

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



Claim No 2007 Folio 1186

BETWEEN:

THE OFFICE OF FAIR TRADING

Claimant

and

- (1) ABBEY NATIONAL PLC**
- (2) BARCLAYS BANK PLC**
- (3) CLYDESDALE BANK PLC**
- (4) HBOS PLC**
- (5) HSBC BANK PLC**
- (6) LLOYDS TSB BANK PLC**
- (7) NATIONWIDE BUILDING SOCIETY**
- (8) ROYAL BANK OF SCOTLAND GROUP PLC**

Defendants

Royal Courts of Justice

DEFENCE AND COUNTERCLAIM
OF THE THIRD DEFENDANT

Transaction: 49624
Fee Code : COMM 1.5 07
Fee : £400.00
Operator : MANSFIELD, K
Dated : 01/10/2007 15:49:21
Payment Mtd:

1. In this Defence and Counterclaim, unless otherwise stated:-
 - 1.1 References to paragraphs by number are references to the paragraphs of the Particulars of Claim;
 - 1.2 Where an allegation is not admitted, the Third Defendant ("Clydesdale") is unable to admit or deny that allegation, and the Claimant ("the OFT") is required to prove it;
 - 1.3 Clydesdale pleads only in response to the allegations against it, and not in response to the allegations against the other Defendants.

DEFENCE

2. Paragraph 1 is admitted.

3. As to paragraph 2, Clydesdale owns and operates banking businesses known as "Clydesdale Bank" and "Yorkshire Bank", both of which provide current account facilities to customers who are consumers (and others).

4. Paragraphs 3 to 7 are admitted. For convenience, regulation 6 of the 1999 Regulations (an extract from which is set out in paragraph 7) is here set out in its entirety:

"(1) Without prejudice to regulation 12 [*concerning the circumstances in which injunctions may be applied for and granted*], 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."

5. Paragraph 8 is admitted. The agreements between Clydesdale and its customers governing the customers' current accounts will be referred to in this Defence as "the Agreements".

6. Clydesdale has, during the material period, from time to time published documents entitled 'Terms and Conditions' and 'Account Card Terms and Conditions' (together, the "Terms Leaflets") and documents entitled 'Tariff... interest and charges' (the "Tariff Leaflets").

7. As to paragraph 9, it is admitted and averred that the terms and conditions contained in Terms Leaflets and Tariff Leaflets, including those described below, are to be considered as contractual terms of the Agreements for the purposes of the 1999 Regulations. Otherwise, paragraph 9 is not admitted.

8. For the purposes of this Defence, the term "Unauthorised Overdraft" describes:
 - 8.1 The debit balance on a current account when no express agreement has been entered into between Clydesdale and the customer granting the customer an overdraft facility; or
 - 8.2 The part of a debit balance on a current account that is in excess of an overdraft limit that has been expressly agreed.

9. The Agreements provide or provided for the following types of fee to be payable by customers (collectively "the Clydesdale Fees"):
 - 9.1 Fees payable when Clydesdale effects payment and debits a customer's account resulting in an Unauthorised Overdraft or further Unauthorised Overdraft ("Unauthorised Overdraft Fees"). In particular:
 - a. Most Agreements provide for a charge (termed an 'Unauthorised Irregular Debit Movement Charge') which is payable on each day in which one or more transactions take place that result in an Unauthorised Overdraft, or further Unauthorised Overdraft, larger than a stipulated amount (now usually £25);
 - b. Some of the Agreements also provide for a periodic charge (variously termed a 'Daily Unauthorised Borrowing Fee', 'Monthly Unauthorised Borrowing Fee', or 'Quarterly Unauthorised Borrowing Fee') to be paid on each calendar day, or in each month or quarter, as the case may be, on or in which a customer's account is in Unauthorised Overdraft.
 - 9.2 Fees payable when Clydesdale refuses a customer's instruction (by cheque, standing order or direct debit) to make payment where that payment would

result in an Unauthorised Overdraft or further Unauthorised Overdraft, and returns the instruction unpaid ("Refused Payment Fees"); and/or

