear how this would be enforced, but, assuming that there is jurisdiction to enforce it by injunctive relief (see paragraph 86 above), an injunction would not be made if a seller and supplier had already ensured that his terms are as plain and intelligible as possible.

"Criteria uncertainties"

123. The OFT criticised the terms of all eight Banks on the grounds of what I have called the criteria uncertainties (see paragraph 115 above). In each case, the criticism was simply that the terms do not explain, and do not seek to explain, the criteria by which the Bank decides whether to make an unarranged overdraft available to the customer when it receives a Relevant Instruction. In the case of the Banks other than Nationwide the criticism is put on the basis that the terms do not explain how the Bank considers the request which, as the Banks' terms are drafted, the customer is taken to have made by way of a Relevant Instruction.

124. The Banks respond by arguing that generally they are not obliged under their contracts with current account customers to adopt any particular criteria when deciding whether to pay upon Relevant Instruction. They are free to adopt what criteria they choose, and are not contractually obliged to use the same criteria for any customer whenever he gives a Relevant Instruction. The OFT does not, I think, suggest otherwise. However, it follows from this, as the Banks argue and I accept, that to this extent there are no contractual criteria to be explained to the customer. The OFT's argument that the criteria should be explained amounts to a contention either that the Banks should make contracts in which they commit themselves to using specific criteria or that extra-contractual criteria should be explained. The complaint is not, in reality, that contractual terms are not plain and intelligible. It might be said that the contractual terms are not plain and intelligible unless they make clear the Banks' discretion whether or not to pay upon a Relevant Instruction, but all the terms that I am considering do make this clear, and, again, I do not understand the OFT to argue otherwise.

125. I therefore reject the complaint about criteria uncertainties. (Barclays' documentation refers to the customer's "financial circumstances" being appraised when deciding whether to pay, and Lloyds TSB refers to assessment of the customer's "personal circumstances". I deal with this when considering the terms of the individual Banks at paragraphs 169 and 254 respectively.)

"Order of processing uncertainties"

126. A complaint of "order of processing" uncertainty is also made about the terms of all eight Banks. It would appear from the evidence that there is no established banking practice whereby it is determined which "off-line" payment instructions within a batch are given priority for processing and payment. At Clydesdale, for example, a member of staff has discretion about this, and, as that Bank's evidence explains, will often give priority to such payments as mortgage or loan repayments.

127. The OFT does not allege that the Banks are contractually obliged to process the transactions upon a customer's account in a particular order if instructions are received simultaneously, provided the account is conducted in accordance with established banking practices. It is not necessary in this judgment to decide what obligations a bank has in these circumstances: see Paget's Law of Banking 13th Ed. (2007) p.472. Nor is it necessary to examine the provisional view expressed by Griffin J in Dublin Port & Docks Board v Bank of Ireland, [1976] IR 118 at p.138 that "a banker should pay his customers' cheques in the order in which they are presented, subject to the interest of the customer being taken into account". It is sufficient to

observe that if and to the extent that a bank is under any obligation to his customer about the order of processing instructions or which are to be paid in priority to others, the obligation arises from an implied contractual term.

128. As I have said, the order in which payment instructions are processed might affect whether a particular instruction is a Relevant Instruction and incur Relevant Charges, or indeed how many of a customer's payment instructions might make him liable for Relevant Charges. As a result of uncertainty about the order in which the Banks might process payment instructions, the customer might not know in advance what Relevant Charges will be levied upon his account. It would be possible for the Banks to reduce this uncertainty by committing themselves to process instructions in a particular order. However, either the OFT's complaint is that the Banks' terms do not set out an implied provision of the Bank's terms or, as with the complaint of criteria uncertainties, it is not about the clarity of the Banks' contractual terms at all but about uncertainty as to how accounts will be operated by the Banks in practice. Whichever it be, I reject the OFT's case that the Banks' terms are not in plain intelligible language because of order of processing uncertainties.

129. It is therefore necessary to consider further the OFT's complaints about uncertainties relating to "available funds", "timing", "Relevant Instructions and "scope". None of these is directed against all eight Banks, and the terms of each Bank need separate consideration. I must therefore explain the accounts offered by the Banks and the standard form documentation that they use.

Abbey's terms

130. Abbey National plc was converted to a public company in 1989 and acquired in 2004 by Banco Santander, SA, Spain's largest financial services group. It offers a range of different accounts to customers, and now has two main types of personal current account for new customers, the Abbey Current Account and the Basic Account. This judgment, as I explained at paragraph 37 above, is concerned only with the former, the account used by about 80% of Abbey's personal current account customers. Accounts of this kind are opened by customers over the telephone, online or – most commonly – by completing an application form at a branch. However the account is opened, it is Abbey's practice to provide the customer with three documents: a booklet called "Abbey Bank Account Terms and Conditions", a leaflet called "The Abbey Personal Current Account Key Features and Price List", and a User Guide. The current contractual documentation was introduced by Abbey last year, being sent to customers in late July and early August 2007 and coming into effect on 10 September 2007. (There have since been some immaterial revisions by way of up-dating, but I need not be concerned about them.)

131. It is stated at the start of the Terms and Conditions booklet that those conditions and "the written details explaining the key features of your current account … and the Price List… form the terms of your contract with us with regard to your current account". This is confirmed by an entire agreement provision in condition 13.12 of the Terms and Conditions. Thus the User Guide is not a contractual document.

132. The Terms and Conditions booklet states that a customer, by opening an Abbey Personal Current Account, "can take advantage of the following main services", which are identified as the "Deposits services", allowing payments into the account,

the "Overdraft services" and the "Payments services", allowing customers to make withdrawals and payments to others. The "Overdraft services" is described in these terms: "you can request an overdraft and, if we agree to your request, you can borrow that money from us". The customer is referred to condition 3 for his rights and obligations relating to the Overdraft service.

133. The OFT argues that the statement of the "main services" is not contractual, but just "some promotional introduction", and characterises as "self-serving" the use of the expression "service" here and elsewhere. I accept that it is not always easy in this document, or indeed in many of the documents produced by Abbey and other Banks, to distinguish what is and what is not contractual, but (if it matter) I would regard this part of the booklet as being of contractual effect. I also find the use of the term "service" in this context natural and do not regard it as strained or contrived.

134. Condition 3 of the Terms and Conditions explains that there "are two different overdraft services available" on an Abbey Personal Current Account: the "Advance Overdraft service", where the customer arranges an overdraft facility (or an increased overdraft facility) before seeking to overdraw, and the "Instant Overdraft service". In the case of the former, an Advance Overdraft Fee is payable for the facility whether or not it is used. No charges are incurred for actual use of a facility, although interest is payable upon borrowings.

135. The focus of the OFT's criticism of Abbey's Relevant Terms is condition 3.3, which reads as follows:

> "3.3 Instant Overdrafts
>
> 3.3.1 Without contracting us at all, you may also request an overdraft by trying to make a payment from your current account, where that payment would:
>
> (i) cause your current account to go overdrawn without an Advance Overdraft in place; or
>
> (ii) cause your current account to go over any Advance Overdraft limit we have previously agreed with you.
>
> In either case this is referred to as an Instant Overdraft request.
>
> 3.3.2 You will be treated as making an Instant Overdraft request to us automatically if you do not have enough money in your current account, or enough unused Advance Overdraft with us and you do any of the following:
> (i) you try to purchase goods or services using your debit card or by cheque;
> (ii) you try to withdraw money from your current account;
> (iii) you try to make a payment from your current account against a cheque which is later returned unpaid or against any other deposit in your current account which has not been processed; or
> (iv) an automated payment you have set up, such as a Direct Debit or a standing order, is requested to be paid.

3.3.3 An Instant Overdraft Request Fee will be payable by you each time that you use the Instant Overdraft service. The Instant Overdraft Request Fee is payable regardless of whether we agree to give you the Instant Overdraft requested.

☞ Important: Payment of the Instant Overdraft Request Fee may result in you becoming overdrawn (or, if you already have an overdraft, further overdrawn) even if we do not agree to give you the Instant Overdraft.

3.3.4 We may give you an Instant Overdraft or we may refuse to do so. If we agree, we will give you an Instant Overdraft to cover the amount of the withdrawal or the payment involved. An Instant Overdraft Monthly Fee will by (sic) payable by you monthly for every calendar month in which you have used our Instant Overdraft service (including where you continue to use an existing Instant Overdraft facility). Interest will also be payable by you at the Instant Overdraft Interest Rate on any money you borrow by way of an Instant Overdraft. If we refuse your Instant Overdraft request but your account is in credit or, if you have an Advance Overdraft and your account still has some unused Advance Overdraft on it, then you will not have to pay the Instant Overdraft Monthly Fee."

136. Thus, by clause 3.3.1 a customer is said to make a request for an Instant Overdraft when he seeks to make a payment which would cause his account to become overdrawn without, or in excess of, an Advance Overdraft facility. An Instant Overdraft Request Fee is incurred whether or not Abbey agrees to the request. An Instant Overdraft Monthly Fee is contractually payable once in a statement period (a period equivalent to a calendar month) in which Abbey agrees to an Instant Overdraft request.

137. It is a feature of Abbey's Terms and Conditions booklet that it includes a number of boxes interspersed among the conditions, these boxes containing notes marked by a picture of a finger pointing to the note and introduced by the word "Important", such as that under condition 3.3.3 that is set out above. Another such note, which is the object of some criticism from the OFT as a "fanciful" extension of the concept of the customer requesting an instant overdraft, appears in condition 5, which is headed "Interest Rates and Service Fees" and explains that Abbey will take from the customer's account the amount of Service Fees and Interest owed on the account. It is placed after condition 5.1.2 and reads:

"☞ Important: If you do not have enough money in your current account, or enough unused Advance Overdraft with us to cover any Service Fees or Interest when we take from your current account the money to pay those Service Fees or Interest, you will be treated as having made an Instant Overdraft request and we will be entitled to charge you an Instant Overdraft Request Fee. An Instant Overdraft Monthly Fee and Interest at the Instant Overdraft rate will be payable."

138. It is Abbey's contention that these notes are not contractual, but are explanatory or advisory. Certainly this is true of some of them: for example, one states, "We consider cases of financial difficulties sympathetically and positively, and we have a specialist team that can help". However, there are also statements in the conditions themselves which similarly are advisory: for example condition 5.1.3 states:

> "You can discuss at any time any Service Fees or Interest you have incurred on your current account, or why your have paid them, by speaking to us in any of our branches or by calling us on …".

There is not a demarcation between contractual conditions and non-contractual boxed notes. For example, in condition 6, which deals with joint accounts, there is a boxed note under condition 6.1.2 which reads:

> "☞ Important: if you open a Joint Account, you will both be liable to us for all money owed to us in relation to your Joint Account including any overdraft balance (whether an Advance Overdraft or Instant Overdraft), Service Fees and/or Interest, regardless of whether it is incurred by you or by your Joint Account holder."

It is true that this duplicates what is found in the conditions themselves, but I cannot accept that it is not of contractual effect. I consider that the note under condition 5.1.2 is also contractual.

139. I refer to condition 4.2 of the Terms and Conditions, which appears under the heading "Clearance of payments from your current account". As far as material it reads as follows:

> "4.2.1. When you give us an instruction to make a payment by internet or by phone, or if you instruct us to make a payment by cheque, the money will normally be taken from your current account on the same working day we receive your instruction. However, it will normally take 3 working days for the payment to reach the account of the person you want to pay and it may take longer than 3 working days for payments to be paid into accounts held with some financial institutions.
>
> 4.2.2 Automatic payment instructions, such as Direct Debits and standing orders, will usually be taken from your current account at the beginning of the working day that they are due.
>
> 4.2.3 There may be a delay between you using your card to make payment from your current account and the time on which that payment is taken from your current account. It is your responsibility to check that there are no payments pending against the balance on your current account before you request a withdrawal or payment from your current account

> 4.2.4 If you are in any doubt as to how long a payment will take to be processed, or whether or not a deposit will be available to cover it, you should speak to us at any of our branches or telephone us on ...".

140. The Information about Instant Overdraft Request Fees in the "Key Features and Price List" leaflet states: "The Instant Overdraft Request Fee is dependent on the size of the transaction which triggers the request for the service (not the size of the Instant Overdraft you request)". It then sets out four levels of fee, ranging between £5.00 (for a transaction up to £9.99) and £35.00 (for a transaction of £30 or more). The leaflet continues: "Instant Overdraft Monthly Fee (charged per calendar month during which an Instant Overdraft is used)", and states a fee of £25.00.

141. Thus, adopting the OFT's categorisation, the Relevant Charges for the Abbey Personal Current Account are these:

i) An Unpaid Item Charge.

ii) A Paid Item Charge.

These charges are by way of the Instant Overdraft Request Fee. No special terms apply when a Relevant Instruction is supported by a cheque guarantee card, and Abbey levies no Guaranteed Paid Item Charge that is distinct from the Instant Overdraft Request Fee.

iii) An Overdraft Excess Charge, which is charged on a monthly basis at £25 per month.

142. The OFT criticises Abbey's Terms and Conditions on the basis of "available funds" uncertainty, "timing" uncertainty, "Relevant Instruction" uncertainty and "scope" uncertainty".

143. "Available funds" uncertainty: the OFT complains that Abbey's terms and conditions do not sufficiently define what funds are available to cover payments, and specifically submits that, while condition 4.2.3 explains that there may be a delay between the time when a debit card is used to make a payment and the time when payment is taken from the customer's account, the customer is not told when a payment will be taken. I reject both the specific and the general criticism: the time when payments are taken from the account depends upon when the payee claims payment from Abbey. Uncertainty of the kind of which the OFT complains is inevitable, and is not properly attributable to Abbey's terms being unclear.

144. "Timing" uncertainty: the OFT complains that Abbey's Terms and Conditions do not enable the customer to know at what time in the working day funds have to be in the account in order to cover a payment which the customer has mandated. The answer to this complaint is, to my mind, similar to that about available funds uncertainty. Abbey is not obliged to deal with the customer's instructions or other processes affecting the balance of available funds at any particular time of the day, and the uncertainty of which the OFT complains is inherent in the operation of the banking

systems and the freedom that the contract allows Abbey about how it operates the account, and is not attributable to lack of clarity in its Terms and Conditions.

145. "Relevant Instruction" uncertainty: the OFT says that Abbey's terms do not make clear whether, if an Instant Overdraft Request Fee is debited to the account, this in itself constitutes a further "request" for an Instant Overdraft, which in turn would incur a further fee. It is not stated in condition 3.3.2 that this gives rise to a fee, and if it did, then the string of fees could continue indefinitely. However, condition 3.3.2 cannot be read as providing an exhaustive list of when a customer is to be treated as making a request for an overdraft: for example, it does not include when a customer issues a cheque to make a gift. Moreover, the note in the box under condition 5.1.2 states that if interest or charges are not covered by funds in the account or an arranged borrowing facility, the customer is treated as having made a request for an unarranged overdraft and is liable for an Instant Overdraft Request Fee and an Instant Overdraft Monthly Fee accordingly.

146. Abbey says that in fact an Instant Overdraft Request Fee is not levied in the circumstances contemplated by the OFT. It says that the information given in the boxed warning under condition 5.1.2 is wrong, but this is not a contractual term and the error does not mean that the contractual terms are not in plain intelligible language.

147. I do not accept that the boxed warning is not contractual and even if it were, I would not consider that this provides an answer to the OFT's criticism. After all, even if the warning were non-contractual, the typical consumer reading the booklet would be seeking to understand the terms themselves in light of the warning; and neither condition 3.3.2 nor any other term provides the customer with specific information about the question that the OFT raises. As a result condition 3.3.2 is not expressed in language that is plain and intelligible in its context. It is irrelevant that (as I accept) Abbey does not in fact impose a Relevant Charge in these circumstances. In so far as a term is not in plain intelligible language, Regulation 6(2) does not prohibit an assessment of fairness.

148. The OFT makes a second criticism that the effect of condition 3.3.2 is obscure. Condition 3.3.2(iii) states that the customer is treated as making such a request if a receipt into the account is reversed and as a result there are not funds covering payment instructions that the customer has given. It is to be observed that the reversal of a single credit to an account might take away funds that would have covered several payment instructions given by the customer and the OFT says that the Terms and Conditions do not make clear whether in these circumstances the customer is treated as having made a single request (because the credit from one receipt is reversed) or whether the number of payment instructions determines how many Instant Overdraft Request Fees may be charged.

149. I am unable to accept this criticism. It seems to me that condition 3.3.2(iii) is clearly couched by reference to the payment instructions given by the customer and the number of "requests" is dictated by the number of payment instructions are not covered by available funds as a result of the credit being reversed. Abbey's Terms and Conditions are in plain intelligible language on this point.

150. "Scope" uncertainty": the OFT makes two further criticisms of the clarity of Abbey's terms and conditions. (It is not important whether these criticisms are best regarded as "scope uncertainties" or fall into some other category.) First, the OFT complains that it is unclear whether a Paid Item Charge is incurred when a payment instruction does not cause the account to become overdrawn but increases the amount of an overdraft; and similarly whether an Unpaid Item Charge is incurred if payment of the Relevant Instruction would not create but would increase the amount by which the account is overdrawn. Condition 3.3.1, it says, suggests that a charge is not incurred in these circumstances, but condition 3.3.2 suggests otherwise.

151. I agree with the OFT's criticism. To my mind the difference between condition 3.3.1 and condition 3.3.2 means that the terms are not in plain intelligible language.

152. Secondly, it is said that the terms are not in plain intelligible language as to whether an Instant Overdraft Monthly Fee is charged if the customer gives a Relevant Instruction during the month but payment is refused. The trigger for the Instant Overdraft Request Fee (under condition 3.3.4) is that the customer has during the calendar month "used [the] Instant Overdraft service", but the terms do not specify whether the customer "uses" the service when he makes a request for an Instant Overdraft, even though Abbey in the event declines to pay.

153. Again, I accept the OFT's criticism. There is an ambiguity in the expression "used [the] Instant Overdraft service" taken in isolation, and in condition 3.3.3 it covers both the position where an Instant Overdraft is granted and where it is refused. I readily accept that the focus of condition 3.3.4 is upon where an overdraft is granted: the second sentence of the condition refers to Abbey agreeing to the request for an unarranged overdraft, and the reference to the customer continuing to "use an existing Instant Overdraft facility" reinforces this. However, this does not provide Abbey with an answer to the point: as Mr Ali Malek QC, who represented Abbey, acknowledged, an Instant Overdraft Monthly Fee is not charged only where Abbey pays upon a Relevant Instruction but also when Abbey refuses to pay upon it and the resultant Instant Overdraft Request Fee takes the account into unarranged overdraft. Accordingly, despite the words in the second sentence of condition 3.3.4, "If we agree", an Instant Overdraft Monthly Fee can result from the refusal to pay upon a Relevant Instruction. The meaning of the expression in condition 3.3.4 "used our Instant Overdraft Service" does not seem to me to be in plain and intelligible language.

154. I therefore consider that in three respects Abbey's terms and conditions are not in plain intelligible language:

i) As to whether, if an Instant Overdraft Request Fee is debited to the account, this in itself constitutes a further "request" for an Instant Overdraft, which in turn incurs a further fee.

ii) As to whether an Instant Overdraft Request Fee is incurred when a payment instruction increases the amount of an overdraft; or would do so if paid.

iii) As to the meaning of "used [the] Instant Overdraft service" in condition 3.3.4.

<u>Barclays' terms</u>

155. Barclays Bank plc has provided current account services on a "free-if-in-credit" basis since 1985. In 2000 it acquired the share capital of Woolwich plc and until recently offered banking services under the name of "The Woolwich" as well as under its own name. The majority of current accounts held by Barclays' customers are "the Barclays Bank Account". Some 5% of Barclays' current accounts are "basic" accounts, "Cash Card" accounts.

156. When customers open a current account, they are provided with a Retail Customer Agreement ("RCA") in the form of a booklet, a leaflet about "Our Bank Charges Explained and other important information" and a leaflet entitled "Accounts: Day-to-day banking". (These are the documents for the Barclays Bank Account. Other types of current account have their own explanatory leaflet, but, apart from basic Cash Card Accounts, they are similar to that for the Barclays Bank Account.) The current RCA is dated February 2007.

157. The RCA states that the agreement between the customer and Barclays is contained in the general conditions in the RCA, in additional conditions and in "the application form or the appointment of bankers signed by you, the customer". The additional conditions "include our charges and the interest rates…" and are in the leaflet entitled "Our bank charges explained and other important information".

158. Condition 4 of the RCA is headed, "Credits to and payments out of your account". Condition 4.5 explains the position if a cheque or other payment into the account is dishonoured or returned in the following terms:

> "If any cheque you have paid in is returned to us unpaid or any electronic or other payment you have received is recalled we will debit your account with the amount of that payment, whether or not it goes overdrawn and even if we allowed you to make a payment or to take cash against that item. You may incur charges and interest on any overdrawn amount."

159. Condition 4.9 provides that Barclays "may refuse to make any payment if you do not have enough money on the account at the close of the working day before the payment is due to be made". It continues,

> "In deciding whether you have enough money we take account of any authorised card transactions, any overdraft limit, any cheques we are treating as cleared, any instructions to make payments and regular payments which have not yet been paid from your account. We may tell you if you can make payments from your account against cheques which are not cleared. We do not have to take account of regular credits or any amounts received after we have decided not to make the payment".

160. The OFT contends that there might be "potential confusion" in relation to uncleared cheques because condition 4.4 provides, "Your statement balance will show credits when your branch receives them even if they include cheques which are not "cleared". However the bank can still return the cheque unpaid, eg for lack of funds. If it does so we will debit your account with the amount of the cheque". However, to my mind

it is clear that condition 4.4 is directed to the balance which may be shown in a statement from time to time; it is not to do with how available funds are calculated.

161. Condition 5.3 of the RCA provides:

> "We shall be entitled to charge you fees whenever you use any of the services we make available to your account(s) from time to time. You will be given details of our fees for using these services (including our overdraft services, as explained in condition 7) either when you open your account and/or from time to time...".

162. Condition 7 is headed "Borrowing from us". Condition 7.1 reads as follows:

> "We expect you to keep your account(s) with us in credit. However, we understand that from time to time you may need to ask us to make our overdraft services available to you. It is entirely within our discretion whether we agree to make those services available to you and we shall be entitled to charge you fees for considering whether we do so, as we explain below. "

163. Condition 7.2 advises the customer that he should request overdraft services before the account goes into overdraft and says that, if the Bank agrees to such a request, it will tell the customer the limit of the overdraft that it is making available and any fees payable that the customer "must pay for this service, as well as the interest rate that applies to the amount of any overdraft that you use from time to time". It is clear, I think, that in this context the expression "this service" refers to the facility rather than borrowing under it.

164. Condition 7.3 reads as follows:

> "If you do not request us to make overdraft facilities available to you in accordance with condition 7.2, you may still request the use of our overdraft facilities by seeking to make a payment on your account (for example by writing a cheque or by using your debit card or making a standing order or direct debit payment) even though there are insufficient funds standing to the credit of your account to meet such a payment. When you seek to make such a payment, or if such a payment would cause you to exceed the limit of an overdraft agreed with you in accordance with condition 7.2, it shall be entirely within our discretion whether we agree to process your payment. Whether or not we do so, we shall be entitled to charge you our fees for considering whether to process each such payment and interest, as set out in our additional conditions. When this condition applies to a guaranteed cheque, you will be deemed to have applied for overdraft facilities for which the fees set out in our additional conditions will be charged. "

165. Condition 7.4 reads as follows:

> "When we make our overdraft services available to you in accordance with condition 7.3, we may ask you to make an immediate payment into your account to reduce the amount of the overdraft we have agreed to make available to you."

166. I must also set out Condition 12.1 of the section of Barclays' Terms and Conditions that is headed, "Barclays Bank card conditions". Condition 12 is headed "Cheque guarantee":

> "You can use the card if the card has a cheque guarantee logo on it and the same sort code as your accounts to guarantee cheques on Barclays accounts in your name. The following conditions will apply:
>
> - You may only use one guaranteed cheque to pay for any one item. The amount of the cheque must not be more than the cheque guarantee limit shown on the card.
>
> - You must not write a guaranteed cheque for more than the amount in your cheque account without permission from your branch.
>
> - You cannot stop payment of the guaranteed cheque.
>
> - You cannot guarantee cheques outside the United Kingdom and Gibraltar."

167. In the leaflet "Our Bank Charges Explained", there is a passage headed "If you go overdrawn without an agreed personal overdraft or exceed an agreed overdraft limit". It advises customers to arrange an overdraft in advance to avoid "unnecessary charges", and because it is cheaper to do so. It continues:

> "You can overdraw up to your agreed limit at any time, but you must manage your account in such a way that the overdraft balance is substantially reduced on a regular basis. However, if you have not agreed or increased a limit with us in advance and go overdrawn or exceed your limit, you will be charged interest at the unauthorised overdraft rate and an administration fee will be charged. This is known as a Paid Referral Fee. Any payments which cause an excess will be paid at the Bank's discretion and we reserve the right to refuse to pay any item that takes your balance beyond any agreed limit on your account. For customers holding the following accounts: Barclays Bank Account [and other specified accounts], a Paid Referral Fee of £30 is charged when we pay an item which results in your account going overdraft by more than £5 without an agreed limit or by more than £5 above an agreed limit. … The Paid Referral Fee will also be charged if we pay any further items which increase your unauthorised borrowing by

> £1 or more. However, you will only pay one of these fees per account per day and you will not be charged more than 3 fees per account within any monthly charging period. We will automatically refund the first Paid Referral Fee incurred, provided you have not incurred a Paid Referral Fee in the previous 12 months and have held your account for at least 12 months. If, however, your account does become further overdraft, you will incur additional Paid Referral Fees in line with the above tariff. Going overdrawn without an agreed limit or beyond an agreed limit is at the bank's discretion".

