

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



2007 Folio 1186

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) THE ROYAL BANK OF SCOTLAND GROUP PLC

Royal Courts of Justice

Transaction: 51222
Fee Code : Central 1.5 07
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Dated : 04/10/2007 10:52:31
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Defendants

DEFENCE AND COUNTERCLAIM OF THE SIXTH DEFENDANT
(LLOYDS TSB BANK PLC)

DEFENCE

1. Unless otherwise stated, all references to paragraphs below are to those in the Particulars of Claim.
2. Save that the last sentence of paragraph 1.6 is noted, paragraph 1 is admitted.
3. As to paragraph 2:
 - 3.1 The Sixth Defendant (*Lloyds TSB*) is a bank providing current account (among other) facilities to customers, including to customers falling within the definition of "consumers" (*Consumers*) in The Unfair Terms in Consumer Contracts Regulations 1999 (*the 1999 Regulations*). In this statement of case, references to customers are to personal current account customers who are Consumers.
 - 3.2 Lloyds TSB does not plead to paragraph 2 insofar as it relates to the other Defendants.
 - 3.3 The third and fourth sentences are noted.

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The 1999 Regulations

4. Paragraph 3 is admitted.
5. Paragraph 4 is admitted.
6. Paragraph 5 is admitted.
7. Paragraph 6 is admitted.
8. As to paragraph 7, Regulation 6 of the 1999 Regulations provides:

- (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."

Terms and conditions of Lloyds TSB

9. Upon a customer opening a current account with it, Lloyds TSB provides, and at all material times provided, a Charges Leaflet to the customer.
10. The Charges Leaflets provided to customers contain (and at all material times contained) information about, and set out, the main fees and charges for personal customers with accounts at Lloyds TSB's UK mainland branches. The Charges Leaflets explain (and at all material times explained) in plain intelligible language, among other things, the charges that Lloyds TSB would make if a customer went or sought to go overdrawn (or further overdrawn) without agreeing this in advance with Lloyds TSB.
11. The current version of the Banking Charges Leaflet issued on or about 1 June 2007 provides among other things as follows:

"If you go overdrawn without agreeing this with us first

We charge a higher rate of interest for borrowing that you haven't agreed with us first. We display this rate in all our branches, and on our website, www.lloydstsb.com

We will also charge you a fee for any borrowing not agreed with us in advance. These charges are shown in the table below, and will be charged to your account monthly.

Overdraft excess fee	Charges
We charge this when you go overdrawn and don't have an overdraft**, or if you go overdrawn above an agreed overdraft. We will charge this fee again on each day we make a payment for you that increases your overdraft.	£30 a day (maximum of 3 charges in any one monthly charging period - maximum of £90)
Returned item fee	Charges
You'll be charged this fee whenever there is not enough money in your account to make a payment such as a direct debit, cheque or standing order.	£35 (maximum of 3 charges a day)

We will write to you every time we are unable to make a payment for you, or the first time you go overdrawn without agreeing it with us in advance. We use the balance on your account at the start of the day* to make decisions on whether or not to pay cheques and other items presented for payment that day.

Please make sure you have enough cleared money in your account at the close of business, to cover any payments you have made, (or cheques that you have written) for the next day. We pay some cheques the same day as they are paid in.

* The start of the day is when we start processing. This is before any Lloyds TSB branches open.

** Please note that there is no overdraft facility for Cash accounts and Islamic accounts. So, if you go overdrawn at all, we will need to charge you the overdraft excess fee shown above, though for the Cash account we won't charge you overdraft excess fees the first day you go overdrawn, as long as you haven't done so in the previous 12 months. In addition, for both the Cash accounts and Islamic accounts we will not charge you interest on the overdrawn amount.

Overdraft interest and charges

On interest bearing accounts we calculate overdraft interest and charges monthly. The day of the month we calculate them depends on the type of account you have.

We will always notify you personally at least 14 days in advance to tell you about any interest and charges you need to pay. We will also tell you on what date we will take the money from your current account."

