Case No: 6QZ87602 and 6QZ90518

IN THE BIRMINGHAM COUNTY COURT

Birmingham Civil Justice Centre
Priory Courts, Bull Street Birmingham B4 6DW

Date: 15 May 2007

Before :

District Judge Cooke

Between :

Kevin Berwick	**Claimant**
- and -	
Lloyds TSB Bank Plc	**Defendant**
And Between :	
Michael Haughton	**Claimant**
- and -	
Lloyds TSB Bank Plc	**Defendant**

Mr Berwick appeared in person. Mr Haughton did not appear but requested that the court deal with the case on the basis of his statement of case. The Defendant did not appear and was not represented.

Hearing date : 13 April 2007

Approved Judgment

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

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District Judge Cooke

District Judge Cooke :

Introduction

1. These two cases were among a number listed before me for final hearing in the small claims track on 13 April 2007. In these cases, as in all the others in that list, the claimant sought to recover from a bank or credit card company various charges which had been made to their account. It is a matter of public notoriety that vast numbers of such claims have been issued, prompted by a "statement of position" issued by the Office of Fair Trading entitled "Calculating fair default charges in credit card contracts", and by the publicity that has followed.

2. In each case, the defendant has filed a defence in a standardised form. These two cases are unusual in that the defendant appears to have taken no further action since doing so; in all other cases in the same list, including several involving this defendant, terms of settlement had been reached between the parties, usually involving payment in full of the amounts claimed without admission of liability. That has been the pattern in previous block lists of similar cases before me and, it appears, in other courts. I have not been made aware of any case in which the merits of such a claim have been ruled on by a court. I do not of course know the reasons that have caused the defendant to reach settlement in those other cases, and the fact that it has done so does not affect in any way the merits of the cases I am now dealing with.

3. Mr Berwick attended in person and presented his case very ably. In answer to my question he said that he had not heard anything from the defendant, and suspected that the reason may be that they had simply lost sight of his paperwork amongst the many claims they receive. He may be right in that.

4. Mr Haughton did not attend. He wrote a letter to the court on 21 March 2007 as follows: "please note that I will not be able to attend the court hearing on 13 April 2007 – please hear the case in my absence. I enclose copies of correspondence with Lloyds TSB." I took this as a request to deal with the case under CPR 27.9, under which the court may take into account a party's statement of case and any documents filed and served provided he makes a written request for it to do so more than seven days before the hearing. Under paragraph 5.4 of the practice direction relating to CPR 27 I am required to prepare a note of my reasons to be sent to each party. This is that note.

5. Having delivered my judgment in draft to the parties and fixed Tuesday 15 May 2007 to hand it down, I have received a fax from solicitors on behalf of the defendant bank in relation to Mr Haughton's case stating that 'this matter will settle directly with the Claimant . Our client will be settling the Claimant's claim within three working days by depositing the sum of £285.35…into the Claimant's bank account…. We would ask for the claim to be marked as satisfied'. I have no communication from Mr Haughton to indicate that terms of settlement have been agreed with him or that he

wishes to discontinue his claim. The letter does not admit liability and is in similar form to that sent by the bank in many bank charges cases on the eve of a small claims hearing, and is no doubt a unilateral attempt by the bank to avoid the hearing proceeding. If the parties had in fact compromised the claim by agreement, or if it had been discontinued by the Claimant at any stage before my judgment was handed down, the claim would be at an end and I would have no decision to make. But that is not the situation and I must in my judgment continue to deal with it. The fact that I have done so and resolved it in favour of the Defendant does not prevent the Defendant from making a goodwill payment to Mr Haughton if it wishes to do so.

Mr Haughton's case

6. I therefore deal with Mr Haughton's case first. His claim was filed online at the County Court bulk centre at Northampton on 5 December 2006. The particulars of claim read as follows "Lloyds TSB have made charges disproportionate to the work involved to them. I am therefore claiming back the charges and any interest and also the £10 subject access fee paid." The claim is stated at £247.50 plus the issue fee of £30. No further particulars are given, and the bank's defence dated 7 January 2007 pleads amongst other things that "the statement of claim is insufficiently particularised and is embarrassing... the particulars of claim in this action disclose no reasonable cause of action against the defendant and make no specific allegations against the defendant as to why the defendant should be liable to the claimant for the amount claimed." It is to be noted that the particulars of claim do not even specify the account or accounts concerned, let alone the charges complained of.