168. There is then a heading "Charges on unauthorised overdraft" and under that heading there are two items. The first is "Unpaid fee", and it is stated: "if you go overdrawn without agreement or if you exceed your agreed limit we may return your cheques, standing orders or Direct Debits". It specifies a charge of "£35 (maximum per account per day)". The second item is under the heading "Paid Referral Fee" and reads, "A Paid Referral Fee is charged when you go above your Paid Referral Buffer. [This is a reference to the provision that the fee is incurred only if the customer goes overdrawn by more than £5.] You will not incur more than 3 fees within any monthly charging period", and a charge is specified of "£30 (per account per day)". The leaflet then states the interest rates on "unauthorised overdrafts".

169. The leaflet also states under the heading "Important Information" that "Barclays is a responsible lender and when considering your application for borrowing, your financial circumstances will be appraised", and advises the customer to contact them if he runs into financial difficulties. Mr Iain Milligan QC, who represented Barclays, submits that this imposes a contractual obligation on Barclays to appraise a customer's financial circumstances when it receives a Relevant Instruction. Given the context of this statement (for it is with other information that is not contractual) I do not consider that this is of contractual effect, and in my judgment Barclays does not make such a contractual commitment.

170. Thus, Barclays' Relevant Charges are the following:

    i) An Unpaid Item Charge, called an Unpaid Fee, which is £35 and is limited to one charge per day**.**

    ii) A Paid Item Charge, called a Paid Referral Fee, which is £30 a day and is subject to various exceptions and qualifications. Barclays does not levy a distinct Guaranteed Paid Item Charge.

171. Barclays' terms are criticised on the basis of "available funds" uncertainty and "Relevant Instruction" uncertainty.

172. "Available funds" uncertainty: condition 4.9 of the RCA says that, in deciding at the end of the working day before a payment is due to be made whether a customer has sufficient funds to make it, Barclays takes account of "any authorised card payments … any instructions to make payments and regular payments which have not yet been paid from your account". The OFT, as I understand the criticism, suggests that a

customer might take this to mean that Barclays reduces the available balance to provide for payments which are expected to fall due not on the same day but at some time further in the future. To my mind, that is far-fetched and is not an interpretation of the condition that would be entertained by the typical customer. I cannot accept that the RCA is not in plain intelligible language in this respect.

173. The OFT also makes a criticism of Barclays' terms that it is unclear what credits are brought into account in deciding whether there are sufficient funds to meet a payment instruction, and in particular about the position if there is a credit item to the account on the day that a payment falls to be made. I reject this criticism of Barclays' terms: again the position is made clear in condition 4.9.

174. "Relevant Instruction" uncertainty: the OFT argues that under Barclays' terms it is unclear whether if a cheque is returned or if a payment is recalled and funds are therefore debited from the customer's account, this is treated as a "request" by the customer for an unarranged overdraft so as to give rise to a Paid Referral Fee. Barclays argues that a Paid Referral Fee is clearly incurred in these circumstances, but I am not persuaded that this is made clear to the typical customer. After all, the name "Paid Referral Fee" connotes that it is a fee payable because an instruction is "referred" for consideration before being paid, and then (in the words of the "Our Bank Charges Explained" leaflet) an "administration fee will be charged". No payment will be "referred" before being made if the account becomes overdrawn as a result of a credit being reversed. Of course, condition 4.5 tells the customer that he might incur charges "on" the overdrawn amount, but it does not specifically refer to charges being incurred because of the process whereby it becomes overdrawn. I agree with the OFT that the reference to "charges" in condition 4.5 is not plain and intelligible in this respect.

175. The OFT makes a further criticism of the clarity of Barclays' terms. It observes that in condition 7.3 it is said that the customer might request use of overdraft facilities "for example, by writing a cheque … or making a standing order or direct debit payment", and suggests that the customer might not appreciate that what is important is whether there are funds when the payment instruction falls to be paid, rather than when the customer issues the payment order. I consider it unrealistic to think that a customer might be so confused.

176. In my judgment, condition 4.5 of Barclays' terms is not in plain intelligible language, but I reject the other criticisms of them.

Clydesdale's terms

177. Clydesdale Bank PLC is a member of the National Australia Bank Group. It does business under both its own name and as Yorkshire Bank. Clydesdale offers several different types of current account but the majority of its current account customers (some 85% of the Yorkshire customers and some 80% of the Clydesdale customers) have a "Current Account Plus". Leaving aside the customers with its basic "ReadyCash Account", the other current accounts do not, I understand, materially differ from the Current Account Plus.

178. The Clydesdale's practice is to give all new Current Account Plus customers a booklet entitled "Managing Your Current Account". It describes the Current Account

Plus as "an account that gives you straight forward day-to-day banking" and indicates that among its features an overdraft is available "subject to status".

179. The conditions that govern the operation of Clydesdale's current accounts (including Current Account Plus) are set out in a folding leaflet. Condition 2 explains that the conditions are split between "Product Specific Conditions", which apply only to the particular account that the customer has, and "Universal Conditions", which apply to all relevant types of current accounts. There is also a tariff leaflet, entitled "Current Account tariff for personal customers", which contains contractual provisions. If the customer has a bank card there is a third relevant contractual document called "Account card".

180. The conditions leaflet states that a Current Account Plus customer may ask to borrow from the Bank by overdraft, and continues at condition 3.2.2 and 3.2.3 as follows:

> "On this account
>
> 3.2.2 you may ask to borrow from us by overdraft (see Condition 8)
>
> 3.2.3 if you make a request for Unplanned Borrowing under Condition 8.3, the fees applicable to your Current Account Plus under that Condition are:
>
> (a) if we refuse your request, the Returned Item Fee; or
>
> (b) if we agree to your request, the Daily Unplanned Borrowing Fee, the Monthly Unplanned Borrowing Fee and the Cheque Card Overdraft Fee, where relevant. In addition, we will charge you interest on any borrowing under Conditions 8.4 and 9; and … ".

Unplanned Borrowing means "borrowing which is the result of our agreement to a request from you under condition 8.3 for a temporary overdraft or a temporary increase to an existing overdraft to cover a Payment Item for which you do not have sufficient Available Funds", and "Payment Item" means "any cheque, standing order, Direct Debit, cash withdrawal, Card transaction or other payment instruction relating to your Account".

181. Condition 7.1 provides that payments will be made from the account provided they are duly authorised by the customer and "either there are sufficient Available Funds or we agree to make the payments in accordance with condition 8.3". The term "Available Funds" is defined as meaning "funds that have been Cleared for Use plus any undrawn amount available to you on the Account under an overdraft facility arranged with us in advance under Condition 8.2". "Cleared for Use" in turn is defined as referring to "the point at which funds from a cheque, or other order, paid into an Account can be drawn upon".

182. Condition 8 states that the customer may make a request to borrow by overdraft in two ways (provided the "Product Specific Conditions … applicable to your type of Account say that you may ask to borrow from us by overdraft"). The leaflet advises

that the customer should "normally discuss with Your Branch any overdraft that you need, and get our agreement to your request, in good time before your Account becomes overdrawn". This wording was criticised by the OFT as "self-serving propaganda" because a contractual provision is unnecessary to allow the customer to make a request of the Bank. While that is undoubtedly so and therefore this provision does not add to the parties' contractual rights or obligations, it does not seem to me unnatural or objectionable that Clydesdale should in this way draw together for the customer how overdrafts can be obtained on a current account. The leaflet explains that if the Bank agrees to the request this will "usually be cheaper… than to request it from us under Condition 8.3 by trying to make a payment for which you do not have sufficient Available Funds". Condition 8.2 explains that if the Bank agrees to the customer having an overdraft facility on his account, it will confirm the terms of the arrangement in writing and "may charge you an arrangement fee for this service".

183. The charges which are the subject of this litigation arise from requests under Condition 8.3, which reads as follows:

> "You may also request that we make a temporary overdraft available to you (or temporarily increase the amount of your overdraft) simply by attempting to make a payment from your Account (for example, by writing a cheque, or using your debit card, or making a standing order or Direct Debit payment) for which you do not have sufficient Available Funds.
>
> 8.3.1 We do not have to agree to your request made in this way. If we do not agree to your request, we will charge you a Returned Item Fee for dealing with your request and for returning the Payment Item unpaid….
>
> 8.3.2 If we do agree to your request made in this way, we will pay the Payment Item and make funds available on your Account temporarily for that purpose. We will charge you where appropriate the fees stated in the Product Specific Conditions (see Condition 3) applicable to your Account for this service. These fees are:
>
> (a) The Daily Unplanned Borrowing Fee
>
> …
>
> The Daily Unplanned Borrowing Fee will be charged on [Current Account Plus and other accounts] for each day on which we make a payment in response to a request from you under Condition 8.3 and where the borrowing on your Account at the end of that day exceeds the Available Funds by more than the Buffer Amount stated in the Tariff. This Fee will be debited to your Account as it becomes chargeable, without any further notice to you.
>
> (b) The Monthly Unplanned Borrowing Fee

…

The Monthly Unplanned Borrowing Fee will be charged on [Current Account Plus] for each calendar month in which your Account is at any time overdrawn, unless your overdraft remains at all times during that month within any relevant overdraft limit that we have agreed with you in advance under Condition 8.2. The Buffer Amount does not apply to the Monthly Unplanned Borrowing Fee. We will notify you of the Monthly Unplanned Borrowing Fee at least 14 Days before it is debited to your Account; and

(c) The Cheque Card Overdraft Fee

…

The Cheque Card Overdraft Fee will be charged on [Current Account Plus and other accounts] whenever we make a payment in response to a request from you under Condition 8.3 which we would have refused but for the fact that your request was made by use of a cheque backed by a cheque guarantee Card. This Fee will be debited to your Account as it becomes chargeable, without any further notice to you.

The amounts of these fees are shown in the Tariff."

184. The term "Buffer Amount" is defined as meaning "the amount in excess of any Available Funds by which you may overdraw the Account without incurring the Daily Unplanned Borrowing Fee".

185. I should also refer to the Account card leaflet, the leaflet that covers the terms and conditions governing the use by the customer of a card issued by Clydesdale, that is to say a card that may be used to withdraw cash at an ATM or to guarantee cheques or as a debit card to pay for goods or services. Condition 3.3.2 explains that where a supplier agrees to accept payment by an Account card, and has sought authorisation from Clydesdale before completing the transaction, the amount available to the customer in his current account with Clydesdale is correspondingly reduced, even though the amount might not have been debited to the account.

186. Condition 6.1 of the Account card leaflet states under the heading "Payment and Charges":

> "Charges for the use of the Card will be contained in the Tariff and/or in any other document containing Card charges which we may send to you. Charges for additional services will be advised at the time you request the service or when you ask."

187. The tariff leaflet states a debit interest rate for planned borrowing and (at a rate of interest more than double that for planned borrowing) unplanned borrowing. It states that the daily unplanned borrowing fee is £25.00, and that the monthly unplanned borrowing fee is also £25.00. The Cheque Card Overdraft Fee is £35 per item. A

note refers to the buffer amount and states that unplanned borrowing within the buffer amount will not attract the daily unplanned borrowing fee, the buffer amount "currently" being £25.00. The tariff leaflet also states under the heading "Other Day to Day Charges" that the "Returned Item Fee: Standing Orders, Direct Debit and Cheques which you authorise but which we return unpaid" is £35.00 per item.

188. Thus, Clydesdale's Relevant Charges are:

i) An Unpaid Item Charge, called a Returned Item Fee, which is £35.

ii) A Paid Item Charge, called a Daily Unplanned Borrowing Fee, which is £25, subject to the "buffer" and a limit of one per day.

iii) A Guaranteed Paid Item Charge, called a Cheque Card Overdraft Fee, amounting to £35. This is charged only when, but for the payment being covered by a cheque guarantee card, Clydesdale would have refused payment.

iv) An Overdraft Excess Charge, the Monthly Unplanned Borrowing Fee, which is £25.

189. The OFT criticises Clydesdale's Terms on the basis of "available funds" uncertainty, "timing" uncertainty, "Relevant Instruction" uncertainty and "scope" uncertainty.

190. "Available funds" uncertainty: the OFT's complaint is that the expression "Available Funds" is defined by reference to funds that have been cleared for use, but the definition does not say when payments reduce the amount of Available Funds. As a result, it is said, the meaning and effect of condition 3.3.2 of the Account card terms is obscure, because it is unclear how the amount of Available Funds might be reduced by use of the customer's Account card before the funds are debited from the account.

191. I reject this criticism. Any customer would realise that the amount of Available Funds would be reduced by payments made from the account. Condition 3.3.2 deals with the position where a supplier has had the Bank authorise the payment of a particular debit card transaction, and where therefore the Bank is committed to making the payment. It is readily understandable that, in those circumstances, funds are committed to the transaction, and that the calculation of what further funds are available in the account for other payments takes account of this. I consider that the language of condition 3.3.2 is plain and intelligible to the typical customer.

192. "Timing" uncertainty: the OFT says that the meaning and effect of condition 8.3 of Clydesdale's conditions is unclear because, while it refers to the request for an unarranged overdraft being made by the customer "attempting to make a payment" (and so indicates that it is made when he makes the attempt to pay), the position is then obscured by the examples provided of when such an attempt is made, for example "by writing a cheque".

193. I reject this criticism also. It is obvious that the balance of a customer's account cannot be affected before the cheque is presented, and I cannot believe that any typical customer would suppose otherwise. The examples are clearly directed to how a customer might attempt to make a payment and not to the timing of the attempt, and I do not accept that the uncertainty that the OFT identifies is a real one.

194. "Relevant Instruction" uncertainty: the OFT says that it is unclear whether a Monthly Unplanned Borrowing Fee is incurred if the account goes into overdraft because interest or charges are levied. The complaint is again about condition 8.3: the first sentence refers to the customer's request for a temporary overdraft and indeed condition 8.3.2 opens with further reference to the customer's request. The statement about when the Monthly Unplanned Borrowing Fee is charged, however, refers simply to the account being overdrawn and no reference is made to the customer requesting a temporary overdraft.

195. The position is the more confusing for customers, the OFT argues, because the account might be taken into unarranged overdraft because an Unpaid Item Charge is debited to it; in other words, because Clydesdale has refused to pay upon a Relevant Instruction. However, the opening words of condition 8.3.2 suggest that the charges to which that condition relates, including the Monthly Unplanned Borrowing Fee, might be incurred if (and only if) the Bank agrees to the customer's request for an overdraft.

196. Clydesdale does in fact levy the Monthly Unplanned Borrowing Fee when the account goes into overdraft because interest or charges are debited. The Bank argues that condition 8.3.2 makes it clear that it is entitled to do so whenever the account goes into unarranged overdraft, and it makes no difference why it does so.

197. The position, it seems to me, is not as straightforward as either the OFT or Clydesdale acknowledged in their submissions. As I understand it, the OFT suggests that the effect of Clydesdale's terms might be that no Monthly Unplanned Borrowing Fee is incurred unless the account *first* goes into unarranged overdraft as a result of a payment instruction given by the customer. To my mind, nobody could reasonably so interpret Clydesdale's conditions. The question is rather whether a fee is incurred if the account would not have gone into unarranged overdraft *at any time* during the month but for interest and charges being deducted from the account.

198. I agree with Clydesdale that the natural interpretation of the terms is that the fee is incurred wherever the account is in unarranged overdraft at some time during the month. This, it seems to me, is the true interpretation of the terms, notwithstanding that under Regulation 7 the meaning most favourable to the customer is to prevail if there is doubt about the meaning of a written term. I am, however, unable to accept that the position is clear as Clydesdale submits. In my judgment, the inconsistency in the wording of condition 8.3 that the OFT identifies is a real one, and as a result a typical customer might understandably be confused about the position. In my judgment, the condition is not in plain intelligible language in this respect.

199. "Scope" uncertainty": the OFT further says that Clydesdale's conditions do not make it clear when an Unpaid Item Charge is levied, which in turn might determine whether the account goes into unarranged overdraft, so as to lead to a Monthly Unplanned Borrowing Fee being incurred. (There might be debate whether this complaint is properly categorised as "scope" uncertainty, but that is unimportant.) Although the OFT acknowledges that the customer would probably suppose that the Unpaid Item Charge would be debited immediately, the OFT submits that Clydesdale's terms do not make this clear, whereas in the case of other fees the customer is specifically told when the charge will be debited. (For example, in the case of the Daily Unplanned

Borrowing Fee, he is told by clause 8.3.2(a) that the fee "will be debited to your account as it becomes chargeable, without any further notice to you".)

200. I do not consider that Clydesdale's terms are unclear about this in any real sense. In my judgment, it is plain that the Bank is entitled to debit the Unpaid Item Charge once it is incurred, and I reject the OFT's contention about this.

201. I therefore conclude that Clydesdale's terms are in plain intelligible language except in respect of the "Relevant Instruction" uncertainty.

HBOS's terms

202. HBOS plc is the holding company of the HBOS Group, which was established in September 2001 by the merger of Halifax Group plc and The Governor and Company of the Bank of Scotland.

203. HBOS offers customers a variety of current accounts: a High Interest account, an ultimate reward account, a money back account, and a student current account as well as a standard current account. When a customer opens a current account, HBOS provides him with a brochure called "Bank Accounts, Special Conditions and Bank Account Conditions", and an Interest Rates and Account Charges leaflet which is referred to in, and incorporated into, the conditions. HBOS's conditions are dated October 2007 and came into force on 1 December 2007. (Similar documentation was provided to existing customers, but for them the information in the brochure and the leaflet was gathered together into a single brochure.)

204. The brochure explains that all HBOS's current accounts offer certain main services and facilities, which are referred to in the brochure as "Main Services". They include these:

i) "You may specifically request, and we may agree to provide, an Arranged Overdraft which will allow you to borrow money from us up to a certain limit"

ii) "You may make an informal request for an Unarranged Overdraft, by instructing us to make a payment which, if we chose to comply with it, would make your account exceed (or further exceed) its overdraft limit, or if you have no Arranged Overdraft, cause your account to be overdrawn (or further overdrawn). (Unless we have guaranteed to a third party that we will make the payment, we do not have to comply with an informal request for an Unarranged Overdraft)."

205. Under the heading "Fees for our services" the brochure states that the Bank's current fees are summarised later in the brochure and set out in the Interest Rates and Account Charges leaflet, and then "highlights some of the fees that you may have to pay for our Main Services and Additional Services", and goes on to state this under the heading "Main Services":

> "If your account remains in credit, and we do not receive an informal request for an overdraft, then at present you will not usually have to pay any fees for having the benefit of the Main Services.

> If your account remains within your overdraft limit and you do not make an informal request for an overdraft, then you will not usually have to pay any fees for having the benefit of the Main Services. You will have to pay interest on the amount by which you are overdrawn at a rate applicable to arranged overdrafts.
>
> If you make an informal request for an overdraft then you will have to pay the following fees for having the benefit of the Main Services on your account:
>
> 1. If we comply with an informal request for an overdraft, then we are entitled to charge you a fee (called a 'Paid Item Fee'). If we do not comply with an informal request for an overdraft, then we are entitled to charge you a fee (called an 'Unpaid Item Fee')
>
> 2. If you have an Unarranged Overdraft then we will charge you a fee every month (called an 'Unarranged Overdraft Fee') for so long as your account remains overdrawn or (if you have an Arranged Overdraft) overdrawn beyond your overdraft limit. We will also charge you interest on the amount of any Unarranged Overdraft at a higher rate applicable to unarranged overdrafts."

206. There is then (after reference to Additional Services) a heading "What can you do to avoid or reduce overdraft fees?", and the advice under it includes this:

> "Contact us to seek to arrange an overdraft. If you require an overdraft, or an increase to an Arranged Overdraft, it would be in your interests to contact us to discuss your borrowing requirements as it will be cheaper for you to have an Arranged Overdraft rather than to make several Informal Overdraft Requests."

The expression "overdraft" is defined in the Conditions as a "facility allowing you to borrow money from us on your account", and an "Unarranged Overdraft" is defined as "an overdraft that has not been organised with us before you go into overdraft".

207. The OFT criticises these provisions as devised to suggest that HBOS is providing a service when it is not in reality doing so. Thus, for example, it is said that the description of an "unarranged overdraft" as a "facility" (rather than simply a loan) is designed to present an unreal equivalence between an arranged overdraft and an unarranged overdraft. I am unable to agree that it is unnatural or misleading so to use the terms "overdraft" and "facility" in this context.

208. Condition 21 is about when HBOS can take money from the customer's account. It states that it can do so, inter alia, to cover "any fee that you owe us on your account (including Unarranged Overdraft Fees, Paid Item Fees and Unpaid Item Fees)" and that HBOS may debit funds so whether the account is in credit or is overdrawn or goes into overdraft because of the debit.

209. Condition 23 introduces the provisions that set out when fees and charges may be levied, and condition 23.1 reads as follows:

> "We can charge you charges and fees on your account for the services and facilities that we provide for you. Fees for overdrafts are explained in conditions 27, 28 and 29. Full details of our current charges and fees are contained in our Interest Rates and Account Charges leaflet. Please ask us for a copy of that leaflet. "

210. Conditions 27, 28 and 29 are under the heading, "Borrowing from us". Condition 27 is about "Arranged overdrafts", explaining that interest may be charged on any money borrowed but not mentioning an arrangement or facility fee. Condition 28 is about "Unarranged overdrafts", but before setting it out I should say that the expression "instruction" is defined as follows:

> "An instruction is made by you when you tell us, by any means, to pay money out of your account. Your instructions may include card transactions, Direct Debits, standing orders, writing a cheque, ATM mobile telephone top-ups, CHAPS, international payments or any other payment instructions, including those made through the telephone or on-line banking service."

Condition 28 reads as follows:

> "28.1 You may also make an informal request for an overdraft by giving us an instruction to make a payment which, if we complied with it, would make your account exceed or further exceed its overdraft limit or, if you have no Arranged Overdraft, cause your account to be overdrawn or further overdrawn. An overdraft which has not been arranged with us in advance is called an Unarranged Overdraft.
>
> 28.2 Whenever you make an informal request for an overdraft, we will consider it and decide whether or not to comply with it. We do not have to comply with any such request, unless we have guaranteed to a third party that we would make the payment requested.
>
> 28.2.1 If, on considering an informal request for an overdraft, we decide not to make the payment, we will inform you of our decision by letter, and we are entitled to charge you an Unpaid Item Fee. This fee will be collected from your account automatically 15 days from the date of the letter.
>
> 28.2.2 If, on considering an informal request for an overdraft, we decide to agree to it, or we have to make the payment because it has been guaranteed to a third

party, we will inform you of our decision by letter and we are entitled to charge you a Paid Item Fee. This fee will be collected from your account automatically 15 days from the date of the letter.

28.3 We are also entitled to charge you a fee (called an Unarranged Overdraft Fee) for every month in which you at any time have an Unarranged Overdraft, which will be collected from your account automatically at the end of the following month. This is in addition to any other fees which arise under condition 28.2.

28.4 If you have an Unarranged Overdraft, we will charge you interest at the rate we set for Unarranged Overdrafts on that proportion of the amount which is unarranged. This rate will usually be higher than the rate we set for an Arranged Overdraft. This is in addition to any other fees which arise under conditions 28.2 and 28.3."

211. Condition 29.1 states that interest rates and fees for overdrafts are set out in a leaflet, and advises where it can be obtained. Condition 29.5 provides, "At any time we may require you to pay us the whole or part of any overdraft, interest and fees or charges which you owe on your account". At paragraph 29.7, HBOS give this advice:

> "If you do require an overdraft or an increase to an Arranged Overdraft, it would be in your interests to contact us to discuss your borrowing requirements as it will be cheaper for you to have an Arranged Overdraft rather than to make several informal requests for an overdraft."

212. The Interest Rates and Account Charges leaflet is entitled "Halifax Bank Accounts, Interest rates and account charges" (and, in the case of existing customers who were notified of HBOS's new terms in November 2007, this information is set out in section 4 of the Conditions brochure). It provides for a Paid Item Charge of £35, for an Unpaid Item Charge of £35 (from 1 December 2007) and for an "Unarranged Overdraft Fee" of £28, this Fee being described as follows:

> "An overdraft administration fee is applied when your account goes overdrawn without a pre-arranged facility or when it exceeds an arranged facility."

(There are different rates for students, which I can leave aside: the differences are immaterial for present purposes.)

213. HBOS's Relevant Charges therefore are:

i) An Unpaid Item Charge. This is £35 for most customers, subject to a limit of three charges on any day.

ii) A Paid Item Charge. This is £35 for most customers, again subject to a limit of three charges on any day. HBOS does not have a distinct Guaranteed Paid Item Charge.

iii) An Overdraft Excess Charge, called an Unarranged Overdraft Fee, which is payable on a monthly basis if there is a movement in the balance that creates an overdraft without, or in excess of, an arranged facility. This is a charge of £28, no more than one charge being levied in any month.

