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1403, 1404, 1405, 1406, 1406(Y) and 1407

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COMMERCIAL COURT
The Honourable Mr Justice Andrew Smith
[2008] EWHC 875 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2009

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE WALLER V-P
and
LORD JUSTICE LLOYD

- -

Between :

(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 — **Appellants/ Defendants**

- and -

THE OFFICE OF FAIR TRADING — **Respondent /Claimant**

- -
- -

Ali Malek QC and **Richard Brent** for **Abbey National plc**
(instructed by **Ashurst LLP**)

Iain Milligan QC, Andrew Mitchell and **Simon Atrill** for **Barclays Bank plc**
(instructed by **Simmons & Simmons**)

Richard Salter QC and **John Odgers** for **Clydesdale Bank plc**
(instructed by **Addleshaw Goddard LLP**)

Robin Dicker QC, Timothy Howe QC and **Jeremy Goldring** for **HBOS plc**
(instructed by **Allen & Overy LLP**)

Richard Snowden QC, Daniel Toledano and **Patrick Goodall** for **HSBC Bank plc**
(instructed by **Freshfields Bruckhaus Deringer LLP**)

Bankim Thanki QC, Richard Handyside and **James Duffy** for **Lloyds TSB Bank plc**
(instructed by **Lovells LLP**)

Geoffrey Vos QC and **Sonia Tolaney** for **Nationwide Building Society**
(instructed by **Slaughter and May**)

Laurence Rabinowitz QC and **David Blayney** for **The Royal Bank of Scotland Group plc**
(instructed by **Linklaters LLP**)

Jonathan Crow QC, Richard Coleman, Jemima Stratford and **Sarah Love** for
The Office of Fair Trading
(instructed by **The Office of Fair Trading**)

Hearing dates: 28 and 29 October and 3, 4 and 5 November 2008

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Approved Judgment

Sir Anthony Clarke :

This is the judgment of the court to which each of its members has contributed.

Introduction

1. This is an appeal from an order made by Andrew Smith J ('the judge') on 23 May 2008 to reflect the conclusions in his judgment which was handed down on 24 April 2008. The appeal is brought with the permission of the judge. It raises a question of construction of a few words in regulation 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999 ('the 1999 Regulations'). However, while it may concern the meaning of only a few words, it has given rise to much debate, both before the judge at first instance and before us. At the outset we would like to pay tribute to the high standard of the argument on both sides and to the forbearance of counsel for the appellants ('the Banks'). The Banks put in a single skeleton argument on all issues and their principal oral argument was advanced by Mr Rabinowitz QC. Other counsel made limited submissions on various matters without repeating anything said by Mr Rabinowitz. The oral argument on behalf of the respondent ('the OFT') was advanced by Mr Crow QC. We would also like to pay tribute to the quality and clarity of the judge's judgment, which is 450 paragraphs long.

2. The principal question before the judge and in this appeal was and is whether or not the OFT is entitled to assess the fairness of certain charges made by the Banks under the 1999 Regulations. It is common ground between the parties that, unless such an assessment is prohibited by regulation 6(2)(b) of the 1999 Regulations, the OFT is entitled to assess them for fairness. Albeit at the risk of taking it out of context, we should quote regulation 6(2) at the outset. It provides:

> "(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."

Before the judge the Banks abandoned any reliance upon paragraph (a). It follows that both before the judge and in this appeal the question was and is whether, on the true construction of regulation 6(2)(b), an assessment of the fairness of the charges imposed pursuant to a particular term is prohibited in the circumstances of this case. The judge held that it is not. The question in this appeal is whether he was correct so to hold.

3. The 1999 Regulations were made under section 2(2) of the European Communities Act 1972. Their purpose was to give effect in the United Kingdom to Council Directive 93/13/EEC on unfair terms in consumer contracts (the "Directive"). There has accordingly been much debate as to the true construction and purpose of the Directive, to which we return below. However, none of the parties has asked for a reference to the European Court of Justice ('the ECJ'). We note in passing that,

unsurprisingly, each of us is a customer of one or more of the Banks, but nobody has suggested that we should not hear this appeal.

The Relevant Charges

4. We will use the same terms as the judge did. As he explained at [1] of his judgment, this action is about charges made by the Banks to their customers who have personal current accounts with them when they are requested or instructed to make a payment for which they do not hold the necessary funds in the account and which is not covered by a facility arranged with the customer. Like the judge, we will refer to such requests or instructions as "Relevant Instructions", to the charges as "Relevant Charges" and to the terms in the standard form contracts between bank and customer providing for the Relevant Charges as "Relevant Terms".

5. As the judge explained at [6], the OFT identified four basic categories of Relevant Charges about which it is concerned: Unpaid Item Charges, Paid Item Charges, Overdraft Excess Charges and Guaranteed Paid Item Charges. As pleaded by the OFT, an Unpaid Item Charge is "levied when the customer gives an instruction for payment or, in some cases at least, withdrawal, that the bank declines to honour because the customer does not have sufficient funds in his account" or (as in the case of other charges) an arranged facility which covers it. A Paid Item Charge is "levied when the customer gives an instruction for payment or, in some cases at least, withdrawal, for which he has insufficient funds in his account and which the bank honours". An Overdraft Excess Charge is "levied if, during a specified period (typically a day or a month) … an account is and/or goes overdrawn (and there is no overdraft facility), or … the debit balance is and/or goes above the limit on an existing overdraft facility, and in both cases irrespective of the reason why the excess has occurred". A Guaranteed Paid Item Charge refers to a charge distinct from a Paid Item Charge which some of the Banks levy when they honour "in accordance with the guarantee, a cheque issued in conjunction with a cheque guarantee card (or, in the case of some banks, a debit card payment made under a guaranteed debit payment system) for which the customer does not have sufficient funds".

6. The judge described the nature of current accounts at [42] to [54], of overdrawing on current accounts at [55] to [63] and of unarranged overdrafts at [64] to [82]. It is not necessary to set out those descriptions again for the purpose of resolving the issues in this appeal.

The background to the action

7. The judge described the background to this action at [2] to [5] of his judgment. It is sufficient for us to say this. The Relevant Terms and Relevant Charges are being challenged on two fronts. As already noted, under the 1999 Regulations the OFT is investigating the fairness of the Relevant Charges: see [3] of the judgment for more detail. Strictly, the investigation is of the fairness of the terms under which the Relevant Charges are imposed, but it is convenient and realistic, in most cases, to speak of the fairness of the Relevant Charges. In addition to the OFT investigation, a large number of individual actions have been brought by individual customers in county courts disputing charges levied by banks, many of them relying not only on the 1999 Regulations but also on common law rules about the unenforceability of

penalties. Those actions have for the most part been stayed for the time being pending the outcome of these proceedings: see [3] to [5] of the judgment.

Issues before the judge

8. As already indicated, the principal issue before the judge was whether the OFT is entitled to carry out an assessment of the fairness of the Relevant Charges. It is not in dispute that it is for the Banks to show that the case falls within regulation 6(2)(b) of the 1999 Regulations. At [33] of his judgment the judge identified the first question as being whether assessment of fairness is prohibited because it would "relate … to the adequacy of the price or remuneration, as against the goods or services supplied in exchange" within the meaning of regulation 6(2)(b) of the 1999 Regulations. In this connection he identified the third question as being whether, if and in so far as regulation 6(2) applies, the protection afforded to the Banks is that the particular term is not to be assessed for fairness (the 'excluded term' construction) or whether the Banks are protected against a particular type of assessment (the 'excluded assessment' construction).

9. However, he also considered (among other things) whether specific contractual terms are in "plain intelligible language" and whether any of the terms giving rise to charges is a penalty at common law: see the second question identified at [33] and [35].

The declarations made by the judge

10. On the main point, in his order the judge made a declaration that an assessment of fairness of specific terms set out in the first schedule to the order, which were Relevant Terms, would 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, within the meaning of regulation 6(2) of the 1999 Regulations. It is the correctness of that declaration which is the main issue in this appeal.

11. Save in a very few cases, the judge made a declaration that the Relevant Terms were in plain intelligible language within the meaning of regulation 6(2). He refused permission to appeal on this part of the case but two of the Banks, namely HBOS plc ('HBOS') and Abbey National plc ('Abbey'), seek permission to appeal against findings that particular terms were not in plain intelligible language. We return to this below. Finally, the judge declared that none of the terms with which he was concerned was a penalty clause at common law. There is no appeal against that part of the order.

The basis of the judge's conclusions and the issues in the appeal

12. Before the judge the Banks argued that the correct construction of regulation 6(2)(b) of the 1999 Regulations was the excluded term construction, whereas the OFT contended for the excluded assessment construction. At [422] the judge identified the question as being that posed at paragraph 15-034 of the 29th edition of *Chitty* on *The Law of Contract* (2004) as follows:

> "The question of substance . . . is whether Art 4(2) (and therefore reg 6(2)) excludes a category of terms from the test of

> fairness ('core terms' or 'core provisions') or whether it instead excludes certain types of issue from being taken into account by the courts ('core issues') in coming to their overall assessment of the fairness of a term under reg 5(1)."

Although the judge correctly noted that this question only arises if article 4(2) of the Directive and therefore regulation 6(2) of the 1999 Regulations applies, we refer to it now because before us it became part of the argument as to the correct approach to the exclusion from the assessment. We note in passing in this regard that, whichever approach was adopted, *Chitty* identified the exclusion as being only of 'core' terms, provisions or issues as the case might be.

13. The judge resolved the issue in favour of the 'core issues' or 'excluded assessment' construction: see his discussion at [422] to [435] and his conclusion at [436]. The Banks do not challenge that conclusion. Indeed they pray it in aid as a means of distinguishing the reasoning of the House of Lords in *The Director General of Fair Trading v First National Bank plc* ('the *First National Bank* case') [2001] UKHL 52, [2002] 1 AC 481.

14. Before the judge the OFT argued that paragraphs (a) and (b) of regulation 6(2) should be construed conjunctively, whereas the Banks argued that they should be construed disjunctively, both on the basis of the use between them of the disjunctive word 'or' and for policy reasons: see the arguments set out at [338] to [343]. The judge resolved this issue in favour of the Banks, except for the point made at [343]: see [344].

15. The OFT does not challenge his decision. We do not therefore express a different view, although in our opinion it is important to construe paragraph (b) of regulation 6(2)(b) in the context of the whole of the regulation including paragraph (a). We note that, after expressing his conclusion, the judge added at the end of [344]:

> "But it by no means follows that regulation 6(2)(b) prohibits an assessment of any term that relates to a payment by way of price or remuneration under a consumer contract or to its adequacy. Accordingly, while rejecting a conjunctive interpretation of the Regulation in this narrow sense, I must still consider the proper limits of the application of regulation 6(2)(b)."

16. At [345] to [358] the judge discussed what he called the restrictive interpretation of regulation 6(2), principally by reference to the decision and reasoning of the House of Lords in the *First National Bank* case, but also by reference to some of the textbooks. This is an important part of the case to which we return below.

