

**BETWEEN :-**

Royal Courts of Justice

Transaction: 49159  
Fee Code : COMM 1.4  
Fee : £400.00  
Operator : MANSFIELD, K  
Dated : 28/09/2007 **Claimant**  
Payment Mtd:

**THE OFFICE OF FAIR TRADING**



**-and-**

- (1) **ABBEE 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**

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**DEFENCE AND COUNTERCLAIM OF THE FOURTH DEFENDANT, HBOS PLC**

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**Introduction**

1. In this Defence and Counterclaim of the Fourth Defendant, HBOS plc ("HBOS"), unless otherwise stated or the context otherwise requires:

- (1) references to paragraph numbers are to the paragraphs of the Particulars of Claim;
- (2) the following expressions have the following meanings:
  - (a) "HBOS personal current account": a personal current account subject to the HBOS Terms with either of the HBOS Banks;
  - (b) "HBOS Terms": the terms and conditions and fees and charges referred to in paragraphs 3(1) -2 below;
  - (c) "HBOS Banks": Bank of Scotland plc (formerly the Governor and Company of the Bank of Scotland until its registration as a public company on 17 September 2007), and, until 17 September 2007, Halifax plc (whose entire business and undertaking was transferred to Bank of Scotland plc on 17 September 2007 in accordance with the HBOS Group Reorganisation Act 2006);

(d) "HBOS customer": a natural person who holds an HBOS personal current account;

(e) "arranged overdraft": the provision upon specific request of an overdraft which has been organized with the relevant HBOS Bank before the HBOS customer goes into overdraft;

(f) "unarranged overdraft": the provision upon informal request of an overdraft which has not been organized with the relevant HBOS Bank before the HBOS customer goes into overdraft. An informal request for an unarranged overdraft may be made by an HBOS customer instructing the HBOS Bank to make a payment which, if it decided to comply with it, would cause the customer's current account to exceed (or further exceed) its overdraft limit, or (in the absence of any arranged overdraft) cause it to be overdrawn (or further overdrawn);

(3) HBOS adopts certain abbreviations and headings used in the Particulars of Claim for convenience only and without thereby making any admissions as to the substance thereof.

2. Pending the provision of full and proper particulars of the OFT's case and/or exchange of evidence, HBOS reserves the right to amend and/or supplement this Defence and Counterclaim, to plead further to the Particulars of Claim and/or to counterclaim further or other relief against the OFT.

3. HBOS responds below to the allegations contained in the Particulars of Claim, and counterclaims certain declaratory relief against the OFT, by reference to:

(1) the terms and conditions and fees and charges relating to HBOS personal current accounts which are currently in force or are to be in force as at 1 December 2007; and

(2) a representative selection of the terms and conditions and fees and charges relating to HBOS personal current accounts which have previously been, but are no longer, in force;

which are together referred to below as "the HBOS Terms".

4. Copies of the HBOS Terms have been supplied on behalf of HBOS to the OFT pursuant to the terms of an agreement entered into between (among others) HBOS, the OFT and the Financial Services Authority dated 25 July 2007 (as amended). For ease of reference, a full list of the HBOS Terms is annexed as Schedule 1 hereto.

5. The HBOS Terms include the Halifax and Bank of Scotland bank account conditions and special conditions dated October 2007 (together the "HBOS October 2007 Terms"), which incorporate certain amendments to the terms and conditions and fees and charges relating to HBOS personal

current accounts and which will be in force as at 1 December 2007. The HBOS October 2007 Terms will be referred to at trial for their full terms, meaning and effect.