214. HBOS's terms are criticised in respect of Relevant Instruction uncertainty and scope uncertainty.

215. Relevant Instruction uncertainty: the OFT complains that the customer is not told clearly whether Relevant Charges are chargeable when the account goes into unarranged overdraft because charges or interest is debited to the account or because a receipt previously credited to the account is reversed. It is said that the customer has to draw inferences from a number of clauses in order to ascertain the position (because, as I understand the OFT's point, there are definitions of some relevant expressions, including "instruction"), and that the meaning and effect of the terms are obscured by the introduction of the unreal concept of the customer making a request for an unarranged overdraft.

216. I am not persuaded that HBOS's terms are unclear because certain terms are defined. The definitions are not surprising or difficult to understand, and the customer is not unduly diverted from the operative provisions by having to refer to definitions. I also cannot accept that there is any want of clarity (because of the references to the customer making requests or for any other reason) about whether Relevant Charges are incurred when the account goes into unarranged overdraft because interest or charges are debited to it or because a credit is reversed. In the case of Paid and Unpaid Item Charges, the terms clearly state that the charge is levied if the customer gives an instruction to pay money out of the account: there can, as I see it, be no doubt that these charges come about when the overdraft is the result of an instruction given by the customer and not otherwise. In the case of the Unarranged Overdraft Fee, on the other hand, the terms explain equally clearly that this is incurred when the customer has an unarranged overdraft. Although the terms contemplate that the customer might informally request an unarranged overdraft, there is nowhere any suggestion that this is the only way in which an unarranged overdraft can come about. Indeed, condition 21 makes it clear (if there were room for doubt) that charges may be levied if the account goes overdrawn because of sums taken by the Bank from the account.

217. I consider that it would be clear to the typical customer that HBOS may levy the Unarranged Overdraft Fee if the overdraft comes about because of charges or interest debited to the account or if a payment into the account is reversed, but may not impose other Relevant Charges in these circumstances. I reject the criticism of HBOS's terms on the grounds of Relevant Instruction uncertainty.

218. Scope uncertainty: the OFT submits that there is inconsistency between HBOS's terms and its Interest Rate and Account Charges leaflet about when Unarranged Overdraft Fees are charged. The terms refer to the fee being levied for every month *in which* the customer *has* an unarranged overdraft. The leaflet refers to "when your

account *goes* overdrawn" which, the OFT argues, would not entitle HBOS to levy a charge if an account *remains* overdrawn, having become overdrawn in the previous month.

219. HBOS disputes this: it says that the contractual provisions must be read together, and then it is clear that an Unarranged Overdraft Charge is levied for every month in which the account has an unarranged overdraft. I agree that the Terms so provide, both in the description under the heading "Main Services" of when an Unarranged Overdraft Fee is charged and in clause 28.3 itself. However, it seems to me that the description in the leaflet of an Unarranged Overdraft Fee obscures the position: indeed its more natural meaning is that the fee is charged only for the month in which the account goes into unarranged overdraft. If a customer were seeking to find out when the fee is charged, he might understandably and reasonably go to the leaflet and, believing that he has found the answer there, look no further. If the leaflet is misleading (as I consider it to be), it is to my mind no answer that the position would be explained to a customer who looked elsewhere in the contract. In any case, taking the Terms and the leaflet together, to my mind the position is not set out in plain intelligible language.

220. I conclude that HBOS's terms are not in plain intelligible language in this respect and only in this respect.

HSBC's terms

221. HSBC plc offers customers a range of current accounts under its own name and also as First Direct accounts, which provide primarily a telephone and internet banking service, supported by HSBC's branch network for transactions that cannot be accommodated remotely. HSBC's most popular account is what is simply called the "Bank Account", but the Bank Account Plus and the Premier Account are similar to it as far as is relevant. The First Direct account which is now available to new customers is the 1st Account, which provides customers with an overdraft facility of £500, including an interest free overdraft facility of £250.

222. The operation of the Bank Account is governed by HSBC's "Personal Banking Terms and Conditions", section 2 of which covers current accounts. These Terms and Conditions came into force on 1 December 2006. HSBC's pricing leaflet, as is stated on its front, also forms part of the contract governing the operation of the account. (Clause 4.4 of the Terms and Conditions states that the contract also includes information on the inside of the front cover of the customer's cheque book, but nothing turns upon that.)

223. In section 2 of the Terms and Conditions, clause 3 is directed to "Paying into your account". Clause 3.7 deals with the position if a cheque paid into a customer's account is returned unpaid and states that the amount will be deducted from the account, and continues (in bold print), "If you withdraw against a cheque which is later returned unpaid, and the deduction of the amount of the unpaid cheque from your account would either make your account go overdrawn or go over an existing overdraft limit, we will treat this as an informal request for an overdraft", and then refers the customer to clause 7.3. As Mr Richard Snowden QC submitted on behalf of HSBC, and as was not disputed and I accept, the term "withdrawal against a

cheque" does not refer only to withdrawal in cash but to any payment from the account.

224. Clause 3.8 provides as follows:

> "If an electronic payment is fraudulently or mistakenly paid into your account, the amount of the payment may subsequently be deducted. This may happen even if you have used the funds to make a payment, transferred or withdrawn all or part of them. If the deduction of the electronic payment from your account would either make your account go overdrawn or go over an existing overdraft limit, we will treat this as an informal request for an overdraft – please see clause 7.3 for further details."

225. Clause 4 is headed "Payments from your account", and in clause 4.1 HSBC says that:

> "We will make payments from your account if:
>
> - you authorise them in any of the ways set out in these Terms, but we may decline to make a payment if the amount exceeds any limit we set for monitoring or fraud prevention purposes; and
>
> - there are cleared funds in your account or they are covered by an overdraft that we have agreed following a formal or informal request from you, made in one of the ways described in clause 7.3. We may consider any other payments we have made or agreed to make from your account, or which have already been authorised, such as card transactions. This will be regardless of whether or not these transactions have already been deducted from your account."

226. Clause 4.2 provides:

> "If we receive:
>
> - any cheque drawn by you (including any cheque guaranteed by an appropriate card … that we may be bound to honour); or
>
> - any debit card transaction on your account; or
>
> - any other payment or withdrawal instruction or request made by you (or by anyone with your authority) to us in any way;
>
> that would, if honoured by us, either make your account go overdrawn or go over an existing overdraft limit, we will treat this as an informal request from you

for an overdraft – please see clause 7.3 for further details."

227. Clause 7 is about "Borrowing from us". Clause 7.1 states that the customer must be at least 18 years of age to borrow from HSBC. I should set out clauses 7.3, 7.4 and 7.5:

> "7.3 You can request an overdraft, or an increase to an existing overdraft, on your Bank Account … from us. You can do this in one of two ways, either:
>
> - by way of a formal request, that is, you ask us for and we agree to provide you with, an overdraft or an increase to an existing overdraft limit before you authorise any payments or withdrawals from your account that, if made by us, would cause your account to go overdrawn or over an existing overdraft limit; or
>
> - by way of an informal request, that is, where you authorise a payment or withdrawal to be made from your account which, if made by us, would cause your account to go overdrawn or over an existing overdraft limit without having agreed with us in advance an overdraft or an increase in an existing overdraft limit on your account to cover such payment.
>
> 7.4 If we receive a formal request for an overdraft or an increase to an existing overdraft limit from you, we will consider your request and, if we agree to it, we will give you a letter setting out the terms of the overdraft. An Arrangement Fee may be charged if we agree to your formal request. We may agree to provide you with another overdraft at the end of the term of your facility and, if we do so, an Arrangement Fee may be payable.
>
> Please refer to clause 6 for more details of our charges.
>
> 7.5 If we receive an informal request for an overdraft or an increase to an existing overdraft limit from you, we will consider your request and if we agree to it, we will provide you with an overdraft or an increase to your existing overdraft to cover the item concerned for 31 days. An Arrangement Fee may be charged if we agree to your informal request.
>
> You will not be charged further Arrangement Fee(s) provided your account does not go any further overdrawn. However, if your account goes into credit, or the overdrawn balance on your account decreases, and you then make another informal request for an overdraft and we agree to such a request, we may charge you a further Arrangement Fee.

> If we do not agree to an informal request from you for an overdraft or an increase to an existing overdraft limit, then we will not make any payment authorised by you that would cause your account to go overdrawn or over any agreed overdraft limit. We may charge for considering and returning these informal payment requests.
>
> Please refer to clause 6 for more details about our charges.
>
> If you do require an overdraft or an increase to an existing overdraft, it would be in your interests to contact us to discuss your borrowing requirements as it would probably be cheaper for you to have a formal overdraft than several informal overdrafts."

As is apparent from the last two sentences, not all of clause 7.5 is of contractual effect: and it includes statements that are advisory or exhortatory in character.

228. Clause 6 explains that the Bank's charges are in the price list. The leaflet of "Price List and Interest Rates" sets out under the heading "Overdraft Service" an explanation (in terms essentially similar to condition 7.3) that the customer can make a formal or an informal request. It then states under the heading "Arrangement Fees" that a first overdraft in 6 months is free and the fee for subsequent overdrafts is £25. As for Return Fees, it is said: "We may not be able to grant every request you make for an overdraft. Where we decline an informal overdraft request we will not charge an Arrangement Fee but a Return Fee will be payable for considering and returning payment requests eg, cheque, standing order, direct debit etc.". The amount of the Return Fees is set out: "Up to £10, no charge. Up to £25, £10 per item. Above £25, £25 per item."

229. The leaflet also sets out HSBC's "Fair Fees Policy" in the following terms:

> "We always aim to be fair in the way we charge for our Overdraft services, therefore:
>
> - we will not charge an Arrangement Fee provided, within the last 6 months, either:
>
> - we have not agreed to a request from you for an overdraft, or
>
> - before 1 November 2006, you have not exceeded your overdraft limit or gone overdrawn without a limit
>
> - we will not charge an Arrangement Fee for an overdraft request of £10 or less
>
> - we will not charge Arrangement Fees for Informal overdrafts if covering funds are paid in before the end of the day

- we will give advance notice before Arrangement Fees are debited from your account

- if debited Arrangement Fees (or interest) cause your account to go overdrawn or further overdrawn we will not make a further charge

- arrangement Fees charged will never be higher than the overdraft requested (eg a £15 overdraft will not cost you say, £50)

- we will not charge more than one Arrangement Fee a day".

Again, the statement of the Fair Fees Policy includes both statements of contractual effect and other non-contractual statements of HSBC's aspiration.

230. Thus the amount of the Return Fee therefore depends upon the amount of the Relevant Instruction, not upon the amount of the overdraft that would be granted if the Relevant Instruction is accepted. The question whether an Arrangement Fee by way of a Relevant Charge is levied depends upon the amount of the overdraft allowed, not the amount of the Relevant Instruction that led to it.

231. The Terms and Conditions governing First Direct's 1st account are not materially different from those of the HSBC Bank Account (although First Direct does not accept persons under 18 years of age as current account customers and nothing is said about the customer having to be 18 years of age to borrow on the account).

232. Thus HSBC's Relevant Charges (on its "Bank Account" and on the 1st account) are:

i) an Unpaid Item Charge, called a "Return Fee", which is £10 per item for items of an amount of over £10 to £25 and £25 for larger items: no charge is made for items of an amount up to £10.

ii) A Paid Item Charge, called an "Arrangement Fee", of £25, subject to certain exceptions and qualifications which are set out in their Fair Fees Policy. No special terms apply when a Relevant Instruction is supported by a Cheque Guarantee Card, and there is no distinct Guaranteed Cheque Item Charge.

233. The same Arrangement Fee is charged where an overdraft facility is arranged in advance, and indeed the same interest is charged whether or not an overdraft is arranged in advance. However, when the overdraft is not arranged in advance, an overdraft facility is granted for only 31 days, whereas, according to HSBC's evidence which I accept, if a facility is arranged in advance, it is often from year to year.

234. HSBC's terms and conditions are criticised on the basis of "available funds" uncertainty. The OFT says that clause 4.1 of the terms and conditions states that the Bank may "consider any other payments that [the Bank has] made or agreed to make from [the] account, or which [the customer has] already authorised", and that this leaves it unclear what payments are or may be taken into account on this basis. For example, the OFT asks, might the Bank take into account a payment due on a later

date, (notionally) hypothecate funds to meet it and so treat a payment instruction as a request for an unarranged overdraft? And if so, what future payments might it bring into account in this way?

235. The OFT's complaint is similar to that which is made in respect of Barclays' RCA, and I reject it as far-fetched. I do not think that clause 4.1 is unclear in this respect. I cannot accept that a typical customer would suppose from clause 4.1 that HSBC is entitled to set aside funds against future payments or that HSBC would do so. The reference to payments that HSBC has agreed to make does not suggest this.

236. The OFT also asserted that it is not clear from clause 7.3 what "triggers" an Unpaid Item Charge and what "triggers" a Paid Item Charge; and also it is not clear from clause 3.7 how charges are calculated if a credit to the account is reversed because a cheque is returned unpaid. These arguments were not developed except that it is said that the position is obscured by "the request machinery". I reject them.

237. Finally the OFT says that clause 4.2 is unclear because it focuses on the Bank receiving a cheque or other payments instruction, whereas in reality the Bank will consider whether there are funds available to make payment not at the very moment when the instruction is received but when the instruction is processed (an example of the criticism to which I referred at paragraph 107 above).

238. As I have indicated, I do not consider this complaint to be justified. Clause 4.2 does not suggest that the question of available funds to make a payment is decided at the very moment that a payment instruction is received, and I cannot accept that a typical customer would be confused by clause 4.2 as the OFT appears to suggest. I reject the criticism of HSBC's conditions with regard to what "triggers" the Relevant Charges.

239. I conclude that HSBC's terms are in plain intelligible language.

Lloyds TSB's terms

240. In December 1995 Lloyds Bank plc merged with the TSB Group plc under a Scheme of Arrangement, and Lloyds TSB plc was established. Before November 2007 Lloyds TSB had not had full written terms, although it had leaflets about its interest rates and charges and some express terms in documents specific to the particular account or product that the customer chose. Lloyds TSB's current Personal Banking Terms and Conditions, published in a booklet called "Your banking relationship with us", came into effect on 2 November 2007. The booklet states that it contains general conditions that apply to personal bank accounts and some related services, and that, while most of the conditions already applied to accounts, the Bank had updated and clarified some conditions and changed others. The agreement between Lloyds TSB and the customer is stated to be made up of the general conditions in the booklet and "additional conditions", which state the interest rates and charges and include other terms that apply to a specific service or account and which will be given to the customer separately. Lloyds TSB says that it does provide the additional conditions to customers, for example by letter or in leaflets and the bank charges guide.

241. There are also in evidence three leaflets which contain information about Lloyds TSB's charges: "Banking charges. Everything you need to know in one guide";

"What you pay for overdraft borrowing"; and "Avoid slipping into the red, We'll help you steer clear".

242. The booklet, "Your banking relationship with us", states in the introduction:

> "We may let you have an overdraft on your current account and, as part of our overall service, we will always consider a request for an Unplanned Overdraft or increased Unplanned Overdraft (which is described more fully in condition 16) and tell you of our decision. Often we do grant an Unplanned Overdraft for a short period because we believe this to be an important aspect of the banking service which we offer our customers. If we always refused Unplanned Overdrafts this would in many cases lead to inconvenience or embarrassment for our customers".

243. Condition 16 is in a section of the booklet headed, "Banking services". It is also referred to in condition 13, which is headed "Payments out of your account". Condition 13.1(b) reads, "It is your responsibility to make sure that you have available funds in your account (see condition 16) to cover any cheques you have written. Otherwise we may return the cheque unpaid".

244. Condition 15 deals with "Interest and Charges". Condition 15.1 states that details of the Bank's current interest rates and charges can be found in the Bank's banking charges and interest guides and on its website, and condition 15.7 provides, "We may take any interest and charges you owe us from money available in the same account, or from your other accounts…"

245. Condition 16 of the Personal Banking Terms and Conditions is headed "Overdrafts and available funds". It defines the expression "available funds" as "the amount you can use to make payments out of your account each day", and provides that overdrafts are repayable on demand, and then, after referring to "Planned Overdrafts", contains terms about "Unplanned Overdrafts" at conditions 16.5 to 16.8:

> "16.5 If you try to make a payment out of your account (for example, by card, Direct Debit or cheque) for which you do not have available funds, we will treat this as a request for an 'Unplanned Overdraft', or for an increase in your Unplanned Overdraft if you already have one, and will consider whether we agree to your request taking into account your personal circumstances. We will not be liable to you if we do not agree to give you an Unplanned Overdraft or increased Unplanned Overdraft.
>
> 16.6 When your account goes into Unplanned Overdraft (but not when we increase one you already have), we will write to tell you we have agreed to it and our charges for considering and agreeing to your request, but we will ignore any Unplanned Overdrafts which are repaid by the end of the day. We only provide Unplanned Overdrafts for a limited period and we will write to tell you when you must repay one. Your Unplanned

> Overdraft will in any case end as soon as you have available funds again in your account (but this does not stop you requesting a new Unplanned Overdraft in future).
>
> 16.7 The amount you have to pay for an overdraft depends on whether it is a Planned Overdraft or an Unplanned Overdraft. The interest rates and charges that apply are set out in our banking charges and interest rates guides, in branches and on our website. [The Bank's guides state that the Bank does not charge for setting up a Planned Overdraft.]
>
> 16.8 Where you do not have available funds to make a payment and we do not agree to your request for an Unplanned Overdraft or increased Unplanned Overdraft, you will not be able to make that payment. We will write to tell you we have declined your request, and our charges for considering the request, dealing with the other bank and telling you about this service."

246. Condition 24.3 refers to cheque guarantee cards:

> "The benefit of a cheque guarantee card is to give an assurance to the person you are making the payment to that we will pay the cheque even if there are not available funds in your account to make the payment. So, if you write a cheque for which you do not have available funds we will treat this as a request for an Unplanned Overdraft or increased Unplanned Overdraft."

247. The three leaflets published by Lloyds TSB provide information about the level of charges. I refer to that entitled "Banking charges. Everything you need to know in one guide". It states this under the heading "Borrowing from us":

> "If you try to make a payment but do not have enough available funds in your account, then we will either agree to an Unplanned Overdraft covering that payment or you will not be able to make that payment. Fees will be charged in either case. Please see condition 16 in "Your Banking Relationship with us" for more details about overdrafts.
>
> You will also be charged interest if you use a Planned or Unplanned Overdraft. All overdrafts are repayable on demand.
>
> How much we lend depends on our assessment of your personal circumstances. Lloyds TSB is a responsible lender and we only wish you to borrow what you can afford and in a way that is best for you."

248. The leaflet continues under the heading "Unplanned Overdrafts" as follows:

> "If you try to make a payment out of your account (for example, by Direct Debit or cheque) for which you don't have

> enough available funds, we will treat this as a request for an Unplanned Overdraft, or for an increase in an Unplanned Overdraft you already have.
>
> We will consider whether to agree to your request taking into account your personal circumstances.
>
> If we agree to your request for an Unplanned Overdraft, we will charge you the following fees".

249. The leaflet then describes:

i) a monthly fee of £15 with this description: "You will pay this fee if you have an Unplanned Overdraft at any time during your monthly billing period (even if your next monthly billing period is only a few days away). We will charge you a maximum of one monthly fee in a monthly billing period"; and

ii) a daily fee with this description: "You will pay a daily fee for using an Unplanned Overdraft. The amount of the fee will be worked out at the end of each day (including weekends and bank holidays) on the balance of your Unplanned Overdraft. We will charge you a maximum of 10 daily fees in a monthly billing period".

The amount of the fees is stated to depend on the Unplanned Overdraft balance, being £6 a day if it is less than £25; £15 a day if it is £25 to £100; and £20 a day if it is more than £100.

A note observes that Unplanned Overdrafts are "intended to be used for short-term borrowing", and that the customers will find it cheaper to ask for a Planned Overdraft (or an increased Planned Overdraft) rather than requesting and using Unplanned Overdrafts. This is because of the Monthly fees and Daily fees: the same rate of interest is payable on Planned and Unplanned overdrafts.

250. The leaflet says this of "Returned items":

> "Where you do not have enough available funds to make a payment and we do not agree to grant or extend an Unplanned Overdraft, you will not be able to make that payment. We will write to tell you we have declined your request. Our charge for considering the request, dealing with the other bank and telling you about this service is as follows:
>
> Returned item fee, £20 for each unpaid item. We will charge you up to a maximum of three fees a day"

251. Thus, Lloyds TSB's Relevant Charges are:

i) An Unpaid Item Charge, which is £20 per item, subject to a cap of three charges on any day; and

ii) Overdraft Excess Charges, being a monthly fee of £15 a month when an account goes into unarranged overdraft or remains in unarranged overdraft

during the month; and a daily fee of between £6 and £20 depending on the level of the unarranged overdraft, subject to a cap of ten daily fees in any month.

Lloyds TSB does not levy a Paid Item Charge or a Guaranteed Paid Item Charge.

252. There is no criticism of Lloyds TSB as far as the available funds uncertainty, the timing uncertainty and the scope uncertainty are concerned. Its terms are said not to be in plain intelligible language because of Relevant Instruction uncertainty. Here the OFT says that it is uncertain whether condition 16.5 only gives examples of "requests" or whether it exhaustively defines what constitutes a "request", and that therefore the terms do not state in plain intelligible language what triggers a charge either in relation to the Unpaid Item Charge or in relation to the daily or the monthly fees.

253. I cannot accept this criticism. I cannot accept that the examples were intended to be exhaustive (so that, say, a standing order could not incur a Relevant Charge, unlike a direct debit instruction), and I cannot suppose that the typical customer would not realise that the types of payments introduced in condition 16.5 by the phrase "for example" are indeed simply examples.

254. I revert to the criticism against Lloyds TSB's terms that they are uncertain because of criteria uncertainty. The leaflet, "Bank Charges, Everything you need to know in one Guide", states that the decision about upon how much the Bank will lend depends upon its assessment of the customer's "personal circumstances", but does not define or explain what sort of "circumstances" are assessed. Mr Bankim Thanki QC, who represented Lloyds TSB, did not dispute, as I understand it, that the Bank accepts a contractual obligation that "personal circumstances" will be one criterion which will inform the decision. For my part, I am not convinced that the statement is to be taken to be intended as contractually binding, any more than the statement that accompanies it, "Lloyds TSB is a responsible lender…". But assuming that it is, in my judgment the reference to "personal circumstances" simply means that the Bank will consider the customer's individual position and will not make the decision only by reference to general rules which it might adopt. In my judgment, this is conveyed sufficiently clearly to the typical customer.

255. I conclude that Lloyds TSB's terms are in plain intelligible language.

Nationwide's terms

256. Nationwide is a mutual building society, which is owned by and managed for the benefit of its members, who are primarily retail savings customers, residential mortgage customers and current account holders.

257. Nationwide offers customers a FlexAccount, which is a name used for various types of accounts with different facilities. As I have said, one form of FlexAccount and its Cash Card account are really by way of basic accounts, but the majority of FlexAccount customers are provided with a wider range of facilities, including the possibility of an overdraft facility arranged in advance. Mr Geoffrey Vos QC, who represented Nationwide, pointed out that the contract between Nationwide and a FlexAccount customer gives the customer no right to an unarranged overdraft.

258. When customers open an account, a standard application form is completed (by the Nationwide when the account is opened at a branch or by telephone and by the applicant when it is opened online). Generally applicants opening a FlexAccount are required to deposit funds, a minimum of £100. When the application is completed, Nationwide provides the customer with its current Terms and Conditions, a copy of which the customer signs, and its Current Tariff Leaflet. (It also provides two other leaflets, one called "Making the most of your FlexAccount" and the other called "Making the most of your Overdraft", but they are not of contractual force.) The Terms and Conditions now used were issued in October 2007 and the Tariff Leaflet in November 2007.

259. As I have indicated, most of Nationwide's FlexAccount customers are eligible to seek overdraft facilities on the account if they are aged 18 years, and, if Nationwide is prepared to make overdraft facilities available, the customer is informed of the amount of the facility, to which Nationwide agrees, and that information is confirmed by letter.

260. Nationwide's FlexAccount customers have a share investment in the society, and the balance standing to their account represents the value of the share investment. A member keeps his share when his account is in debit. The Terms and Conditions of the FlexAccount provide that an account holder's membership may be withdrawn if his account goes into unarranged overdraft, but (as I find on the basis of the evidence of Mr Jeremy Wood, the Divisional Director, Consumer Finance at Nationwide) in practice Nationwide does not withdraw membership in these circumstances and membership is withdrawn only when an account is closed.

261. The Terms and Conditions governing the FlexAccount include these:

i) (at condition 12) that Nationwide will pay interest on credit balances in the account.

ii) (at condition 13) "The central clearing cycle is normally three days and you should allow this time for your payment to clear ...".

iii) (at condition 14) "Payments … from your account will only be made if there are enough cleared funds available in your account. If you need to transfer funds from another Nationwide account this needs to be done by 5.00pm on the working day before payments are due. We may decline to make a payment if the amount exceeds any limit we set for monitoring or fraud prevention purposes".

iv) (at condition 21) -

> "We can debit your account with additional charges in accordance with the scale applicable at the time you incur the charge. You can ask us for the latest scale of charges at any time. We can change or add to the additional charges but the following are examples of when you will have to pay us such a charge:
>
> i) if your account becomes overdrawn without our authority

ii) if a cheque you have written cannot be paid because of insufficient funds in the account

iii) if a Direct Debit or standing order on your account cannot be paid because of insufficient funds in the account."

v) Condition 22 concerns guaranteed cheques: "The guarantee that your Card provides is only valid for Nationwide cheques drawn on your FlexAccount cheque book for less than the guarantee limit and signed in the presence of the payee …"

vi) Condition 30 provides:

"When deciding to authorise a transaction [sc. initiated by use of a Debit Card], we will calculate the available funds in your account and may consider any outstanding Debit Card transactions; any authorisation given for a future Debit Card transaction; and any funds that we reasonably believe to have been credited or debited to or from your account".

vii) Condition 47 explains that interest will be charged on overdrafts, but no arrangement fee or similar charge is mentioned.

viii) Condition 49 provides:

"Cheque Guarantee Cards do not entitle you to overdraw your account or exceed a previously agreed overdraft limit. Cheques guaranteed with your card will be debited from your account and cannot be stopped. Suspension or cancellation of the card does not affect our right to debit your account with the amount of any cheque(s) that have been guaranteed – whether payment has been countermanded or not, or whether the cheque is technically irregular".

ix) Condition 51 provides:

"If withdrawals or payments made from your FlexAccount create an unarranged overdraft, your account must be brought back into credit immediately."