12. Lloyds TSB will refer insofar as necessary at trial to the full terms of the Charges Leaflets issued by it from time to time.

13. Lloyds TSB also provides its Charges Leaflet to customers at various intervals during the account relationship, including when the customer first makes use of Lloyds TSB's unauthorised borrowing services or the customer is granted an

overdraft facility. Furthermore, information about Lloyds TSB's charges is made available to customers through Lloyds TSB's network of approximately 2,000 branches and is also readily available on its website.

14. As to paragraph 8, it is admitted that a contract arises between Lloyds TSB and each of its current account customers upon the opening of such accounts. The terms of such contract include the following:

- 14.1 Lloyds TSB undertakes to receive money and to collect bills for its customer's account;
- 14.2 the proceeds so received by Lloyds TSB are not held in trust for the customer, but Lloyds TSB borrows the proceeds and undertakes to repay them;
- 14.3 the said promise to repay is to repay at the branch of Lloyds TSB where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to Lloyds TSB at the branch;
- 14.4 Lloyds TSB will not cease to do business with the customer except on reasonable notice;
- 14.5 the customer undertakes to exercise reasonable care in executing his written orders so as not to mislead Lloyds TSB or to facilitate forgery;
and
- 14.6 Lloyds TSB is not liable to pay the customer the full amount of his balance until he demands payment from Lloyds TSB.

Paragraph 8 is otherwise not admitted.

15. It is averred that Lloyds TSB is not, in the absence of express agreement, under any obligation to advance sums to the customer by allowing him to overdraw his account.

16. As to paragraph 9:

- 16.1 Paragraphs 9 to 13 above are repeated;
- 16.2 Where a Lloyds TSB current account customer either:

16.2.1 draws a cheque on his account or otherwise seeks to initiate a payment from it which, if paid or made, would cause the account to go into overdraft or further overdraft, in circumstances where the customer has not first agreed an overdraft facility with Lloyds TSB in respect of that account; or

16.2.2 draws a cheque on his account or otherwise seeks to initiate a payment which, if paid or made, would cause the debit balance on his account to exceed or further exceed the amount of the overdraft facility that he has previously agreed with Lloyds TSB in respect of that account;

the customer, by necessary implication, requests Lloyds TSB alternatively accepts Lloyds TSB's offer to consider whether to grant and/or requests Lloyds TSB to grant an overdraft or increased overdraft (as applicable) to the customer on Lloyds TSB's usual terms as to interest and other charges as set out in Lloyds TSB's Charges Leaflets and on its website;

16.3 A new and specific contract comes into being between the customer and Lloyds TSB whereby, in return for Lloyds TSB considering the customer's request and/or (as the case may be) granting or declining the customer the overdraft or increased overdraft requested, the customer agrees to pay Lloyds TSB's usual charges for those services as set out in Lloyds TSB's Charges Leaflets and on its website;

16.4 In the alternative, the charges made by Lloyds TSB where a customer goes or seeks to go overdrawn (or further overdrawn) without agreeing this in advance with Lloyds TSB are the price or remuneration (or part of the price or remuneration) for the range of banking services provided in exchange by Lloyds TSB pursuant to the contract referred to in paragraph 14 above or otherwise;

16.5 If, which is denied, the customer is in breach of any contractual duty to Lloyds TSB by acting as set out in paragraphs 16.2.1 or 16.2.2 above, such breach is waived by Lloyds TSB.

Paragraph 9 is otherwise admitted.

