

**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) THE ROYAL BANK OF SCOTLAND GROUP PLC**

Royal Courts of Justice
Transaction: 51051
Fee Code : COMN 1.5 07
Fee : £400.00
Operator : SIDIKU, L
Dated : 03/10/2007 16:08:17
Payment Mtd:

Defendants

**DEFENCE AND COUNTERCLAIM OF * REFUNDED *
THE ROYAL BANK OF SCOTLAND GROUP PLC**

Royal Courts of Justice
Transaction: 49400
Fee Code : COMN Other 07
Fee : £1700.00
Operator : SIDIKU, L
Dated : 10/10/2007 10:58
Payment Mtd:

- 1** In this Defence and Counterclaim:
- 1.1** "1999 Regulations" means the Unfair Terms in Consumer Contracts Regulations 1999;
 - 1.2** "Account" means a personal current account with one of the RBSG Banks;
 - 1.3** "Customer" means an individual who holds an Account;
 - 1.4** "RBSG" means the Eighth Defendant, The Royal Bank of Scotland Group plc;

- 1.5 "RBSG Banks" means National Westminster Bank plc ("NatWest") and The Royal Bank of Scotland plc ("RBS");
- 1.6 "Relevant RBSG Charges" means the fees described at paragraph 7 below applied under the Relevant RBSG Terms to Accounts;
- 1.7 "Relevant Instruction" means a payment instruction issued by a Customer which, if executed, would create or increase an unarranged overdraft on his or her Account;
- 1.8 "Relevant RBSG Terms" means the current and historic contractual terms included in agreements between the RBSG Banks and Customers which make provision for the Relevant RBSG Charges to be applied to Accounts. The relevant documents constituting these agreements will be listed in a schedule to be provided to the OFT. To avoid repetition, the present tense is used when referring to the current and historic contractual terms;
- 1.9 References to paragraph numbers are, unless otherwise indicated, references to the numbered paragraphs of the Particulars of Claim; and
- 1.10 RBSG does not plead to the allegations made in the Particulars of Claim in so far as they relate to the other Defendants. Admissions, non-admissions and denials should be taken to relate only to RBSG and/or the RBSG Banks, as the context requires.

DEFENCE

- 2 Paragraph 1 is admitted as a general and non-exhaustive summary of some of the OFT's functions and powers and some of the provisions of the Enterprise Act 2002 and the 1999 Regulations.

- 3 As to paragraph 2, it is admitted that RBSG is the parent company of the group of which the RBSG Banks are members. The RBSG Banks each carry on the business of banking in the United Kingdom and offer Accounts to Customers who are "consumers" within the meaning of the 1999 Regulations.
- 4 Paragraphs 3 to 6 are admitted. RBSG will rely at trial on the whole of the 1999 Regulations for their true meaning and effect.
- 5 As to paragraph 7, the accuracy of the quotation of Regulation 6(2) of the 1999 Regulations is admitted.
- 6 Paragraphs 8 and 9 are admitted.
- 7 As to paragraph 10, it is admitted that the personal current account agreements between the RBSG Banks and the Customers contain terms (i.e. the Relevant RBSG Terms) which provide for the application of one or more of the Relevant RBSG Charges as well as terms which provide for the application of a higher rate of interest on unarranged overdrafts. The Relevant RBSG Charges can be summarised as follows:
 - 7.1 The unarranged borrowing fee/monthly maintenance charge. This is applicable in circumstances in which an Account becomes overdrawn without prior arrangement, or any arranged overdraft limit is exceeded.
 - 7.2 The paid referral fee. This is applicable in circumstances in which a Customer issues a Relevant Instruction and the relevant RBSG Bank processes the instruction and decides in its discretion to execute it.
 - 7.3 The guaranteed card payment fee. This applies in relation to Customers to whom the relevant RBSG Bank has agreed to issue a card which enables Customers to make payment instructions which the relevant

RBSG Bank agrees to meet, whether or not there are available funds in the Account. The guaranteed card payment fee is payable when a Customer issues a Relevant Instruction which the relevant RBSG Bank is obliged to execute because the Customer has used such a card.

7.4 The unpaid item fee. This is applicable in circumstances in which a Customer issues a Relevant Instruction and the relevant RBSG Bank processes the instruction and decides in its discretion not to execute it.