262. The current Tariff Leaflet provides for an Unauthorised Overdraft Charge of £20 per month, a charge of £21.50 for "cheques guaranteed when insufficient cleared funds", and a charge of £30 when a Relevant Instruction is not accepted.

263. Thus Nationwide's Relevant Charges are:

i) An Unpaid Item Charge, the amount of which is £30.

ii) A Guaranteed Paid Item Charge of £21.50.

iii) An Unauthorised Overdraft Charge, which is £20 for any month during which the account is overdrawn where the necessary facility was not arranged in

advance. The same fee is charged however many times the account is so overdrawn during the month.

Nationwide does not levy a Paid Item Charge.

264. The OFT criticises Nationwide's Terms and Conditions on the basis of "available funds" uncertainty, "timing" uncertainty, "Relevant Instruction" uncertainty and "scope" uncertainty.

265. "Available funds" uncertainty: the OFT observes that, while condition 14 of the FlexAccount Terms and Conditions states that payments from the account will be made only if there are enough "cleared funds" available in it, no explanation is given of what cleared funds will be treated as being available. Thus, condition 30, which concerns payments arising from use of a debit card, states that when deciding whether to authorise a payment, Nationwide will calculate the available funds in the account, and "may" consider other matters, including any outstanding debit card transactions and any funds that they believe to have been credited to or debited from the account.

266. The thrust of the OFT's criticism is that condition 30 indicates that, when calculating the available funds, account may be taken of such matters as outstanding debit card transactions. That is not my understanding of the condition. It seems to me that it contemplates a calculation of the available funds, and explains that, if there are not available funds and so Nationwide has to decide whether to lend funds to cover the payment, it may weigh the considerations to which condition 30 refers. To my mind, condition 30 makes this clear and is in plain intelligible language.

267. "Timing" uncertainty: the OFT says that condition 14 does not state when payments into the account will need to be made if they are to be included in the cleared funds that are available to be used to make payments, apart from sums transferred from another Nationwide account.

268. This reflects uncertainty inherent in the banking systems. Understandably, Nationwide is able to commit itself when internal transfers need to be made, but does not do so otherwise. I do not consider that the terms and conditions are significantly unclear in this respect.

269. "Relevant Instruction" uncertainty: the OFT says that condition 21 does not make it clear whether, if an account becomes overdrawn not because of payment instructions from the customer but because charges or interest are debited to the account, there is an unarranged overdraft which incurs charges.

270. I reject this criticism also. Condition 21(i) makes it clear that charges may be incurred if the account "becomes overdrawn" and nothing suggests that there is an exception if it becomes overdrawn because of debits for interest or other charges.

271. The "scope" uncertainty: the OFT says that it is unclear whether a customer can incur for the same transaction both a Guaranteed Paid Item Fee and an Unauthorised Overdraft Charge because condition 49 does not refer to the Unauthorised Overdraft Fee.

272. This criticism fails to recognise that whereas the Guaranteed Paid Item Charge is incurred in respect of a specific transaction, the "Unauthorised Overdraft Charge" is triggered by the balance of the customer's account. The fact that condition 49 does not refer to the Unauthorised Overdraft Charge does not obscure the position.

273. I conclude that Nationwide's terms are in plain intelligible language.

RBSG

274. The Royal Bank of Scotland Group plc includes both National Westminster Bank plc ("NatWest") and The Royal Bank of Scotland plc ("RBS"). RBSG publishes for its NatWest customers and for its RBS customers similar booklets entitled "Personal and Private Banking Terms and Conditions", which explain in the introduction that the contract between the Bank and the customer includes the terms and conditions and also "the terms about interest rates and charges in our leaflet "Personal and Private Banking – A Guide to Fees and Interest"".

275. The Terms and Conditions provide, at condition 4.2.1, under the headings "Payments into your account" and "Cheques", that, if a cheque paid into the account is dishonoured, "We will deduct the amount of the cheque from your balance no later than the end of the sixth business day after it was added to your balance. After that, we will not deduct the amount of your cheque from your balance unless you give your consent to our doing so or you were knowingly involved in a fraud concerning the cheque."

276. Condition 5.4. provides under the headings "Payments out of your account" and "Services and Charges" as follows:

> "5.4.1 We may impose:
>
> (a) charges for the operation of your account, including overdraft charges, interest and unpaid item charges; and
>
> (b) other charges relating to your account or to the supply of services requested by you.
>
> 5.4.2 Our current charges for the operation of your account and the other charges we most frequently impose are set out in our leaflet "Personal and Private Banking – A Guide to Fees and Interest". You can also find out about our charges by telephone, on our website ... , or by asking our staff. We will tell you about the charges for any service not covered by the leaflet before we provide the service and at any time you ask.
>
> 5.4.3 There may be other costs (such as taxes) imposed by third parties on your account. We may debit to your account the amount (if any) of any tax, duty or other charge levied on your account by any competent

authority in connection with your account and which we may pay to such authority on your behalf."

277. Condition 6.1 explains about the availability of arranged overdrafts, and condition 6.6.1 states that, if a fee is charged when the Bank arranges or renews an overdraft, it is debited to the customer's account on or shortly after the day on which it is arranged or renewed.

278. Condition 6.3 deals with "Unarranged overdrafts and unpaid items". It provides:

"6.3.1 If you issue instructions for a withdrawal or other payment which would result in:

(a) your account becoming overdrawn, or further overdrawn, without prior arrangement; or

(b) your overdraft limit being exceeded,

we will treat your instructions as an informal request for an unarranged overdraft. General Conditions 6.3.2 and 6.3.3 describe the charges we make when we process your request.

6.3.2 If we are obliged to accept your request because you have used a card to guarantee payment to a third party, we will make a charge known as a Guaranteed Card Payment Fee.

6.3.3 If we are not obliged to accept your request, we will decide, at our discretion, whether to accept it or not. The following charges will apply:

(a) if we accept your request, we will make a charge known as a Paid Referral Fee.

(b) if we do not accept your request, we will make a charge known as an Unpaid Item Fee.

6.3.4 Where you have an unarranged overdraft, in addition to any charge imposed under General Conditions 6.3.2 and 6.3.3, we will:

(a) apply a monthly charge know as a Maintenance Charge; and

(b) charge interest (know as debit interest) on the unarranged overdraft at a rate which is higher than the rate we charge on arranged overdrafts.

6.3.5 You will find details of the interest and charges mentioned in this General Condition 6.3 in "Personal and Private Banking - A guide to Fees and Interest".

6.3.6 If we allow an overdraft to be created or your arranged overdraft limit to be exceeded, this will not mean that your overdraft limit has been changed, nor that we are bound to make any other payment which would have the same effect."

279. Condition 6.4 deals with the calculation of whether the account has become overdrawn, and condition 6.4.1 says that "To determine whether your instructions would result in an unarranged overdraft, we will look at the cleared balance (plus any unused arranged overdraft facility) on your account".

280. Condition 6.6 explains how charges are levied:

"6.6.2 Interest and charges relating to overdrafts (whether arranged in advance or not) will be payable and will be calculated and charged in the manner and at the rates set out in "Personal and Private Banking – A Guide to Fees and Interest" and in any overdraft confirmation letter. Interest will be calculated on the daily cleared overdrawn balance on your account (both before and after any judgment for payment).

…

6.6.4 We may debit your account with any interest, fees, charges or other costs, even if this results in or increases an unarranged overdraft. If an unarranged overdraft arises in this way, we will not charge a Paid Referral Fee under General Condition 6.3.3(a) but we may apply charges and interest under General Condition 6.3.4"

281. Condition 13.3 is about using a debit card, and condition 13.3.4 deals with the position if there are insufficient funds to cover the debit:

"If by using the card you (or any additional cardholder(s)) instruct us to debit your account where there are insufficient funds available to cover the debit, or the requested debit would cause an arranged overdraft limit to be exceeded, we will treat your instructions as an informal request for an unarranged overdraft. If an unarranged overdraft arises as a result (either through exercise of our discretion to pay the item, or through payment being guaranteed to a third party, or through interest and charges being debited to your account) this will be an unarranged overdraft and the provisions set out in General Condition 6 above will apply. "

282. Although there is some difference in presentation, the "leaflets" about interest and fees for NatWest and RBS customers are similar as far as the descriptions of the charges for unarranged overdrafts and unpaid items are concerned and so far is otherwise relevant. (RBSG call them leaflets although they are quite substantial, that

for NatWest customers running to some 20 pages.) Under the heading "The price for your banking services", the basic charging structure is described in these terms:

> "The charges and rates of interest set out in this leaflet include:
>
> - the monthly subscription fees we charge for Advantage Gold, Advantage Private and Advantage Blue (section 4);
>
> - the interest rates we pay you when your account is in credit (section 5);
>
> - the interest rates we charge you when your account is overdrawn (section 6); and
>
> - our overdraft and unpaid item charges (section 7).
>
> These charges and rates of interest work together as the main elements of the pricing structure we use for our current accounts. The way we charge puts you in control of what you pay.
>
> As long as you stay in credit, you can enjoy the services listed in section 3 of this leaflet without any separate charge being made. This is possible because our pricing structure enables us to charge for the provision of the account through the fees, charges and interest set out in sections 4, 6 and 7, and through setting the interest rates shown in section 5 at a level which allows us to benefit from the use we make of any credit balance in the account."

Although this explanation is itself not contractual, I accept RBSG's submission that it is properly brought into account to interpret the parties' rights and obligations under the contract.

283. I should set out how the leaflets describe the Relevant Charges levied by RBSG.

i) There is a "Maintenance Charge" of £28, described as follows:

> "If your account become overdrawn without prior arrangement or any arranged overdraft limit is exceeded, you will be liable for a monthly Maintenance Charge.
>
> The Maintenance Charge will be applied if you have an unarranged overdraft at any time during a monthly charging period. The monthly charging periods for the Maintenance Charge are set out in section 8."

ii) There is a Paid Referral Fee of "£30 for each day on which a Paid Referral occurs (subject to a maximum of £90 in any calendar month)", which is described as follows:

"A Paid Referral Fee will be payable if:

- you informally request an overdraft by issuing instructions for a withdrawal or other payment on your account; and
- the payment cannot be met from the funds in your account or any unused arranged overdraft facility; and
- we decide in our discretion to make the payment, so that an unarranged overdraft is created or increased."

iii) There is a Guaranteed Card Payment Fee of £35 for each transaction:

"A Guaranteed Card Payment Fee will be payable if:

- you informally request an overdraft by issuing instruction for a withdrawal or other payment on your account; and
- the payment cannot be met from the funds in your account or any unused arranged overdraft facility; and
- we are obliged to make the payment because you have used a cheque guarantee or debit card to guarantee payment to a third party."

iv) There is an Unpaid Item Fee of "£38 for each item (subject to a maximum of £114 per day)", which is described thus:

"An Unpaid Item Fee will be payable if:

- you informally request an overdraft by issuing instructions for a withdrawal or other payment; and
- the payment cannot be met from the funds in your account or any unused arranged overdraft facility; and
- we decide in our discretion not to make the payment."

The leaflet continues:

"Making an informal request for an overdraft means you will have to pay a Paid Referral Fee, a Guaranteed Card Payment Fee or an Unpaid Item Fee. If an unarranged overdraft arises, you will also have to pay the Maintenance Charge and interest. For examples showing how our charges work, please see the section headed "Unarranged Overdrafts and Unpaid Items" in our leaflet "Our commitment to you".

284. Thus RBSG's Relevant Charges are:

i) An Unpaid Item Charge, which is £38 per item, subject to a cap of three charges for any day's transactions.

ii) A Paid Item Charge of £30, subject to a cap of one charge for any day's transactions and a cap of three charges in any calendar month.

iii) An Excess Overdraft Charge, which is £28 per month.

iv) A Guaranteed Paid Item Charge of £35 per item.

285. The OFT makes criticisms of RBSG's terms for "available funds" uncertainty, "timing" uncertainty and "Relevant Instruction" uncertainty.

286. "Available funds" uncertainty: the OFT's complaint is that it is unclear when debit card payments are deducted from the account for the purpose of calculating the funds available to make payments without it becoming overdrawn (as explained in condition 6.4.1). This is because condition 13.3.5 states, "Transactions carried out using your card will normally be applied to your account on the day that transaction is carried out or on the next business day".

287. Condition 13.3.5 is not a contractual term defining the parties' rights and obligations. It is, as I understand it, simply an explanation about how in practice payments involving the use of debit cards work, and this would, I think, be readily apparent to the typical consumer. As I have said, when the payment is debited from the customer's account depends, unsurprisingly, upon when the retailer presents it to the Bank unless the payment has been specifically authorised. The uncertainty of which the OFT complains is not because RBSG's terms are unclear, and I reject the complaint of available funds uncertainty.

288. "Timing" uncertainty: the OFT's complaint about timing uncertainty is that it is unclear when the Bank assesses whether there are funds available to meet Relevant Instructions. (The OFT points out that in this respect the current terms differ from the Bank's previous conditions, which stated that funds were assessed at 3.30pm on the working day before it received payment instructions. Although it is not, I think, relevant to what I have to decide, I should mention that, as RBSG explains in one of its leaflets, extended opening hours now mean that some branches accept receipts after 3.30 pm and customers are advised to "check [the position] locally".)

289. Again, this is, to my mind, a complaint not about lack of clarity in RBSG's terms but a reflection of the banking system and the flexibility that the contract reserves to RBSG about how it organises its operations. The terms make it clear that the question whether there are funds available to cover a payment instruction, and so whether Relevant Charges are incurred, depends (in part) upon what funds have been credited to the account when the instruction is processed. The Bank does not make a commitment to the customer to process receipts and instructions in a particular order or to treat funds received by a particular time as funds that are available to meet a payment instruction, but this does not mean that the contractual terms are not in plain intelligible language. I reject the OFT's complaint of timing uncertainty against RBSG.

290. "Relevant Instruction" uncertainty: the OFT acknowledges that condition 6.6.4 of RBSG's terms make it clear that if an account goes into unarranged overdraft because interest or charges are debited to the account, no Paid Item Charge (or Paid Referral Fee) will be incurred but an Excess Overdraft Charge (or Maintenance Charge) will be triggered. However, it says that the terms are unclear about whether Relevant Charges might be incurred if there are insufficient funds in the account to cover a payment instruction because a cheque paid into it is dishonoured and a deduction made from the account under condition 4.2.1.

291. The position here is that, as when fees or interest charged to an account bring about an unarranged overdraft, no Paid Item Charge is incurred but an Excess Overdraft Charge might be. This is because under condition 6.3.1 a Paid Item Charge is triggered by a Relevant Instruction (which the customer has not given in these circumstances) but condition 6.3.4 provides that the Maintenance Fee is payable if the customer has an unarranged overdraft. While the position is not explained as specifically as in the case where interest or charges take the account into overdraft, the terms do, to my mind, make it plain and intelligible. I therefore also reject the OFT's complaint of Relevant Instruction uncertainty.

292. I conclude that RBSG's terms are in plain intelligible language.

Conclusion about plain intelligible language

293. I therefore conclude that the terms of four of the Banks, HSBC, Lloyds TSB, Nationwide and RBSG are in plain intelligible language. Those of Abbey, Barclays, Clydesdale and HBOS are in plain intelligible language except in certain specific and relatively minor respects.

294. What is the effect of my conclusions that the terms of four of the Banks are largely but not entirely in plain intelligible language? The Banks' position is that any assessment of fairness should in these circumstances be restricted to "the parts of the term" that are not plain and intelligible. The OFT's position is that, "The term is thereby opened, as a whole, to the full assessment of fairness". The parties did not fully develop their arguments at the hearing before me, the issues that are raised are not straightforward (not least as to how a "term" is identified for the purpose of this enquiry, given that the OFT recognises that a single contractual clause can comprise more than one "term") and the question is one of some general importance. If I had held that otherwise Regulation 6(2) applied to the Bank's terms, I would have invited submissions as to how the positions adopted in these broad terms by the parties are to be applied to my conclusions about the terms and in light of my conclusion about the nature of the exemption from assessment if Regulation 6(2) does apply (see paragraph 436 below). Since in my judgment Regulation 6(2) does not in any event protect the Banks' terms from assessment as to fairness, it is unnecessary for me to say more about this.

Penalties

295. Before dealing with other issues about the application of the 1999 Regulations, it is convenient next to consider whether the Relevant Terms and Relevant Charges are penalties so as to be unenforceable at common law against the customer. In order for a provision for payment to be penal, it must provide for payment upon a breach of

contract (see Export Credits Guarantee Department v Universal Oil Products Co, [1983] 1 WLR 399) that is not a genuine pre-estimate of loss from the breach but which is extravagant and unconscionable in amount in comparison with the prospective loss (see Jeancharm Ltd v Barnet Football Club Ltd [2003] EWCA Civ 58 at para 27).

296. The Banks seek declarations that their Relevant Terms and their Relevant Charges "are not capable of amounting to" penalties at common law. They do not suggest that I can determine on the evidence before me whether the amounts levied by them are extravagant or unconscionable and no more than a genuine pre-estimate of loss. That would, if necessary, require consideration on another occasion. The Banks do, however, argue that the Relevant Charges are not payable upon a breach of contract on the part of customers.

297. The OFT rightly does not suggest that prima facie a customer is in breach of his contract with his bank if he gives instructions for a payment from his current account for which he does not have funds or a facility. He will not thereby be in breach of contract in the absence of special circumstances or some specific provision in his contract with the bank which prohibits what he does.

298. The OFT, however, identifies some provisions in the Banks' current and historical terms which, it is submitted, might give rise to customers being in breach of contract in these circumstances. For reasons that I have explained, in this judgment I consider provisions in current terms other than those governing basic accounts, specifically provisions in the terms of Abbey, Barclays, Lloyds TSB and Nationwide, and I also consider some historical terms used until recently by Clydesdale and by RBSG. It is necessary to examine separately each of the provisions identified by the OFT as arguably penal in order to determine (i) whether it is truly of contractual effect (and not, for example, merely exhortatory or advisory); (ii) if it is of contractual effect, whether it imposes an obligation or prohibition upon the customer (rather than, for example, simply states a condition precedent before an obligation on the Bank arises); and (iii) if it does impose a contractual obligation or prohibition upon the customer, whether the Relevant Charge is payable upon breach of it. Leaving aside basic accounts, I consider that the OFT has identified all the arguably penal provisions in the terms now used by the Banks for their personal current accounts and in the historical terms of Clydesdale and RSBG to which I have referred. It has rightly not suggested that there is any penal provision in the terms now used by Clydesdale, HBOS, HSBC, and RBSG.

299. The Banks emphasise that a Relevant Charge cannot be penal unless it is payable upon a breach by the customer, and illustrate this principle by referring to the decision of the Court of Appeal in Jervis v Harris, [1996] Ch 195, which concerned a provision in a lease (clause 2(10)) obliging a tenant to carry out repairs and providing that if he did not do so, the landlord might do the repairs and recover from the tenant the costs and expenses of doing so. This provision was held not to be penal, and Millett LJ said this (at p.206E-G):

> "… it is well settled that the event on which the sum alleged to be a penalty becomes payable must be a breach of some other contractual obligation owed by the obligor to the obligee. That is not the case here. There is only one relevant obligation on

> the part of the tenant and that is to repay the landlord his costs in carrying out repairs himself…. the event which triggers the tenant's liability under a clause such as clause 2(10) is the expenditure by the landlord of money in effecting repairs, not the anterior failure of the tenant to repair."

Undoubtedly the law about penalties does not apply if the obligation is to pay for a service or upon an event other than a breach, even if the service is supplied or the event takes place against the background of or accompanied by a contractual breach, and even if the service would not have been provided or the event would not have occurred but for the breach. A customer could not necessarily invoke the law about penalties to challenge charges payable for his bank lending him money simply because his account would not be overdrawn but for his own breach. If an obligation to pay is penal, it must require payment upon the breach itself.

Penalties - Abbey's terms

300. I observe at the outset that the OFT admits in its Reply that Abbey's current terms do not make provision for the payment of fees for breach of a customer's contractual duty and that there is no contractual prohibition on the customer seeking to make a payment from his account that causes it to go overdrawn or to exceed an arranged overdraft. Nevertheless, I propose to consider the provisions in Abbey's present terms that the OFT elsewhere in its pleading identifies as terms which may "impose an obligation to avoid making a payment instruction with insufficient funds". I do not understand Abbey to press any complaint about the state of the OFT's pleadings, but in any case I reject the OFT's submissions on the substantive point.

301. Condition 4.2 of Abbey's Terms and Conditions explains to customers when money will "normally" or "usually" be taken from accounts after instructions for a payment or a withdrawal are received, and that there may be a delay between the customer using his debit card to make a payment and the time when payment is taken from the account. Condition 4.2.3 continues, "It is your responsibility to check that there are no payments pending against the balance on your current account before you request a withdrawal or payment from your current account".

302. The OFT suggests, as I understand it, that the reference to the customer's "responsibility" imports a contractual obligation upon him to ensure that, if he has given a payment instruction, he does not thereafter make further payments or withdrawals which prevent the account having sufficient funds to cover it. I am unable so to interpret condition 4.2.3. Condition 4.2 as a whole is, as I read it, designed to give the customer information or advice about how he can expect his account normally to operate, and in this context condition 4.2.3 makes it clear that if because of the order in which the Bank receives payment instructions insufficient funds are available to meet one of them, the customer has to bear the consequences (whether in that the payment instruction is not met by Abbey or by way of resulting fees or charges or both). The general advisory nature of condition 4.2 is confirmed by condition 4.2.4 which advises the customer to speak to the Bank if he is in doubt about how long a payment will take to be processed. I am unable to accept that condition 4.2.3 is naturally to be understood in the context of condition 4.2 as a whole as introducing a contractual obligation owed to the Bank by the customer. After all, Abbey's Terms and Conditions do not impose a general prohibition upon the

customer from giving Relevant Instructions or a general obligation to ensure that there are funds to cover all payment instructions, and it would be odd to introduce a contractual obligation only in respect of the particular circumstances described in condition 4.2.3.

303. The OFT also refers to Abbey's "Key Features and Price List" leaflet. As its title suggests, the leaflet falls into two parts, a description of the "Key Features" of an Abbey Personal Bank Account and a "Price List" specifying the level of Abbey's fees, charges and interest rates and also including two examples about what charges might be made by Abbey in two hypothetical sets of circumstances. In the "Key Features" section, the leaflet states this under the heading "Deposits service":

> "Money paid into your account by cheque will not be available for withdrawal immediately. If you want to draw against a cheque you have paid in, you must ensure that the money is available first. If you ask us to pay money out without sufficient funds in your account or a sufficient Advance Overdraft in place then you will be treated as making a request for an Instant Overdraft … Further information on cheque processing times can be obtained from the terms and conditions or by contacting us."

304. The OFT suggests that the second sentence of this passage places a contractual obligation upon the customer to ensure that funds are available to meet payment obligations. Abbey submits in response that the Key Features part of the leaflet, unlike the Price List, is not of contractual effect.

305. This broad submission appears to me inconsistent with the introductory words of Abbey's Terms and Conditions booklet that its obligations and those of the customer are set out in that document and that they, "together with the written details explaining the key features of your bank account (the "Key Features document") and the price list included in the Key Features document, form the terms of your contract with us with regard to your bank account". It is true that the introductory words of the Key Features leaflet state that the document is "only a guide" and that the customer should refer to the terms and conditions for "full details about your account". It is also true that there are non-contractual statements in the Key Features part of the leaflet (such as Abbey's statement that it "always want[s] to be open and fair with you" and the details of how a customer can contact one of Abbey's advisers). But it does not follow that nothing in the Key Features section of the leaflet is of contractual effect. The proper approach, I think, is not to categorise the whole of this part of the leaflet as non-contractual but to consider whether its individual provisions evince contractual intent.

306. However that might be, it seems to me clear that the part of the leaflet under the heading "Deposits Service" to which the OFT refers does not impose any contractual obligation on customers to ensure that if they want to "draw against a cheque" paid into their accounts, the funds from it are available. This passage simply provides a warning or explanation to customers that funds are not immediately available and draws their attention to the position if they issue an instruction on the account in reliance upon funds from a cheque paid into the account.