- 9.3 Fees (variously termed a 'Cheque Guarantee Card abuse fee' or 'Debit Card abuse fee') payable when Clydesdale makes a payment that results in an Unauthorised Overdraft or further Unauthorised Overdraft and which payment Clydesdale would have refused were it not obliged by the cheque guarantee system or debit card system (known as "Maestro") to honour the instruction and make payment ("Forced Payment Fees").
10. The Agreements also typically provide or provided for a higher rate of interest to be charged on Unauthorised Overdrafts than on overdrafts incurred under a facility which had been expressly agreed in advance between Clydesdale and the customer.
11. The Agreements, to which Clydesdale will refer in full at trial, provide for the Clydesdale Fees to be charged, and regulate the Clydesdale Fees, by way of:
- 11.1 Terms specifying that the Clydesdale fees will be charged ("Charging Clauses"). These terms appear in Terms Leaflets, and refer the reader to Tariff Leaflets for the clauses that specify the quantum of the fees.
- 11.2 Terms specifying that the quantum of the Clydesdale Fees may be varied by Clydesdale in certain circumstances. These terms appear in Terms Leaflets.
- 11.3 Terms specifying the quantum of the Clydesdale Fees ("Amount Clauses"). These terms appear in Tariff Leaflets.
12. The two Schedules to the Particulars of Claim, in their latest versions as modified by the OFT subsequent to the service of the Particulars of Claim, include provisions from the Agreements relating to the charging of Unauthorised Overdraft Fees, Refused Payment Fees and Forced Payment Fees. Those provisions will be referred to in this Defence as "Clydesdale's Relevant Terms and Charges". The two Schedules as served with the Particulars of Claim contained various typographical and other errors, and Clydesdale has raised a number of issues regarding the format and content of the Schedules. Clydesdale and the OFT are seeking to agree revised versions of these

Schedules, to which the Court will be referred. Save as aforesaid, paragraph 10 is denied.

13. Paragraph 11 is admitted.

14. Clydesdale has not given the indication alleged in the last sentence of paragraph 12 to have been given by "certain Banks". Otherwise, that paragraph is admitted.

15. Paragraphs 13 and 14 are admitted save that:

15.1 Some of the clauses in column B of the Current Terms Schedule and Historic Terms Schedule only entitle Clydesdale to charge fees for Unauthorised Overdrafts when the Unauthorised Overdraft exceeds a stipulated amount (often £25), and not *whenever* the customer's account goes into Unauthorised Overdraft;

15.2 The clauses in column D of the Current Terms Schedule and Historic Terms Schedule only provide for Clydesdale to charge fees when a customer issues a guaranteed cheque without sufficient funds to meet it in situations in which Clydesdale would not have made the payment had the cheque not been guaranteed.

16. Paragraphs 15 and 16 are denied. Clydesdale's Relevant Terms and Charges, whether contained in Charging Clauses or Amount Clauses, are core terms and fall within regulation 6(2) of the 1999 Regulations and therefore are excluded from any assessment for fairness under those Regulations:

16.1 Clydesdale's Relevant Terms and Charges (and each of them) are in plain intelligible language in the way they are worded, their legibility, their availability and otherwise.

16.2 Clydesdale's Relevant Terms and Charges (and each of them) relate to the definition of the main subject matter of the Agreements and/or the adequacy of the price or remuneration, as against the services supplied in exchange, and

any assessment of the fairness of those terms is precluded by regulation 6(2)(a) and/or 6(2)(b) of the 1999 Regulations.

17. Without prejudice to the generality of paragraph 16 above, at the time and place when and where a customer opens an account, it is Clydesdale's standard practice that he or she has a meeting with a Clydesdale employee. At that meeting the customer is given the then prevailing Terms Leaflets and Tariff Leaflets, and also brochures explaining the circumstances in which the Clydesdale Fees are imposed. The employee also draws to the customer's attention Clydesdale's Relevant Terms and Charges, as set out in the Tariff Leaflets. Throughout the term of the Agreements, each customer is then notified by post of any variation of Clydesdale's Relevant Terms and Charges at least thirty days before such a variation becomes operative. The contents of Terms Leaflets and Tariff Leaflets are also made available in Clydesdale's branches and on its websites and telephone helplines.