17. Ultimately, the basis of the judge's decision depended upon the true construction of regulation 6(2)(b). He held that the Relevant Charges do (or did) not "relate … to the adequacy of the price or remuneration, as against the goods or services supplied in exchange" within the meaning of paragraph (b). His conclusions may be briefly summarised in this way.

i) The Banks do not render "services" when they process, but do not pay upon, a Relevant Instruction: see [359] to [372]. The judge accepted the OFT's argument that, if a Bank declines to pay upon a Relevant Instruction, it supplies no, or no relevant, services by way of considering, processing or otherwise dealing with it: see [372].

ii) He added in [370], as we see it by way of alternative to his principal conclusion:

> "Moreover, even if the Banks' processes of considering and processing Relevant Instructions short of paying them, or with a view to deciding whether to pay, could, in any sense, be described as services supplied to the customer, the real and essential service supplied by the Banks under their contracts with customers is that of paying upon the customer's instruction, and the Banks' procedures whereby they deal with Relevant Instructions before making payments or when they decide not to pay are ancillary to and incidental to the service of paying in accordance with the mandate."

iii) By contrast, the Banks do supply 'services' when they pay upon a Relevant Instruction: see [373] to [377] and [383]. It is important to note that at [374] to [377] the judge rejected the OFT's submission that the services of making payment upon a Relevant Instruction and of providing an unarranged overdraft are not services of a kind relevant for the purposes of regulation 6(2) because they are incidental or ancillary to the essential bargain between the parties. However, this does not mean that it is irrelevant to the application of regulation 6(2)(b) that charges are levied for carrying out payment instructions and allowing borrowing only when the instructions are Relevant Instructions and the borrowing is by way of unarranged overdraft. It is relevant to whether the Relevant Charges are covered by regulation 6(2)(b): see [383]. We return below to the correctness or otherwise of [373] to [377] in connection with the respondent's notice.

iv) As we understand it, in this appeal the OFT does not challenge the conclusion that, when it pays upon a Relevant Instruction, the Banks supply 'services' within regulation 6(2)(b).

v) The judge considered but did not rule upon an alternative argument advanced by Mr Vos QC for Nationwide (and repeated before us but not, at any rate initially, adopted by the other Banks) that services provided in response to a Relevant Instruction are within regulation 6(2) because, upon proper analysis, they form part of the main subject matter of the contract. The judge identified the argument as being that, if the services supplied when an overdraft is advanced are not part of the main subject matter of the contract, they become so when the account becomes overdrawn. In the absence of specific contractual provision to the contrary (and there are no such provisions in Nationwide's terms), unless and until a current account customer's account goes into debit, the provisions of the contract that would apply to a debit account are by way of unilateral commitments by his bank, and when those

commitments are accepted by the customer overdrawing upon his account, the terms of the contract between bank and customer change accordingly: see [378] to [382]. (We return to Mr Vos' submissions below.)

vi) Although the Banks supplied services, they were not "supplied in exchange" within the meaning of regulation 6(2)(b): see [384] to [421]. Under this general heading, the judge divided his analysis into a number of sections as follows.

'The price or remuneration'

vii) The judge considered the meaning of 'the price or remuneration' at [384] to [389]. He concluded that not every payment for which a customer might be liable under a contract is 'price or remuneration'. The question is whether a payment falls squarely within regulation 6(2) so that its exemption is justified by the purpose of respecting the parties' freedom of contract about the price/quality ratio as at the time when the bargain was made. The 1999 Regulations contemplate something clearly recognisable as an exchange for the benefit of the customer such as will typically be at the core of a consumer contract: see [384] and [385].

viii) It is necessary to identify a recognisable exchange between the service the customer receives and what he is to pay. In this regard it is relevant to consider the way in which the typical consumer would view the matter, albeit without disregarding the view of the typical supplier: see [388], where the judge said *inter alia* that, as he had already observed, the concept of an "average consumer . . . who is reasonably well informed and reasonably observant and circumspect" is a concept often used in applying and interpreting European consumer law, and is an appropriate guide as to whether a payment is the price or remuneration within the meaning of the 1999 Regulations. He added, after referring to the importance of the structure of the contract:

> "Nevertheless, the question whether a payment is the price or remuneration depends upon the substance of the agreement between the parties and the true nature of the payment rather than upon how it is described or presented, and it would, I think, be surprising if the court felt able to conclude that a payment is the price or remuneration within regulation 6(2)(b) even though the typical consumer would not recognise it as such when presented with the terms of the seller or supplier."

ix) The judge identified a number of relevant considerations, including the contingent nature of the relevant payment or otherwise, but ultimately concluded at [390] that the requirement that a payment be, and be recognisable as, the price or remuneration paid in exchange for services does not provide a bright-line as to what falls within regulation 6(2). It is a question of evaluation of the facts of the particular case.

'Adequacy of the price or remuneration'

x) The judge discussed the concept of adequacy of the price or remuneration at [391] to [394] and ultimately concluded at [394] that the expression 'adequacy' imports reference to a relationship and the relationship here is between the Relevant Charges and the services supplied.

The whole package argument

xi) Between [395] and [401] the judge considered and rejected the whole package argument advanced by the Banks, which was that under the contract between Bank and customer the Bank agrees to provide its customer with an overall package and in return the customer agrees to pay charges as and when they become payable in accordance with the contractual terms.

xii) At [397] the judge recognised the economic force of the argument but rejected the Banks' case for the reasons given at [398] and [399]:

> "398. I am unable to accept this argument, for two (linked) reasons. First, I do not consider that the payments are made in exchange for the whole package of services supplied by the Bank when it is operating a current account. It is not a natural use of language to say that the Relevant Charges are levied or paid *in exchange* for those services supplied when an account is in credit. Secondly, I do not consider that the payments are *the price or remuneration* for those services in any natural meaning of the phrase or within the meaning of regulation 6(2). The payments would not be so recognised by the typical customer when he opens a current account with a Bank, and they are not generally so presented by the Banks in their terms or other documentation.
>
> 399. On the contrary, the very description "free-if-in-credit" connotes that there is no price to be paid for services supplied when an account is in credit, and that a customer might pay for the Bank's services supplied if and when his account goes into debit. I do not overlook that RBSG introduced in December 2007 its leaflet, "Personal and Private Banking - A Guide to Interest and Fees", which includes its Relevant Charges under the heading "The price for your banking services" and among "the main elements of the pricing structure we use for our current accounts"; but this is not how Relevant Charges are generally presented to customers, previously RBSG's documentation did not provide this explanation, and, I have said, it is not of contractual effect."

The specific services argument

xiii) This argument is that each of the Relevant Charges is the price or remuneration in exchange for the services or a service supplied in connection with a Relevant Instruction given by the customer or by way of the Bank's response to it. The judge held that it was necessary to consider each category of Relevant Charges separately. He rejected the Banks' submissions in each case on the ground that the relevant service was not supplied in exchange for the price or remuneration. He gave his reasons between [403] and [416].

18. The judge expressed his overall conclusion that the Relevant Terms are not exempt from assessment under the 1999 Regulations in these terms at [421]:

> "I therefore conclude that the Relevant Terms are not exempt from assessment under the 1999 Regulations. This does not seem to me surprising. Regulation 6(2) exempts assessment of the fairness of the balance of the essential bargain between a seller or supplier and a consumer. As the Banks themselves explain, under a "free-if-in-credit" price structure the economic balance in a contract between a Bank and its current account customer is between the package of services supplied by the Bank and the total benefits to the Bank from operating the current account, not only by way of Relevant Charges but also in particular by way of the use of the funds if the account is in credit and interest if it is in debit. On no view does an assessment of the Relevant Charges (or the Relevant Terms) impinge upon the adequacy of the totality of the benefits received by the Bank in exchange for the package of services. The OFT's investigation might well involve consideration of the fairness of the structure of a "free-if-in-credit" pricing regime but that is very different from an assessment of the overall "adequacy" of the benefits to a Bank from operating it."

19. The Banks challenge those conclusions, whereas the OFT says that the judge was (for the most part) correct or, at least, that he was entitled to reach the conclusions he did. If necessary the OFT says, by way of respondent's notice, that the judge's approach to the construction of the paragraph was too narrow. It says in effect that his approach was based upon a narrow common law over-linguistic analysis and that he should have adopted a broader approach based upon the way in which the ECJ considers issues of community law of this kind. The argument was not put in quite this way before the judge and at one stage in the argument the Banks sought to say that it was not open to the OFT to advance it now. However, as we read the transcript, that objection was not maintained and, in any event, we can see no prejudice to the Banks in allowing the argument to be advanced in this court, even though it involves challenging some of the conclusions reached by the judge which the OFT did not initially challenge, at any rate expressly.

20. In the respondent's notice as drafted the OFT asserts that the Relevant Terms are incidental or subsidiary provisions of the contracts under which the Banks supply personal current accounts to their respective customers and are therefore not exempt from an assessment of fairness by regulation 6(2) for a number of specific reasons. As we see it, this way of putting the case involves two separate submissions. The first is that, if the Relevant Terms are incidental or subsidiary terms, a relevant assessment

is not precluded under the regulation as a matter of construction and the second is that the Relevant Terms are, as a matter of fact, incidental or subsidiary and not core provisions or, put another way, that they are not part of the core or essential bargain.

21. As to the first point, there was much debate before the judge as to these questions, even if the point of principle was not formulated in quite that way. As to the second point, the Banks are correct to say that the OFT's submission is contrary to the conclusions of the judge at [373] to [377]. However we do not think that the Banks are in any way prejudiced by the OFT being permitted to challenge those conclusions.

22. It struck us in the course of the argument that the question whether an assessment is in principle exempt under the regulation if the Relevant Terms are incidental or subsidiary is a critical question in deciding how the regulation and Directive should be construed and that, logically, it should be addressed at the outset of any analysis. In these circumstances we will consider the correct approach to the construction of the 1999 Regulations before seeking to construe regulation 6(2)(b) in the light of that approach. This will in practice involve considering the general approach contended for in the respondent's notice before the correctness or otherwise of the judge's conclusions. However, we turn first to the relevant legislative materials.

The 1999 Regulations

23. The judge described the 1999 Regulations at [10] to [19]. As already indicated, they were introduced to give effect to the Directive. They were the second set of regulations intended to have that effect. The first were the Unfair Terms in Consumer Contracts Regulations 1994 ("the 1994 Regulations"), which were introduced to comply with article 10 of the Directive, which required Member States to bring into force provisions necessary to comply with the Directive by no later than 31 December 1994. Such provisions were to apply to all contracts concluded after 31 December 1994. The 1994 Regulations were revoked and replaced by the 1999 Regulations for reasons which are not relevant to this appeal.

24. By regulation 4(1), the 1999 Regulations apply "in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer" and provide by regulation 5(1) that 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".

It is common ground that the Banks are sellers or suppliers within the 1999 Regulations. It is also common ground that many of the Banks' customers are consumers because, by regulation 3(1), the expression "consumer" means "any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession". The judge noted at [11] that it was agreed that he was to proceed on the assumed basis that none of the terms with which he was concerned had been "individually negotiated". He added that that was no doubt generally the case, notwithstanding that customers sign individual mandates. Nobody suggested that we should not proceed on the same basis.