307. I therefore conclude that Abbey's terms do not impose any relevant obligation or prohibition upon its customers.

Penalties - Barclays' terms

308. The OFT suggests that a customer might incur Relevant Charges as a result of breach of the terms of his contract relating to use of a cheque guarantee card, and in particular condition 12.1 of the card conditions. Condition 12.1 uses the word "must" at two points: "The amount of the cheque must not be more than the cheque guarantee limit shown on the card", and "You must not write a guaranteed cheque for more than the amount in your cheque account without permission from the branch". The OFT suggests that this terminology means that the customer is in breach of contract if he writes a guaranteed cheque for too high an amount or without having the necessary funds in his account. Barclays says that this terminology marks two conditions precedent which must be met if Barclays is to undertake that the cheque will be paid, and which must be met if the customer is to have authority to use the cheque guarantee card; and that it does not impose any contractual obligation or prohibition on the customer.

309. In support of this submission, Barclays says that the provision in condition 12.1 about using only one guaranteed cheque to pay for one item ("You may only use one guaranteed cheque to pay for any one item") simply gives the customer instructions about how the card may be used and places a limit upon his authority. It is argued that the provision about not exceeding the limit on the card, which is under the same bullet point in the booklet, is of similar effect; and that the provision that the customer must not write a guaranteed cheque for more than the amount in the account is also similar. However, in the latter case undoubtedly a customer without adequate funds in his account has ostensible authority to give the payee of the cheque Barclays' undertaking that it will be paid, and Barclays will generally be bound by the undertaking to the payee of the cheque.

310. In my judgment, the terms place the customer under a contractual prohibition not to use his card to support a cheque unless there are sufficient funds in his account to support it. While the terms no doubt place limits on the customer's authority to use the card, this limitation on the customer's authority is in itself of little practical effect, and the natural reading of condition 12.1 is that it also means that the customer is in breach of his contract with the Bank if he uses his card in these circumstances. I find some support for this conclusion in the reference to the branch's "permission", which, I think, connotes that the customer might obtain Barclays' permission to do what would otherwise be prohibited, rather than that the customer might obtain the Bank's authority to do what otherwise would be outside it.

311. However, no Relevant Charge is imposed because a cheque guarantee card is used without the required funds in the account. It is true that if the card is used in such circumstances so that the account goes into unarranged overdraft, this might lead to Barclays levying a Paid Item Charge. It will not necessarily do so: for example, the customer might be protected by the "buffer" for which Barclays' terms provide. Even if a Paid Item Charge is levied, it is for no more than that for an unarranged overdraft incurred when Barclays chooses to pay a Relevant Instruction when the customer did not use a card. It might be that, had the card not been used, Barclays would have refused to pay upon the Relevant Instruction (and levied the higher

Unpaid Item Charge), but that does not mean that the Relevant Charge is payable upon the breach. The breach is simply part of the history that leads to the Paid Item Charge being incurred and, since it is not payable on breach, the Paid Item Charge is incapable of being a penalty.

312. For similar reasons, no Relevant Charge is payable upon the customer using a card to support a cheque for more than the limit stated on the card. I am, in any case, inclined to accede to Barclays' argument that this provision in condition 12.1 does not impose a contractual prohibition upon the customer despite the use of the word "must", but it is not necessary for me to express a concluded view about that.

Penalties - Clydesdale's terms

313. The OFT does not argue that Clydesdale's current terms and conditions provide for any relevant breach on the part of the customer, but I am to consider some provisions in its terms that were superseded in January 2008. These provided (at condition 8.2) that, "Your Account must always be kept in credit unless you have agreed an overdraft facility with us. When an overdraft facility has been agreed, you may withdraw money from your Account up to the agreed limit". Further, Clydesdale's accompanying tariff leaflets used this terminology: borrowing was called "unauthorised" if no facility was arranged in advance; the Overdraft Excess Charge, now called a Monthly Unplanned Borrowing Fee by Clydesdale, was previously called a "Monthly Unauthorised Borrowing Fee"; the Guaranteed Paid Item Charge, now called a Cheque Card Overdraft Fee, was called a "Debit Card Abuse Fee". It also used the expression "Irregular Debit Movement Charge" to refer to what is now called a Monthly Unplanned Borrowing Fee. The OFT suggests, as I understand it, that, read in the context of this terminology, condition 8.2 should be understood to be imposing a contractual prohibition upon the customer.

314. I am unable to accept this argument. It is of some significance that the OFT does not, I think, specify whether it is said that the customer is prohibited from giving the Bank a payment instruction which, if paid, would lead to his account being overdrawn without or beyond a facility agreed with the Bank, or whether the customer is in breach of his contract only if the instruction is paid and the account becomes so overdrawn. There is nothing in the terms which would support the former contention, but the customer could not become overdrawn without the Bank making payment in accordance with the customer's Relevant Instruction. It seems to me that, as Clydesdale submits, at most condition 8.2 defines the limits of the customer's right to give instructions to Clydesdale which the Bank must pay: customers do not undertake any obligation by agreeing to condition 8.2, and it does not contain any contractual prohibition. The other terminology to which the OFT refers is not of itself contractually operative: while expressions such as "irregular", "unauthorised" and "abuse" connote that the Bank does not approve of the customer so conducting the account, it does not mean that it is contractually prohibited.

Penalties - Lloyds TSB's terms

315. The OFT suggests that condition 13.1(b) of Lloyds TSB's Terms and Conditions might impose a contractual obligation upon the customer to ensure that he has funds in his account "to cover any cheques [that he has] written". I am unable to accept that this is a possible or reasonable interpretation of the condition. It is not a

precisely written provision, but it is clearly directed to whether the customer has funds in the account when the cheque is presented and not when he (or indeed any other mandate holder) writes them. It is naturally understood, in my judgment, to make it clear that if there are not funds in the account, a cheque might not be honoured upon presentation.

Penalties - Nationwide's terms

316. The OFT's pleading refers to conditions 49 and 51 of Nationwide's Terms and Conditions as being capable of imposing obligations or prohibitions on customers and so of giving rise to penalties. However, when considering whether Nationwide's Relevant Charges might be charged in respect of breaches of contract by customers, I am (as the parties agree) also to have regard to conditions 1 and 14 (reference to these apparently being omitted from the OFT's pleading in error).

317. I do not consider that any of these conditions imposes any relevant obligation or prohibition upon Nationwide's customers (rather than limitations on the rights of customers and the corresponding obligations of Nationwide). Condition 1 provides that withdrawal of membership is a possible consequence of the customer being overdrawn without or beyond an agreed facility, but it does not specify that he is or might be in contractual breach in these circumstances. Condition 14 limits Nationwide's obligation to pay in accordance with the customer's instructions to when there are enough cleared funds in the account. Condition 49 does not provide that it is a breach of contract to use a cheque guarantee card if payment of the cheque will result in an overdraft (or an overdraft in excess of an agreed facility). It simply makes it clear that as between Bank and customer there is no obligation on the Bank to honour the payment (notwithstanding Nationwide's obligation to the payee), and that as between Nationwide and its customer the payment does not give rise to an agreed overdraft. The condition does not include an undertaking on the part of the customer not to use his card without having adequate funds in his account or a facility to cover the payment. Condition 51 does not state, and is not, in my judgment, to be taken to imply, that it is a breach of contract for the customer to give a Relevant Instruction (or to give a Relevant Instruction that Nationwide accepts). It acknowledges that the customer might be in breach of contract if, payment having been made upon a Relevant Instruction, he does not "immediately" repay the resulting overdrawing, but the obligation to make immediate repayment of the unarranged overdraft arises only once the account is in debit. No Relevant Charges are payable because of a failure to bring the account back into credit, and the customer's obligation under condition 51 is irrelevant to whether the Relevant Charges (or the Relevant Terms) are capable of being penal.

318. I do not overlook that in its leaflet "Making the most of your Overdraft" Nationwide states under the heading "What if I know I am going to exceed my overdraft limit?" that "Exceeding your unauthorised limit is a breach of terms and conditions and will incur a charge". That is not, in my judgment, an accurate statement. The leaflet itself is not a contractual document and does not itself create any contractual obligation or prohibition that is binding upon customers.

Penalties - RBSG's terms

319. As in the case of Clydesdale, the OFT does not allege that any of the terms currently used by RBSG is penal. I am, however, to consider terms that previously applied to NatWest's Adapt Account and its Card Plus Account and were in a brochure of September 2007 entitled "Youth Terms and Conditions". The NatWest Adapt Account and the Card Plus Account are designed for customers aged between 11 and 18 years of age. The OFT suggests that the terms might have imposed a contractual obligation on customers not to overdraw the account, so that the Relevant Charges levied upon customers might have been penal. (In its pleadings, the OFT also alleged this in relation to the Young Saver Account, an account designed for children aged under 11 years of age. However, it now recognises that this, as its name suggests, is a savings account, not a current account, and no complaint is pursued in relation to the Young Saver Account.)

320. The statement which is said to give rise to the customers' obligation reads as follows:

> "Your account may not be overdrawn – that means you cannot take out more money than you have in your account. If your account becomes overdrawn we may inform your parents or guardians."

The only type of Relevant Charge that applies to the Adapt Account and the Card Plus Account is an Unpaid Item Charge.

321. The natural meaning and effect of this statement, in my judgment, is that it advises customers that no overdraft facility is available on these accounts and that borrowing is not permitted. I do not interpret it as stating that, should an account nevertheless become overdrawn, the customer will be in breach of contract, any more than the Bank would be in breach of contract if it allowed the account to become overdrawn in those circumstances.

322. Moreover, Mr Rabinowitz rightly points out that the condition is concerned with the account going into overdraft. It is not directed to prohibiting customers from issuing payment instructions that would, if paid, result in an overdraft. The account could become overdrawn only if the Bank decided to pay upon a Relevant Instruction but then an Unpaid Item Charge would not be incurred. This in itself means that there is no Relevant Charge applicable to these accounts that is capable of being penal.

<u>Conclusions about whether terms provide for sums to be payable upon breach</u>

323. I therefore conclude that none of these provisions which the OFT has identified means that the customer is under a contractual commitment such that Relevant Charges could be a penalty for breach of the commitment, and so unenforceable at common law. I have reached this conclusion without resort to Regulation 7(2) of the 1999 Regulations. However, if there were doubt about the meaning of these provisions, they would be given the interpretation most favourable to the consumer. This would mean that they would be construed so as to avoid customers being under any contractual commitment. (It might be suggested that it would be most favourable to consumers to interpret them so as to give rise to contractual commitments so that they might enjoy the common law protection relating to penalties. However, in my judgment, Regulation 7(2) operates similarly to the principle that a contract is to be construed contra proferentem. This does not mean that, if there is ambiguity, the

court will invariably adopt the meaning that turns out in the circumstances that have arisen to be less favourable to the party putting the contractual terms forward, but simply that it will construe the contractual terms themselves so as to be the more onerous upon him: see Skillion plc v Keltec Industrial Research Ltd, [1992] 1 EGLR 123 at p.126 per Knox J.)

324. The Banks have two other arguments that the Relevant Terms and Relevant Charges are not capable of amounting to a penalty at common law. If I am correct in my conclusions thus far, the Banks do not need to rely upon them and, in my judgment, they would not in any case assist the Banks.

Waiver

325. The Banks say that the Relevant Charges other than Unpaid Item Charges are not capable of being penalties because once a Bank has paid upon the Relevant Instruction and thereby agreed to extend an unarranged overdraft, any breach on the part of the customer is waived and the Relevant Charge is not payable upon breach of contract but, the contract being varied so that the previously prohibited instruction and that resultant overdrawing is permitted, the payment is a charge under the varied contract. (They cite Chitty on Contracts, 29th Ed (2004) para 3-081 and Shamsher Jute Mills Ltd. v Sethia (London) Ltd, [1987] 1 Lloyd's Rep 388 at p.392 in support of their argument of a connection of this kind between waiver and variation.)

326. I cannot accept this argument. The expression "waiver" used in the law bears a variety of different meanings, and it is always important to identify in what sense it is being used. An innocent party (here, it is to be supposed, the Bank) might choose not to assert its rights as to the action that it is entitled to take in response to another party's breach of contract (sc. to exercise its entitlement to decline to pay upon a Relevant Instruction). That does not necessarily mean that the innocent party is waiving the breach in the sense of electing not to claim damages or other sums that are payable upon it. Chitty on Contracts 29th Ed (2004) at para 22-046 would classify waiver in that sense as a species of estoppel. However it is classified, waiver of this kind will generally depend upon whether the innocent party has evinced an intention such as to lead the party in breach to believe that he is not pursuing his entitlement to damages or payment upon breach.

327. Here in some cases, most obviously where a cheque guarantee card was used by the customer, the Bank has no choice about paying upon a Relevant Instruction, and the payment and lending resulting from it does not evince any intention as to election or waiver on the part of the Bank. But in any case, just because a Bank accedes to its customer's wishes as expressed in a Relevant Instruction, it does not thereby evince an intention not to assert against the customer other consequences of the customer's (supposed) breach. Indeed, at least some of the Banks, when they have made a payment that is not covered by funds in the account or an arranged facility, advise the customer of the Relevant Charges that they are levying, the Relevant Charges being (as I am to suppose for the purpose of this argument) payable upon the customer's breach. It is not necessary to refer to all the evidence about this: by way of example, HBOS sends such a letter whenever a Relevant Charge is incurred, generally within 24 hours; and it is Barclays' practice, when a Paid Referral Fee is first levied in any monthly charging period, to write such a letter to the customer the next day. In any event, I am unable to accept that, by paying upon a Relevant Instruction and therefore

allowing the customer to overdraw on his account, a Bank evinces an intention not to require the customer to make any payment upon his (supposed) breach in issuing the instruction for which the customer might be liable by way of Relevant Charges, damages or otherwise.

Do the 1999 Regulations displace the common law of penalties?

328. The 1999 Regulations, the Banks also submit, define the circumstances in which a contractual term is unfair, and those circumstances include when a term requires the payment of a disproportionately high sum as compensation for failure to fulfil a contractual obligation: see paragraph (e) of the "greylist" of illustrative terms. Where the 1999 Regulations apply, the Banks say, they supplant and displace the common law, being inconsistent with it.

i) First, there might be unfairness under the 1999 Regulations where the common law as to penalties would not apply (for example, because the unfair terms do not relate to the consequences of breach), and conversely the common law of penalties might apply although the 1999 Regulations do not invalidate a term (for example, if there were no significant imbalance in the rights and obligations under the contract because it provided for exorbitant penalties upon breach by either party).

ii) Unfairness relating to the adequacy of the price may not be assessed under the 1999 Regulations, but the ambit of the common law of penalties is not so restricted.

iii) If a term is to be regarded as unfair, it is, as Regulation 8 provides, not binding on the consumer. Under the common law, a provision may be enforced to the extent that it is not penal.

329. The common law relating to penalties is a creature of public policy (see, for example, Philip Bernstein (Successors) Ltd v Lydiate Textiles Ltd, 26 June 1962, 106 SJ 669 per Diplock LJ) and given that public policy, as the Banks argue, is now embodied in the 1999 Regulations, there is no place for the common law of penalties in territory occupied by the 1999 Regulations. The Banks cited, for example, the decision of the Court of Appeal in R v Secretary of State for Transport, Local Government and the Regions, ex p. Factortame Ltd, [2002] EWCA Civ 982, [2003] QB 381, in which the Court of Appeal recognised that statutory provisions marked a shift in public policy relating to champerty, which should be reflected in the common law's restrictions upon champertous agreements.

330. It is not suggested that the common law of penalties is displaced except to the extent that the 1999 Regulations' regime applies: that is to say, (i) where a party to the contract is a consumer within the meaning of the 1999 Regulations; (ii) where the term is penal against the consumer, not where it is penal against the supplier; and (iii) where an assessment is not excluded by Regulation 6(2). It follows that the implications of this argument are (i) that the common law of penalties applies to some terms of a contract and not others, and (ii) it might be to the disadvantage of the party that he is a consumer within the meaning of the 1999 Regulations.

331. I am not persuaded by the Banks' argument. If the 1999 Regulations do apply and a term is assessed as unfair, then it is not binding upon the consumer. The question whether, if it were binding, it might be unenforceable in whole or in part because it is penal does not arise. However, I see no reason that the 1999 Regulations should displace the common law rules against penalties when the 1999 Regulations do not protect the consumer. After all, the Directive has laid down minimum standards of protection for consumers. It does not reflect a policy that consumers should not enjoy protection beyond that in the Directive. There is no reason that either the Directive or the 1999 Regulations introduced to implement it should deprive consumers of protection that they enjoy at common law.

Is the fairness of the Relevant Terms excluded from the assessment because they "relate … to the adequacy of the price or remuneration, as against the goods or services supplied in exchange"?

332. I come to the question whether no assessment of fairness of the Relevant Terms is permitted because it would "relate … to the adequacy of the price or remuneration, as against the goods or services supplied in exchange" under Regulation 6(2). The Banks say that Regulation 6(2)(b) applies to the Relevant Terms. (Although the pleadings refer at times also to Regulation 6(2)(a), none of the Banks argued that they could succeed in an argument based on Regulation 6(2)(a) if Regulation 6(2)(b) does not cover the Relevant Terms.)

333. The Banks put their case that the Relevant Charges are the price or remuneration, or part of the price or remuneration, for services that they supply principally in two alternative (but not mutually inconsistent) ways. First, they say that they supply to their current account customers a "bundle" or "package" of services which enables customers to manage their day-to-day finances, and this includes services whereby customers can, without making prior arrangements, request an overdraft by issuing a payment instruction which, if executed, would create or increase borrowing from the Bank, that is to say, in the terminology that I have adopted, a Relevant Instruction; and where the Bank chooses to grant such a request (or is committed to do so because a cheque guarantee card has been used or for some other reason) customers can borrow from the Bank on its standard terms. The Relevant Charges, together with other revenue in particular from interest paid by customers on borrowing and the use of credit balances in customers' accounts, are the price or remuneration for the package of services. I shall refer to this as the "whole package" argument. Secondly, the "specific services" argument is advanced: that, if the Relevant Charges are not to be regarded as part of the price or remuneration for the package of services supplied by the Banks to customers with current accounts, then they are the price or remuneration for some part of those services, that is to say for the services or a service supplied in connection with borrowing requests where no facility has been arranged in advance.

334. In response, the OFT argues that the Relevant Charges do not fall within Regulation 6(2)(b). Its main contentions include:

    i) That Regulation 6(2)(b) is directed to the main subject matter of the contract between a customer and a seller or supplier. It covers only what can properly be treated as the price or remuneration for the main subject matter of the contract, and, the OFT contends, the Relevant Charges cannot properly be said

to be the price or remuneration for the main subject matter of the contract, and the Relevant Terms are not to do with the main subject matter of the contract.

ii) That in any event, even if the application of Regulation 6(2)(b) is not confined to the main subject matter of the contract, Regulation 6(2)(b) does not cover every payment which falls to be made by the consumer in a contract for goods or services but only payments that can properly be regarded as a "price or remuneration" and for which "goods or services" are "supplied in exchange".

iii) That Regulation 6(2)(b) precludes only assessment of the "adequacy" of a price or remuneration.

335. The Banks dispute both stages of the OFT's first argument. They argue that on its proper interpretation Regulation 6(2)(b) is not to do with only the main subject matter of the contract, and does not only apply where the price or remuneration is paid in exchange for the main subject matter of the contract or where the terms providing for the price or remuneration are part of the main subject matter. And the Banks also say that in fact the Relevant Charges are paid for the main subject matter of the contract between a Bank and its customer for the operation of the current account, and the Relevant Terms are part of the contract's main subject matter.

336. Two further arguments have been advanced in answer to the OFT's contentions.

i) The first concerns whether the Relevant Terms and the Relevant Charges are to do with the main subject matter of the contract (assuming this question to arise on the proper construction of the 1999 Regulations). Mr Vos responded to the OFT's argument about this as follows: if it be right to restrict the application of Regulation 6(2)(b) as the OFT contends, the essential characteristics of a current account contract change according to whether the account is in credit or debit and this must be recognised when identifying its main subject matter.

ii) Some (but not all) of the Banks advanced what I shall call the "specific contract" argument: that when a Bank grants a customer a loan by way of unarranged overdraft, it enters into a specific contract with him in relation to that transaction (albeit a specific contract made against the background of the general contract governing their banking relationship as a whole) and the main subject matter of that specific contract is the Bank's service of providing a loan, the price for which is a Relevant Charge (or Relevant Charges). They extend this argument to cover the position when the Bank decides not to allow the customer an unarranged overdraft.

337. The OFT submits that it is for the Banks to show that the Relevant Terms fall within the exceptions from assessment for fairness under the 1999 Regulations. This seems to me correct, being in accordance with the general principle that he who asserts must prove ("Ei qui affirmat non ei qui negat incumbit probatio": Joseph Constantine SS Line Ltd v Imperial Smelting Corp. Ltd. [1942] AC 154 at p.174 per Visc. Maugham), but my decision on this, and other questions, has not depended upon where the burden of proof lies.

Is Regulation 6(2) to be interpreted "conjunctively" or "disjunctively"?

338. I first consider the meaning and effect of Regulation 6(2), and whether it applies only where the "price or remuneration" or where the "goods or services supplied in exchange" for it are the main subject matter of the contract. The OFT submits that Regulation 6(2)(a) and 6(2)(b) are "two sides of the same coin": the former excludes from assessment the definition of the main subject matter being supplied, and the latter excludes the price or remuneration that the consumer is paying for the goods or services forming the main subject matter so defined (and, they add, even then some terms relating to the price or remuneration are open to assessment). The Banks dispute this, arguing that Regulation 6(2)(b) applies to any term that relates to the adequacy of the price (or part of the price) paid by customers for services supplied by the Banks under their agreement with their customers, whether or not they are or form part of the "main subject matter" of the contract.

339. This difference was characterised by the Banks as a choice between a "conjunctive" interpretation of the 1999 Regulations whereby Regulation 6(2)(b) is limited in its application to terms relating to the price or remuneration paid in exchange for services that fall within Regulation 6(2)(a) and a "disjunctive" interpretation whereby the two parts of the Regulation 6(2) are interpreted independently. Although these are convenient labels which I shall adopt, this distinction does not, to my mind, convey the real flavour of the OFT's argument, which is that the requirement to limit the application of Regulation 6(2)(b) is driven not by the wording of Regulation 6 but in order to recognise the purpose of the 1999 Regulations generally and the reason for the exclusions from assessment contained in Regulation 6(2) specifically.

340. The Banks submit that a disjunctive interpretation is required both by the policy and by the language and wording of the 1999 Regulations; and that a conjunctive interpretation would be impossible to apply in practice.

341. As for language and wording, I agree that Regulation 6(2)(a) and Regulation 6(2)(b) provide for two separate exemptions from assessment of fairness, and the reference to "the main subject matter" in Regulation 6(2)(a) does not on its face limit the effect of Regulation 6(2)(b). The two provisions are linked by the conjunction "or", and within Regulation 6(2)(b) the phrase "the goods and services supplied" is not qualified. This reflects the Directive in that Article 4(2) provides that "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price or remuneration, on the one hand, as against services or goods supplied in exchange, on the other, …". The Banks support their argument by referring to the "greylist" in schedule 2 to the 1999 Regulations. None of the terms in schedule 2 is an example of a term providing for payment for a peripheral part of the customer's purchase.

342. As for the practical application of the exception in Regulation 6(2)(b), the Banks say that it would be impossible to restrict the Regulation to the assessment of the price or remuneration for the main subject matter of the contract in those (certainly not uncommon) cases where a simple undifferentiated charge is made for a collection of goods or services, some of which are at the heart of the bargain and others of relatively minor importance.

343. I should refer to a further argument adduced in support of the disjunctive interpretation: the Banks point out that retail banking is subject to other regulatory controls: that it is regulated in respect of deposit taking under the Financial Services

and Markets Act 2000; that it is subject to the jurisdiction conferred on the OFT and the Competition Commission by the Competition Act 1998 and the Enterprise Act 2002; and that the Banking Code includes a commitment by banks subscribing to it (as all eight defendant Banks do) to give customers details of any charges for the day-to-day running of the account upon opening an account (section 5.1) and to give at least 30 days' notice of any increase in the charges (section 5.3). For my part, I do not find this point compelling: I cannot accept that the particular regime for controlling competition and protecting consumers found in the United Kingdom should inform the interpretation of the Directive, which is to be given an autonomous meaning, or of the 1999 Regulations, which are to be interpreted harmoniously with the Directive.

344. However, I accept the Banks' other arguments that Regulation 6(2) is not to be given a conjunctive interpretation in as much as they demonstrate that there is no proper justification for importing the phrase "main subject matter" of the contract from Regulation 6(2)(a) and introducing it by inference into Regulation 6(2)(b). Neither the structure nor the language of Regulation 6(2) justifies that. Moreover the policy of the 1999 Regulations is not only to protect consumers but also to facilitate the establishment of the internal market and to promote competition. But it by no means follows that Regulation 6(2)(b) prohibits an assessment of any term that relates to a payment by way of price or remuneration under a consumer contract or to its adequacy. Accordingly, while rejecting a conjunctive interpretation of the Regulation in this narrow sense, I must still consider the proper limits of the application of Regulation 6(2)(b).

The restrictive interpretation of Regulation 6(2)

345. The starting place is the speeches in the First National Bank case. This case concerned a provision in a standard form loan agreement of First National Bank under which it lent money to consumers. Condition 4 of the agreement provided for the customers to pay interest on the outstanding balance, and the rate of interest, specified at paragraph D of the form of agreement, was a monthly rate variable in accordance with changes in the Bank's base lending rate. The last sentence of condition 8 provided as follows:

> "Interest on the amount which becomes payable shall be charged in accordance with condition 4, at the rate stated in paragraph D … (subject to variation) until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment)."