8 As to paragraph 11:

8.1 By an agreement dated 26 July 2007, RBSG, the OFT and the Financial Services Authority agreed that the terms and conditions of the agreement dated 25 July 2007 between the OFT, the Financial Services Authority and the First to Seventh Defendants would apply between them *mutatis mutandis*.

8.2 Paragraph 11 is otherwise noted. The RBSG Banks anticipate that some further disclosure will be made, including in relation to any relevant replacement terms and conditions and/or price lists.

9 Paragraphs 12 to 14 are noted. The schedules to the Particulars of Claim do not set out clearly or accurately the contractual terms which provide for the fees referred to in paragraph 10. RBSG will seek to agree revised schedules with the OFT, failing which it will serve its own schedules.

10 As to paragraphs 15 and 16:

10.1 The OFT asserts that each of the Relevant Terms and Charges (as defined in the Particulars of Claim) "does not relate to the definition of the main subject matter of the contract" and "does not relate to the

adequacy of the price of remuneration, as against the goods or services supplied in exchange” and that “[a]ccordingly ... such terms fall to be assessed for fairness under the 1999 Regulations”.

10.2 Regulation 6(2) provides that, in so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate to the definition of the main subject matter of the contract, nor to the “adequacy” of the price or remuneration, as against the goods or services supplied in exchange. The 1999 Regulations are not a mechanism for controlling the price of consumer banking services.

10.3 As regards the application of Regulation 6(2), RBSG refers to paragraphs 17 to 25 below.

10.4 Paragraphs 15 and 16 are otherwise denied.

11 The Relevant RBSG Terms and Charges are in plain intelligible language. RBSG will refer to its relevant contractual documentation at trial. Without limiting the submissions which may be made with reference to such documentation, the following points are made:

11.1 In relation to NatWest Accounts the contractual documentation current at the date when these proceedings were issued includes the following language relating to the Relevant RBSG Charges:

“6. Unarranged borrowing – interest and fees

...

Fees

Fee type	When charged	Fee amount
Unarranged Borrowing*		
If you exceed your arranged overdraft facility, or if you go overdrawn without prior arrangement: This is in addition to interest payable, as detailed on page 16.	Unarranged borrowing fees are applied on the dates shown on page 20	£28
Unarranged transactions – Unpaid		
Payable when a cheque, standing order or Direct Debit is not paid due to there being insufficient funds available in your account.	Unpaid fees are applied at the time the transaction is not paid or taken from your account	£38 per item
Guaranteed card payment fee*		
Payable when you informally request an overdraft by making a payment supported by cheque guarantee or Maestro where there are insufficient funds or insufficient unused agreed overdraft facility to meet the payment.	Guaranteed card payment fees are applied at the time the transaction is paid or taken from your account.	£35 per item

Fee type	When charged	Fee amount
Paid referral*		
Payable when you informally request an overdraft by issuing a payment instruction on your account where there are either insufficient funds or insufficient unused agreed overdraft facility to meet the payment and we in our discretion make payment which results in or increases an unarranged overdraft.	Paid referral fees are applied on the sixth business day of the month after the transactions took place.	£30 (maximum £90 in a calendar month)

This does not apply to Step, Card Plus, Student or Graduate Accounts.

11.2 In relation to RBS Accounts the contractual documentation current at the date when these proceedings were issued includes the following language relating to the Relevant RBSG Charges:

“Charges

...

Unarranged overdrafts

Service charge

- monthly maintenance charge **£28**
- R21 and Student Royalties – **£10**
monthly maintenance charge

If you borrow more than your agreed overdraft limit you will be liable for a maintenance charge applied monthly, 16 days after the end of the charging period (or the next business day if this is a Saturday, Sunday

or Bank Holiday). The charging period is normally in line with the date we send your statement to you.

Unarranged borrowing - paid referral	£30 for any day on which a paid referral occurs
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Subject to a maximum of £90 per month

Payable when you informally request an overdraft by issuing a payment instruction on your account where there are either insufficient funds or insufficient unused agreed overdraft facility to meet the payment and we in our discretion make payment which results in or increases an unarranged overdraft. The fee will be payable on the 6th business day of the following month and the account will be debited on that date.