25. Regulation 6 is headed "Assessment of unfair terms" and reads as follows:

> "(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."

26. Regulation 7 is headed "Written contracts" and provides:

> "(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.
>
> (2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12."

27. Regulation 8 provides that if a term is unfair, it is not binding on the consumer but "the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term". The duty on the OFT to consider (with certain exceptions) any complaint made to it that any contractual term drawn up for general use is unfair is stated in regulation 10. The 1999 Regulations further express the powers and obligations of the OFT and others in dealing with complaints. Regulation 12 provides that the OFT (and other bodies) may apply for a (final or interim) injunction in respect of apparently unfair terms drawn up for general use.

28. The judge correctly observed at [16] that the 1999 Regulations establish what was described by Lord Steyn in the *First National Bank* case at [33] as "a dual system of *ex casu* challenges and pre-emptive or collective challenges by appropriate bodies". Whatever the form of the challenge, the assessment is of the fairness of terms in an individual contract made by a seller or supplier with a customer (in the case of *ex casu* challenges in an actual contract with the customer challenging it or in the case of pre-emptive or collective challenges in a notional contract with a hypothetical customer), and not the fairness of the standard terms used by a seller or supplier as against the body of consumers who enter into contracts with the seller or supplier on his standard terms.

29. Some reliance was placed on Schedule 2 to the 1999 Regulations. By regulation 5(5), Schedule 2 contains "an indicative and non-exhaustive list of the terms which may be

regarded as unfair". As the judge noted at [17], that list, like the similar list in the Directive, is sometimes referred to as a "greylist" because it is not a "blacklist" of terms that are necessarily to be regarded as unfair, but contains illustrations of the sort of terms that might be found to be unfair: see the seventeenth recital to the Directive, which states that the terms in the list "can be of indicative value only".

30. So far as potentially relevant, paragraph 1 of the Schedule defines the terms on the greylist as follows:

> "1. Terms which have the object or effect of –
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> …
>
> (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
>
> (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
>
> (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
>
> …
>
> (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
>
> …
>
> (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded."

Paragraph (e) seems to us to be of particular significance in this context, since it is specifically concerned with the amount of a payment to be made by the consumer, and

it is directed to a secondary obligation to pay when a primary obligation has been breached.

31. The judge noted at [17] that paragraph (l) is concerned with payment as a primary obligation but not with the amount of the price or when it is payable but with clauses that allow a late determination of the price at the time of delivery or a variation in the price with no concomitant right for the consumer to cancel the contract. Paragraph 2 of the Schedule is entitled "scope of paragraphs 1(g), (j) and (l)" and includes:

> "(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described".

The Directive

32. As already stated, the Directive is of considerable importance in this appeal. It is common ground that, as the judge held at [20], given that the 1999 Regulations were introduced to give effect to the Directive, the Regulations are to be interpreted so as to give effect to the terms and purpose of the Directive and resort may properly be had to the Directive in order to interpret them. The judge further noted, in our opinion correctly, that, although the Directive is intended only to set minimum requirements for the control of fairness of terms in consumer contracts, and, as article 8 makes clear, Member States may adopt or retain more stringent measures to protect consumers, in fact the 1999 Regulations largely mirror the Directive. Importantly, Lord Steyn said this in the *First National Bank* case at [31]:

> "As between the Directive and the domestic implementing Regulations, the former is the dominant text. Fortunately, the 1994 Regulations, and even more so the Unfair Terms in Consumer Contracts Regulations 1999, appear to have implemented the Directive in domestic law in a manner which ought not to cause serious difficulty".

As appears below, the *First National Bank* case was a decision on regulation 3(2) of the 1994 Regulations, which was similar to but in terms different from regulation 6(2) of the 1999 Regulations.

33. It is also common ground that the *travaux préparatoires* are a legitimate aid to the construction of the Directive. We will first set out the relevant terms of the Directive and then, after discussing the approach of the House of Lords to the Directive in the *First National Bank* case, consider how article 4(2), which is the origin of regulation 6(2) of the 1999 Regulations, came to be in the Directive. This is important because it seems to us to be clear that the purpose of article 4(2) is different from that of most of the provisions of the Directive. The latter purpose is essentially one of consumer protection, albeit in the context of the internal market, whereas the purpose of article 4(2), which was not in the first drafts, is to limit the protection given to consumers in some respects. An important question in the appeal is what the purpose of that limitation was and how the limitation was given effect.

34. As the judge observed at [21], the Directive was made under what is now Article 95 (then Article 100a) of the EC Treaty. Article 95(3) expressly refers *inter alia* to

proposals concerning consumer protection and states that the Commission, in its proposals under this article, will "take as a base a high level of protection". Almost all the recitals to the Directive refer to the importance of avoiding unfair terms. The judge referred in particular to the tenth recital, which includes among the purposes of the Directive that of providing more effective protection to the consumer "by adopting uniform rules "in the matter of unfair terms". See also the fourth and sixth recitals. The judge also referred to the eighth recital, which refers to two Community programmes "for a consumer protection and information policy", which were initiated by resolutions of the Council and which "underlined the importance of safeguarding consumers in the matter of unfair terms of contract", and states that "this protection ought to be provided by laws and regulations which are either harmonised at Community level or adopted directly at that level". These programmes, adopted by Council resolutions of 1975 and 1981, granted to consumers basic rights, including the right to protection of economic interests and the right to information and education.

35. The judge also noted the references in the recitals to the internal market. Thus at [22] he observed that Article 95 provides that its provisions are to apply "for the purpose of the objectives set out in Article 8a" and that the Community should adopt measures with the aim of progressively establishing the internal market. He added, in our opinion correctly, that the recitals also show that the aims include the reduction of distortions in competition between sellers of goods and suppliers of services caused by differences in rules governing terms in consumer contracts and stimulation of competition. He nevertheless accepted the OFT's submission that the Directive's dominant purpose is that of consumer protection, albeit promoted in the context of the internal market: see *R (Khatun) v London Borough of Newham* [2004] EWCA Civ 55 per Laws LJ at [57].

36. In our judgment, the judge correctly identified the purposes of the Directive. He did so by reference to this statement of Lord Steyn in the *First National Bank* case at [31]:

> "The purpose of the Directive is twofold, viz the promotion of fair standard contract forms to improve the functioning of the European market place and protection of consumers throughout the European Community. The Directive is aimed at contracts of adhesion, viz "take it or leave it" contracts. It treats consumers as presumptively weaker parties and therefore fit for protection from abuses by the stronger contracting parties. This is an objective which must guide the interpretation of the Directive as well as the implementing Regulations."

37. At [24] the judge said that the nature of the protection that the Directive gives to consumers is indicated in the sixteenth 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; whereas, in making an assessment of

> good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account."

38. The key articles of the Directive for present purposes are these:

> "Article 1
>
> 1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
>
> …
>
> 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.
>
> …
>
> 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> Article 4
>
> 1. Without prejudice to Article 7, 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. 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.
>
> …

> Article 6
>
> 1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."

Article 7 is not relevant for present purposes and it is not necessary to set out the remainder of the directive. We should however note that the Annex is the basis of the greylist in the 1999 Regulations.

39. It can immediately be seen that article 4(2) is the origin of regulation 6(2) of the 1999 Regulations. In this connection, we must set out the nineteenth and twentieth recitals as follows:

> "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; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer;
>
> Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;"

First National Bank

40. Before referring to the *travaux préparatoires*, it is appropriate to consider the approach of the House of Lords in the *First National Bank* case, where the issue arose out of regulation 3(2) of the 1994 Regulations, which provided as follows:

> "In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which – (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied".

As can be seen, regulation 3(2) was not in the same terms as regulation 6(2) of the 1999 Regulations, which follows the language of article 4(2) of the Directive more closely.

41. In the *First National Bank* case the courts were concerned with a term in a common form loan agreement which provided for the continuance of contractual interest payments after judgment had been given in favour of the bank in the county court, where, unlike the position on a High Court judgment, statute does not provide for interest to be payable on a money judgment. The Director General of Fair Trading considered the term to be unfair for the purpose of regulation 4 of the 1994 Regulations and sought an injunction to restrain use of the term by the bank. The bank argued that an assessment of the fairness of the term was prohibited by regulation 3(2). The judge at first instance held that such an assessment was not prohibited but that the term was not unfair. This court held that the term was unfair and the bank appealed to the House of Lords, which held that the assessment of the term was not precluded under regulation 3(2) and thus it fell to be assessed under regulation 4 but that it was not unfair.

42. Lord Bingham, with whom all the other members of the appellate committee agreed (while expressing certain views of their own), said at [9] that regulation 3(2) gave effect "almost word for word" to article 4(2) of the Directive, although he added that some light might be shed on the problem by the nineteenth recital to the Directive. The argument advanced by the bank was that no assessment of the term was permitted because it concerned the assessment of the adequacy of the bank's remuneration as against the services supplied, namely the loan of the money. The first answer to that argument which was given by Mr Crow on behalf of the Director General was recorded by Lord Bingham at [11] in this way:

> "… condition 8, of which the term forms part, is a default provision. Its purpose, and its only purpose, is to prescribe the consequences of a default by the borrower. It does not lay down the rate of interest which the bank is entitled to receive and the borrower bound to pay. It is an ancillary term, well outside the bounds of regulation 3(2)(b)."

43. As we read the speech of Lord Bingham, he (and therefore the House) accepted that submission. He did so in these terms at [12]:

> "In agreement with the judge and the Court of Appeal, I do not accept the bank's submission on this issue. The regulations, as Professor Sir Guenter Treitel QC has aptly observed (*Treitel, The Law of Contract*, 10th ed, 1999, p 248) "are not intended to operate as a mechanism of quality or price control" and regulation 3(2) is of "crucial importance in recognising the parties' freedom of contract with respect to the essential features of their bargain" (ibid, at p 249). But there is an important "distinction between the term or terms which express the substance of the bargain and 'incidental' (if important) terms which surround them" (*Chitty on Contracts*, 28th ed, 1999, "Unfair Terms in Consumer Contracts", p 747, para 15-025). The object of the regulations and the directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) were so broadly interpreted as to cover any terms other than those

> falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default, plainly does not fall within it. It does not concern the adequacy of the interest earned by the bank as its remuneration but is designed to ensure that the bank's entitlement to interest does not come to an end on the entry of judgment. I do not think the bank's argument on merger advances its case. … But even if a borrower's obligation were ordinarily understood to extend beyond judgment even in the absence of an independent covenant, it would not alter my view of the term as an ancillary provision and not one concerned with the adequacy of the bank's remuneration as against the services supplied. It is therefore necessary to address the second question."

44. We have already quoted two passages from [31] in the speech of Lord Steyn. They clearly show that the House of Lords was construing not only regulation 3(2) of the 1994 Regulations, but also article 4(2) of the Directive, which Lord Steyn described as the dominant text. This point is further emphasised by Lord Steyn in the last three sentences of [31]. In [32] Lord Steyn made clear his view that the concepts of the Directive must be given autonomous meanings so that there would, so far as possible, be uniform application of the Directive throughout the EC. He thus treated regulation 3(2) of the 1994 Regulations as having the same autonomous meaning as article 4(2) of the Directive. It is plain from the part of his [31] quoted at [32] above, that he would have treated regulation 6(2) of the 1999 Regulations as having the same meaning.