18. Without prejudice to the generality of paragraph 16.2 above:
 - 18.1 Where a customer of Clydesdale seeks to operate that customer's current account in a way that will result in the account being debited despite there being insufficient available funds to support the debit (i.e. in a way which will result in the account going into Unauthorised Overdraft):
 - (a) The customer thereby requests Clydesdale to consider whether to permit that operation and, if Clydesdale does permit it, to make funds available to the customer for that purpose.
 - (b) Clydesdale provides to the customer the service of considering the request and, if it decides (or is obliged to a third party) to agree to it, the further services of making the requested payment and of making funds available for that purpose (together "the Unauthorised Overdraft Services").
 - (c) Clydesdale's Relevant Terms and Charges entitle Clydesdale to charge the customer for the provision of each of the Unauthorised Overdraft Services.

18.2 The Unauthorised Overdraft Services constitute part of the main subject matter of the contract for the purposes of the 1999 Regulations, alternatively constitute the main subject matter of the contract for those purposes.

- (a) Under the Agreements, Clydesdale agrees and/or offers to provide a variety of services to its Customers, including the Unauthorised Overdraft Services, as well as facilities for receiving and making payments, holding deposits, withdrawing cash and other services. Each customer may from time to time require different services or different combinations of services from Clydesdale. Accordingly, the Agreements provide for a variety of modes of performance by Clydesdale, depending upon the manner in which the customer uses the customer's account from time to time, and each of those modes of performance constitutes part of the main subject matter of the Agreements. The price of Clydesdale providing the main subject matter of the Agreements to customers comprises the Clydesdale Fees and other charges set out in the Tariff Leaflets, together rather than each fee or charge in isolation, and that exchange constitutes the essential bargain between customers and Clydesdale.
- (b) Further or alternatively, a customer who requests an Unauthorised Overdraft will do so by use of one of the payment services (including cheques, debit cards, standing orders and direct debits) that Clydesdale makes available to its customers. The provision of those payment services (including the Unauthorised Overdraft Services, which are one aspect of them) constitutes part of the main subject matter of the Agreements, alternatively constitutes the main subject matter thereof.
- (c) Alternatively, the relevant contract for the purposes of the application of the 1999 Regulations comprises the provision by Clydesdale to the customer at the customer's request of one or more of the Unauthorised Overdraft Services in return for payment of the sums stated in Clydesdale's Relevant Terms and Charges, and the provision of that or those services and the amounts payable therefore constitute the main subject matter of that contract.

- 18.3 Further or alternatively and in the premises, Clydesdale's Relevant Terms and Charges:
- (a) Comprise part of a pricing structure, as set out in the Tariff Leaflets, which constitutes the price or remuneration for Clydesdale's various services under the Agreements; alternatively
 - (b) Relate solely to the adequacy of the price or remuneration for the provision of one or more of the Unauthorised Overdraft Services.
19. Further without prejudice to the generality of paragraph 16.2 above, Clydesdale will so far as may be necessary contend that:
- 19.1 Clydesdale's Relevant Terms and Charges and each of them provide for fees that are payable in return for services, as set out above, and not by reason of the customer having breached any provision of the Agreements.
- 19.2 Insofar as any of the Agreements contain statements to the effect that the customer's account "should" or "must" be kept in credit unless the customer has agreed an overdraft facility with Clydesdale, or that the customer must obtain Clydesdale's agreement before overdrawing his account, those statements are on their true construction limitations on the customer's entitlement to draw on the account and/or guidance to the customer. In either case, they do not constitute contractual promises by customers to Clydesdale not to request an Unauthorised Overdraft.
- 19.3 Alternatively, if and insofar as a customer commits any breach of the Agreements by operating his account in circumstances which give rise to an Unauthorised Overdraft Fee and/or Forced Payment Fee, Clydesdale waives such breach by making the requested payment and/or making funds available for that purpose by way of Unauthorised Overdraft.
20. Paragraphs 17 to 19 are admitted.