Transaction fees

Unpaid items

- also applies to Key Accounts	£38 per item
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Payable when a cheque, Standing Order or Direct Debit is not paid due to there being insufficient funds available in your account.

Guaranteed card payment fee	£35 per transaction
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Payable when you informally request an overdraft by making a payment supported by cheque guarantee or Maestro where there are insufficient funds or insufficient unused agreed overdraft facility to meet the payment.”

11.3 Although the amount of the fees and some of the terminology have changed, similarly plain intelligible language was used in all earlier

versions of the contractual documentation which have been disclosed to the OFT pursuant to the agreement dated 25 July 2007.

- 12 Paragraph 17 is admitted subject to the detailed provisions of Part 8 of the Enterprise Act 2002. For the avoidance of doubt, if and to the extent that the OFT alleges that any of the Relevant RBSG Terms and/or Relevant RBSG Charges are "unfair" within the meaning of the 1999 Regulations, such allegation is denied.
- 13 Paragraphs 18 to 20 are noted. For the avoidance of doubt, it is denied that it would be appropriate for any of the orders contemplated in paragraphs 18 and 20 to be made.
- 14 As to paragraphs 21 and 22:
- 14.1 RBSG's case is as set out in paragraphs 17 to 25 below.
- 14.2 It is admitted that the issue of the applicability of Regulation 6(2) to the Relevant RBSG Terms and Relevant RBSG Charges is fundamental to the matters identified at paragraph 22.
- 15 Save as expressly admitted, not admitted, or noted above, each allegation made in relation to RBSG in the Particulars of Claim is denied.

COUNTERCLAIM

- 16 The Defence above is repeated.

The services provided by the RBSG Banks and the integrated pricing structure

- 17 In providing and operating an Account, the RBSG Banks supply an integrated bundle of services, which (among other things) enables the Customer to do some or all of the following:

- 17.1** To deposit money in the Account in a variety of ways (including by post, at a branch or by electronic means) and to receive payments from third parties for the credit of the Account;
 - 17.2** To monitor in a variety of ways (including by paper statements, ATMs, telephone and internet banking) the balance on the Account and the transactions which have taken place on it;
 - 17.3** To withdraw cash at a branch, through an ATM (including through ATMs operated by banks other than the Customer's own bank) or via cashback at a retailer;
 - 17.4** To make payments from the Account in a variety of ways (including by cheque, bank draft, CHAPs, debit card or electronic payment by telephone or via internet banking);
 - 17.5** To set up, cancel and amend arrangements for payments to be made from the Account by standing order or direct debit;
 - 17.6** To borrow with the bank's prior agreement on an arranged overdraft;
 - 17.7** To request an unarranged overdraft without formality by the issue of a Relevant Instruction, and, where the bank chooses (or has previously agreed by the issue of a guarantee card) to grant such request, to borrow on the bank's standard terms for unarranged overdrafts.
- 18** The RBSG Banks operate an integrated pricing structure in relation to the bundle of services set out in paragraph 17 above. Under that pricing structure Customers incur fees in some circumstances but are able in many instances to avoid incurring fees altogether. In consequence, the basis on which the RBSG Banks provide personal current account banking services (including those set

out in paragraph 17 above) is often referred to in the media as “free banking”. This basis of charging for the provision of banking services became prevalent in the UK, in response to consumer preference, in place of previous pricing structures under which customers typically paid transactional charges whether or not their accounts were in credit or debit. The “free banking” pricing structure is one of a range of pricing structures that are in place in various consumer banking markets around the world.

19 The main components of the integrated pricing structure offered by the RBSG Banks are set out in paragraphs 19.1 to 19.5 below, together with an outline explanation of the interrelated way in which those components operate as parts of the price for the bundle of services offered in connection with the provision and operation of an Account:

19.1 Customers are able to use Accounts from day to day without incurring any fees.

19.2 Customers incur an opportunity cost represented by the difference between the interest (if any) paid on credit balances and the interest or return which the customer could have earned on the money through depositing or investing it elsewhere. Correspondingly, the RBSG Banks earn revenue from the provision and operation of Accounts through the use they make of funds deposited by Customers, on which the interest (if any) payable by the RBSG Banks is less than the interest which the RBSG Banks would have to pay on funds of an equivalent amount raised from wholesale sources. (The RBSG Banks refer to this as “Credit Net Interest Income”, or “Credit NII”.) The amount of Credit NII

earned by the RBSG Banks is directly related to the level and duration of credit balances on Accounts.