45. What then is that autonomous meaning? Lord Steyn considered it at [34], where he said that "certain provisions, sometimes called core terms" have been excluded. He added:

> "Clause 8 of the contract, the only provision in dispute, is a default provision. It prescribes remedies which only become available to the lender upon the default of the consumer. For this reason the escape route of regulation 3(2) is not available to the bank. So far as the description of terms covered by regulation 3(2) as core terms is helpful at all, I would say that clause 8 of the contract is a subsidiary term. In any event, regulation 3(2) must be given a restrictive interpretation. Unless that is done regulation 3(2)(a) will enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision. Similarly, regulation 3(2)(b) dealing with "the adequacy of the price or remuneration" must be given a restrictive interpretation. After all, in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended. Even price escalation clauses have been treated by the Director as subject to the fairness provision: see Susan Bright, loc cit, at pp 345 and 349. It would be a gaping hole in the system if such clauses were not subject to the fairness requirement. For these further

> reasons I would reject the argument of the bank that regulation 3(2), and in particular 3(2)(b), take clause 8 outside the scope of the regulations."

46. Although the fact that clause 8 of the loan agreement was a default provision played a part in the analysis, the important point for present purposes is that the House of Lords regarded the purpose of the exception, both in article 4(2) of the Directive and in regulation 3(2) of the 1994 Regulations, as being to exclude from assessment the essential features or the substance or core of the bargain and not incidental or ancillary terms. That conclusion was derived at least in part from the 28th edition of *Chitty*, which was of course considering the 1994 Regulations. It is therefore of interest to consider whether the editors' approach has changed in the most recent edition, which is the 30th edition, in which they consider regulation 6(2) of the 1999 Regulations. At paragraph 15-049 they say that that regulation reflects very closely article 4(2) of the Directive and comment that in the English context it has become usual to refer to the exclusion in regulation 6(2) as relating to "core terms". It can immediately be seen that the approach adopted in the 30th edition is the same as that adopted in the 28th edition, even though the two editions were considering different regulations.

47. Thus in paragraph 15-056, in our opinion correctly, the editors of the 30th edition treat the principles in the *First National Bank* case as being relevant to the construction of regulation 6(2) of the 1999 Regulations. This is an important conclusion in the context of this appeal because the Banks say that the reasoning of the House of Lords in the *First National Bank* case is of no assistance on the ground that the House was considering regulations in different terms. In particular, they submit that it is plain from the language of both Lord Steyn and Lord Bingham that they applied an excluded term construction (and not an excluded assessment construction) both to article 4(2) of the Directive and to regulation 3(2) of the 1994 Regulations. The Banks correctly observe that the distinction was not made in argument in the House of Lords and submit that in these circumstances the opinions expressed by the House do not advance the OFT's case.

48. We are not, however, able to accept those submissions because the starting point of the analysis in the House of Lords was the Directive as the dominant text. It follows that nothing turns on the difference between the terms of paragraph 3(2) of the 1994 Regulations and those of paragraph 6(2) of the 1999 Regulations, which (as already stated) adhere closely to the text of article 4(2) of the Directive. In any event, as a central part of its reasoning in construing the Directive, the House identified and relied upon its view of the underlying purpose of the Directive. Although the facts of this case are different from those in that case, the underlying purpose must be the same.

49. As already indicated, once the autonomous meaning of the Directive was established by the House of Lords, we must apply that meaning to paragraph 6(2)(b) of the 1999 Regulations because it cannot have a different purpose or meaning from the Directive. As we see it, it follows from the reasoning of the House of Lords that what article 4(2) of the Directive was seeking to exclude from the assessment required by the national authorities (here the OFT) was the core bargain or the core price but not ancillary or incidental provisions. In our judgment, regulation 6(2) of the 1999 Regulations should be construed with that underlying purpose in mind.

50. In this regard it is important to note that the House of Lords was considering paragraph (b) of regulation 3(2) of the 1994 Regulations. It was not considering paragraph (a). Although, regulation 3(2) was in somewhat different terms from regulation 6(2) of the 1999 Regulations, it too was divided into two paragraphs. It follows that the House of Lords' approach to the 'core bargain' applies not only to 'the main subject matter of the contract' in paragraph (a) but also to 'the price or remuneration' in paragraph (b). It is not we think without significance in this regard that paragraph (b) refers to 'the price or remuneration' and not to part of the price or remuneration. The judge was similarly struck: see [400] and [414].

51. Although the OFT did not rely upon this point before the judge, it does so now as part of its argument on the respondent's notice. The judge put it thus at [400] and [414] in the context of the whole package argument:

> "400. Moreover, the basis of the whole package argument is that the Relevant Charges are not *the* price or remuneration for services but *part* of the price or remuneration for services. An assessment of the fairness of the Relevant Charges does not involve an assessment of the level or adequacy or appropriateness of the overall price or remuneration for the package of services supplied by the Bank, and an assessment of the fairness of the Relevant Charges as against those services, apart from being entirely beside the point, would not intrude upon the essential bargain between the parties that the Directive and the 1999 Regulations intend should be protected from assessment. The whole package argument does not engage the policy of the Directive and the 1999 Regulations for exempting the fairness of the Relevant Terms from assessment. Indeed, I am far from convinced that an assessment of part of the price or remuneration (or at least for less than what is manifestly the predominant part of the price or remuneration) for goods or services would ever be covered by regulation 6(2)(b), but since this is not an argument advanced by the OFT, I say no more about that."

At [414] the judge referred back to [400] when making the same comment in connection with the specific services argument.

52. In our view these considerations support the conclusion that the purpose of regulation 6(2)(b) was to limit the exclusion to the essence of the price, just as the purpose of regulation 6(2)(a) was to limit it to the main subject matter of the contract. As appears below, the reason for the limitation was to reflect the fact that the parties would be likely to (or might well) negotiate the main subject matter of the contract and the essential price but not the detail.

53. The judge considered the *First National Bank* case at [345] to [358]. He referred extensively to the speeches of Lord Bingham and Lord Steyn: see in particular [348] and [350]. The judge said this at [349]:

> "It is rightly pointed out by Mr Rabinowitz that Lord Bingham does not refer to the main subject matter of the contract (the terminology of regulation 3(2)(a) of the 1994 Regulations, as it is of regulation 6(2)(a) of the 1999 Regulations). However, Lord Bingham recognised that, even if they are important terms, terms that do not express the substance of the bargain but are incidental to it, do not fall "squarely" within regulation 3(2)(b) and the Regulation does not apply to it. It was an application of this general principle that led Lord Bingham to conclude that the term was not covered by regulation 3(2)(b). The application of the general principle was that, the term being a provision that dealt with the consequences of a default, it was to be regarded as incidental. There is nothing in Lord Bingham's speech that indicates that he regarded only provisions dealing with default as being "incidental" and so falling outside regulation 3(2)(b), and to my mind it would distort his reasoning so to restrict what terms are to be categorised as "incidental" for this purpose."

We agree. See also [351], where the judge makes similar observations relating to the speech of Lord Steyn.

54. At [354] the judge referred to Lord Bingham's reference to the 10th edition of *Treitel* on *The Law of Contract* and added:

> "In the 11th edition of his work (2003) he said this (at p 273), "The requirement of considering the adequacy of the price or remuneration 'as against' the subject matter of the contract could similarly restrict the concept of 'core provision' and hence of regulation 6(2)". This sentence is also included in Mr Edwin Peel's 12th edition (2007) of the book at para 7-101. It was criticised by the Banks as moving too far towards a conjunctive interpretation of the 1999 Regulations because of the reference to "core provisions" informing the interpretation of regulation 6(2)(b). I am unable to accept this criticism. Neither edition suggests that regulation 6(2)(a) and regulation 6(2)(b) be given a conjunctive reading in the sense that wording from regulation 6(2)(a) is to be read into regulation 6(2)(b), but the observation in the 11th and 12th editions of the work emphasises that regulation 6(2)(b) is directed to the essential bargain between the parties, or the "core terms", an expression already used in the 10th edition of which Lord Bingham approved."

Again, we agree.

55. This last point is of some importance because the Banks submit that, once the conjunctive construction has been rejected, there is no room to apply the principle of essential bargain to price clauses, if only because of the difficulty in deciding to which it applies and to which it does not. We are not able to accept that submission. We accept the OFT's submission that it all depends upon the circumstances of the particular case and that it is a question of fact whether a clause which might otherwise

fall to be assessed is outside the essential bargain between the parties. In our opinion the reasoning of the House of Lords in the *First National Bank* case supports that approach.

56. It was suggested in the course of the argument that this conclusion is in conflict with the OFT's acceptance of the judge's rejection of the conjunctive construction of regulation 6(2). We do not accept that submission. The question whether paragraphs (a) and (b) should be construed conjunctively or disjunctively is entirely distinct from the question whether each such paragraph is concerned only to exclude an assessment of the essence of the bargain. As we see it, the judge had this point in mind in [344] of his judgment:

> "However, I accept the Banks' other arguments that regulation 6(2) is not to be given a conjunctive interpretation in as much as they demonstrate that there is no proper justification for importing the phrase "main subject matter" of the contract from regulation 6(2)(a) and introducing it by inference into regulation 6(2)(b). Neither the structure nor the language of regulation 6(2) justifies that. Moreover the policy of the 1999 Regulations is not only to protect consumers but also to facilitate the establishment of the internal market and to promote competition. But it by no means follows that regulation 6(2)(b) prohibits an assessment of any term that relates to a payment by way of price or remuneration under a consumer contract or to its adequacy. Accordingly, while rejecting a conjunctive interpretation of the Regulation in this narrow sense, I must still consider the proper limits of the application of regulation 6(2)(b)."

57. It is plain from that paragraph that the judge was not considering the construction of paragraph (b), which he correctly made clear must be considered separately. Some reliance is placed upon the opening words of the paragraph, in which he was rejecting a point made by the Banks which he had set out at [343]. The Banks say that it follows that he was accepting all their other points, one of which was that made in [342], which was that it would be impossible to restrict the regulation to the assessment of the price or remuneration for the main subject matter of the contract in those (certainly not uncommon) cases where a simple undifferentiated charge is made for a collection of goods or services, some of which are at the heart of the bargain and others of relatively minor importance. We do not think that he was going so far as to reject a suggestion that paragraph (b) is restricted to excluding 'the price or remuneration' in the sense of core price. If he was, we respectfully disagree with him.

58. Our conclusions derived from the *First National Bank* case are in our view supported both by the *travaux préparatoires* which led to the Directive and by a number of academic writings, some of which were brought to our attention since the conclusion of the oral argument and have been the subject of further submissions.