Because of this sentence, to which Lord Bingham referred as "the term" (cit sup at para 2), an expression that I shall adopt, the OFT sought an injunction to restrict the Bank from using any contractual term or provision having the object or effect of "making interest payable on the amount of any judgment obtained by the [Bank] for sums owing by a consumer under an agreement regulated by the Consumer Credit Act 1974; or making interest payable upon interest;…"

346. The issues in the case were whether the fairness of the term was subject to assessment, and if so whether it was fair. The House of Lords held that its fairness was subject to assessment and that the provision was fair.

347. On any view, the First National Bank case differed from this case in two ways: it concerned the 1994 Regulations, not the 1999 Regulations; and it concerned a contractual provision that took effect only after default on the part of the customer. However, the House of Lords were concerned not to give Regulation 3(2)(b) of the 1994 Regulations an interpretation that would frustrate the protection of consumers that the Directive is designed to achieve. This consideration applies equally to Regulation 6(2)(b) of the 1999 Regulations and is not relevant only where a default provision is under consideration. As the OFT observes, this purpose would be compromised if the 1999 Regulations were interpreted so as to exclude assessment of the fairness of any term which impinges upon what the consumer is to pay, however peripheral to the essential bargain it might be and whether or not the payment is recognisable as the "price or remuneration" that the consumer has to pay, not least, perhaps, because the less prominent or significant a term is, the less is the likelihood that the typical consumer, presented with non-negotiable documentation, will appreciate its effect.

348. The first speech in the First National Bank case was that of Lord Bingham. Having referred (at para 11) to the submission of the OFT that the term was "an ancillary term, well outside the bounds of regulation 3(2)(b)", he said this (at para 12):

> "In agreement with the judge and the Court of Appeal, I do not accept the bank's submission on this issue. The Regulations, as Professor Sir Gunter Treitel QC has aptly observed (*Treitel The Law of Contract*, 10th ed (1999), p248), "are not intended to operate as a mechanism of quality or price control" and regulation 3(2) is of "crucial importance in recognising the parties' freedom of contract with respect to the essential features of their bargain": p249. But there is an important "distinction between the term or terms which express the substance of the bargain and 'incidental' (if important) terms which surround them": *Chitty on Contracts*, 28th ed (1999), vol 1, ch 15 "Unfair Terms in Consumer Contracts", p747, para 15-025. The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default, plainly does not fall within it. It does not concern the adequacy of the interest earned by the bank as its remuneration but is designed to ensure that the bank's entitlement to interest does not come to an end on the entry of judgment."

349. It is rightly pointed out by Mr Rabinowitz that Lord Bingham does not refer to the main subject matter of the contract (the terminology of Regulation 3(2)(a) of the 1994 Regulations, as it is of Regulation 6(2)(a) of the 1999 Regulations). However, Lord Bingham recognised that, even if they are important terms, terms that do not express the substance of the bargain but are incidental to it, do not fall "squarely" within Regulation 3(2)(b) and the Regulation does not apply to it. It was an application of

this general principle that led Lord Bingham to conclude that the term was not covered by Regulation 3(2)(b). The application of the general principle was that, the term being a provision that dealt with the consequences of a default, it was to be regarded as incidental. There is nothing in Lord Bingham's speech that indicates that he regarded only provisions dealing with default as being "incidental" and so falling outside Regulation 3(2)(b), and to my mind it would distort his reasoning so to restrict what terms are to be categorised as "incidental" for this purpose.

350. Lord Steyn was also concerned that the Regulations should be interpreted so as not to frustrate their purpose and that of the Directive. He said (at para 34):

> "Clause 8 of the contract, the only provision in dispute, is a default provision. It prescribes remedies which only become available to the lender upon the default of the consumer. For this reason the escape route of regulation 3(2) is not available to the bank. So far as the description of terms covered by regulation 3(2) as core terms is helpful at all, I would say that clause 8 of the contract is a subsidiary term. In any event, regulation 3(2) must be given a restrictive interpretation. Unless that is done regulation 3(2) will enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision. Similarly, regulation 3(2)(b) dealing with "the adequacy of the price or remuneration" must be given a restrictive interpretation. After all, in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended. Even price escalation clauses have been treated by the Director as subject to the fairness provision … It would be a gaping hole in the system if such clauses were not subject to the fairness requirement …".

351. Like Lord Bingham, Lord Steyn did not adopt from Regulation 3(2)(a) the terminology of "main subject matter of the contract" in order to give Regulation 3(2)(b) the "restrictive interpretation" that he considered necessary, but he too clearly recognised that the Regulation did not apply to all terms that related in some way to a price or remuneration; and, as I understand his speech, he considered such clauses as price escalation clauses, which determine how much is to be paid by way of price if they are applicable, to be subject to assessment because otherwise there would be a "gaping hole in the system". I venture to suppose that typically price escalation clauses are said not to be directly related to the price or remuneration as against the goods or services supplied because generally they do not directly affect the price/quality ratio as at the time when the contract is made, but are directed to ensuring that it is not altered by future events. But, however that might be, I do not accept that, as was suggested during argument, Lord Steyn had in mind only the sort of clause mentioned at paragraph (l) of the "greylist" where the seller or supplier is allowed to increase the price without the consumer having a corresponding right to cancel the contract. In any case, paragraph (l) reflects that the price/quality ratio that the Directive is concerned to protect from assessment is that which obtains at the date of the contract, as at which date any assessment as to fairness is to be made.

352. Lord Hope too concluded that the term was not concerned with the adequacy of the remuneration which the Bank was to receive for making money available to the borrower. He said that provisions that concern the adequacy of the price charged for the loan were to be found in condition 4, and that the term, being directed to interest being payable on the whole of the amount due on default, which included legal and other costs, charges and expenses as well as the balance of the borrowing, could not be said to "be directly related to the price charged for the loan or its adequacy", but was instead concerned with the consequences of the borrower's breach of contract.

353. Although Lord Hope used the phrase "directly related to the price charged", the basis for deciding that the term fell outside the protection of Regulation 3(2)(b) was that it was a default provision. His reasoning, it seems to me, was specifically directed to the facts of the First National Bank case, but he is not to be understood to disagree with the wider reasoning of Lord Bingham: indeed, like the other Law Lords, he expressed his agreement with Lord Bingham's speech.

354. Lord Bingham cited, with approval, the 10th edition of Treitel, The Law of Contract. I observe that in that edition, while emphasising that the 1994 Regulations recognised the parties' freedom of contract with respect to the "essential" features of their bargain and distinguishing the "incidental" terms, Professor Sir Gunter Treitel QC did not use the phraseology of Regulation 3(2)(a), "main subject matter of the contract", to limit what terms as to price fell within Regulation 3(2)(b). In the 11th Edition of his work (2003) he said this (at p.273), "The requirement of considering the adequacy of the price or remuneration "as against" the subject matter of the contract could similarly restrict the concept of "core provision" and hence of reg. 6(2)". This sentence is also included in Mr Edwin Peel's 12th Edition (2007) of the book at para 7-101. It was criticised by the Banks as moving too far towards a conjunctive interpretation of the 1999 Regulations because of the reference to "core provisions" informing the interpretation of Regulation 6(2)(b). I am unable to accept this criticism. Neither edition suggests that Regulation 6(2)(a) and Regulation 6(2)(b) be given a conjunctive reading in the sense that wording from Regulation 6(2)(a) is to be read into Regulation 6(2)(b), but the observation in the 11th and 12th editions of the work emphasises that Regulation 6(2)(b) is directed to the essential bargain between the parties, or the "core terms", an expression already used in the 10th edition of which Lord Bingham approved.

355. After this observation, Treitel gives this illustration at para 7-101 of the 12th edition:

> "The point may be illustrated by reference to the case in which a contract for the hire of goods for a fixed period provides that the hirer is to pay a "holding charge" if he retains the goods after the end of the stipulated period. Although such a provision could be described as the "price" of an option to extend the period of hire, it could also be regarded as "ancillary" to the main object of the contract; or as fixing the "price", not of what was to be supplied, but of the option described above. The provision would then be subject to the Regulations and, if the charge were unusually high, the term requiring it to be paid could be regarded as "unfair" within them."

It is pointed out that this comes close to the term at paragraph (h) of the "greylist" in Schedule 2 to the 1999 Regulations.

356. I do not accept the submission made by Mr Milligan that Regulation 6(2) exempts from assessment all terms which relate to payment by the consumer other than a default payment, that is to say a payment that is to be made only upon default on the part of the consumer. It is true that the First National Bank concerned such a default provision, and so did the case of Bairstow Eaves London Central Limited v Smith, (cit sup), in which Gross J applied the First National Bank decision. But this submission does not accommodate the price escalation clause referred to by Lord Steyn or Treitel's example of a "holding charge", nor, to my mind, does it give proper recognition to the reasoning of Lord Bingham and Lord Steyn.

357. My attention was drawn to the case of Codifis SA v Jean-Louis Fredout, Case C-473/00. The Banks submitted that support is found in the opinion of Advocate General Tizzano that even a penalty clause might be covered by Article 4(2) of the Directive: see para 40 of his opinion. He said, referring to the financial clauses which set "rates of contractual interest and of interest on late payment and [provided] a penalty for failure to repay the sums due", that "the financial clauses are the main subject-matter of a credit contract and that in such a case, under Article 4(2) of the Directive, the assessment of their unfairness is precluded if they are in plain, intelligible language…". Before the European Court, the case went off on a different basis – the Court was not prepared to dismiss the reference on the grounds that assessment was precluded under Article 4(2) because the National Court considered that some of the financial terms were vitiated by lack of clarity and comprehensibility. I do not find this compelling authority for the proposition that penalty clauses generally are exempt from an assessment as to fairness or for adopting anything other than a restrictive view as to what financial clauses are so exempt. The financial clauses were not considered separately by Advocate General Tizzano, and in any case he was considering a contract the main purpose of which was clearly to provide credit repayable by monthly instalments. To my mind it is more significant that the Advocate General regarded it as relevant that the financial clauses were "the main subject-matter of a credit contract" and, apparently, did not consider that it was beside the point whether they were the main subject-matter and that it sufficed that the repayment obligation was the "price or remuneration" for the credit.

358. The question whether a term falls within Regulation 6(2)(b) is not answered simply according to whether or not it is a default provision. It requires broader consideration of the substance of the provision and the part that the term plays in the contract, and of whether it is directly to do with a payment that is properly within the expression, "the price or remuneration". Thus it is necessary to consider both the nature of the payment and how directly the term is directed to defining the payment obligation.

Do the Banks supply "services" when they process, but do not pay upon, a Relevant Instruction?

359. Undoubtedly the Banks supply their current account customers with services. Regulation 6 proceeds on the basis that every contract to which the 1999 Regulations apply is concluded for goods or services, and there is no dispute that the 1999 Regulations do apply to the contract between each of the Banks and its current account customers.

360. It is inherent in the characteristics of a current account that the services provided by a bank to a current account customer include that of receiving money, cheques and payments by other means into the account, making payments in accordance with the customer's instructions and maintaining a running account upon which there will be a credit or debit balance. If the running account produces a debit balance, the provision by the bank of a loan on a current account is, as a matter of ordinary language, the provision of a service. This would be so whether or not the contract governing the relationship between the bank and the current account customer obliges the bank to allow the customer to borrow.

361. The Banks seek to extend this statement of the services provided on a current account. They argue that a service is provided to customers when a Bank receives a payment instruction even if it does not pay in accordance with it, in particular if it does not do so because the customer does not have sufficient funds or an adequate facility to cover it and it declines to lend in order to pay in accordance with the instruction. The argument was formulated in various ways. It was said that services are provided in these circumstances because the customer chooses to avail himself of them and they are supplied under the general umbrella of the current account contract, it being nothing to the point whether the Bank is obliged to provide the services. Another formulation was that the Bank provides "services" because, viewed at the time that the current account contract between bank and customer is made, the Bank undertakes a commitment to deal with payment instructions that it receives. It is not important which formulation is preferred, but for my part I do not think that it is a necessary characteristic of "services" within the meaning of the 1999 Regulations that the supplier contractually undertook to provide them. In the case of an estate agent, for example, the introduction of a prospective purchaser is a service even if the agent is under no contractual obligation to introduce one, or even to try to do so.

362. It is said by the Banks that they supply a service when they receive Relevant Instructions because they consider whether to make a payment, and more generally it is said that they supply a service because they deal with the instruction in accordance with standard banking procedures and, it might be, also provide additional services such as communicating to the customer the decision not to pay upon the instruction and any Relevant Charges incurred. If (contrary to my own view) it matters whether services are provided pursuant to a contractual obligation, all of the Banks are obliged to deal with Relevant Instructions in accordance with proper banking procedures: as I have said, some but not all of the Banks expressly commit themselves to considering any Relevant Instructions that they receive before refusing payment.

363. Are the Banks in these circumstances supplying anything by way of "services" within the meaning of the 1999 Regulations, which give effect to the Directive which in turn was introduced having regard to the Treaty establishing the European Economic Community and having regard to the internal market "in which goods, persons, services and capital move freely"? Article 50 of the Treaty provides that "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons". The Banks argue that this is a wide definition and the expression "services" when used in associated legislation such as the Directive should also be interpreted widely.

364. The Banks rely upon the case of Faaborg-Gelting Linien A/S v Finanzamt Flensburg, Case C-231/94, [1996] ECR I-2395. This was a decision of the European Court of Justice about whether for the purposes of the Sixth Directive (which deals with Value Added Tax) the supply of restaurant meals on ferries is the supply of goods or the supply of services, a question which was relevant to where they were regarded as being supplied under the Directive. It was held that the transaction was for the supply of services, and the Banks cite this passage of the judgment (at paras 12–14):

> "12. In order to determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features.
>
> 13. The supply of prepared food and drink for immediate consumption is the outcome of a series of services ranging from the cooking of the food to its physical service in a recipient, whilst at the same time an infrastructure is placed at the customer's disposal, including a dining room with appurtenances (cloak rooms, etc), furniture and crockery. People whose occupation consists in carrying out restaurant transactions, will have to perform such tasks as laying the table, advising the customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten.
>
> 14. Consequently, restaurant transactions are characterized by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services within the meaning of Article 6(1) of the Sixth Directive. The situation is different, however, where the transaction relates to 'take-away' food and is not coupled with services designed to enhance consumption on the spot in an appropriate setting."

365. Thus, the Banks say, "services" include "preparatory acts" (such as cooking the meal) which precede any supply to the customer and which attract no separate price. No less, they say, they provide services when dealing with a Relevant Instruction before making their decision whether or not to pay in accordance with it.

366. I do not consider the decision in Faaborg-Gelting Linien provides any real assistance in this case. The question before the court was whether the restaurant customer was receiving a "supply of goods" or a "supply of services" for the purpose of applying a directive that defined "supply of services" as "any transaction which does not constitute a supply of goods". The Court had to choose between the two alternatives: when a restaurant meal is supplied, is it a supply of goods or a supply of services? The case does not, to my mind, assist as to the meaning or usage of the term "services" in European law generally or in the Directive in particular.

367. The Banks argue that it is a benefit to customers that they consider Relevant Instructions because, if they rejected them without consideration, customers would lose any chance of having them paid. Consideration of the request is a necessary step

if the customer is to have any chance of the benefit of an unarranged overdraft. They say that, once it is accepted (as the OFT does accept) that it is a service if a Bank allows a customer to borrow, it follows that acts necessarily ancillary to the provision of an overdraft are themselves the provision of services, the more so because if it receives a Relevant Instruction, a Bank employs complex systems and expensive procedures, which in part would not be engaged if the customer had funds or a facility to pay.

368. The OFT draws a distinction between the supply of a service and acts done by a supplier which are preparatory to supplying a service, and says that it is only acts that a consumer considers to be of sufficient value to justify remuneration that qualify as "services", and preparatory acts do not do so. It cited the decision of the European Court of Justice in HM Customs and Excise v Schindler, Case C-275/92. The case concerned residents of another member state seeking to import into the United Kingdom advertisements and application forms, and possibly tickets, for a lottery, and whether it offended against the freedom of movement of goods and services when the Customs and Excise impounded them. The question arose whether the tickets in and advertisements for a lottery were goods under article 30 of the Treaty or whether their provision related to services so that article 59 was engaged. The Court determined that the importation related to a service within the meaning of article 60 of the Treaty and that article 59 was engaged. In the judgment at paragraphs 22 and 27 the Court drew a distinction upon which the OFT relies: "[22] The activity … appears, admittedly, to be limited to sending advertisements and application forms, and possibly tickets, on behalf of a lottery operator … However, those activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate ... [27] The services at issue are those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance in the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organized and the prizes or winnings to be ascertained and paid out". The Banks on the other hand point out that the Court also said (at para 35) that "lottery activities" are to be considered services under the treaty.

369. Thus, the Court considered that the importation took its character from the lottery activity to which it related. However, it does not seem to me that the Court decided or needed to decide whether the importation was a service in its own right or whether it was no more than preparatory for the service whereby the lottery operators gave consumers the chance to take part in a lottery. I am unable to accept that this authority assists either the OFT or the Banks upon the questions that I have to decide.

370. There can be no fixed rule as to whether or not distinct and preliminary acts done by a seller or supplier with a view to supplying or deciding whether to supply the benefit which the consumer ultimately seeks are "services" within the meaning of the 1999 Regulations. Sometimes where the customer requests the preliminary or preparatory act (for example, an architect is engaged to produce preliminary drawings), that clearly will be a service in its own right. Equally clearly, the provision of a service might not necessarily provide the consumer with the benefit that he seeks: a doctor might fail to cure but he still provides medical services. But in these cases it is at least easy to see that something is "supplied" to the consumer. In the case of the customer giving a Relevant Instruction, the customer is seeking payment in

accordance with it, not that the Bank simply considers making payment, and that is reflected in the terms of the seven Banks (other than Nationwide) whose terms are drafted by reference to a request (or deemed request) on the part of the customer for an overdraft. In view of this and given that the customer receives no actual benefit from his Bank considering his instruction or request for payment and declining to accede to it, I am unable to accept that what the Bank does when it deals with a Relevant Instruction upon which it does not make payment is properly described as "services" and unable to accept that anything can properly be said to be "supplied" to the customer. Moreover, even if the Banks' processes of considering and processing Relevant Instructions short of paying them, or with a view to deciding whether to pay, could, in any sense, be described as services supplied to the customer, the real and essential service supplied by the Banks under their contracts with customers is that of paying upon the customer's instruction, and the Banks' procedures whereby they deal with Relevant Instructions before making payments or when they decide not to pay are ancillary to and incidental to the service of paying in accordance with the mandate.

371. I should add that it was argued by some of the Banks that when a Bank decides not to pay upon a Relevant Instruction, it provides a service, at least in some cases, by way of informing the customer of the position. The decision might involve the Bank in other procedures: for example, returning a cheque through the clearing system in accordance with the rules of the clearing house. These activities, in my view, are no more than the incidental consequences of the Bank's decision, and I am unable to regard them as services supplied to the customer. Further, on any view they are, again, ancillary or incidental activities.

372. I therefore accept the OFT's submission that if a Bank declines to pay upon a Relevant Instruction, it supplies no, or no relevant, services by way of considering, processing or otherwise dealing with it.

Do the Banks supply "services" when they pay upon a Relevant Instruction?

373. The OFT argues that when a Bank pays upon a Relevant Instruction it does not provide a "service" such as contemplated by Regulation 6(2) because the provision of overdrafts, or at least the provision of unarranged overdrafts, is not among the essential features of a personal current account. It points out, and I accept, that customers have no right to borrow by way of an unarranged overdraft; that it is not a reliable way of making payments and is expensive; that many customers never give Relevant Instructions and they represent a small proportion of the payment instructions given to banks by personal current account customers; and that unarranged overdrafts are discouraged by many of the Banks, and are not generally promoted as a feature of current accounts. The OFT also argues Relevant Instructions might well be the result of error on the part of the customer, if not improper behaviour, but here it seems to me to overstate its contention: see paragraph 60 above.

374. None of this means that a Bank does not supply its customer with services when it makes a payment in accordance with a Relevant Instruction. The OFT's argument is, to my mind, flawed because it focuses not upon what the Bank does, but upon the state of the customer's account when the Bank processes the instruction. Clearly, it is a central feature of a current account that the bank makes payments in accordance

with the customer's instructions (or, as it might be said, supplies payment services). When a Bank pays upon a Relevant Instruction, it is doing just that. It is true that it is doing so in particular circumstances, but that does not change the essential character of what the Bank does. Nor is that altered because the Bank goes through additional processes before making the payment because the customer did not have available funds or facilities.

375. For similar reasons, it seems to me that the provision of an unarranged overdraft is part of the essential services supplied by a bank operating current accounts. It is an essential part of the bargain whereby a bank operates a current account that it keeps a running account of receipts into and payments from the account, and necessarily the account shows a credit or debit balance for the customer (or a nil balance). If it shows a debit balance for the customer, it of course means that the bank is allowing the customer to borrow on the account (or supplying lending services), but I am unable to accept that that in itself means that the activities of the bank have extended outside the essential services of the contract under which the current account is operated. This is so whether or not the customer's borrowing takes place without or in excess of a facility arranged in advance between bank and customer. The characterisation of what the Bank provides as an "unarranged overdraft" seems to me to define it with too great a degree of particularity for the purpose of deciding whether the Bank is supplying a service within the meaning of Regulation 6(2).

376. The point can be illustrated by an argument advanced by Mr Snowden on behalf of HSBC. If a bank operates current accounts free of charges when the credit balance is more than, say, £100, then the logic of the OFT's position would suggest that, if the bank pays upon instructions that take the balance of the account below £100 without taking the account into debit, its services are not "incidental" to those essential to a contract for a current account and so fall within the ambit of Regulation 6(2), but the position would be different if a payment takes the account into debit. This would, to my mind, be a surprising distinction.

377. I therefore reject the argument that the services of making payment upon a Relevant Instruction and of providing an unarranged overdraft are not services of a kind relevant for the purposes of Regulation 6(2) because they are incidental or ancillary to the essential bargain between the parties.

378. In view of this conclusion, the Banks do not need to rely upon the alternative argument advanced by Mr Vos that the services provided in response to a Relevant Instruction are within Regulation 6(2) because, upon proper analysis, they form part of the main subject matter of the contract. However, I shall deal with it briefly, not least out of respect for the clarity with which it was presented. It was, I should make clear, presented as an alternative to other arguments presented by the Banks, and Nationwide, like the other Banks, disputes that upon the proper interpretation of Regulation 6(2) its application is confined to the main subject matter of the parties' contract and argues that in any event the services provided in response to Relevant Instructions are part of the main subject matter of the contract

379. Mr Vos' argument is that, if the services supplied when an overdraft is advanced are not part of the main subject matter of the contract, they become so when the account becomes overdrawn. In the absence of specific contractual provision to the contrary (and there are no such provisions in Nationwide's terms), unless and until a current

account customer's account goes into debit, the provisions of the contract that would apply to a debit account are by way of unilateral commitments by his bank, and when those commitments are accepted by the customer overdrawing upon his account, the terms of the contract between bank and customer change accordingly. In support of this part of his argument, Mr Vos cites Goode: Consumer Credit Law and Practice, para 23.44/45:

> "23.44. Some documents, though labelled 'agreement' and signed by both parties, do not in fact possess contractual force at the time of their execution, since they do not themselves embody any specific transaction but simply lay down a set of 'if' provisions, ie standard terms which are to govern future dealings between the parties if and when these occur. Such standard terms may either provide for future bilateral contracts, involving an exchange of promises giving rise to each such contract, or constitute terms of a continuing offer to be accepted by conduct, generating a series of unilateral contracts. In the sphere of consumer credit, the latter is by far the most common. For example, the terms of a bank overdraft facility constitute a continuing offer by the bank to extend credit on the specified terms, the offer to be accepted by the prospective debtor by drawing on its line of credit with the bank. This produces a series of unilateral contracts each of which merges in the contract preceding it to produce a single, consolidated agreement governed by the standard terms, the debit and credit items in the current account constituting a single blended fund. … 23.45 Thus, an "agreement" for an overdraft facility crystallises into a contract every time the customer issues a cheque drawn on his account…"

380. I should also refer to paragraph 24.107 of Goode: Consumer Credit Law and Practice, which refers to unarranged overdrafts:

> "An example of the unilateral contract is an agreement to provide an overdraft facility (indeed, it is in the nature of any facility that there is no commitment by the offeree to utilise it, so that the contract is almost invariably unilateral). A bank agrees to allow its customer to overdraw up to a stated amount. This 'agreement' by the bank constitutes a continuing offer which remains open until withdrawn prior to acceptance and which the customer accepts each time he overdraws his account. Hence, each drawing on the account when it is not in credit constitutes a separate acceptance and thus generates a separate contract, the consideration for the bank's promise to honour the cheque being the customer's express or implied undertaking to repay the advance with interest. If the customer, without authority, overdraws beyond the agreed limit, this is not an acceptance of the bank's offer (since the offer is limited to the agreed credit ceiling) but a request to the bank to honour the further drawing (ie an offer by the customer to repay the

> bank with interest if it honours the further cheque), which the bank impliedly accepts by payment. It is at this point that the contract comes into existence as regards the excess overdraft."