- 19.3** Customers who have arranged overdrafts pay any applicable interest and arrangement fee.
- 19.4** If the Customer has an unarranged overdraft or impliedly requests the grant of such an overdraft by issuing a Relevant Instruction, the Customer pays one or more of the Relevant RBSG Charges together with interest on the amount of any such borrowing.
- 19.5** There is a natural inverse relationship between the level of credit balances and the incurring of the Relevant RBSG Charges, because the maintenance of a substantial credit balance, relative to the level of outgoing payments from the Account, increases the likelihood that there will be sufficient funds to cover any given payment instruction. Consequently the Relevant RBSG Charges operate in conjunction with Credit Nil to provide alternative sources of revenue from Accounts operated in different ways.
- 20** The provision of an integrated bundle of banking services (including those referred to at paragraph 17 above) on the basis of the pricing structure (referred to at paragraphs 18 and 19 above) gives Customers the opportunity to control how and to what extent they pay for their banking services. It is open to a Customer to maintain a low average credit balance (thereby causing the Bank to earn little Credit Nil in respect of the Account) but to avoid incurring Relevant RBSG Charges by ensuring that sufficient funds are in place for all payment instructions. Customers who manage their Accounts in this way receive the benefit of current account banking services at a very low cost. The

opportunity for Customers to do this plays a major part in making banking services available at low cost for low income customers.

- 21 The Relevant RBSG Charges are a necessary part of the pricing structure described above, in the sense that they are integral to the economic sustainability of the pricing structure in its current form.
- 22 The pricing structure, including the Relevant RBSG Charges, is subject to market forces. The market, as overseen by the competition authorities, operates as a control upon the structure and level of prices charged by banks for personal current account services, and is the appropriate mechanism for so doing.

Regulation 6(2)

- 23 For the reasons set out at paragraphs 17 to 22 above, the Relevant RBSG Charges are an integral part of the price paid by Customers for the bundle of services received from the RBSG Banks in connection with the provision and operation of an Account. The Relevant RBSG Terms also serve to define part of the main subject matter of the contract.
- 24 In the premises, and provided that they are in plain intelligible language, the effect of Regulation 6(2) is to preclude any assessment being made of the fairness of the Relevant RBSG Terms and the Relevant RBSG Charges, alternatively to preclude any such assessment being made if such assessment relates to the level at which the Relevant RBSG Charges are set (or otherwise to the adequacy of the price paid by the Customer as against the services supplied by the RBSG Banks in exchange).

25 If (contrary to the contentions pleaded in paragraphs 18, 19 and 23 above) the Relevant RBSG Terms and the Relevant RBSG Charges do not form part of the definition of the main subject matter of the contract for the provision of the Account as a whole and do not form part of the price for the provision of the Account as a whole, RBSG will contend in the alternative that:

25.1 The Relevant RBSG Terms and the Relevant RBSG Charges represent the price for the services supplied by the Bank in response to a Relevant Instruction;

25.2 Alternatively, the Relevant RBSG Terms and the Relevant RBSG Charges form part of the definition of the main subject matter of a new contract for the supply of services, which arises consequent upon the issue of a Relevant Instruction informally requesting the supply of such services and/or represent the price for those services; and in either case

provided that they are in plain intelligible language, the effect of Regulation 6(2) is to preclude any assessment being made of the fairness of the Relevant RBSG Terms and the Relevant RBSG Charges, alternatively to preclude any such assessment being made if such assessment relates to the level at which the Relevant RBSG Charges are set (or otherwise to the adequacy of the price paid by the Customer as against the services supplied by the RBSG Banks in exchange).

The requirement of good faith

26 If (contrary to RBSG's contentions) the fairness of the Relevant RBSG Terms and/or the Relevant RBSG Charges is subject to assessment under the 1999 Regulations, it is a necessary (but not sufficient) pre-condition to the Relevant