The travaux préparatoires

59. In paragraphs 15-050 and 15-051 of the 30th edition of *Chitty* the editors consider the *travaux préparatoires* which led to the Directive. They note that the original Proposal

for a directive did not contain an exclusion equivalent to article 4(2). They trace the origins of the exception to a paper by Brandler and Ulmer (1991) CMLR 645, who suggest that article 4(2) reflects a double purpose. First, it seeks to ensure that the Directive does not interfere with the free operation of the market, which the Directive seeks to facilitate by establishing the internal market, encouraging the confidence of consumers in making transactions (especially cross border) and removing distortions in competition between sellers and buyers. Secondly, it is concerned to ensure that a consumer's choice in relation to the price and main subject matter of the contract is a genuine one. We return to *Chitty* below.

60. Since the Directive was enacted under what is now Article 95 EC, it was subject to the Co-operation Procedure. The documents show that the Directive underwent the following legislative process. The Proposal for a directive was adopted by the Commission and transmitted to the Council of Ministers ('the Council') on 24 July 1990. It was transmitted to the European Parliament on 2 October 1990. The Parliament first considered the Proposal in two committees, which presented their report and opinion a short time apart in April 1991. The ECOSOC was also consulted and published its opinion a little later in April 1991. The Parliament considered the Proposal and ECOSOC opinion on the first reading of the Directive and proposed various amendments on 20 November 1991. The Commission revised and republished its Proposal on 4 March 1992. The Council reached a Common Position on 22 September 1992 (political agreement having been reached on 26 June). The Directive had its second reading on 16 December 1992. The Commission re-examined its Proposal and republished it for the third time on 26 January 1993. The Council received the re-examined Proposal, agreed the final amendments on 2 March 1993 and formally adopted the Directive on 5 March 1993.

61. There was some debate in the course of the argument as to when and how the nineteenth recital and article 4(2) found their way into the Directive. The reference to main subject matter ("specification") and "price" of the contract first appeared in the initial Commission Proposal of July 1990 which stated that:

> "The use of standard term contracts effectively excludes the possibility of real negotiation between the parties on the terms governing the subject-matter of the contract (*although there may be negotiation on such matters as the price and the specifications of the goods*). These are, in reality 'take it or leave it' contracts …" (our emphasis)

62. Paragraph 2.2.1 of the ECOSOC opinion in April 1991 included the following:

> "The directive is intended to restore balance in consumer contracts. The explanatory memorandum to the proposal consistently describes the numerous imbalances which characterize consumer [sic] and which are totally inconsistent with the traditional principle of freedom of contract which is based on the assumption that the contracting parties have equal bargaining power. As equal bargaining power is so often absent in consumer negotiations, the proposal for a directive seeks to ensure this bargaining power or to rectify the imbalances."

63. As stated above, there followed a first reading and a second Proposal on the part of the Commission and the Council's Common Position was adopted on 8 September 1992. It was in that document that the nineteenth recital and article 4(2) were proposed. It was also at that time that a greylist was proposed instead of a blacklist. The document setting out the Council's Reasons for its Common Position included the following:

> "2. *Aim of the Legislation*
>
> The aim of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a consumer and a seller or supplier, in order to eliminate unfair terms from such contracts."

It may be noted that there was no separate free market or freedom of contract aim proposed. The document continued thus in the context of the proposed article 4:

> "Article 4
>
> In accordance with the Opinion of the European Parliament, the scope of the Directive excludes negotiated terms, all provisions relating to assessment of the unfairness of such clauses have therefore been deleted, particular the provision in Article 4(1) of the amended proposal.
>
> The new wording of paragraphs 1 and 2 is intended to clarify the procedures for assessing the unfairness of terms and to specify their scope *while excluding anything resulting directly from the contractual freedom of the parties (eg quality/ price relationship).* This point is covered by recitals Nos 18 and 19.
>
> …"

64. That reasoning, especially the part we have put in italics, seems to us to be of some significance because it is an explanation of the very paragraph which was adopted and became article 4(2) of the Directive and subsequently therefore regulation 6(2) of the 1999 Regulations. It shows that the underlying idea of excluding anything from the assessment for fairness was that there should be excluded only that which could be expected to result from the contractual freedom of the parties to negotiate the particular term. This would no doubt exclude the underlying subject matter of the contract, since the consumer would no doubt have true freedom whether or not, say, to buy a car, and perhaps to negotiate the underlying price - that is, to negotiate the core or essential terms of the contract - but he would in practice not be able to negotiate the other ancillary or incidental terms. This seems to us to be the idea underlying the Council's Common Position and, indeed, to be the idea underlying the approach of the House of Lords in the *First National Bank* case and thus the idea which led to the view that the purpose of the exclusion was to exclude core terms from assessment but not others.

65. Although the Common Position introduced the exclusion contained in the proposed article 4, there is nothing in the Council's Reasons to suggest that it intended to challenge the underlying philosophy of the Directive. On the contrary, the Council's Reasons suggest to us that the amendment was intended to be consistent with the Parliament's proposals. This can be seen if consideration is given to the Commission's original Proposal for a directive, to which a Technical Annex was attached: see for example COM(90) 322 final at pages 2-3.

66. Thus the Explanatory Memorandum in respect of the Proposal began in this way:

> "In all Member States the law of contract is consensual. It is presumed that the parties understand the terms of their agreement, particularly if it has been put in writing and signed. This rule is something of a fiction even at the national level and it must be reviewed if the Common Market is to operate satisfactorily. Within the Common Market there are currently twelve Member States with more than twelve distinct legal systems and nine official languages. It cannot be assumed that consumers who cross frontiers to buy goods or services, or to invest or acquire property in other Member States, have understood and agreed the terms of a contract they have made, if they do not speak the local language or are unfamiliar with the local law, especially if it is complex – for example standard terms and conditions for the sale of a motor vehicle. Unless there is some assurance that they will not be seriously disadvantaged by unfair contracts, consumers will lack the confidence to use the new possibilities opened up by the completion of the internal market, for example the opportunity to buy goods and services at more favourable prices in other Member States than their country of residence."

67. The Technical Annex both explained the position in different Member States in some detail and identified the problems which arise or can arise for consumers. After doing so, it stated at page 7 that "the widespread use of standard terms thus calls into question the consensual basis of the law of contract". The Technical Annex also included the following (at page 7):

> "The use of standard term contracts effectively excludes the possibility of real negotiation between the parties on the terms governing the subject-matter of the contract (although there may be negotiation on such matters as the price and the specifications of the goods)."

As we see it, that is the very point being made in the Council's Reasons when explaining the purpose of the new nineteenth recital and article 4 which it proposed to add to the Directive. Thus, on the one hand standard form contracts should be subjected to a test of fairness save, on the other hand, to the extent that their terms might in fact be negotiated.

68. The Council's Common Position was transmitted to the European Parliament for the second reading of the Directive on 22 October 1992 and was reconsidered in

December. The Parliament suggested some amendments but none that is relevant for present purposes, save perhaps that a blacklist was suggested instead of a greylist. The Commission said that the majority of states would not accept a blacklist, with the result that the greylist was adopted. One of the reasons for rejecting a blacklist was to avoid the suggestion that, if a term was not on the blacklist, it was to be treated as fair. We should perhaps add that the indexation exception in paragraph (l) of the greylist was only introduced at this stage. However that may be, no amendments were made to the draft which became article 4(2) of the Directive and the basis of regulation 6(2) of the 1999 Regulations.

69. In our judgment a consideration of the *travaux préparatoires* supports these conclusions:

i) Article 4(2) must be read in light of the fact that the use of standard term consumer contracts is less likely to cause market distorting effects and be unfair in circumstances where the term concerns the main subject matter of the contract or the core price/quality ratio.

ii) The Directive recognises that the widespread use of standard terms calls into question the consensual basis of the law of contract.

iii) Ancillary or incidental price, remuneration or payment terms will not fall within the exception in article 4(2) because they do not fulfil the purpose or essential rationale of the exception.

iv) There can, as the Commission Proposal acknowledged, never be a precise bright line between the exercise of consumer autonomy in negotiating terms and the direct imposition of standard terms on a consumer by a supplier of goods or services. However, in assessing this dividing line a court should bear in mind the rationale for the exception from the scope of the Directive, the general EC law requirement that exceptions to EC law rights should be interpreted restrictively and the fact that ancillary or incidental payment terms are much less likely to fall within the essence of the exception than core price or remuneration terms which may have been the subject of negotiation with the parties.

Academic writings

70. As indicated above, we have been referred to a number of academic writings in addition to those which we have already mentioned. The most extensive reviews of the problem raised by this appeal are contained in the 30th edition of *Chitty* and in an article in (2008) 71 MLR 987 by Professor Elizabeth Macdonald, who is Professor of Law at Swansea University. The article is entitled "Bank Charges and the Core Exemption" with specific reference to the decision of the judge in this case. In the article Professor Macdonald first discusses the concept of "plain intelligible language" and then, at pages 992-998, the exemption in regulation 6(2)(b) of the 1999 Regulations.

71. As we read the analyses of the editors of *Chitty* and of Professor Macdonald, they both support the conclusion of the judge but they both take the view that he approached the exemption in regulation 6(2)(b) of the 1999 Regulations too narrowly.

We will return to the judge's approach below but first wish to refer briefly to the conclusions reached by *Chitty* and Professor Macdonald.

72. It is not possible to do justice to the detailed analysis in *Chitty* here. However, as we read it, the editors conclude that the judge's analysis of the true construction of regulation 6(2)(b) adopts too narrow a common law approach. This can perhaps best be seen from paragraph 15-058, under the heading "Reasonable Understanding of "Average Consumer" (disregarding the footnotes):

> "However, with respect, it is submitted that treating the issue whether a particular term falls within reg 6(2) as turning on construction of the term in the ordinary common law sense (and therefore on the intention of the parties as seen in their factual matrix) as to whether the term set the price itself or merely set a "default sum" is not appropriate in the context. For, the exclusion of "core terms" by reg 6(2) is contained in an EC directive aimed (in part) at the protection of consumers and this purpose should be borne in mind in setting the perspective from which the proper qualification of a contract term as relating 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 should be seen. In this respect, the Director General of Fair Trading earlier expressed the view that:
>
> > " … it would be difficult to claim that any term was a core term unless it was central to *how consumers perceived* the bargain. A supplier would surely find it hard to sustain the argument that a contract's main subject matter was defined by a term which a consumer had been given no real chance to see and read before signing it - in other words if that term had not been properly drawn to the consumer's attention."
>
> Rather than relying on the construction of the contract in the traditional way (the intention of both the contracting parties as viewed objectively), this view proposes that a court should look at the reasonable expectation of the consumer in question. And in *OFT v Abbey National Plc* this view was accepted by the High Court as appropriate given the significance of the notion of an 'average consumer' in the jurisprudence of the European Court of Justice."

We agree that that is the correct approach, for the reasons given by *Chitty*, although, as the judge noted at [388], reference to the reasonable expectation of the consumer is not to the exclusion of a consideration of the typical seller or supplier.