### Summary of HBOS' case

6. In summary, HBOS contends (as pleaded below) that:

- (1) the fees and charges relating to HBOS personal current accounts which are the subject of these proceedings constitute remuneration payable in exchange for the supply by the HBOS Banks of a package of services, to or for the benefit of HBOS customers, as part of the provision of such personal current accounts;
- (2) the nature and level of the fees and services which are charged or provided are clearly drawn to the attention of HBOS customers in plain and intelligible language, both when their personal current accounts are opened and also at various times subsequently;
- (3) contrary to the OFT's case, the terms which provide for these fees and charges constitute "core terms" of the contractual bargain between the HBOS Banks and their customers and, as such, do not as a matter of law fall to be assessed for fairness under the 1999 Regulations by reason of Regulations 6(2)(a) and/or 6(2)(b) thereof;
- (4) if (contrary to the above) such terms are not "core terms" and do fall to be assessed for fairness under the 1999 Regulations, it is a necessary precondition for such terms to be found to be unfair for the purpose of the 1999 Regulations that they are contrary to the requirement of good faith in Regulation 5(1); for them to be contrary to the requirement of good faith, it would have to be shown that the HBOS Banks did not, at the time of contracting, deal openly and fairly with their customers in respect of the relevant terms, fees and charges;
- (5) in any event, if and to the extent that this issue subsequently arises, such terms are not in fact contrary to the requirement of good faith, nor unfair, for the purpose of the 1999 Regulations;
- (6) further, such terms are not, as a matter of law, capable of amounting to penalties because, amongst other things, the relevant fees and charges constitute remuneration for the supply of services by the HBOS Banks to or for the benefit of HBOS customers, and/or are incurred in circumstances where there are no, or no subsisting, breaches by the HBOS customers of the HBOS terms, and/or do not constitute sums payable in respect of any breaches in such a manner as would be required if they were to be capable of amounting to penalties at common law;

- (7) in any event, if and to the extent that this issue subsequently arises, such terms do not in fact amount to penalties at common law;
- (8) consequently, the OFT is not entitled to the declaration which it seeks in relation to Regulation 6(2) of the 1999 Regulations; Further, in the light of the matters referred to above, HBOS is entitled to, and seeks, appropriate declaratory relief as against the OFT.

### DEFENCE

7. HBOS does not plead in this Defence to the allegations contained in the Particulars of Claim insofar as they relate to, or concern, any other Defendant.

#### **The Parties**

8. Subject to reference to the relevant provisions of the Enterprise Act 2002, the Directive and the 1999 Regulations for their respective full terms, meaning and effect, paragraphs 1, 1.1-1.8 inclusive are admitted as a non-exhaustive description of certain statutory functions and powers of the OFT and a broad summary of certain provisions of the legislation which is referred to.
9. As to paragraph 2:
- (1) it is admitted that HBOS is the holding company of the group of companies which includes the HBOS Banks;
  - (2) the HBOS Banks are or have been engaged in the business of banking in the United Kingdom, in the course of which they have made personal current accounts available to HBOS customers who qualify as "consumers" within the definition of that term in Regulation 3(1) of the 1999 Regulations (as referred to in paragraph 11(1) below);
  - (3) the third and fourth sentences are noted: HBOS pleads more particularly to the two schedules to the Particulars of Claim in paragraph 26 below.

#### **The Directive, the 1999 Regulations and their application**

10. Paragraph 3 is admitted. The 1999 Regulations, which came into force on 1 October 1999, fall to be interpreted in the light of, and so as to give effect to, the provisions of the Directive, which is the primary and governing source of law and to which resort is properly to be made for the purposes of construction.
11. Paragraph 4 is admitted. Regulation 4(1) of the 1999 Regulations gives effect to Article 1(1) of the Directive. Further, HBOS:

- (1) will refer to the definition of a “consumer” in Regulation 3(1) of the 1999 Regulations (giving effect to Article 2 of the Directive) as “*any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.*”;
  - (2) notes that the Directive and the 1999 Regulations do not apply to the terms of any contract concluded by HBOS with a customer who is not a natural person or with any natural person who is acting for purposes within his or her trade, business or profession.
12. Without prejudice to the generality of paragraphs 8 and 10 above, HBOS will in particular refer to the following provisions of the Directive:
  - (1) 16<sup>th</sup> 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; ...”
  - (2) 19<sup>th</sup> Recital: “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; ...”
  - (3) Article 3(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.”
  - (4) Article 4(2): “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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language.”
13. Subject to reference to Regulations 5 and 8 of the 1999 Regulations, paragraphs 5 and 6 are admitted. Regulation 5(1) gives effect to Article 3(1) of the Directive, while Regulation 5(5) gives effect to Article 3(2) thereof. Similarly, Regulations 8(1) and 8(2) give effect to Article 6(1) of the Directive.
14. As to paragraph 7:
  - (1) it is admitted that Regulation 6(2) is in the terms quoted, and that the test of fairness set out in the 1999 Regulations does not apply in relation to so-called “core terms”;