7. Mr Haughton filed an allocation questionnaire which gave no further elucidation of his claim. I made an order, drawn on 8th February 2007, allocating the claim to the small claims track and giving directions for the hearing on 13th April. Amongst those directions was a requirement that "the claimant must include in his bundle of documents a full list of the charges disputed, specifying the date and amount of each and the reasons given for it". Mr Haughton has not complied with that direction. He has lodged no bundle of documents and no witness statement or other evidence, and although his letter of the 21st March attaches a copy of a letter apparently sent to Lloyds TSB on 20th November 2006 referring to a credit card number and stating that it enclosed a schedule of charges, no such schedule was attached to the copy sent to the court.

8. In the absence of such basic information about the claim, and of any evidence to support it, the court cannot deal with it. It would not be appropriate to make assumptions as to the nature of the charges complained about, or that the complaints made about those charges in the particulars of claim (or, assuming the court could take it into account, in his letter of complaint to the bank in November 2006) applied to those charges or could be justified. The burden is on Mr Haughton to make out his claim by evidence presented to the court and he has not done so. He has not requested any adjournment to be able to provide this information and indeed by his letter invites the court to proceed on the basis of the information so far before it. Accordingly, Mr Haughton's claim is dismissed.

Mr Berwick's claim

9. Mr Berwick's claim is made in more detail. He also issued his claim online, and based it on one of the forms available from the various consumer websites which have sprung up to assist parties wishing to make such claims. He gives two bank account numbers, and the material parts of the particulars of claim are as follows:

> "2. since the 5th October 2000 of the defendant debited charges and interest in respect of purported breaches of contract…
>
> 4. claimant contends:
>
> (a) the charges exceed the defendant's losses caused by the breaches
>
> (b)the term permitting the defendant to levy such charges is unenforceable under the Unfair Terms in Consumer Contracts Regulations 1999, Unfair Contract Terms Act 1977 and at common law
>
> 6. alternatively if the charges are a fee for a service then they must be reasonable under section 15 of the Supply of Goods and Services Act 1982"

10. The defence filed denies that the charges are made in respect of any breach of contract on the claimant's part and asserts that in consequence they cannot be considered to be penalties. Instead it is said that there are charges imposed for the banking services provided by the defendant, that they are imposed by virtue of a term of the contract, that particulars of them are given to the customer when he opens his account and that advance notice is given in each statement of any charges incurred by the customer during that month, which are then debited to his account in the following month. It is asserted that the charges are fair and reasonable and not unlawful, and in particular in relation to the Unfair Terms in Consumer Contracts Regulations, it is asserted that as they constitute the price payable by the customer for services provided, they are excluded from any consideration of fairness by regulation 6 of those Regulations.

11. The amount claimed is the return of the charges totalling £1982.37 plus interest and costs. I made a directions order in Mr Berwick's case similar to that made in Mr Haughton's case and he has filed a bundle of documents, in good time, containing a witness statement setting out his arguments, a full schedule of the charges complained of with a spreadsheet calculating interest and copies of various other documents including his correspondence with the defendant, extracts from the defendant's web site detailing the charges they make to bank accounts, copies of the statutes and regulations referred to, and various press articles and other items of comment.

12. At the hearing I made clear to Mr Berwick that since the bank had not attended the case would be decided on the basis of the evidence he had submitted, but that he had to satisfy me that the claim has been made out, and that in particular insofar as points

of law arose it was my duty to consider those and come to a decision on them and that I could not rule in his favour simply because the bank had failed to attend. He accepted this in good heart and dealt fairly and honestly with the questions I put to him seeking to explore the issues, showing a good understanding of the legal principles. He was, in short, a model litigant. At the end of the hearing I reserved judgment and caused a note to be sent to the parties to the effect that the reserve judgment would be handed down on a date to be notified.