73. Professor Macdonald also criticises the judge's approach. She does so on the ground that he places too much emphasis on the expression 'exchange' in the regulation and approaches the expression 'goods and services' too narrowly: see pages 995 and 996. At pages 997 to 998 she suggests that the court reached the correct conclusion but that

the approach should have been to emphasise the exclusion from the core exemption of incidental terms, which was an approach indicated in the *First National Bank* case. She then sets out her conclusion as follows at page 998:

> "Any consideration of the Bulletins and Reports of the OFT on the operation of UTCCR shows that the Regulations have had a very significant impact on the fairness of the standard terms encountered by consumers. However, for that impact to continue, the scope of the 'core exemption' must be kept within narrow bounds. As the House of Lords made clear in the *First National Bank* case, a narrow approach must be taken to the core exemption if the purpose of the Regulations is not to be frustrated. To a very large extent, however, the House of Lords left open how that was to be achieved. The *Abbey National* case provides a significant opportunity for clarification, particularly as the interests involved may well ensure that appeals will be taken to their fullest extent. At first instance the right conclusion would seem to have been reached on the status of the Relevant Charges as falling outside the core exemption. However, it can be contended that the right result as to scope of Regulation 6(2)(b) was reached but for the wrong reasons, with the judge unhelpfully emphasizing the references in Regulation 6(2)(b) to 'adequacy' and 'goods and services'. The better approach can be argued to be to emphasize the point which was made in *First National Bank* that 'incidental terms' fall outside the core exemption and that is how the Relevant Charges would be perceived by the parties."

As appears below, we agree with that approach, although we should add that, in doing so, we do not disregard the language of the regulation but simply construe it in the context of the underlying purpose of the exemption created by it.

74. We have already referred to some of the other academic writing, including *Treitel*, who drew essentially the same distinction between the substance of the bargain and its incidental features in the passage quoted by Lord Bingham at [12] and set out above. In the *First National Bank* case Lord Steyn referred at [33] to an article by Susan Bright, of St Hilda's College, Oxford, entitled "Winning the battle against unfair contract terms", (2000) 20 LS 331 at 333-352. We were referred to pages 343-4 of the same article in which she says of regulation 6(2):

> "It may be that core provisions are not excluded altogether and that such terms are capable of being assessed for fairness but, in doing so, the adequacy of the price itself and the definition of the main subject matter will not be assessed for fairness. … The intention behind this provision in the Directive appears to have been to exclude from the scope of the Directive 'anything resulting directly from the contractual freedom of the parties'. This fits with consumer behaviour: most consumers will focus upon the price and quality of goods when deciding whether or not to enter the contract, and these aspects of the contract can, therefore, be said to reflect a free choice in the majority of non-

> monopoly cases. Other terms of the contract will, however, seldom form part of the decision making process. There is no real market in non-core contractual terms, which explains why consumers need greater protection against unfairness in relation to non-core terms which have not been negotiated."

We agree.

75. Susan Bright then considers some examples of OFT practice, which we should perhaps leave out of account, but adds that it is generally thought that the core terms exemption should be interpreted in a very restricted way. At page 345 she notes that in relation to paragraph (b) the price/quality ratio is excluded but not other terms relating to price and at pages 346-347 concludes that on the whole there has been a 'consumer-orientated' approach to regulation 6(2), especially paragraph (b). Those conclusions seem to us to be consistent with the other academic sources to which we were referred.

76. So too are the conclusions of Chris Willett of De Montfort University in Leicester in his work *Fairness in Consumer Contracts, The Case for Unfair Terms*: see his paragraphs headed "5.8.3 Core Terms and Reasonable Expectations" and in particular his view at paragraph 5.8.3.1 on pages 249 and 250 that the core exclusions in regulation 6(2) were really intended to exclude those terms that genuinely reflect the pre-existing reasonable expectations of the consumer. On page 250 he adds this, which is we think of some relevance on the facts of these cases:

> "An important point to emphasize is that when we talk about pre-existing expectations as to core obligations this is restricted to what happens in the normal performance of the contract, ie in the normal and due course of things. So, for example, if (under a particular term) the trigger for a sum to be payable by the consumer is a default (or anything that does not arise in the due performance of the contract) this is surely not a core term as the reasonable expectations of the consumer as to his core obligation will not extend to what happens outwith normal performance of the contract."

See also page 251.

77. Finally in this regard we should refer to the Joint Consultation Paper issued by the Law Commission (then under the chairmanship of Lord Justice Carnwath) and the Scottish Law Commission. In January 2001 they were asked to consider a number of issues, including whether the Unfair Contract Terms Act 1977 and the 1999 Regulations should be replaced by a unified regime which would be consistent with the Directive. At paragraph 3.19 they said that both limbs of regulation 6(2) were sometimes described as excluding 'core' terms. Although they fairly noted that Peter Gibson LJ had said in the *First National Bank* case in this court, at [2000] QB 672 at 686, that the phrase did not appear in the regulations and that the question was whether the term fell within what is now regulation 6(2), the consensus of opinion in all (or almost all) the materials we have seen is that in order to reflect the purpose of the Directive the assessment of any term excluded by both paragraph (a) and (b) of regulation 6(2) must be the assessment of a core term.

78. The OFT also relies upon paragraphs 3.31 and 3.32, which is part of a section in which the Commissions discuss regulation 6(2). They focus on the significance of the way the deal is put to the consumer and thus on the reasonable expectation of the consumer: see the whole discussion at paragraphs 3.27 to 3.34. As we see it the most interesting point from our perspective is their focus on terms which have an effect on price in certain circumstances which might or might not strictly amount to a default. This can perhaps best be seen in paragraph 3.32, which depends, not upon the reasoning of the House of Lords in the *First National Bank* case, but upon logic (and thus principle).

79. Paragraph 3.32 reads:

> "Our second basis [that is for adopting the approach they are adopting to the scope of the exemption] depends on the logic of the directive's exemptions of the 'definition of the main subject matter' and the 'adequacy of the price as against the goods or services supplied in exchange'. We think that the reason for not subjecting these to review is that consumers will generally be aware of the terms in question and (provided they are in plain, intelligible language) understand them. Therefore, consumers are unlikely to be taken by surprise and also the terms will be subject to 'the discipline of the market'. Consumers are much less likely to take into account terms which will only apply in certain circumstances (whether or not those circumstances involve a default) and accordingly these terms should be subject to review."

Again, that passage seems to us to be of considerable assistance in identifying the correct approach to the facts in this appeal.

80. Consideration of the various academic works to which we have been referred seems to us to support the conclusions we have drawn from both the *First National Bank* case and the *travaux préparatoires*.

Discussion – principles of construction

81. There was some debate in the course of the argument as to the correct approach to the construction of the Directive and the 1999 Regulations given the conclusions that we have reached so far, namely that article 4(2) must be given an autonomous meaning so as to have the same meaning throughout the EC and that the exemption should be construed narrowly or restrictively, first because it is an exception to what would otherwise be the position and secondly for the reasons given by the House of Lords in the *First National Bank* case: see in particular per Lord Steyn at [34].

82. The Banks accept that the community law approach is that specific limitations or derogations from a general provision of community law are to be construed narrowly but submit that that means no more than that the language of article 4(2) must be given its usual meaning. They rely, for example, upon *Commission v Spain* [2001] ECR I-445. However, we accept the OFT's submission that it is not as simple as that.

83. The judge discussed this problem at [32] in these terms:

> "It will be necessary to return to the application of regulation 6(2) to the Relevant Terms, but it is convenient at this point to say something of the proper approach to giving effect to it. The OFT points out that regulation 6(2) is a limitation on or derogation from secondary Community law and submits that as such it must be interpreted narrowly (*Commission v Spain* [2001] ECR I-455 at para 19), the more so because it is legislation for the protection of consumers (*Heininger* [2001] ECR I-9945 at para 31, [2004] All ER (EC) 1, [2003] 2 CMLR 1291). Undoubtedly the Regulation must be given an interpretation that does not allow the purpose of consumer protection to be frustrated by allowing it to apply to cases that do not fall squarely within it (see Lord Bingham in the *First National Bank* case (cit sup) at para 12), and its interpretation must be restricted accordingly (see Lord Steyn's speech at para 31 and also *Bairstow Eves London Central Ltd v Smith* [2004] EWHC 263 (QB) at para 25, [2004] 2 EGLR 25, [2004] 29 EG 118). However, the point cannot be taken so far that due respect is not paid to the language of the Regulation. The Banks cited *easyCar (UK) Ltd v OFT* [2005] ECR I-1947 to support their submission that, even in a case where Community legislation includes an exception to a provision for consumer protection, it does not follow that the legislation will always be given the narrowest interpretation or that most favourable to consumers. The court will not impose upon legislation an interpretation that its wording cannot properly bear where there is another interpretation which does not defy common sense. To my mind, the *easyCar* case illustrates no more than that."

84. We do not disagree in any way with that approach. A glance at [106] to [140] of volume 1 of the *Law of the European Union* by David Vaughan QC and others shows that there are a bewildering number of cases in which the ECJ has addressed the problem of interpretation of EC instruments: see for example in the context of derogation, exceptions, exemptions and exclusions [110] to [112] and the very many cases cited in the footnotes. In the course of his oral submissions Mr Crow summarised the position in four propositions which we have slightly amended as follows:

i) When engaging with the process of interpreting Community legislation, it is wrong to lay down rigid rules or principles of interpretation. A provision means what it means, in the context in which it appears and, as in domestic law, resort may be had to a variety of different indicators in arriving at the true meaning of the provision in hand, and in different contexts different indicators will have different degrees of influence. There are no hard edged rigid rules.

ii) It is wrong to set up a teleological or purposive interpretation on the one hand and a literal interpretation on the other as if they were mutually exclusive alternatives. It is not as simple as that. A literal interpretation of legislative wording may be required in order to achieve the legislative purpose. In that event a teleological approach would require a literal interpretation. A

teleological interpretation does not necessarily mean an expansive interpretation. It simply means giving effect to the intended purpose of the legislative instrument, which may or may not involve simply giving its words their literal meaning.

iii) It is wrong to adopt a prescriptive approach to the meaning of the expression 'restrictive interpretation'. It is not a mathematical formula to be applied with precision. As Lord Steyn has said extrajudicially, interpretation is an art and not a science. When applying a restrictive interpretation, the court must take account of the ordinary meaning of the words used but it must do so in the relevant legislative context and must therefore have regard to the overall purpose of the Directive, and in particular to the specific interests that the relevant exception (here article 4(2) of the Directive (and therefore paragraph 6(2)(b) of the 1999 Regulations)) is designed to protect. Such an exercise might involve reading words in, cutting them out or taking any other step necessary to produce a result which reflects the relevant purpose in the circumstances. It follows that it is wrong to suggest that the phrase 'restrictive interpretation' must involve simply giving the words their ordinary meaning. It is not as simple as that. As ever, all depends upon the circumstances.

iv) It does not help to say that a restrictive interpretation means giving words their ordinary or usual meaning because legislative wording inevitably has a certain elasticity of meaning depending upon its context. Put another way, the natural meaning of the words will itself depend upon the purpose for which and the context in which they are being used.