381. From this analysis, Mr Vos argues that in determining the nature of the contract between a bank and a current account customer and the main services supplied under it, it is necessary to distinguish the position of an account which is in credit and the position of an account in debit (when the unilateral "if" provisions have been accepted and become part of the contract). Once it is recognised that the proper question is what are the main services supplied when an account is in debit, Mr Vos argues, it is clear that they comprise lending to the customer, and, once an account is in debit, the bank is supplying one of its main services when it deals with payment instructions which would, if paid, increase the borrowing.

382. As I have explained, Mr Vos' argument is designed to meet a problem that, in my judgment, does not arise. It also seems to me that the argument might well bear upon a question to which I refer at paragraph 444 below and which, for reasons that I shall explain, I am not to decide: namely, given that any assessment of fairness of a term is to be made when the contract is made (see the First National Bank case (cit sup) at paras 13 and 20 per Lord Bingham), when is the contract to be taken to be made in the circumstances of this case? I shall therefore not express a concluded view about Mr Vos' argument, and only say that, if I had thought that the Banks were not supplying "services" when paying upon Relevant Instructions and extending credit to customers accordingly, then I would have seen great force in the submission that the main subject matter of the contract must be determined in light of whether the account is in credit or debit and in light of whether the terms of the contract between bank and customer have been supplemented in the way explained by Professor Goode.

383. I therefore conclude that the Banks supply to current account customers services within the meaning of the 1999 Regulations when they pay in accordance with a payment instruction regardless of whether it is a Relevant Instruction and involves the Bank in carrying out additional procedures and when they operate the running account with a debit balance, that is to say, when they allow borrowing on the account, regardless of whether the borrowing is by way of an unarranged overdraft. However, this does not mean that it is irrelevant to the application of Regulation 6(2)(b) that charges are levied for carrying out payment instructions and allowing borrowing only when the instructions are Relevant Instructions and the borrowing is by way of unarranged overdraft. It is relevant to whether the Relevant Charges are covered by Regulation 6(2)(b).

The meaning of "the price or remuneration".

384. I move from consideration of what "services" are supplied by the Banks to the meaning of the phrase "the price or remuneration" in Regulation 6(2)(b) – or "the price and remuneration", as it is put in article 4 of the Directive. It is a compendious expression, and it is not helpful to analyse minutely its individual components. Just as Regulation 6 proceeds on the basis that every contract to which the 1999 Regulations apply is concluded for goods and services, so too, it seems to me, it supposes that the seller or supplier will receive a price or remuneration under it (and Regulation 6(2)(b) refers to "the" price or remuneration, not "a" price or remuneration.) While the expression "the price or remuneration" must not be interpreted so narrowly as to

prevent this, it does not mean that every payment for which a consumer might be liable under the terms of his contract is a "price or remuneration" the adequacy of which is exempt from assessment.

385. The question is whether a payment falls "squarely" within Regulation 6(2) of the 1999 Regulations so that its exemption is justified by the purpose of respecting the parties' freedom of contract about the price/quality ratio as at the time when the bargain was made. The wording of the 1999 Regulations, reinforced, I think, by the connotation of the very terms "price" and "remuneration" (whether taken individually or together), confines the application of Regulation 6(2)(b) to payments that can properly be said to be payable by way of exchange. Of course, in a broad sense every contractual payment (at least in the case of contracts supported by consideration rather than those made by deed) is payable in exchange for a promise or the receipt of what the law recognises as a benefit. However, it seems to me that the 1999 Regulations contemplate something clearly recognisable as an exchange such as will typically be at the core of a consumer contract.

386. This does not mean that the payment must be in exchange for the benefit for which the consumer hoped or which was his reason for making the contract. The Banks pointed out that payments by students applying for university or, more parochially, by barristers applying for silk are payments made in consideration of the relevant bodies considering their applications and not for the success for which applicants no doubt hope. Depending upon the terms of the particular arrangements, commission to an estate agent might well be payable for the introduction of a potential purchaser although at some stage the sale falls through. The consumer, although ultimately disappointed, receives services in exchange for the payment, and I would regard these payments as falling within Regulation 6(2)(b).

387. The OFT drew a distinction between what is payable by a consumer by way of the price or remuneration and what he might pay upon a contingency or the happening of an event. The point cannot be pressed too far. A price or remuneration might be payable only contingently. Again, the estate agent example illustrates this: in a case such as Bairstow Eves (cit sup) the commission is payable in exchange for the introduction of a potential purchase, but payable only if a contract for purchase is made. If the only consideration that the seller or supplier receives under the contract is a promise of payment upon a contingent event, the more likely the payment will be recognisable as the price or remuneration – the typical consumer will expect to have to pay something by way of the price or remuneration under the contract. However, the Relevant Charges are not the only "payment" that current account customers make – the essential nature of the bank/customer relationship is that of debtor and creditor, the customer either giving the bank use of his money or if he is in debit paying interest to the bank. If (as here) the seller or supplier receives other benefits under the contract, the more likely the contingent nature of payments such as the Relevant Charges will make them less recognisable as the price or remuneration and the less likely they will fall within Regulation 6(2)(b).

388. I have referred to the need for a "recognisable" exchange between the service that the customer receives and what he is to pay. This reflects a submission of the OFT that the issues that arise under Regulation 6(2) are to be considered from the point of view of the typical consumer. In the First National Bank case Lord Bingham (cit sup at para 20) said that, in judging the fairness of the term, it is necessary to consider the

position of typical parties when the contract is made. Lord Steyn (at para 33) referred to the need to take into account "the effects of contemplated or typical relationships between the contracting parties" in order to make the Directive and the 1999 Regulations work sensibly and effectively. It is an extension of this approach to consider the position of the typical consumer when deciding whether Regulation 6(2) applies to a term (although I observe in passing that it reflects the approach of Evans-Lombe J at first instance in the First National Bank case, [2000] 1 WLR 98 at p.103C-E), and it would be a narrowing of the test if the position of the typical consumer were considered to the exclusion of that of the typical seller or supplier. That said, I consider that the question whether typical parties to a transaction of the kind under consideration would recognise a payment as the price or remuneration is a useful guide as to whether a payment falls within the Regulation, and I cannot accept the submission made on behalf of RBSG that this would lead to different answers for different customers or groups of customers. As RBSG itself said and as I have already observed, the concept of an "average consumer … who is reasonably well informed and reasonably observant and circumspect" is a concept often used in applying and interpreting European consumer law, and to my mind it is an appropriate guide as to whether a payment is the price or remuneration within the meaning of the 1999 Regulations. Of course, it does not displace the need for the court to examine and respect the terms of the parties' contract. After all, as Lightman J observed in Wire TV Ltd. v Cable Tel (UK) Ltd., [1998] CLC 244 at p.258, when construing an agreement which is not a sham (and I do not consider that any of the Relevant Terms could be so described), the court recognises that the parties might have a choice as to how a contract is structured and pays appropriate respect to the structure adopted by the parties. Nevertheless, the question whether a payment is the price or remuneration depends upon the substance of the agreement between the parties and the true nature of the payment rather than upon how it is described or presented, and it would, I think, be surprising if the court felt able to conclude that a payment is the price or remuneration within Regulation 6(2)(b) even though the typical consumer would not recognise it as such when presented with the terms of the seller or supplier.

389. Against this background, I accept the submission of the OFT that a payment is likely to be the less recognisable as the price or remuneration for services supplied if it is payable only in circumstances which might well not happen and which both parties are likely to hope will not come about. I also accept that a payment is the more likely to be recognisable as the price or remuneration payable in exchange for services supplied if it can readily be understood when and what is payable.

390. The requirement that a payment be, and be recognisable as, the price or remuneration paid in exchange for services does not provide a bright-line as to what falls within Regulation 6(2). This is a question of evaluation of the facts of the particular case.

The "adequacy of the price or remuneration"

391. Regulation 6(2)(b) does not exempt all terms that relate to the price or remuneration, but only terms that relate to its "adequacy". Recognising that an exempted term has to relate directly to this, Mr Rabinowitz suggested that Regulation 6(2)(b) is directed to terms which *specify* the price, but does not cover terms that state the *method* by which the price is determined, a distinction that, I confess, I find rather elusive in its application. However, it is not necessary for the purposes of this case to decide whether terms that state the method by which the price or remuneration is determined

necessarily fall outside Regulation 6(2)(b), and if so, how they are to be distinguished from terms that specify the price or remuneration. On any view the Relevant Terms deal directly with payments that the Banks claim from customers as Relevant Charges. The significance of Mr Rabinowitz's submission, to my mind, is that, first, it recognises the importance of giving effect to the reference to the "adequacy" of the price or remuneration; secondly it reflects a properly restrictive approach to interpreting the exemption from assessment under the 1999 Regulations; and thirdly, it illustrates that the precise ambit of the exemption is not susceptible of precise definition: there is no litmus test as to the application of the general principles explained in the speeches in the First National Bank case.

392. The Banks emphasise that it is not only terms that relate to the level of the price that are exempted from assessment under Regulation 6(2)(b). They say that it covers all terms which bear directly upon the economic value of what is to be paid, and that includes, at least, the timing and frequency of payment. Indeed Mr Snowden, on behalf of HSBC, submitted that it "must include all terms that provide for the incidence, amount, currency, timing, frequency, and place and manner of payments because all in their interrelated way affect the burden that is placed on the consumer and the benefit to the supplier in exchange". It seems to me that this overstates the point: this formula would include provisions that (for example, the place of payment) would not typically directly impact on the economic value of what the consumer agreed to pay as at the date of the contract. It also would cover, I think, provisions such as condition 15.7 of Lloyds TSB's terms (at para 244 above), which Mr Thanki rightly recognised is not protected from assessment by Regulation 6(2): that is to say, a term providing that the Bank may take interest and charges from any account of the customer, this relating to the manner of payment. However, I accept that the expression "relate ... to the adequacy of the price or remuneration" not only includes what relates to the amount of the price or remuneration but also covers when and in what circumstances it is payable in so far as they affect the economic value or cost of what is to be paid.

393. In the First National Bank case, Lord Rodger (cit sup at para 64) observed that the words corresponding to "adequacy" that are used in the French and German texts of the Directive are "adéquation" and "Angemessenheit". He said that, "Both may suggest what is in issue is the "appropriateness" of the price or remuneration as compared with the services or goods – in other words whether there is an equivalence between the services or goods and the consideration for them". The references in recital 19 to the "quality/price ratio" and the "price/quality ratio" have similar connotations. Hence, Lord Rodger was concerned that the term "adequacy" loses some of its significance if it is understood simply to mean "the extent of the remuneration", a phrase used by Evans-Lombe J in his first instance judgment (cit sup at p.107B-C): it requires comparison of what is paid by the consumer with what he receives.

394. This connotation of "adequacy" is reinforced in Regulation 6(2)(b) by the reference to the adequacy of the price or remuneration being assessed *as against* the goods or services supplied in exchange. The Regulation does not cover terms about charges that might be made not actually for goods or services supplied in exchange but by reference to some circumstance incidental to the exchange that is essential to the parties' bargain. For example, if a seller or supplier includes in his terms a surcharge

if payment is made by cheque or by credit card, it does not seem to me that that is exempt from assessment simply because it relates to how much the consumer has to pay: it does not relate to the adequacy of what the consumer has to pay by way of price or remuneration for the goods or services supplied in exchange. Similarly, and nearer to the facts of this case, it does not seem to me that, if a supplier levies a charge or a surcharge not by reference to the actual services supplied but because of an incidental circumstance attendant upon their supply, the term imposing the charge or surcharge is covered by the Regulation. The expression "adequacy" imports reference to a relationship and the relationship here is between the Relevant Charges and the services supplied themselves.

The whole package argument

395. The first argument advanced for the Banks is that the contract between Bank and customer for the operation of a current account is one whereunder the Bank agrees to provide its customer with an overall package of services and in return the customer agrees to pay charges as and when they become payable in accordance with the contractual terms. The pricing structures adopted by the Banks, reflecting a policy of providing "free-if-in-credit" current account facilities, are, they say, simply how they have chosen to charge for the range of services supplied to customers with a current account. If they had decided, for example, upon a structure of charges whereby there was a fee for each transaction or a periodic fee for operating a current account regardless of the number of transactions during the period, the fees would surely be by way of "the price or remuneration" for "services supplied in exchange" and Regulation 6(2) would preclude any assessment of the fairness of a term reflecting their "adequacy". The position is no different, they say, where the structure of fees and charges reflects a policy of "free-if-in-credit" facilities, and fees are charged only when the account is not in credit. The Banks have simply confined their fees to specific types of transactions or to transactions carried out in particular circumstances.

396. This analysis, if accepted, by-passes a number of the OFT's arguments. First, the question whether the price or remuneration needs to be for the main services is redundant. The Relevant Charges are for all the Banks' services, whether main, subsidiary and intermediate. Secondly, there is no need to dissect the contractual dynamic of a Relevant Instruction: whether it truly is a request and whether the Banks' response accords with what is requested. That question is irrelevant, as is the question of what services, if any, the Bank supplies in response to a Relevant Instruction. Thirdly, the implication of this argument is that, if it is accepted in principle, it necessarily applies to all the Relevant Charges: there is no room to ask (for example, of the Unpaid Item Charges) whether they are associated with anything that can really be described as services supplied by the Bank.

397. The Banks can also say with some force that this view reflects the true economics of the relationship between a Bank and the customer in a "free-if-in-credit" banking regime. The regime provides for an integrated pricing structure for the Banks' services, many of which are provided similarly to customers whether their account is in credit or in debit. The Relevant Charges are one source of revenue for the Banks under it: in addition, in particular, those customers with accounts in credit pay by lending the funds in their account to the Bank and those whose accounts are in debit pay interest. Regulation 6(2) is directed, the argument goes, to the price or

remuneration for the services supplied to the customer or *part* of the price or remuneration. In these circumstances it does not matter, the Banks say, that the Relevant Charges are incurred only in particular circumstances, or when particular services are supplied by the Bank and used by the customer.

398. I am unable to accept this argument, for two (linked) reasons. First, I do not consider that the payments are made in exchange for the whole package of services supplied by the Bank when it is operating a current account. It is not a natural use of language to say that the Relevant Charges are levied or paid *in exchange* for those services supplied when an account is in credit. Secondly, I do not consider that the payments are *the price or remuneration* for those services in any natural meaning of the phrase or within the meaning of Regulation 6(2). The payments would not be so recognised by the typical customer when he opens a current account with a Bank, and they are not generally so presented by the Banks in their terms or other documentation.

399. On the contrary, the very description "free-if-in-credit" connotes that there is no price to be paid for services supplied when an account is in credit, and that a customer might pay for the Bank's services supplied if and when his account goes into debit. I do not overlook that RBSG introduced in December 2007 its leaflet, "Personal and Private Banking – A Guide to Interest and Fees", which includes its Relevant Charges under the heading "The price for your banking services" and among "the main elements of the pricing structure we use for our current accounts"; but this is not how Relevant Charges are generally presented to customers, previously RBSG's documentation did not provide this explanation, and, I have said, it is not of contractual effect.

400. Moreover, the basis of the whole package argument is that the Relevant Charges are not *the* price or remuneration for services but *part* of the price or remuneration for services. An assessment of the fairness of the Relevant Charges does not involve an assessment of the level or adequacy or appropriateness of the overall price or remuneration for the package of services supplied by the Bank, and an assessment of the fairness of the Relevant Charges as against those services, apart from being entirely beside the point, would not intrude upon the essential bargain between the parties that the Directive and the 1999 Regulations intend should be protected from assessment. The whole package argument does not engage the policy of the Directive and the 1999 Regulations for exempting the fairness of the Relevant Terms from assessment. Indeed, I am far from convinced that an assessment of part of the price or remuneration (or at least for less than what is manifestly the predominant part of the price or remuneration) for goods or services would ever be covered by Regulation 6(2)(b), but since this is not an argument advanced by the OFT, I say no more about that.

401. In my judgment the Banks' whole package argument provides no basis for concluding that the Relevant Terms fall within Regulation 6(2).

<u>The specific services argument</u>

402. The Banks' specific services argument is that each of the Relevant Charges is the price or remuneration in exchange for the services or a service supplied in connection with a Relevant Instruction given by the customer or by way of the Bank's response

to it. Here it is necessary to consider each category of Relevant Charges separately: despite Mr Doctor's submission to the contrary, I see no reason that either all four of the OFT's categories of Relevant Charges are assessable for fairness or none is: after all, the OFT does not suggest that the adequacy of all charges or remuneration that the Banks make of their current account customers are to be, or should be, assessed for fairness.

403. For the reasons that I have already explained, I am unable to accept that the Banks supply customers with any services within the meaning of the 1999 Regulations when they refuse to pay upon Relevant Instructions, and it follows that I reject the specific services argument as far as Unpaid Item Charges are concerned. However, when payment is made, the Bank supplies payment services by way of paying in accordance with the customer's mandate and supplies lending services. The Banks submit that Paid Item Charges and Guaranteed Paid Item Charges are paid in exchange for both payment services by way of making payment in accordance with a Relevant Instruction and lending services by way of an allowing an unarranged overdraft. (They would add that they are also paid in exchange for processing the customer's Relevant Instruction, but I have rejected their argument that that in itself constitutes the supply of services.) They submit that Overdraft Excess Charges are levied in exchange for extending an unarranged overdraft.

404. The OFT says that the Relevant Charges are not the price or remuneration in exchange for services supplied. It says that, as presented by the Banks and as perceived by the typical customer and in reality, the Relevant Charges are simply charges levied upon defined events or in defined circumstances, and they are not in reality a price or remuneration and are not payments in exchange for services. That, it argues, is clear unless one is blinded by the artificial and misleading language of the standard terms of the seven Banks (other than Nationwide) whereby the customer is said to make (or be deemed to make) a request for an unarranged overdraft, and the Bank is said to respond to it. This language does not alter the true nature of the charges.

405. I have rejected the OFT's submission that the Banks' terms are misleading as to the true nature of a Relevant Instruction and, as I have explained (see paragraph 76 above), I consider that, far from being a device, the terms reflect a proper analysis of the legal position when a customer gives a Relevant Instruction. But the OFT's argument that the Relevant Charges are not a price or remuneration in exchange for services does not depend upon its criticism of the language of the Banks' terms.

406. I am not able to accept that Paid Item Charges and the Guaranteed Paid Item Charges are the price or remuneration in exchange for services by way of the actual payment of a Relevant Instruction, or that this contention provides the essential element of exchange that is the hallmark of a price or remuneration with the meaning of the 1999 Regulations. It does not reflect how Relevant Charges are generally presented to customers, or what they are in substance. After all, the Relevant Charges are made under a contract under which the customer does not usually have to pay when payments are made upon his instructions. In reality they are not charges in exchange for services involved in making payments, but charges levied because the services are supplied in particular circumstances. While the Banks' evidence shows that additional processes are involved if the customer gives a payment instruction when he does not have funds or a facility to cover it, these are not explained in the

documentation provided to customers and, even if the typical customer would suppose that this might be the case, the contract does not identify these additional processes as being provided in exchange for the charges.

407. The point can be made by considering the Paid Item Charges and Guaranteed Paid Item Charges made by the different Banks. Abbey charges the same Instant Overdraft Request Fee if the customer gives a Relevant Instruction whether or not it pays in accordance with it, and so the fee cannot be seen as the price or remuneration for making the payment as instructed. Barclays simply describes its Paid Referral Fee as an "administrative fee", but charges a lower fee when it pays upon a Relevant Instruction than when it refuses payment. The implication is that the charge is for the administration (or "referral") involved because the customer gives a Relevant Instruction and nothing extra is charged for making the payment. The name of Clydesdale's Paid Item Charge, the Daily Unplanned Borrowing Fee, indicates that it is not charged for the service of paying Relevant Instructions, and this is reinforced by the fact that the fee is charged if any Relevant Instructions have been paid on a particular day, rather than by reference to what or how many Relevant Instructions are paid. Like Barclays, its Unpaid Item Charge is more than the Paid Item charge. The name of its Guaranteed Paid Item Charge, the Cheque Card Overdraft Fee, indicates that it is not charged in exchange for the service of making the payment. In the case of HBOS, its charges are the same, both in amount and in the cap upon the number of fees charged on any day, whether a Relevant Instruction is paid or not (although, unlike Abbey, it gives different names to the fees); and again this, on the face of it, indicates that the charge is not the price payable in exchange for the Relevant Instruction being paid. I refer further to HSBC's Paid Item Fee, the Arrangement Fee, below at paragraph 410. It suffices here to say that the fact that the same fee is charged for an arranged overdraft facility and an unarranged overdraft indicates that it is not the price or remuneration paid in exchange for paying upon a Relevant Instruction. As for Nationwide, which has Guaranteed Paid Item Charges but not Paid Item Charges, it does not suggest in its terms that the charges are made in exchange for services involved in making the payment rather than because it is compelled to make a payment because a guarantee card has been used. Like Barclays, RBSG calls its Paid Item Charge a Paid Referral Fee, and its Unpaid Item Fee, payable on declining a Relevant Instruction, is higher than its Paid Referral Fee. There is nothing in the terms of any of the Banks to indicate that Paid Item Charges and Guaranteed Paid Item Charges are levied as a price or remuneration in exchange for making the payment that the customer instructs.

408. Are these charges and the Overdraft Excess Charges the price or remuneration paid in exchange for the service of providing an unarranged overdraft? Initially, I leave aside HSBC's Arrangement Fee, which requires separate consideration. The OFT draws a contrast between interest charged according to the amount of borrowing and the time for which funds are borrowed, on the one hand, and Relevant Charges, which do not reflect the amount lent by the Banks and bear either no correspondence or in the case of overdraft excess charges at best an imprecise correspondence with the time for which money is lent. It pleads that the main term as to price or remuneration for a temporary loan is that providing for the payment of interest. Undoubtedly, as the Banks point out, when a bank makes arrangements with a customer in advance for an overdraft facility, the customer might incur an arrangement fee for the facility as well as interest, but typically the fee for the facility is charged regardless of whether it is

used and the interest is charged for the borrowing itself. Clearly the Relevant Charges are not levied in exchange for a facility in that sense.

409. I am unable to accept that either the Paid Item Charges and Guaranteed Paid Item Charges or the Overdraft Excess Charges are the price or remuneration or even a part of the price or remuneration that the customer pays in exchange for lending services or that the typical customer would recognise it as such or that the Banks so present it. Unlike interest, no fees comparable to any of the Relevant Charges are imposed for borrowing under a planned facility. Excess Overdraft Charges are referable to the circumstances in which the overdraft came about and not in exchange for the actual lending on the account, that is to say not in exchange for the lending services supplied by the Banks. The same is true of Paid Item Charges and Guaranteed Item Charges.

410. In two ways HSBC's Arrangement Fee differs from other Relevant Charges and has an appearance more closely resembling a price or remuneration paid in exchange for services. First, it is charged in the same amount for unarranged overdrafts and for arranged overdraft facilities. Secondly, when it is charged the Bank commits itself under condition 7.5 (see paragraph 227 above) to "an overdraft or increase to [the customer's] existing overdraft to cover the item concerned for 31 days". Thus HSBC is able to argue that if, as the OFT appears not to dispute, in the case of an arranged overdraft the Arrangement Fee is payable by way of the price or remuneration in exchange for the service of providing a facility, so too it is paid by way of the price or remuneration where the 31 day facility is provided in response to a Relevant Instruction.

411. I see considerable force in this argument, but in the end I do not accept it. Although HSBC commits itself to extending for 31 days the lending necessary to cover the payment, the reality of the matter is that the Bank does not afford the customer a facility in any recognisable sense. As Mr Snowden himself submitted, the commitment is confined to the lending that the Bank makes in order to pay upon the Relevant Instruction and if that is repaid or reduced in amount within the 31 day period, the customer is not entitled to use the "facility" to make other payments or for any other purpose. Under condition 7.5 if the customer "make[s] another informal request for an overdraft and [HSBC] agree[s] to such a request, [HSBC] may charge [the customer] a further Arrangement Fee". Although it is presented as something akin to a facility, as with the other Banks, the substance of the arrangement that HSBC makes when it pays upon a Relevant Instruction is simply that it makes an ad hoc loan to the customer. Although the Arrangement Fee for a planned facility and an Arrangement Fee levied when a Relevant Instruction is paid are similar in name and amount, the "triggers" for the charges are different in kind. Albeit disguised by the structure and terminology of HSBC's terms and conditions, the Arrangement Fee in the latter case is a charge levied when the customer borrows, and levied not in exchange for HSBC paying upon a Relevant Instruction or in exchange for the actual lending but because of the circumstances in which the payment is made and the lending comes about. As with the Relevant Charges of the other Banks, this leads me to conclude that HSBC's Arrangement Fee, when levied in these circumstances, does not fall squarely within the expression "price or remuneration" as used in Regulation 6(2).

412. There is another consideration that reinforces me in this view, although this is not in itself decisive. Condition 7.5 of HSBC's conditions states not that an Arrangement

Fee will be charged, but that it *may* be charged. Such tentative language and the indication that the charge is in some way uncertain or discretionary are not characteristic of a price or remuneration, and make the Arrangement Fee the less recognisable as the price or remuneration for services. (Of course, similar language is used in condition 7.4 in respect of the Arrangement Fee for an arranged facility, but here the customer's obligation will be crystallised when the facility is arranged, and presumably stated in the letter setting out the terms of the overdraft which condition 7.4 says will be sent.)

413. I therefore conclude that the Relevant Charges are not the price or remuneration in exchange for services by way of providing an unarranged overdraft, and I reject the specific services argument.