- (3) save as aforesaid, paragraph 7 is denied; in particular, Regulation 6(2), giving effect to Article 4(2) of the Directive, does not contain an “*exception to the applicability of*”, but ~~rather defines the extent and limits of the application of, the assessment of fairness under the~~ 1999 Regulations;
- (4) the onus of proof rests upon the OFT to establish that the assessment of fairness under the 1999 Regulations extends and applies to each of the HBOS Terms which is referred to in Schedules A and B to the Particulars of Claim.

#### **Services supplied by HBOS Banks in relation to HBOS personal current accounts**

15. The relationship of banker and customer, between the HBOS Banks and each of their customers which is the subject matter of this action, involves, in each case:

- (1) the relevant HBOS Bank agreeing to provide its customers with an overall package of services, as part of the provision of a personal current account; and
- (2) the HBOS customer agreeing to pay fees and charges to the relevant HBOS Bank as and when such fees and charges become payable as set out in the HBOS Terms.

The nature and level of the services and fees from time to time set out in the applicable HBOS Terms are those which the HBOS Banks offer to their customers.

16. The overall package of services, which the HBOS Banks, for their part, provide, varies depending on the precise type of personal current account, but includes, although it is not limited to, all or some of the following:

- (1) the crediting of payments into, and the debiting of payments made out of the balance on, the account in a variety of ways;
- (2) the provision of cheque books (including their cancellation and replacement if lost or stolen) and the processing of cheques;
- (3) the provision of debit and cash machine cards, which may also operate as cheque guarantee cards (including cancellation and replacement if lost or stolen);
- (4) the provision of regular bank statements (on-line and/or by post);
- (5) access to a 24-hour banking service, in order to carry out transactions, raise queries or obtain assistance (by telephone, on -line and at an HBOS ATM, in addition to self-service facilities, branch access and counter services);

- (6) access to ATM networks in the United Kingdom and abroad;
  - (7) the provision of foreign exchange services and facilities;
  - (8) the provision upon prior request of an arranged overdraft; and
  - (9) the provision upon informal request of an unarranged overdraft.
17. The fees and charges which the HBOS customer, for his or her part, agrees to pay to the relevant HBOS Bank are set out in, amongst other things, the applicable HBOS Terms.
18. In each case:
- (1) the agreement by the relevant HBOS Bank to provide a personal current account which comprises such an overall package of services: and
  - (2) the agreement by the HBOS customer to pay fees and charges in accordance with the applicable HBOS Terms;
- are mutual agreements provided by the HBOS Bank or the HBOS customer, as the case may be, in exchange for the agreement provided by the other party.
19. Such fees and charges (if any) as the HBOS customer becomes liable to pay, during the course of the relationship of banker and customer, constitute remuneration payable to the relevant HBOS Bank in consideration for the provision in exchange of the overall package of services referred to above.
20. Pursuant to such agreements:
- (1) an HBOS customer who operates his or her account in such a way that none of the fees or charges set out in the HBOS Terms become payable, will enjoy what is often referred to as "free banking" or "free, if in credit banking".
  - (2) an HBOS customer who maintains a credit balance on his or her personal current account will enable the relevant HBOS Bank potentially to earn income through the use that it makes of such funds, less the interest (if any) which it is required to pay the customer.
  - (3) an HBOS customer who operates his or her account in such a way that one or more of the fees and charges set out in the HBOS Terms becomes payable, will be liable to pay such fee or charge to the relevant HBOS Bank.
21. An HBOS customer who operates his or her account in such a way as, for example, to make one or more informal requests for an unarranged overdraft, further or alternatively:

- (1) thereby requests the relevant HBOS Bank to provide, and upon acceptance of such request the relevant HBOS Bank agrees to provide, a service or services to or for the benefit of the customer and/or to take certain steps to its own cost and/or detriment (including, but not limited to, agreeing and proceeding to check and process the request, consider it, decide to grant or refuse it, make any necessary debit(s) to the account and notify the customer and/or the intended payee in writing as appropriate); and
  - (2) will become liable to pay fees and charges in accordance with the HBOS Terms.
22. The nature and level of the fees and services from time to time charged or provided, in accordance with the HBOS Terms, are clearly drawn to the attention of HBOS customers, in plain and intelligible language, both when the relevant HBOS personal current account is opened and also, at various stages, subsequently. In particular:
- (1) the nature and level of the fees and services charged or provided are clearly set out, when the relevant HBOS personal current account is opened, on the HBOS Banks' websites, in the HBOS Terms and in accompanying literature and information, relating to such accounts, which is provided to HBOS customers when they open their accounts.
  - (2) HBOS customers are kept informed of any changes in the nature and level of the fees charged by means of the publication of Interest Rates and Account Charges leaflets, which are regularly updated and made available to HBOS customers through the HBOS Banks' branch network, by post and on their websites.
  - (3) HBOS customers are also provided with further information during the course of operating their accounts to assist them in managing such accounts, including in particular if and when any such fees or charges are incurred by them, by the provision of bank account statements, notices (including notices which are sent before such fees and charges are debited to their accounts) and leaflets, including a leaflet entitled "Helping you to understand our bank charges".

### **The HBOS Relevant Terms and Charges**

23. As to paragraphs 8 and 9:

- (1) it is admitted that the HBOS Banks are parties to agreements with HBOS customers who are consumers for the purposes of the 1999 Regulations, containing terms and conditions relating to the operation of HBOS personal current accounts by such HBOS customers;
- (2) it is further admitted that certain leaflets and price lists relating to the HBOS Terms, as referred to in Schedule 1 hereto, which are made available to HBOS customers and which

contain details of applicable account charges and interest rates from time to time and associated terms and conditions, comprise or contain contractual terms with HBOS customers ~~for the purposes of the 1999 Regulations;~~

- (3) save as aforesaid, paragraphs 8 and 9 are not admitted; in particular, pending full and proper particulars of the OFT's case, no admissions are made as to the nature, terms, contractual status (if any), or effect of any (unspecified) "*notices to, guides to or communications with*" HBOS customers at any material times.

24. As to paragraph 10:

- (1) it is admitted that the HBOS Terms contain provisions which, in summary, entitle or have entitled the HBOS Banks to charge the following fees to HBOS customers in connection with unarranged overdrafts in the following circumstances, together with interest on the amount by which the account is overdrawn at a rate applicable to unarranged overdrafts:
  - (a) a "Paid Item Fee" payable in the event of an HBOS Bank complying with a payment instruction from an HBOS customer which results in or increases an unarranged overdraft;
  - (b) an "Unpaid Item Fee" payable in the event of an HBOS Bank deciding not to comply with a payment instruction from an HBOS customer in circumstances where there are insufficient funds or no arranged overdraft to pay the transaction and (if an HBOS Bank did comply with the payment instruction) payment of which would result in an unarranged overdraft;
  - (c) an "Unarranged Overdraft Fee" payable on a monthly basis in the event of the account going overdrawn without a pre-arranged facility or exceeding an arranged facility;
- (2) for ease of reference below:
  - (a) the fees described in paragraphs 15(1)(a)-(c) above are together referred to as "the HBOS unarranged overdraft fees"; and
  - (b) the provisions of the HBOS Terms which entitle or have entitled the HBOS Banks to charge the HBOS unarranged overdraft fees, and which define their amount and when, how and to what extent they apply, are together referred to as "the HBOS Relevant Terms and Charges";