21. As to paragraph 20, it is denied that Clydesdale's Relevant Terms and Charges or any of them are unfair, contravene the 1999 Regulations, or harm the collective interests of consumers. Otherwise, paragraph 20 is not admitted.
22. Paragraphs 21 and 22 are admitted.

COUNTERCLAIM

23. The Defence is repeated.

Penalties

24. It has been contended by customers seeking to challenge Clydesdale's Relevant Terms and Charges that they are penalty clauses. In the premises, Clydesdale seeks a declaration against the OFT that Clydesdale's Relevant Terms and Charges do not provide for payment of a sum by the customer for breach of a contractual duty owed to Clydesdale (there being no such breach or any such breach having been waived by Clydesdale) and accordingly are not capable of amounting to penalties at common law.
25. Alternatively, if, contrary to the last preceding paragraph, any of Clydesdale's Relevant Terms and Charges are held to be capable of amounting to a penalty at common law, Clydesdale will thereafter (at the appropriate stage of these proceedings or in any subsequent proceedings) contend that such terms or charges do not in fact amount to penalties, because:-
 - 25.1 they have a justifiable commercial purpose within Clydesdale's pricing structure;
 - 25.2 further or alternatively, it is not the dominant purpose of such terms or charges to deter customers from committing any breach of contract;

25.3 alternatively, such terms or charges are neither unconscionable nor extravagant in relation to the greatest loss which might follow from the breach (if any).

Core Terms

26. In the premises, and in view also of the claim set out in the Particulars of Claim, Clydesdale also seeks a declaration against the OFT that Clydesdale's Relevant Terms and Charges relate to the definition of the main subject matter of the Agreements and/or the adequacy of the price or remuneration, as against the services supplied in exchange, and any assessment of the fairness of those terms is excluded by regulation 6(2)(a) and/or 6(2)(b) of the 1999 Regulations.

Good faith

27. Even if, which is denied, the Relevant Terms and Charges or any of them do not fall within the exclusions in regulation 6(2) of the 1999 Regulations, it is a necessary precondition to such terms 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.

28. The requirement of good faith within the meaning of the 1999 Regulations is a requirement that the party dealing with the consumer conducts those dealings in a manner that is fair and open.

29. In the premises, Clydesdale seeks a declaration against the OFT that it is a necessary precondition to terms 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 that "good faith" for the purposes of the 1999 Regulations is a requirement that the party dealing with the consumer does so in a manner that is open and fair.

AND Clydesdale claims:-

- (1) A declaration that Clydesdale's Relevant Terms and Charges and each of them:-
 - (i) relate to the definition of the main subject matter of the Agreements; and/or
 - (ii) provide for payment of remuneration for services provided by Clydesdale and/or relate to the adequacy of that remuneration as against the services supplied;and that accordingly any assessment of the fairness of those terms is excluded by regulation 6(2)(a) and/or 6(2)(b) of the 1999 Regulations;
- (2) A declaration that Clydesdale's Relevant Terms and Conditions and each of them are not capable of amounting to a penalty at common law.
- (3) A declaration that it is a necessary precondition to terms 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

- (4) A declaration that the requirement of good faith within the meaning of the 1999 Regulations is a requirement that the party dealing with the consumer conducts those dealings in a manner that is open and fair.

**RICHARD SALTER QC
JOHN ODGERS
ADAM KRAMER**

Statement of Truth

I believe that the facts stated in this Defence and Counterclaim are true.

Michael Webber

Name: Michael Webber

Position: Head of Legal Services

Date: 28 September 2007

Served by Addleshaw Goddard LLP of 150 Aldersgate Street, London EC1A 4 EJ, solicitors
for the Third Defendant.

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Defendants

**DEFENCE AND COUNTERCLAIM OF
THE THIRD DEFENDANT**

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