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## PRESS SUMMARY

### **Office of Fair Trading (Respondents) v Abbey National plc & others (Appellants) [2009] UKSC 6**

*On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 116*

**JUSTICES:** Lord Phillips (President), Lord Walker, Baroness Hale, Lord Mance, Lord Neuberger

#### **INTRODUCTION:**

This appeal involved a relatively narrow issue. The Supreme Court had to decide not whether the banks' charges for unauthorised overdrafts were fair but whether the OFT could launch an investigation into whether they were fair.

At present, banks provide retail banking services on the basis that customers whose accounts are kept in credit (in other words who lend money to the banks) will not be charged for the services provided; customers who have authorised overdrafts will be charged interest on the money that they borrow from the bank; and customers who incur unauthorised overdrafts will be charged, not only interest on the sums borrowed, but fixed fees for each particular service involved.

The OFT has power to assess the fairness of terms in consumer contracts but this is subject to the limits laid down in the Unfair Contract Terms in Consumer Contracts Regulations 1999, which implemented European Council Directive 93/13/EEC.

Regulation 6(2)(b) states that the assessment of the fairness of a term in a contract "shall not relate . . . to the adequacy of the price or remuneration, as against the goods or services supplied in exchange". In other words, the "value for money" equation is excluded.

The Court of Appeal held that this exclusion applied only to the "core terms" of the contract and not to ancillary terms such as the charges for unauthorised overdrafts. The Supreme Court unanimously held that the charges for unauthorised overdrafts fell within this exclusion. They were part of the price paid by the customer for the banking services provided.

However, the charges might still be open to assessment by the OFT on other grounds under Regulation 5.

#### **BACKGROUND TO THE APPEAL:**

The Office of Fair Trading ("the OFT") wished to investigate the fairness, under the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations"), of the terms ("the Relevant Terms") in the Appellant banks' contracts with customers imposing charges ("the Relevant Charges") on unauthorised overdrafts. The Regulations implemented European Council Directive 93/13/EEC. The OFT applied for a declaration that it was entitled to make such an investigation, notwithstanding Regulation 6 (2) (b)

of the Regulations, which stated that the assessment of fairness of a term in a contract ‘shall not relate... to the adequacy of the price or remuneration, as against the goods or services supplied in exchange’. Both the High Court and the Court of Appeal decided that Regulation 6 (2) (b) did not stop the OFT from making such an investigation. The banks appealed.

## **JUDGMENT**

*The Supreme Court unanimously allowed the appeal by the banks.*

## **REASONS FOR THE JUDGMENT**

- Lord Walker made clear that the scope of the appeal was limited – the court did not have the task of deciding whether or not the system of charging current account customers was fair, but whether the OFT could challenge the charges as being excessive in relation to the services supplied in exchange (**Paragraph 3**). As Lord Phillips stated, even if such a challenge was not possible, it might still be open for the OFT to assess the fairness of the charges according to other criteria (**Para 61**).
- The key issue was whether the charges constituted the ‘price and remuneration’ as against ‘the goods or services supplied in exchange’ within the meaning of the Regulations. The Supreme Court considered and decided a number of arguments as to whether the charges could be said to be ‘price or remuneration’ under Regulation 6 (2) (b):
  - (1) The charges were not paid ‘in exchange’ for the transactions to which they related – eg. honouring a cheque when the customer had insufficient funds to do so (**Para 75**).
  - (2) The Court of Appeal was wrong to find that Regulation 6 (2) (b) did not apply to charges that were ‘ancillary’ to the core contract between the bank and customer (**Paras 38-41, 47, 78, 112**). Lord Walker commented that Regulation 6 (2) (b) contained no indication that only the ‘essential’ price or remuneration was relevant. In fact, any monetary price or remuneration payable under the contract would naturally fall within the language of Regulation 6 (2) (b) (**Para 41**).
  - (3) The charges were not concealed default charges designed to discourage customers from becoming overdrawn on their accounts without prior arrangement (**Paras 88, 114**). The High Court had rejected this argument and was right to do so.
  - (4) The charges were properly to be regarded as falling within the scope of the Regulations (**Paras 43, 80, 104**). They were in fact *part* of the price or remuneration paid by the customer in exchange for the package of services which made up a current account (**Paras 47, 89**). The fact that liability to pay the charges depended on specific events occurring was irrelevant to that conclusion (**Paras 47, 104**).
- Accordingly, since any assessment of the fairness of the charges, which related to their appropriateness as against the services supplied in exchange, fell within Regulation 6 (2) (b), no such assessment could take place and so the appeal would be allowed (**Paras 51, 90, 92, 118, 119**).

### *Further Comments*

- Lord Phillips also noted that in the absence of the charges the banks would not be able profitably to provide current account services without a fee (**Para 88**). He stated that it might be open to question whether it is fair to subsidise some customers whose accounts always remain in credit by levies on others who experienced events they did not foresee when they opened their accounts (**Para 80**).
- Lord Walker commented that ministers and Parliament had decided to transpose the directive as it stood rather than to confer the higher degree of consumer protection afforded by the national laws of some other member states. Parliament might wish to consider whether to revisit that decision (**Para 52**). Lord Mance endorsed this comment (**Para 118**).

- Lady Hale commented that if Lord Walker's invitation to ministers and Parliament was to be taken up, it might not be easy to find a satisfactory solution. She questioned whether the real problem was not the charging model, but the lack of competition between the banks as to the product they offered (**Para 93**).

*No Reference to European Court of Justice*

- The court decided that although the interpretation of the European directive which the Regulations implemented was a question of European law it was not necessary to refer the matter to the European Court of Justice (**Paras 49, 91, 115, 120**).

**NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.**

**Judgments are public documents and are available at: [www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)**