85. We accept those submissions. It is dangerous to take one or two cases decided by the ECJ and pluck statements made in one context and apply them mechanistically to another.

86. The question is whether to import the notion of essential bargain into the construction of article 4(2) and into both paragraphs (a) and (b) of regulation 6(2). Our answer to that question is yes, essentially for the reasons we have already given when discussing the *First National Bank* case and the *travaux préparatoires*. We would summarise them in much the same way as Mr Crow did in the course of the oral argument:

i) The concept of the essential bargain flows naturally from the structure of the Directive, from the purpose of the Directive, from the purpose of the exemption and from the decision in the *First National Bank* case.

ii) It flows naturally from the structure of the Directive because, as is common ground, not every payment that a consumer pays falls within regulation 6(2)(b). An appropriate analytical tool for working out what does and what does not fall within 6(2)(b) is to ask whether or not the payment forms part of the essential bargain between the parties.

iii) It flows from the purpose of the Directive because it prevents regulation 6(2)(b) from being construed too widely. Moreover, it ensures protection in respect of the kind of issues that a consumer will not have in focus when entering into a bargain. The purpose for which the exception was included was to carve out from the assessment of fairness that part of the bargain which

can genuinely be viewed as representing the consensus between the parties and thus a genuine reflection of freedom of contract.

iv) Those conclusions reflect the reasoning both in the *travaux préparatoires* and in *First National Bank* case: see especially per Lord Bingham at [12] and Lord Steyn at [34].

87. We would add to this with reference to the proposition that not every payment obligation is 'price or remuneration', let alone 'the price or remuneration'. These principles show that it cannot, for example, refer to those which are not likely to have been the subject of individual negotiation by the consumer. This conclusion is supported by the existence of the greylist the Annex , which includes payment obligations owed by the consumer, particularly in (d), (e), (f) and (l), in the non exhaustive indicative list of terms which may be regarded as unfair. The scope of 'price or remuneration' cannot be interpreted so broadly so as to include all payments which do not fall within this list. It cannot be said that all payments for the package of all services supplied pursuant to a contract will automatically fall within article 4(2).

88. It is not helpful to analyse the payment provisions in the greylist as 'secondary provisions' which require either a 'variation' or 'breach' of the contract as defined by national law. This would permit suppliers to circumvent the purpose and scope of the Directive by framing their terms such that consumers do not 'vary' or 'breach' the contract in circumstances where the payment term is triggered. Unless article 4(2) is given a restrictive interpretation it would enable the main purpose of the scheme of the Directive to be frustrated by endless formalistic arguments as to whether a term or payment obligation is price or remuneration for goods or services provided in exchange. This point is a development of the approach adopted by Lord Steyn at [34] of the *First National Bank* case. It is also consistent with some of the academic writings referred to above: see eg Willett and the Law Commissions Report.

89. These are some of the reasons for the introduction of the concept of the essential bargain in arriving at the autonomous EC meaning of the Directive and the 1994 Regulations. The next question is how to decide whether a particular term forms part of the essential bargain. It seems to us that this is a broad question which depends upon the circumstances of the particular case. The judge said this at [358]:

> "The question whether a term falls within regulation 6(2)(b) is not answered simply according to whether or not it is a default provision. It requires broader consideration of the substance of the provision and the part that the term plays in the contract, and of whether it is directly to do with a payment that is properly within the expression, "the price or remuneration". Thus it is necessary to consider both the nature of the payment and how directly the term is directed to defining the payment obligation."

We agree.

90. The above analysis suggests that the following considerations are relevant to this broad question, together no doubt with many others, depending upon the facts of the particular case:

i) The nature of the services provided as a whole and the manner and terms in which the standard term documentation is provided to consumers.

ii) The quantum of the particular payment, the goods or services to which it is said to relate and the other payments required under the contract.

iii) In order to be 'price or remuneration' within the meaning of article 4(2) the payment provision must not be ancillary to the central bargain between the consumer and supplier. Along this sliding scale:

a) if the payment obligations are directly negotiated between the consumer and supplier they will not be subject to assessment for fairness under the Directive;

b) the more closely related the payment term is to the essential bargain between the parties, the more likely it is to fall within the exception in article 4(2); but

c) the more ancillary the payment term is and the less likely it is to come to the direct attention of the consumer at the time the contract is entered into, the less likely it is to be within the concept of 'price or remuneration' within the meaning of the Directive.

91. It seems to us that the perspective of the 'typical consumer' is a useful guide in ensuring that article 4(2) has a suitably restrictive approach. The judge focused on the typical consumer at [388], from which we have quoted above, in this way:

> "I have referred to the need for a "recognisable" exchange between the service that the customer receives and what he is to pay. This reflects a submission of the OFT that the issues that arise under regulation 6(2) are to be considered from the point of view of the typical consumer. In the *First National Bank* case Lord Bingham (cit sup at para 20) said that, in judging the fairness of the term, it is necessary to consider the position of typical parties when the contract is made. Lord Steyn (at para 33) referred to the need to take into account "the effects of contemplated or typical relationships between the contracting parties" in order to make the Directive and the 1999 Regulations work sensibly and effectively. It is an extension of this approach to consider the position of the typical consumer when deciding whether regulation 6(2) applies to a term (although I observe in passing that it reflects the approach of Evans-Lombe J at first instance in the *First National Bank* case [2000] 1 WLR 98 at p 103C-E), and it would be a narrowing of the test if the position of the typical consumer were considered to the exclusion of that of the typical seller or supplier. That said, I consider that the question whether typical parties to a

> transaction of the kind under consideration would recognise a payment as the price or remuneration is a useful guide as to whether a payment falls within the Regulation, and I cannot accept the submission made on behalf of RBSG that this would lead to different answers for different customers or groups of customers. As RBSG itself said and as I have already observed, the concept of an "average consumer . . . who is reasonably well informed and reasonably observant and circumspect" is a concept often used in applying and interpreting European consumer law, and to my mind it is an appropriate guide as to whether a payment is the price or remuneration within the meaning of the 1999 Regulations. Of course, it does not displace the need for the court to examine and respect the terms of the parties' contract. After all, as Lightman J observed in *Wire TV Ltd v Cable Tel (UK) Ltd* [1998] CLC 244 at p 258, when construing an agreement which is not a sham (and I do not consider that any of the Relevant Terms could be so described), the court recognises that the parties might have a choice as to how a contract is structured and pays appropriate respect to the structure adopted by the parties. Nevertheless, the question whether a payment is the price or remuneration depends upon the substance of the agreement between the parties and the true nature of the payment rather than upon how it is described or presented, and it would, I think, be surprising if the court felt able to conclude that a payment is the price or remuneration within regulation 6(2)(b) even though the typical consumer would not recognise it as such when presented with the terms of the seller or supplier.

We agree.

92. Although we accept that in the *First National Bank* case the House of Lords only referred to the typical consumer in the context of fairness, we do not accept the Banks' submission that he (or she) is irrelevant to the question how the Directive or the 1999 Regulations should be construed and applied. Although the position of the Banks is certainly not to be ignored, given the significance attached to the lack of bargaining power in the *travaux préparatoires*, it is in our judgment appropriate to have particular regard to the viewpoint of the typical consumer, rather than that of the Banks. In any event we entirely agree with the last sentence of [388] of the judgment just quoted.

Discussion - application of the principles

93. The OFT wishes to assess the fairness of each of the Relevant Charges. As expressed in regulation 6(2)(b), the critical question is whether that assessment relates "to the adequacy of the price or remuneration, as against the … services supplied in exchange". The above analysis shows, in our opinion, that that involves asking the question whether each of the Relevant Charges is part of the essential bargain or, put another way, is a core provision because, if it is not, the assessment falls outside the paragraph. Although, as we see it, strictly the question should be posed by reference to each of the Relevant Charges separately, nobody suggested that this question

should be answered differently in the case of different Relevant Charges. In what follows we therefore consider them together. Not without hesitation, we have reached the conclusion that the Relevant Charges are not part of the essential bargain in the sense discussed above. Our reasons may be summarised as set out below. We express them in terms of article 4(2) of the Directive because regulation 6(2)(b) must be construed in the same way.

94. Very few terms in a banking contract are subject to direct bargaining between an individual customer and a bank. In the context of current accounts, a typical consumer is likely only to have any control over how much money is deposited and, at least potentially, the size of any arranged overdraft facility. He is likely to know that the current account is advertised as 'free in credit', that banks invest the money deposited with them and earn interest on it and that, since he will only be entitled to a relatively low set rate of interest, it follows that the bank will use his money to make profits. He is also likely to know that if he overdraws without consent he may be liable to pay interest at a rate higher than that payable on an arranged overdraft, although it is fair to say that HSBC and Lloyds TSB charge the same interest rate on both arranged and unarranged overdrafts. He may also know that banks do not always 'bounce' transactions which draw on more money than is in cleared funds or permitted by an authorised overdraft. He may in addition know that such a payment may trigger a charge, which may be waived.

95. The evidence shows that most high street banks offer similar current accounts, that the express terms of the banking contract are contained in several leaflets available from the bank and that the express terms and conditions are lengthy. It seems unlikely in the extreme that the typical customer reads them. In such circumstances, where the majority of the terms are not bargained directly between the parties and where it is not straightforward to identify the 'price or remuneration' for the package of banking services, it seems to us that, in order to preserve the purpose of the Directive, it is necessary to require a narrow definition of 'price or remuneration'.

96. Although an unauthorised overdraft may be within the contemplation of a typical consumer at the time of the contract, and may be one of the essential services used, this does not mean that any charge relating to it must automatically be 'the price or remuneration' levied in exchange for that essential service. The price or remuneration must be clearly recognisable, and must surely be recognisable as such, by the typical consumer.

97. The materials we have considered show that the court must have regard to the manner in which the terms are presented and framed because it is a relevant consideration in deciding what can properly be excepted from a fairness assessment as the price. It is not determinative if the charge is described in the standard terms as a 'price' because the court must look at the substance of the bargain and the relationship between the parties. Applying this approach it seems to us that, where a bank provides a current account, which includes various banking services pursuant to one set of terms and conditions, opened by a customer on one occasion and which is sold as one package, it is unrealistic and overly formalistic to analyse on a specific level which payment by the consumer corresponds to which specific service provided by the bank. The substance of the contract must be analysed as a package.

98. It was suggested that the key protection for the consumer is the requirement that the terms must be expressed in plain intelligible language. However, although that requirement is of undoubted importance, it cannot be a sufficient protection for consumers on its own, if the Relevant Term is one of a large number of terms in the literature provided to consumers in the form of terms and conditions, price lists and leaflets and the Relevant Charge does not feature in advertising.