Penalties for breach of contract

13. It is convenient first to consider the contractual position in relation to the charges imposed and whether they arise in circumstances of breach of contract by the customer, in which case they may be attacked as unlawful penalties rather than genuine pre- estimates of loss.

14. Mr Berwick accepts in principle that the contract for his account with the bank is governed by the bank's standard terms and conditions, and that those terms contained provisions on the face of them entitling the bank to payment of these charges. He does not dispute, as a matter of fact, that the circumstances expressed to entitle the bank to those fees occurred (for instance, in the case of a charge for exceeding his agreed overdraft limit, that the limit was in fact exceeded). I do not have in evidence a full set of the terms and conditions applying to the account. The defence refers to a leaflet given to the customer when he opened his account, but does not attach that leaflet. Mr Berwick has not produced any such leaflet; no doubt this is because he has been operating his account for some years and does not retain the paperwork given to him when he opened it. He did produce a number of pages from the bank's web site headed "current account charges" and accepted that they applied to his account. He also, very fairly, accepted that the bank's terms and conditions would be likely to entitle it to amend the terms and conditions from time to time and in particular to change the amount and basis of charges.

15. The "current account charges" pages set out details of a number of charges which the bank will make for operation of accounts. For some accounts there is a monthly fee and for others no such fee. There is a table of charges for particular transactions such as the use of cash machines. There is a table of rates of interest paid by the bank on credit balances on different types of account. A section headed "overdraft charges" contains the following information:

> "If you decide you need an overdraft or think you might go over your agreed overdraft limit, please contact any Lloyds TSB branch ... We won't charge a fee for setting up an overdraft. All you pay is interest on the amount you borrow. When you arrange to borrow from us we will give you written details of:
>
> - The interest rates,
> - When we charge interest,

- If there are any fees.

If you go overdrawn without agreeing this with us

We charge a higher rate of interest for borrowing that you haven't agreed with us first. ... we will also charge you a fee for any borrowing not agreed with us in advance. These charges are shown ... below and will be charged to your account monthly.

Overdraft excess fee

We charge this when you go overdrawn and don't have an overdraft facility, or if you go overdrawn above an agreed overdraft ...

Returned item fee

You'll be charged this fee whenever there is not enough money in your account to make a payment such as direct debit, cheque or standing order."

16. The charges Mr Berwick complains of are listed in the schedule attached to his witness statement, which he has also sent to the bank. For the most part, the description given is either "unauthorised borrowing fee" "overdraft usage fee" or "overdraft excess fee". Mr Berwick was not aware of any difference between these, and I assume that they all correspond to the "overdraft excess fee" referred to above. A small number of charges are described as "unpaid direct debit" or "unpaid standing order", both of which I assume correspond to the "returned item fee" referred to above. Finally there are two entries described as "first request for payment" which Mr Berwick was unable to explain but which I infer may be a charge made when the bank writes to him to demand payment from him to reduce an overdrawn balance on his account. If so it is not one of the charges referred to above, but in view of Mr Berwick's concession I assume it is nevertheless a charge which the bank is contractually entitled to make.

17. It is to be noted that none of the provisions I have been referred to contain any prohibition against the customer going overdrawn, or issuing a cheque or other payment instruction which, if honoured, would cause his account to go overdrawn or exceed an agreed overdraft limit. Mr Berwick did not give evidence of any other express contractual term which would have that effect. Insofar as I can take account of the bank's statement of case it denies the existence of any such term. After the conclusion of the hearing I looked myself at the bank's web site to see what information it contained about the terms and conditions applying to current accounts. Had I found anything which appeared to suggest that there was a relevant express term of the contract I would have had to consider whether I could properly take this into account in the light of the somewhat more relaxed rules of evidence applying in small claims hearings, if necessary giving Mr Berwick the opportunity to make further submissions. In fact, although there were pages setting out the terms and conditions applying to current accounts, they dealt with matters such as the use the bank might

make of personal data and information about its regulatory body, and not with the basic operation of the account. There was nothing relevant to the issues before me.