17. As to paragraph 10:

17.1 paragraphs 10, 11 and 16 above are repeated;

- 17.2 it is admitted that, where a customer seeks to operate his account in a way that will result in the account being debited despite there being insufficient available funds to support the debit, Lloyds TSB typically charges an Overdraft Excess Fee where it agrees to effect payment and thereby allows the account to go into overdraft or further overdraft, or to exceed or further exceed an existing overdraft;
- 17.3 Lloyds TSB does not presently otherwise make a charge when a customer moves into or is in an unauthorised overdrawn position within a specified period;
- 17.4 it is admitted that, when a customer seeks to operate his account in a way that will result in the account being debited despite there being insufficient available funds to support the debit, Lloyds TSB typically charges a Returned Item Fee where it declines to authorise payment because of insufficient funds in the account. Where the declined payment sought to be made by the customer is a payment by cheque, Lloyds TSB returns the cheque to the payee marked "refer to drawer", "refer to drawer, please represent" or "uncleared effects";
- 17.5 paragraph 10.3 is admitted insofar as it relates to Lloyds TSB;
- 17.6 the final paragraph under paragraph 10 is noted. Lloyds TSB pleads further in relation to the Schedules to the Particulars of Claim in paragraph 20 below.
18. Lloyds TSB has published written Personal Banking terms and conditions (*the Personal Banking Terms*) that will apply from 2 November 2007 to all personal bank accounts and to some related services, including debit and cheque guarantee cards. Each personal account customer of Lloyds TSB has been or by 3 October 2007 will have been sent a copy of the Personal Banking Terms by post and they are available on Lloyds TSB's website. The Personal Banking Terms will, on coming into effect, provide for Lloyds TSB to charge a customer in the circumstances described in paragraphs 17.2 to 17.4 above. The amount of the charges will continue to be set out in Charges Leaflets. Lloyds TSB repeats paragraphs 16.2 to 16.5 above in relation to the Personal Banking Terms.

19. As to paragraph 11:

- 19.1 the agreement between the Claimant (*the OFT*), the Financial Services Authority and the First to Seventh Defendants dated 25 July 2007, as amended by an agreement dated 29 August 2007, (*the Litigation Agreement*) is admitted;
- 19.2 Lloyds TSB has provided the OFT with copies of the Charges Leaflet and the debit card terms and conditions that were current as at the date of the Litigation Agreement together with a representative selection of previous Charges Leaflets, and terms and conditions. Individual customers of Lloyds TSB have disputed Lloyds TSB's tariffs and terms and conditions contained in these documents in proceedings in County Courts.
20. The basis described in paragraphs 12 to 14 upon which the OFT has purported to prepare the Schedules to the Particulars of Claim is noted. Insofar as they purport to set out provisions of Lloyds TSB's Charges Leaflets and debit card terms and conditions, the Schedules attached to the Particulars are inaccurate in some respects. Lloyds TSB will seek to agree revised Schedules to the Particulars of Claim with the OFT. If such agreement cannot be reached, Lloyds TSB will serve its own Schedules in due course and will seek declaratory relief in relation to them. Lloyds TSB does not plead to paragraphs 12 to 14 insofar as they relate to the other Defendants.

Application of a test of unfairness

21. Paragraph 15 is denied. Paragraphs 9 to 17 above are repeated. In the premises and/or in any event, Lloyds TSB's usual terms as to charges material to the allegations in the Particulars of Claim (including as set out in the Charges Leaflets and, when they come into effect, the Personal Banking Terms) (*Lloyds TSB's Terms*):

- 21.1 are in plain intelligible language; and
- 21.2 relate to the main subject matter of the relevant contract between Lloyds TSB and each of its current account customers; and/or
- 21.3 relate to the adequacy of the price or remuneration, as against the goods or services being supplied in exchange under the relevant contract.

22. Paragraph 16 is denied insofar as it relates to Lloyds TSB's Terms. Lloyds TSB does not plead to paragraph 16 insofar as it relates to the terms of the other Defendants.

23. Lloyds TSB does not plead to paragraph 17. It is noted that the OFT does not presently allege that Lloyds TSB's Terms are "unfair" within the meaning of the 1999 Regulations or at all and Lloyds TSB will plead to such an allegation if and when it is positively made.