414. I add two observations. First, in so far as the argument is that the Relevant Charges are levied in exchange for the provision of an overdraft, on any view, since all the Banks charge interest on overdrafts, they are only part of the price or remuneration. The considerations to which I referred at paragraph 400 when dealing with the whole package argument apply here also.

415. Secondly, whilst the Directive and the 1999 Regulations are concerned with the fairness of the individual contract between the seller or supplier and a particular consumer and are not directly concerned with whether a seller or supplier treats fairly consumers as a body, the Banks' position is that the Relevant Charges and the "free-if-in credit" pricing structure of which they are part are a proper basis for financing the provision of personal current account services generally. They cite the Competition Commission's statement (at para 439 of its report, "Personal current account banking services in Northern Ireland market investigation", 15 May 2007) that:

> "PCAs perform many functions which are charged for in a variety of ways, and some functions are provided without charge. Therefore it would be unrealistic to expect every aspect of charging necessarily closely to reflect the costs of performing the associated service, even if it could be calculated".

The Banks do not say that their Relevant Charges are related to the costs of providing specific services which trigger the levying of the charges. (According to Mr Elithorn's evidence, which I accept as providing a broadly reliable picture, information provided by the Banks suggests that in 2006 the Banks between them received £2.5 billion from Relevant Charges on an average daily unarranged overdraft balance of £0.6 billion.) It strikes me that in these circumstances it would be surprising if the Relevant Terms were immune from assessment because it would relate to the relationship between the amount, or more generally the value, of the Relevant Charges and specific services supplied in exchange. On the Banks' own argument, no such relationship is intended by their pricing structure.

416. I am unable to accept the specific services argument in respect of any of the Relevant Charges.

<u>The specific contract argument</u>

417. I come to the specific contract argument, which was not advanced by all the Banks and was advanced with little apparent enthusiasm by those who did so. I can deal with it briefly. It is based upon the contract that arises between bank and customer when a bank provides an overdraft on a current account to which it was not contractually committed in advance. Paget's Law of Banking 13th Ed (2007) para 7.1 explains the position thus:

> "[The relationship of banker to customer] consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide."

See too Lloyds Bank plc v Voller, [2002] 2 All ER (Comm) 978.

418. Accordingly, the argument is, as I understand it, if a bank agrees to an unarranged overdraft, it makes a specific (or special) contract about it, the subject matter of which are the grant of the loan and the charges that the customer is to pay for it. The Relevant Charges are the main subject matter of such a contract. The argument is further developed, I think, that if a Bank declines to pay upon a Relevant Instruction, then similarly there is a specific contract whereunder the Bank agrees to consider the request for an overdraft and the customer agrees to pay Relevant Charges.

419. The extension of the specific contract argument can be answered shortly. The customer's request, when giving a Relevant Instruction, is for the Bank to make payment in accordance with his instructions, not that it consider doing so. If payment is refused, there is no correspondence between an offer and acceptance so as to give rise to a specific contract.

420. There is, as I see it, an equally short answer to the specific contract argument that arises when the Relevant Instruction is paid. The OFT's investigation is into the Relevant Terms in what Paget calls the "general contract" and is directed to their fairness in a general contract. If they are unfair, they are not binding upon the Banks' customers. The OFT does not seek to investigate the fairness of any special contracts (such as Paget describes) or the fairness of the Relevant Terms or any terms relating to Relevant Charges that might have been incorporated into them. If a special or specific contract contains such terms, it is because they were in the general contract; and if the terms are not binding upon the customer as part of the general contract, they are not incorporated into any special contract so as to be binding upon the customer, and the Banks are not entitled to the Relevant Charges under specific contracts of this kind.

Conclusion about whether the fairness of the Relevant Terms is precluded from the assessment because they "relate … to the adequacy of the price or remuneration, as against the goods or services supplied in exchange"

421. I therefore conclude that the Relevant Terms are not exempt from assessment under the 1999 Regulations. This does not seem to me surprising. Regulation 6(2) exempts assessment of the fairness of the balance of the essential bargain between a seller or supplier and a consumer. As the Banks themselves explain, under a "free-if-in-credit" price structure the economic balance in a contract between a Bank and its current account customer is between the package of services supplied by the Bank and the total benefits to the Bank from operating the current account, not only by way of Relevant Charges but also in particular by way of the use of the funds if the account is in credit and interest if it is in debit. On no view does an assessment of the Relevant Charges (or the Relevant Terms) impinge upon the adequacy of the totality of the benefits received by the Bank in exchange for the package of services. The OFT's investigation might well involve consideration of the fairness of the structure of a "free-if-in-credit" pricing regime but that is very different from an assessment of the overall "adequacy" of the benefits to a Bank from operating it.

The nature of the exception if Regulation 6(2)(b) applies

422. If I had concluded that Regulation 6(2) covers the Relevant Terms, a further question would arise about the nature of the exemption under the Regulation. Since the matter was argued fully before me, I should express my conclusions about it. If Regulation 6(2)(b) applies to a term, is any assessment of its fairness excluded (the "excluded term" construction), or does the Regulation exclude only an assessment relating to the adequacy of the price (the "excluded assessment" construction")? The question is posed in Chitty, Law of Contact (2004) 29th Ed at para 15-034 in these terms:

> "The question of substance … is whether Art. 4(2) (and therefore reg. 6(2)) excludes a category of terms from the test of fairness ("core terms" or "core provisions") or whether it instead excludes certain types of issue from being taken into account by the courts ("core issues") in coming to their overall assessment of the fairness of a term under reg. 5(1)."

Chitty expresses the opinion, at para 15-035, that the better view is that Regulation 6(2) "excludes from the requirement of fairness terms which define the subject matter of the contract or the adequacy of the price…". The OFT argues for an excluded assessment construction: that even if the Relevant Terms are covered by Regulation 6(2), that does not mean that all consideration of their fairness is permitted, and what is precluded is an assessment of the adequacy of the price or remuneration (as against the services supplied in exchange). The Banks argue for the "excluded term" construction, while also submitting that ultimately the question which construction is preferred is not decisive of the issues in this case because, even if an "excluded assessment" construction is adopted, the 1999 Regulations still prohibit any assessment of fairness that affects the level of the Relevant Charges, including an assessment of the fairness of the structure of the charges and the events which allow the Banks to levy them.

423. I have much sympathy with the Banks' observation that the distinction between the alternative constructions can be an elusive one to apply, increasingly so the more tightly the ambit of Regulation 6(2)(b) is confined to terms that deal with the adequacy of the price, rather than terms concerned simply with the price or remuneration. However, that is no answer to the question of principle identified by Chitty.

424. Given that the term "adequacy" has the connotation that Lord Rodger explained (see paragraph 393 above), it would surely, as Chitty acknowledges at para 15-034, be unusual for a contractual term to be directed to the adequacy of the price, as opposed to its level. (I do not overlook that in the First National Bank case Lord Hope (cit sup at para 43) said that condition 4 of the agreement under consideration contained provisions "that concern the adequacy of the price charged for the loan", but he was, as I read his speech, simply drawing a contrast between the circumstances in which the interest provisions of condition 4 applied and the term. Unlike Lord Rodger, his focus was not upon the meaning of "adequacy".) This being so, I find it difficult to understand how, if an excluded term construction is preferred, any real force can be given to the reference to "adequacy" or indeed how exempted assessments are limited to those which concern the price/quality ratio or the essential bargain between the parties.

425. The wording of Regulation 6(2) of the 1999 Regulations, and that of Article 4(2) of the Directive which it reflects, supports the excluded assessment construction. Article 4(1) is directed to how the unfairness of a contractual term is to be assessed. Article 4(2) specifically states that the "assessment" shall not relate to the exempted matters. It is not to relate to one aspect of the price or remuneration, its adequacy as against the goods or services supplied in exchange (just as an assessment relating to the definition of the main subject matter, and not an assessment relating to any term that defines the main subject matter, is excluded from assessment for fairness). Similarly in Regulation 6(2) the subject of the verb "shall not relate" is "assessment".

426. It is suggested that the clauses in the Regulation and in the Article about plain intelligible language might support an excluded term construction. I do not find that suggestion compelling. I recognise that the requirement for plain intelligible language in Regulation 6(2) is that the term is to be so expressed, but this does not seem to me to indicate that its fairness is to be protected from assessment generally and not only as regards the adequacy of the price or remuneration. On the contrary, the fact that both the Directive and the 1999 Regulations use the expression "in so far as" rather than simply "if" might be seen to point to the excluded assessment construction. Article 4(2) refers to "these terms" being in plain intelligible language, but I see little difficulty or straining of language in understanding this to mean "the relevant terms".

427. In my judgment, the 19th recital to the Directive lends no support to an argument that an excluded term construction is to be preferred. It seems to me that, as a matter of grammar, the recital contemplates that no assessment should be made of (i) "terms which describe the main subject matter of the contract" and (ii) "the quality/price ratio of the goods or services supplied". (I cannot accept that the grammar of the recital is that no assessment should be made of terms which describe (i) "the main subject matter of the contract" and (ii) "the quality/price ratio…". It would, as I have already said, be remarkable if any consumer contract contained a term describing the quality/price ratio.) Against this, Mr Rabinowitz pointed out that the recital goes on to say that it is permissible to take into account the main subject matter of the contract and the price/quality ratio in assessing the fairness of *other* terms in the contract, which of itself suggests that the distinction between what is a permissible assessment and what is impermissible is defined according to the term under consideration. The two parts of the recital do not completely fit together under rigorous linguistic

analysis, and it is unhelpful to press its precise wording too far. Lord Steyn in the First National Bank case (cit sup at para 32) pointed out that the Directive is "not an altogether harmonious text", and in truth no entirely harmonious reading of the recital can be found. However, it seems to me that the purpose, as expressed in this recital, that lies behind protecting part of the parties' bargain from assessment as to fairness is better achieved by an excluded assessment construction.

428. I consider that some further support for this view is to be found in the history of Article 4(2) of the Directive. It was introduced into the draft Directive in 1992 by the Council of Ministers, who explained in their Reasons for the common position that they adopted that the wording was intended to "clarify the procedures for assessing the unfairness of terms and to specify their scope while excluding anything resulting directly from the contractual freedom of the parties (eg quality/price relationship)": (1992) 15 JCP 483.

429. The argument for an excluded term construction is that this is required by the First National Bank case. Undoubtedly there are expressions in the speeches that lend support to this argument. Thus, for example, Lord Bingham (cit sup at para 12) spoke of what terms fell within Regulation 3(2)(b) of the 1994 Regulations. Lord Steyn (at para 34) said that "certain provisions, sometimes called core terms, have been excepted from the regulatory regime". Lord Hope (at para 43) spoke of what terms described the main subject matter of the contract or were directly related to the adequacy of the price charged for the goods or services. However, I am unable to accept that these expressions compel or justify an excluded term construction of Regulation 6(2) of the 1999 Regulations. The First National Bank case was concerned with Regulation 3(2) of the 1994 Regulations, which, unlike Regulation 6(2) of the 1999 Regulations, was expressed in language of excluding assessment of excepted terms: see para 31 above. As is observed in Chitty on Contracts (cit sup) at para 15-034, there is "a subtle change in the treatment of Article 4(2) by the 1994 Regulations and the 1999 Regulations: in the 1994 Regulations, the text implementing Art. 4(2) of the Directive was placed as an exception under the heading "Terms to which these Regulations apply;" in the 1999 Regulations, the text implementing Art. 4(2) was placed in a provision headed "Assessment of unfair terms," following in this respect the framework of the Directive itself".

430. There was, as it appears, no argument advanced in the First National Bank case about whether an excluded term construction or an excluded assessment construction was to be preferred (although, as Mr Rabinowitz pointed out, the debate was obliquely alluded to in the appellant Bank's printed case). Further, once it was accepted that the term did not concern the adequacy of the price or remuneration within the meaning of the 1994 Regulations, that sufficed to establish that the assessment of fairness was not excluded. There was no need to enter upon the question whether it was any assessment of the term or a particular kind of assessment that was excluded. Given that the answer to that question was less clear under the 1994 Regulations than under the 1999 Regulations, and might have led to arguments as to how far the wording of Regulation 3(2) should be given a somewhat strained interpretation in order to achieve consistency with the Directive, it is not surprising that the choice between an excluded term construction and an excluded assessment construction was not discussed.

431. However, the Banks put forward another argument based on the First National Bank case: they say that the case was about whether consumers would unfairly be taken by surprise by the term because it would allow the Bank to charge interest after judgment when it could not otherwise have done so, and that, this being so, had the House of Lords preferred an excluded assessment construction, this would have been a "knockout blow" for the Bank. Because the House of Lords did not so dispose of the case, the Banks invite the inference that they preferred an excluded term construction. I am not persuaded that this would have provided the obvious answer to the case that the Banks suggest. The OFT's complaint was not only that customers were taken by surprise but also that they were liable for excessive interest under the term (as against the position if the contract had not included the term) so as to cause "a significant imbalance of the parties' rights and obligations". I can well see the argument that the real question was whether the assessment would be directed to whether it was fair that the term should disentitle customers from the protection against interest after judgment but equally it might have been said that the assessment would amount to, or at least necessarily involve, assessing whether the contractual rate of interest (that is to say, the rate of interest for the loan itself and not a special rate for when the customer was in default) was excessive. It is sufficient to say that I am not persuaded that the excluded assessment construction was a readily available knockout blow for the Bank.

432. The question which construction is to be preferred was not in issue, as far as appears from the reports, in either Bairstow Eves v Smith, (cit sup) before Gross J or in Domsalla v Dyason, [2007] EWHC 1174 (TCC) before HH Judge Thornton QC, and I derive no assistance on the point from those decisions.

433. It was argued that the excluded assessment construction is to be rejected because it necessarily leads to assessment of the fairness of the amount paid. An assessment as to fairness involves an assessment as to whether a term causes a significance imbalance in the parties' rights and obligations arising under the contract, and in the case of a term directly specifying a price, this necessarily involves an assessment of its adequacy as against the services supplied in exchange. Further, given that the difference between a large price and a small price relates to adequacy of the price, there is no difference in logic between making a minutely small charge and making none at all: as Mr Milligan put it, "the mathematician would say that the vanishingly small price is no different from the right to charge it in the first place". Once a payment obligation is categorised as a price, the argument runs, there is no difference between investigating whether the price is fairly charged at all and investigating the fairness of its amount.

434. I am not persuaded by this argument. It proves too much. A similar argument, it seems to me, could be deployed to show that any term relating to the price or remuneration is covered by Regulation 6(2) (including, for example, a price escalation clause such as Lord Steyn referred to in the First National Bank case, cit sup at para 34, which might be capped to limit its effect to a modest price increase). While there might not be a clear line between an investigation into a pricing structure and an investigation into the adequacy of the price, that does not mean that the Regulation does not require a judgment to be made as to where the line falls. The assessment required by Regulation 5(1) is into the overall balance of the parties' rights and obligations under the contract. While this might entail some consideration of the level

of the price paid by consumers as against what they receive in exchange, the assessment under Regulation 5(1) is a broader one (and would be so the more obviously if the term the fairness of which is assessed does not relate to all that the consumer pays by way of the price or remuneration under the contract but only part of it.) It involves, as Lord Bingham said in the First National Bank case (cit sup at para 17) "looking at the contract as a whole". As recital 19 to the Directive makes clear, a distinction is to be drawn between (permissibly) taking into account the price/quality ratio when assessing fairness and (impermissibly) assessing the price/quality ratio itself.

435. In the course of argument, the Banks' submission that an excluded term construction should be adopted underwent some refinement. As I have said, contracts are unlikely to contain terms that directly deal with "the adequacy of the price or remuneration as against the goods or services supplied in exchange". Mr Rabinowitz, recognising this, accepted that, even upon an excluded term construction, the 1999 Regulations are not to be interpreted as excluding a particular clause or paragraph of the contract, but the excluded term construction contemplates that the "term" comprises all contractual provisions which give rise to a particular obligation (in the case of Regulation 6(2)(b), an obligation to pay), notwithstanding these contractual provisions might be found in various clauses of the contractual documentation. It seems to me unlikely that Regulation 6(2) requires an exercise of identifying different elements of a "term" in this way, rather than the relatively simple approach that the excluded assessment construction requires.

436. It seems to me that the "excluded assessment" construction of the 1999 Regulations is to be adopted.

The requirement of good faith

437. By the Litigation Agreement, it was agreed that the Banks should bring a counterclaim for a declaration that "if the Relevant Terms and/or Relevant Charges fall to be assessed for fairness under the 1999 Regulations, … 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 relief sought by the Banks about the effect of the words "contrary to the requirement of good faith" underwent some changes in the course of the hearing. In the end they sought declarations that:

i) "It is a necessary, but not a sufficient, precondition to any finding of unfairness under Regulation 5(1) to the 1999 Regulations that the contractual terms under consideration are contrary to the requirement of good faith."

ii) "The Relevant [Bank] Terms and Relevant [Bank] Charges could not be found to be unfair within the meaning of Regulation 5(1) of the 1999 Regulations by virtue only of giving rise to a significant imbalance in the rights and obligations of the parties, without reference to the issue of good faith."

iii) "If the OFT seeks any relief from the Court based upon a contention that the Relevant Terms and Relevant Charges are unfair within the meaning of

> Regulation 5(1) of the 1999 Regulations, one of the matters which it will have to establish is that the bank has not dealt fairly and openly with its customers as regards the process by which the Relevant [Bank] Charges were agreed by [or otherwise became part of the contract between] the bank and its customers."

(As I understand it, the Banks include the words in square brackets simply to indicate that these words might or might not be included in any declaration made. Although in the third declaration the word "customers" (plural) is used, it is not disputed that the 1999 Regulations are concerned with the fairness of terms between the seller or supplier and an individual customer: see paragraph 16.)

438. As far as the first declaration is concerned, the OFT does not dispute that it is a necessary, but not a sufficient, precondition to any finding of unfairness under Regulation 5(1) that the terms under consideration are contrary to the requirement of good faith. There is also no issue that the Relevant Terms and Relevant Charges could not be found to be unfair within the meaning of Regulation 5(1) by virtue only of giving rise to a significant imbalance in the rights and obligations of the parties, without reference to the issue of good faith.

439. In the First National Bank case the House of Lords explained, in the context of the facts of the case, about the requirement of good faith and its part in an assessment of fairness. Lord Steyn (cit sup at para 36) referred to the "twin requirements of good faith and significant imbalance", and went on (at para 37) to say that, "there is a large area of overlap between the concepts of good faith and significant imbalance". As for the requirement of good faith itself, he said this (at para 36): "The examples given in the Schedule 3 [to the 1994 Regulations, that is to say the "greylist"] convincingly demonstrate that the argument of the bank that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected". Lord Millett (at para 54) warned against looking for a single test for what constitutes unfairness as defined by the 1999 Regulations. Lord Bingham (at para 17) said this:

> "A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the

> detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulation. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote"

440. These observations were made by the highest authority by reference to the facts of the specific case before them. It is not appropriate for me, asked to consider in the abstract and without reference to specific facts whether the Relevant Terms satisfy the requirement of fairness, to seek to explain or amplify what they said. As I see it, I am effectively being invited by the first and second proposed declarations to add a gloss to the 1999 Regulations while resolving nothing in dispute between the parties, and this would be at best valueless and at worst confusing. I decline to grant these declarations.

441. It is apparent that the Banks' third proposed declaration is drafted on the basis of Lord Bingham's speech (with which, as I have said, all of the other Law Lords expressed their agreement) but nothing would be gained from me making a declaration if it is designed simply to endorse what he said. I would be the more reluctant to make the proposed declaration because on any view it is difficult fully to define the requirement of good faith, a concept which is to be given an autonomous interpretation in light of the recitals to the Directive (and in particular the 16th recital) but at the same time has different connotations in the law of different member states: see Lando & Beale's Principles of European Contract Law, Notes to Article 1:201 (combined and revised 2000**).** As Mr Rabinowitz observed, there is room for debate as to quite what would be covered by Lord Steyn's expression "procedural defects in the negotiating process", and it seems to me that equally the expression in the proposed declaration "as regards the process by which the Relevant … Charges were agreed by … the bank and its customers" would give rise to uncertainty. For example, the 16th recital to the Directive states that in making an assessment of good faith, particular regard shall be had (among other things) to "the strength of the bargaining position of the parties", but the strength of the parties' bargaining position in itself (and in contradistinction from its exploitation by the stronger party) is not obviously part of the "procedure" or the "process" whereby the contract was made.

442. The Banks' argument that I should grant the third declaration faces a further difficulty. As I have mentioned, in the First National Bank case (cit sup at para 13, and see too para 20) Lord Bingham made it clear that "fairness must be judged as at the date the contract is made, although account may properly be taken of the likely effect of any term that is then agreed and said to be unfair". The question therefore arises when in the circumstances of the present case and the current account contracts between a Bank and an individual customer the contract is to be taken as being made. One obvious answer might be that it is made when, possibly many years ago (maybe before 31 December 1994, the date referred to in article 10 of the Directive), the Bank agreed with the customer to operate a current account. But there is an equally obvious objection to this: the Relevant Terms that are the subject of the issues between the parties were in many cases not included in the contract when it was first made, but were introduced into it at some later date (whether by way of consensual variation or by way of what is called in Chitty on Contracts, 29th Ed (2004) at para 22-039 a "unilateral power of variation" exercised by the Bank). Assuming that the fairness of the Relevant Terms is not to be assessed as at a time before they were introduced into the contract between Bank and customer, it does not necessarily follow that the fairness is to be assessed when they were so introduced rather than at some later date, for example when the parties make what I have termed a specific contract, such as that explained in Paget's Law of Banking 13th Ed (2007) at para 7.1 to which I referred at paragraph 417 above.

443. This question was not identified in advance as one that I was to consider at this hearing of preliminary issues, and not one with which the parties dealt in their written submissions. Indeed, I think that it is fair to say that its potential importance and the difficulties that it entails were not identified by the parties before I raised it during the hearing. Although some of the Banks made some oral submissions about it, in the end the Banks told me that its implications were of such potential importance that they did not wish me to answer it until they had had the opportunity to consider it further. The OFT, for its part, made no submissions as to the date as at which any assessment of fairness is to be made in the circumstances of this case, and did not dissent from the Banks' request that I should not decide the question in this judgment, reserving its position as to whether it should be decided by me after further argument.

444. Although in some ways it is unfortunate that this question should not be resolved, I accept the Banks' contention that I should not determine it without the parties having the opportunity to decide what position that they wish to adopt about it and to make full submissions.

445. It is against this background that I consider whether I should make the third proposed declaration. The proposed declaration itself refers to the "process by which the Relevant … Charges were agreed by [or otherwise became part of the contract between] the bank and its customers". The wording reflects uncertainty about how the Relevant Terms were introduced into the Banks' contracts with individual customers, and the evidence about this is unsatisfactory. As I explained in paragraph 96 above, all of the Banks now have the right under their standard terms to give customers thirty days' notice of a change of terms, and it seems probable that many of them used a comparable power in their previous terms to introduce the Relevant Terms into their existing contracts with individual customers, but there is no clear evidence about this; and indeed in the case of Lloyds' TSB there is no evidence that it

had any such power before its current terms of November 2007, and there is no evidence about how the Relevant Terms were introduced into its existing contracts.

446. The focus of the third proposed declaration is that the Banks' wish to establish that, provided a Bank acted properly (as it was put in Mr Rabinowitz's opening submissions) with regard to the manner in which it obtained its customer's agreement to the terms under scrutiny, the requirement of good faith is satisfied and any enquiry as to how the Bank acted thereafter and any enquiry as to whether any contractual term causes a significant imbalance in the parties' rights and obligations arising under the contract would be superfluous. They argue that this follows from a proper understanding and application of the speeches in the First National Bank case and the decision of the Court of Appeal in Bryan & Langley v Boston, [2005] EWCA Civ 973.

447. I have serious doubts whether in any case it would be appropriate to make a declaration of this kind in abstract terms and without regard to the facts of any particular case, but in any event I am not willing to make one without forming some view as to when, for the purposes of the declaration that the Banks seek, the process of making the contract containing the Relevant Terms is to be taken to be complete. Otherwise, I am not in a position to consider the implications of deciding that subsequent conduct cannot bear upon whether the requirement of good faith is satisfied, and otherwise the meaning of any declaration that I might make would be inappropriately obscure.

448. For these reasons I shall make none of the declarations about the requirement of good faith that the Banks seek.

Conclusion

449. As for the position at common law, I accept the Banks' submission that none of the terms which I have considered (the terms now generally used by the Banks for personal current accounts other than basic accounts and also certain of the terms used until recently by Clydesdale and RBSG) could be unenforceable on the grounds that they are penal (paragraph 323 above).

450. With regard to the 1999 Regulations, I conclude that, of the terms now generally used by the Banks for personal current accounts (other than basic accounts), those of HSBC, Lloyds TSB, Nationwide and RBSG are in plain intelligible language, and those of Abbey, Barclays, Clydesdale and HBOS are largely in plain intelligible language but not so in certain specific and relatively minor respects (paragraph 293 above). However, I reject the Banks' contention that the Relevant Terms are exempt from assessment as to fairness under Regulation 6(2) of the 1999 Regulations (paragraph 421 above). This does not mean that the Relevant Terms are necessarily to be regarded as unfair under Regulation 5(1) or that they are not binding upon consumers under Regulation 8(1): those are not questions for me to decide in this judgment. For the reasons that I have explained, I decline to make any declaration as to the meaning and effect of the requirement of good faith in Regulation 5(1) of the 1999 Regulations (paragraph 448 above).