18. I find it therefore on the evidence before me that there is no express term of the contract between Mr Berwick and the bank of the type referred to above. Is there any similar term to be implied? It is trite law that a term will only be implied into a contract if it is necessary to do so to make the contract make business sense. The word "necessary" must be emphasised; it is not enough that a contract would make better sense if an additional term were written in, the court must be satisfied that the parties must be taken to have agreed the additional term because without it the contract would make no business sense at all.

19. At its simplest, a contract for the operation of a current account by a bank envisages that the customer will from time to time pay money in to the credit of that account, and from time to time give the bank instructions to make payments which may be debited against that account. Those instructions might be in the form of cheques but they may take other forms, such as a standing order for the payment of a particular amount to a particular payee at specified intervals, an electronic funds transfer instruction or a direct debit authority by which the customer instructs the bank that it may debit his account with amounts from time to time demanded by a third-party payee. The bank collects the payments into the account, complies with the customer's instructions for payment out of the account and keeps an account of all these payments in and out, and the balance from time to time resulting.

20. This is not a straightforward matter; there may for instance be considerable delay in relation to payments both into and out of the account before they are cleared. Suppose the customer hands in at the bank counter a cheque in his favour drawn by some third party. The bank on his behalf sends that cheque through the clearing system for the payer's bank to honour. If it is honoured, the payer's bank transmits funds to the customer's bank, which are then credited to his account. The time between the original handing over of the cheque at the counter and the arrival of funds into the customer's account is not fixed. It depends upon the successful operation of the clearing system and the cheque being honoured by the payer's bank. The customer may have a more or less informed expectation as to when the funds will reach his account but he has no direct means of knowing whether the funds have in fact arrived, and if so when, until the bank tells him, for example on his inquiry or when he next receives a statement.

21. Similarly the customer has no direct means of knowledge of the date when payments that he is authorised to be made out of his account are actually debited to it. If he writes a cheque and gives it to a third party he will not normally know when that person hands the cheque into his own bank, still less when it will be presented at the customer's bank for payment. If he gives a direct debit authority in favour of, say, a utility company the customer will not know exactly when that company will ask for a payment under it, and he may not even know the amount of that payment since many such authorities are for amounts of variable at the payee's discretion.

22. It is obvious from the above that the customer will typically not know the exact state of his balance at any point in time. Even if he keeps the most meticulous records of all payments into and out of the account, it is likely that on any given day the balance shown by those records will not be the same as the cleared balance on the account at the bank, by reason of the variable and unascertainable delays in clearance in both directions.

23. I canvassed these points with Mr Berwick, and asked him for instance whether he thought he would be in breach of contract to the bank if he gave a cheque to someone who did not present it for some time, and it so happened that when it was presented there were insufficient funds in his account for it to be paid. His view was that he would not be in breach of contract, since he had no control over the date on which the cheque was presented for payment. Equally, when I asked him if he would be in breach of contract if he paid into his account a cheque given to him by someone else and the cheque bounced, he said that he would not be in breach of contract because he had no control himself over whether the third party's cheque was honoured.

24. It would no doubt be possible to draw up a contract in which the customer was placed under an express obligation to ensure that there were at all times in his account sufficient cleared funds to meet any payment request authorised by him from that account on the day the payment fell to be made. Such a term would be onerous for the customer (as Mr Berwick's reaction makes clear) because of his inability to ascertain the exact state of the account at any point. In the absence of any such express term (and I have no evidence to suggest that there is such an express term applying to Mr Berwick's account) it is not in my judgment a term which should be implied into a contract by the court. The contract to run the account makes perfectly acceptable commercial sense without it; the customer may make or authorise whatever requests for payment out of his account he wishes; the bank is obliged to honour those requests insofar as there are sufficient funds in the account (or within any overdraft facility it has contracted to allow the customer) and it is free to accept or decline the request in any other case. If the bank accepts the request it is entitled to debit the customer's account and (to the extent that payment causes or increases an overdraft) in due course to be repaid by the customer for what it has paid out on his behalf. If the bank declines to accept the request it is not in breach of contract to the customer for having done so and nor is the customer in breach of contract having made the request in the first place.