The OFT's Investigation

24. The second sentence of paragraph 18 is admitted but otherwise this paragraph is not admitted.

25. The first sentence of paragraph 19 is admitted. The second sentence is admitted insofar as it relates to Lloyds TSB.

26. The first sentence of paragraph 20 is admitted but otherwise this paragraph is not admitted. For the avoidance of doubt, it is denied that any determination by the OFT that Lloyds TSB's Terms are "unfair" and contravene the 1999 Regulations would be definitive or binding on any Court.

27. As to paragraph 21, it is admitted that, in the course of the OFT's current investigation, the Defendants have advanced, among others, the following contentions:

27.1 that their relevant terms and charges fall within Regulation 6(2) of the 1999 Regulations and do not fall to be assessed for fairness;

27.2 that if, contrary to the foregoing, their relevant terms or charges do fall to be assessed for fairness, then, as a precondition to each Defendant's relevant terms and charges being found to be unfair for the purposes of the 1999 Regulations, that Defendant must be shown to have contravened the requirement of good faith; and

27.3 that their charges are for services, rather than for a breach of contract, and are not capable of amounting to a penalty at common law.

28. Lloyds TSB here repeats each of the foregoing contentions in relation to Lloyds TSB's Terms.

29. Paragraph 22 is admitted.

30. As to the final paragraph of the Particulars of Claim, it is denied that the OFT is entitled to the declaration referred to against Lloyds TSB.

COUNTERCLAIM

31. Lloyds TSB repeats its Defence above.

32. In the premises, Lloyds TSB is entitled to and seeks declarations that:

32.1 Lloyds TSB's Terms are in plain intelligible language and:

32.1.1 relate to the definition of the main subject matter of the contract;
and/or

32.1.2 relate to the adequacy of the price or remuneration, as against
the goods or services supplied in exchange; and/or

32.1.3 provide for payment of remuneration for services supplied by
Lloyds TSB to a customer, rather than payment of a sum by the
customer for breach of a contractual duty owed by the customer
to Lloyds TSB;

32.2 accordingly, by reason of Regulations 6(2)(a) and/or (b) of the 1999
Regulations, Lloyds TSB's Terms shall not be assessed for fairness,
alternatively any assessment of fairness of them shall not relate to the
definition of the main subject matter of the contract, or to the adequacy
of the price or remuneration, as against the goods or services supplied
in exchange; and/or

32.3 Lloyd's TSB's Terms are not capable of amounting to a penalty at
common law.

33. In the alternative to paragraph 32.2 above, if, contrary to Lloyds TSB's case, the
Lloyds TSB's Terms (or any of them) fall to be assessed for fairness under the 1999
Regulations, Lloyds TSB is entitled to and seeks declarations that:

33.1 it is a necessary but not a sufficient pre-condition 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; and

33.2 good faith, for the purposes of Regulation 5(1) of the 1999 Regulations, means that Lloyds TSB must, during the making of the contract, deal fairly and openly with its customer.

AND LLOYDS TSB COUNTERCLAIMS:

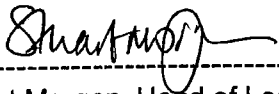
- (1) Declarations as set out in paragraphs 32.1, 32.2 and 32.3 above, alternatively, 32.1, 32.3 and 33 above, or in such terms as the Court deems appropriate; and
- (2) Such further or other relief as the Court considers appropriate.

Bankim Thanki Q.C.

Richard Handyside

Statement of Truth

The Sixth Defendant believes that the facts stated in this Defence are true.



Stuart Morgan, Head of Legal Services, UK Retail Banking for the Sixth Defendant

Served this 28 day of September 2007 by Lovells of Atlantic House, Holborn Viaduct,
London, EC1A 2FG, Solicitors for the Sixth Defendant.

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

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) THE ROYAL BANK OF SCOTLAND
GROUP PLC**

Defendants

**DEFENCE AND
COUNTERCLAIM OF THE SIXTH
DEFENDANT**

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Sixth Defendant's Solicitors