25. It follows in my judgment that none of the charges complained of were imposed by reason of any breach of contract on Mr Berwick's part. It follows also that the law relating to penalties and liquidated damages, which applies only to sums stipulated for payment in circumstances of breach of contract, has no application to those charges.

26. In this respect, it is worth observing, the position is potentially materially different between a case such as this which concerns charges applied to a current account and other cases, such as those dealt with in the OFT's position statement, which involve credit cards. In the operation of credit card accounts, the customer is typically under an obligation to make a minimum payment to his account each month and may also be

under an express obligation to ensure that the total amount he charges to his account does not cause a limit to be exceeded. If he is in breach of either of these obligations, any charge provided for by the terms of his contract is potentially susceptible to the argument that it is a penalty. I express no views on the merits of that argument in such a case, or upon the OFT's stated position in relation to such charges.

Unfair Contract Terms Act 1977

27. Turning to the various statutory provisions upon which Mr Berwick relies, I consider first his reference to the Unfair Contract Terms Act 1977. He referred me to sections 3 and 4 of that Act, but in my judgment neither of those sections is of relevance. They would apply, potentially, to any term of the contract between Mr Berwick and the bank made on the bank's standard terms which purported to exclude liability on the bank's part for breach of contract by it, or to impose liability on Mr Berwick to indemnify the bank for any liability incurred by the bank in negligence or breach of contract. There is no suggestion here of any negligence or breach of contract by the bank such as would engage these sections.

Section 15, Supply of Goods and Services Act 1982

28. Mr Berwick's particulars of claim also assert that if the charges are fees for a service they must be reasonable under section 15 of the Supply of Goods and Services Act 1982. That section does not in fact create any general requirement that all charges for the provision of services must be reasonable; it is in these terms:

> "15 (1). Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the cause of dealing between the parties, there is an implied term of the party contracting with the supplier will pay a reasonable charge.
>
> (2). What is a reasonable charge is a question of fact."

29. This section does not therefore directly regulate any terms as to price insofar as the price is fixed at the time the contract is made. It is however potentially applicable in this case because the charges made to Mr Berwick's account have varied in amount of over time. The "overdraft excess fee" for instance has on some occasions been charged at £20, on others at £25 and on others at £30, which is the rate of charge presently specified in the bank's schedule of charges that Mr Berwick provided. He assumed, as do I, that he had been provided with a scale of charges applicable at the date he opened his account, and that these charges had subsequently been amended by the bank from time to time in accordance with a provision of the contract entitling it to do so.

30. Insofar as the bank has amended its schedule of charges in pursuance of any such contract term, the revised charges are arguably "determined in a manner agreed by the contract" and if so there would be a requirement imposed by section 15 that the customer will pay a reasonable charge. What is reasonable is expressly stated to be a question of fact. Insofar as Mr Berwick asserts that they are not reasonable, that is a fact which must be established by evidence and the onus is on him to produce that evidence.

31. Mr Berwick relied in his submissions to me on an assertion that the amount of the charges exceeded the actual cost to the bank caused by the circumstances giving rise to the charge. For instance, he said, if the bank refused payment of a direct debit because of insufficient funds this was likely to be an automated decision without human intervention. If a letter was written to him it would be produced automatically and cost nothing like £30 to prepare and send it. He had no direct evidence of what the actual cost would be and sought to rely on various estimates which have been made in the media. I ruled those not to be admissible as evidence in this case. He was prepared to accept that some element of profit would not make the charge unreasonable, and that in calculating what the cost was it would be legitimate to include elements of overhead spending such as the cost of premises and staff. Even so he felt the cost directly involved in each of these charging events and a reasonable (but unspecified) profit on that cost would be much less than the amount charged, and said that in his view the banks were using these charges to subsidise (or as he put it "cover") their free banking offers.

32. I have come to the conclusion that this approach of seeking to isolate the particular transaction or event giving rise to the charge and identifying what would be a "reasonable" charge for that transaction or event by reference to the costs directly attributable to it is fundamentally flawed. Section 15 of the Supply of Goods and Services Act refers to "the consideration for the service" which is provided. The service the bank provides in operating an account is in my view the whole range of facilities and activities which it provides and carries out in doing so. The range of these activities is indicated in the defence which pleads as follows:

> "by opening an account with the bank the customer enters into a commercial arrangement with the bank for the provision of banking services. The bank is entitled, as part of that arrangement, to charge for those services.... For personal customers, a number of services are provided for free notwithstanding that they are an expense to the bank. Such services presently include, but not limited to, providing cheques, bank statements, the facility to make payments by direct debits and standing order, debit cards [and] cash machines."

33. These are activities for which no direct charges made. It could equally be said that no charge is made in terms for the administration involved in collecting payments into the account and making payments from it through the clearing system, or in establishing and maintaining a system of branches and telephone call centres through

which the customer can deal with the bank. Indeed the very act of keeping the customer's money safe and returning it to him on demand is a service of value to the customer. Nowadays perhaps it is taken for granted, but in former times when there were not readily available creditworthy institutions to perform this service any individual with money or valuables had to make his own arrangements for looking after them, for example by burying them in a place where he hoped that he, but no one else, would be able to find them.

34. For this package of services the bank makes charges on a basis which (as is not disputed in this case) are notified to the customer and either agreed to by him when he set up his account or determined by the bank in accordance with the contract the customer makes at the outset. The bank is not under any obligation to devise a scale of charges which divides up all its activities into individual portions and makes a charge for each of them; it is perfectly entitled to propose to its customers a system of charging under which particular charges are a attributed to some transactions or events and others are not charged for, the overall result of which across the entire range of its customers is expected to produce a revenue stream acceptable to the bank. If it misjudges this scale, in the sense either that it is not sufficiently competitive to attract a sufficient number of customers or that customers manage to use their accounts in such a way that they do not pay enough to cover the cost of the whole range of services, the bank will lose money. Any other service provider is, in principle, in the same position.

35. In my judgment therefore in considering for the purposes of section 15 what is a reasonable charge for the service provided by the bank, an assessment would have to be made of the whole package of charges made by the bank for the whole service it provides. Potentially this would be a very difficult and expensive exercise. It is certainly not one which can be conducted within the confines of this case and on the evidence before me. If it were conducted, the result might very well be that if any individual bank had a charging structure which was broadly similar to that of other banks operating in a competitive market, that charging structure could not be said to be an unreasonable charge for the service. The mischief at which section 15 is aimed might plausibly be argued to be one in which the supplier of a service uses a term of the contract entitling him to fix the price of his service after the customer is bound so as to require the customer to pay an amount significantly more than he might have paid for a similar service elsewhere in the market, had he been free to go elsewhere.

36. If I am wrong on that, and each element of what the bank does that is charged for must be considered to be a separate "service" for which a charge must be reasonable, then in my view it would be necessary in considering what is a reasonable charge for that service to take into account not only that the bank will incur costs directly related to that specific element of its services but also the fact that by reason of the arrangement as a whole with the customer the bank will provide other services and incur other costs for which it makes no charge. This of course brings one back to a very similar position; the whole range of services and the whole range of charges must be taken into account. There is no evidence before me from which I could conclude that, taking into account the other elements of the service provided by the bank without charge, these particular charges were unreasonable.

37. I observe also that section 15 does not prohibit the making of a profit by a service provider, nor does it restricts the amount of that profit in any way other than by implication from the use of the term "reasonable". It could not therefore be sufficient, if a charge or scale of charges were to be attacked under section 15 if it were proved that they exceeded the costs of the service provider, whether those costs were taken to be the direct costs of the particular event on which the charge was based, or the whole costs of the service provision.

38. Mr Berwick accepted that the charges made to him by this bank were very similar to the charges he would have incurred in similar circumstances with other banks. He would no doubt prefer that the bank might have set up a different structure which would have produced a lower charge to him from the use which he in fact made of his account. That is not sufficient either to make the charges unreasonable for the purposes of section 15.

39. Accordingly I reject the argument under section 15 of the Supply of Goods and Services Act and turn to the final argument raised by Mr Berwick, which depends on the application of the Unfair Terms in Consumer Contracts Regulations 1999.

Unfair Terms in Consumer Contracts Regulations 1999

40. Those regulations contain the following provisions, which I have re-ordered for convenience:

> "8 (1). An unfair term in a contract concluded with a consumer buyer and seller or supplier shall not be binding on the consumer.
>
> 3….. 'unfair terms' means the contractual terms referred to in regulation 5.
>
> 5(1). 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.
>
> (5) schedule 2 to these regulations contains an indicative and non exhaustive list of the terms which may be regarded as unfair.
>
> 6(1)…. The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services to 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 the term shall not relate … (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

41. It is not in doubt that for the purpose of these regulations Mr Berwick was dealing as a consumer, and the term imposing the charges he complains of was not individually negotiated with him. He relies particularly on paragraph 1(e) of schedule 2, that is to say one of the indicative list of terms which may be considered unfair, which is as follows "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".

42. In my judgment however this paragraph is inapplicable; I have held that Mr Berwick was not in breach of contract, it follows that the charges imposed on him are not compensation for any breach of obligation by him.

43. The defence pleads that the charges are in plain intelligible language (Mr Berwick does not say otherwise), and are terms which relate to the price payable by the customer for a service provided by the bank, and pursuant to regulation 6 that they are not subject to any assessment of fairness. Mr Berwick's criticism is that the amount of those charges is greater than the cost, as he assumes it to be, incurred by the bank in relation to the events giving rise to those charges. That, he indicated to me in response to my question, was where the "unfairness" lay. He also said that it was unfair that a charge should be imposed for an event (such as exceeding his overdraft limit) which was not directly in his control and which he might not know about in advance since he could not, for the reasons given earlier in his judgment, be aware of the exact balance on his account at any point in time.

44. Regulation 6(2) might itself be criticised for deficiencies of intelligibility. It refers for instance to "the adequacy of the price or remuneration" which might on the face of it be taken to be a concern that the price could be inadequate, that is to say not high enough. In the context however of regulations for the protection of the consumer who will be paying that price it must be assumed that it is in fact referring to the possibility that the price might be too high. The effect of the regulation is therefore that the court is not entitled to find that a term is unfair because it imposes too high a price for the services supplied under a contract.

45. Having held that the charges complained of are not charges for breach of contract but part of the price of the services provided by the bank, it follows in my judgment that regulation 6(2) prevents the court from making any determination that they are unfair. In this respect, the result is the same whether those charges are seen as part of a package of charges for a package of services, or as an individual charge for an individual service such as making a payment which causes an overdraft limit to be exceeded. The result is equally the same whether the criticism is that the price is too high (on the basis that because the cost involved was lower only a lower charge would be justified) or whether it is said that it is unfair that a charge should be made at all and the bank's charges should be structured in some completely different way.

46. Having received my judgment in draft, Mr Berwick submitted a letter prepared on his behalf by Mr Tom Brennan, a non-practising barrister, containing legal submissions and referring me to the decision of the House of Lords in Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, which he said was inconsistent with my provisional conclusion that the charges complained of were not charges imposed for breach of contract by Mr Berwick. That decision was made on the language of Reg 3(2) of the Unfair Terms in Consumer Contracts Regulations 1994, which is to the same effect as Regulation 6 of the 1999 Regulations. In my judgment it does not assist Mr Berwick further; it is abundantly clear that in that case the consumer was found to be in breach of contract (where I have held that Mr Berwick was not) and that the charges in dispute were imposed to specify the consequences of that default.

Conclusion

47. I conclude therefore that despite the clarity with which Mr Berwick presented his case he has not satisfied me that he has any ground in law for recovering from the bank the amount of any charges which he has paid to it, or for preventing the bank from recovering from him any such charges which have been made to his account but which he has not yet paid. Accordingly, I must dismiss his claim.

District Judge Cooke.....  .....15 May 2007