99. The OFT relies upon a number of specific factors both in the respondent's notice and in Mr Crow's oral submissions. It is sufficient to take them from the latter, which we set out in a somewhat varied form.

i) Personal current accounts are not loan accounts. The main reason why a person opens a personal current account is to receive and make payments from an account in credit rather than to borrow money.

ii) If a personal current account customer intends to borrow from a bank, he has the opportunity and the incentive to arrange it in advance. So arranged borrowing is the exception rather than the rule and unarranged borrowing is, as it were, an exception to the exception.

iii) No customer is entitled to an unarranged borrowing.

iv) As a matter of law, personal current accounts can work perfectly well without unarranged borrowings, and indeed there is a whole breed of accounts which do. An example is what is called a basic account which does not make borrowing available.

v) The Relevant Charges are only paid in contingent circumstances that may never arise.

vi) The Relevant Charges are paid, if at all, in circumstances that neither party would or should wish to arise.

vii) Instructions giving rise to Relevant Charges are statistically rare by reference to the number of instructions issued to banks overall.

viii) The Relevant Charges are likely to arise unwittingly in many cases because the customer may not know what is going into his account and/or in what order transactions are processed.

ix) It is likely to be uncertain whether any charge will in fact be levied in any given case because of what are known as buffers, caps and waivers; so that it is possible to slip into an unarranged overdraft without necessarily incurring a charge.

x) It is likely to be uncertain which charge will be levied in any given case because the customer may not know in advance whether the cheque is going to bounce or clear. So the customer may not know what will give rise to a liability, even if he knows that one of the cheques may bounce and give rise to a charge.

xi) A market study conducted by the OFT and completed since the judgment below shows that customers are generally unaware of how the charges work.

xii) Incurring Relevant Charges is a thoroughly uneconomic form of borrowing.

xiii) The cost of borrowing bears no real relationship of proportionality to the amount or the length of borrowing, because, if the customer goes over £10 or £100, he can be hit with exactly the same charge, and if he is overdrawn for a day, he can be hit with the same amount as if he is overdrawn for a week or two.

xiv) One way of testing whether the availability of unarranged overdrafts constitutes part of the essential bargain is to see whether or not they are actually sold as products. Unsurprisingly, the Banks do not advertise on the basis that customer should come to them because they only charge £25 rather than £38 for bouncing a cheque.

xv) In summary, the incurring of Relevant Charges is simply outside (or outwith) the ordinary conduct of the contractual relationship.

100. Mr Crow submits that for those reasons it cannot be suggested that unarranged borrowing and the Relevant Charges that are levied as a result of it form part of the essential bargain. By contrast, the Banks invite us to reject that submission. In this regard their submissions were led by Mr Vos. He submits that it is wrong to focus solely on the customer whose account is in credit because there are very many customers whose accounts are from time to time in debit. He submits that there are several types of normal customer. They include those whose accounts are always in credit, those whose accounts are sometimes in debit and those whose accounts are frequently in debit. He thus submits that Mr Crow's fifteen points tell only part of the story.

101. He points to the figures for 2006, which were before the judge. They show that in that year the Banks earned £2.56 billion from the Relevant Charges and submits that, while it is true that they earned £4.1 billion from NII, which was net interest earned on accounts in credit, the holders of over 12.6 million accounts, representing some 23 per cent of the Banks' customers, incurred a Relevant Charge in 2006 and, moreover, 57 per cent of those who had unauthorised overdrafts in 2006 had had unauthorised overdrafts in 2005. Further, the majority of those who incurred one Relevant Charge incurred more than one. He submits that in these circumstances it is wrong to say that these are isolated incidents and that it is a misuse of language to describe unarranged borrowing as an exception to the exception. Mr Vos accepts many of Mr Crow's points as a matter of fact but his answer is 'So what?'. In short, the contracts make provision for the various Relevant Charges and in the many cases in which they are levied they are an essential part of the bargain and in general arise out of the fact that the customer needs the money.

102. As to the point that the Relevant Charges are contingent, Mr Vos submits that that is irrelevant because it says nothing about whether they are part of the essential bargain. He again makes the point that for the very many customers whose accounts are in debit they are self-evidently part of the essential bargain. He rejects the point that they are statistically rare on the basis that in 2006 there were some 12 million

customers who incurred a Relevant Charge out of 65 million accounts. As to whether they are incurred wittingly or unwittingly, he submits that that is nothing to the point. The customer has an opportunity to read the leaflets which are written in plain intelligible language. As to waiver and to the suggested uncertainty that a particular charge may in fact be levied, he submits that that is irrelevant to the question whether the Relevant Charges are part of the essential bargain. As to the suggestion that customers are generally unaware of how the charges work, he refers to the twentieth recital to the directive and observes that it requires them to have a fair opportunity to know the terms but not that they read them. He adds that there is no principle of European law that says that customers must read the terms and that unless they do the terms will be unenforceable. As to the suggestion that the Relevant Charges are an uneconomic form of borrowing and that they bear no real relationship of proportionality to the amount or length of the borrowing, Mr Vos says that neither point is relevant to whether they form part of the essential bargain. Finally, as to the suggestion that the Relevant Charges are not actually sold as products, he accepts that they may not form part of the Banks' advertising campaign, but correctly notes that they are set out in the Banks' leaflets.

103. Mr Vos submits that in these circumstances it cannot fairly be said that, to use Willett's phrase (quoted above), the obligation to pay the Relevant Charges is something "outwith normal performance of the contract" and thus not a core term or part of the essential bargain. He also relies on the judge's finding at [375] that the provision of an unarranged overdraft is part of the essential services supplied by a bank operating current accounts.

104. We say at once that there is undoubted force in these submissions but we have nevertheless reached the conclusion that, when all the circumstances are taken into account, the Relevant Charges are not part of the core or essential bargain in the sense that that concept has been used in the sources to which we have referred.

105. The most important reason which has led us to that conclusion is encapsulated by the Law Commissions in the last sentence of their paragraph 3.32 quoted above:

> "Consumers are much less likely to take into account terms which will only apply in certain circumstances (whether or not those circumstances involve a default) and accordingly these terms should be subject to review."

106. As appears from regulation 6(1), the fairness or otherwise of a contractual term is to be assessed as at the time of the conclusion of the contract. That might have a bearing on the answer to be given in a particular case, because of the relevance of facts known to both parties at that time. However, whenever the contract is concluded, as stated above the Relevant Terms are not the subject of bargaining between the customer and the Bank. Customers do not choose one bank in preference to another on the basis of the difference between Relevant Terms or Relevant Charges. These are critical considerations because the underlying purpose of the Directive is the protection of consumers in circumstances where the particular terms of the contract are not freely negotiated between the parties.

107. We recognise that, as the judge explained at [442] to [444], the issue as to when a customer enters into a contract was not before him for decision and that it is not

before us either. However, where a customer enters into a contract and his account is in credit at the outset, no-one could suggest that the terms referable to the account when in credit are not part of the core or essential bargain. On the other hand, one thing that is not negotiated is the making of an unauthorised overdraft, let alone its terms. Moreover, the Relevant Terms operate so as to impose Relevant Charges in contingent circumstances. They are therefore akin to default charges which are triggered by a breach of contract. Although they are not in fact triggered by a breach of contract because of the manner in which the contractual relationship has been expressly framed, this does not mean they are not contingent charges of the kind which the Law Commissions had in mind in the sentence just quoted.

108. The time when the contract is made might be relevant to Mr Vos' proposed distinction between credit customers and debit customers. The judge recognised this, but declined to decide the point because he was asked by the parties not to rule on what the date was for this purpose: see [382] and [442] to [444]. We would only observe that an unarranged overdraft can arise both for a customer who is in credit (but not sufficiently) and for one who is in debit, whether by way of an arranged overdraft or already by way of an unarranged overdraft. In these circumstances we do not see any relevance for present purposes in the distinction between credit and debit customers.

109. We do not accept the submission that the contingent nature of the charges is irrelevant to the question whether the Relevant Charges are part of the core bargain. On the contrary, it is a strong indication that they are incidental or ancillary provisions, rather as the default provision in the *First National Bank* case was held to be incidental or ancillary. That fact, together with the fact that the Relevant Terms were not specifically negotiated, are strong pointers to the conclusion that, notwithstanding the points powerfully made by Mr Vos, they are not core terms and the Relevant Charges are not 'the price or remuneration' within the meaning of article 4(2) of the Directive or regulation 6(2) of the 1999 Regulations. Moreover, it seems to us to be of some significance that the Relevant Charges, although referred to in the Banks' leaflets, are not at the forefront of the Banks' advertising. In all these circumstances, we conclude that an assessment of their fairness would not relate to "the adequacy of the price or remuneration, as against the goods or services supplied in exchange".

110. We recognise that we have reached this conclusion on a rather broader basis than that adopted by the judge. It may well be that the case was argued on a broader basis before us than it was before the judge. We also recognise that the conclusion just expressed is or may be inconsistent with the conclusions of the judge at [374] to [377], where he said this:

> "374. None of this means that a Bank does not supply its customer with services when it makes a payment in accordance with a Relevant Instruction. The OFT's argument is, to my mind, flawed because it focuses not upon what the Bank does, but upon the state of the customer's account when the Bank processes the instruction. Clearly, it is a central feature of a current account that the bank makes payments in accordance with the customer's instructions (or, as it might be said, supplies payment services). When a Bank pays upon a Relevant Instruction, it is doing just that. It is true that it

> is doing so in particular circumstances, but that does not change the essential character of what the Bank does. Nor is that altered because the Bank goes through additional processes before making the payment because the customer did not have available funds or facilities.
>
> 375. For similar reasons, it seems to me that the provision of an unarranged overdraft is part of the essential services supplied by a bank operating current accounts. It is an essential part of the bargain whereby a bank operates a current account that it keeps a running account of receipts into and payments from the account, and necessarily the account shows a credit or debit balance for the customer (or a nil balance). If it shows a debit balance for the customer, it of course means that the bank is allowing the customer to borrow on the account (or supplying lending services), but I am unable to accept that that in itself means that the activities of the bank have extended outside the essential services of the contract under which the current account is operated. This is so whether or not the customer's borrowing takes place without or in excess of a facility arranged in advance between bank and customer. The characterisation of what the Bank provides as an "unarranged overdraft" seems to me to define it with too great a degree of particularity for the purpose of deciding whether the Bank is supplying a service within the meaning of regulation 6(2).
>
> 376. The point can be illustrated by an argument advanced by Mr Snowden on behalf of HSBC. If a bank operates current accounts free of charges when the credit balance is more than, say, £100, then the logic of the OFT's position would suggest that, if the bank pays upon instructions that take the balance of the account below £100 without taking the account into debit, its services are not "incidental" to those essential to a contract for a current account and so fall within the ambit of regulation 6(2), but the position would be different if a payment takes the account into debit. This would, to my mind, be a surprising distinction.
>
> 377. I therefore reject the argument that the services of making payment upon a Relevant Instruction and of providing an unarranged overdraft are not services of a kind relevant for the purposes of regulation 6(2) because they are incidental or ancillary to the essential bargain between the parties."

111. We entirely see the force of the judge's conclusions and, if one focuses narrowly upon the decision to make the payment and to grant an unauthorised overdraft, it can in one

sense be said that the debiting of the account is part of an essential service, whether the account is in credit or in debit. However, in our opinion that is to pose the question too narrowly. As we see it, the question is not what is an essential service but what is the core or essential bargain between the parties and the answer depends on the considerations to which we have referred. The principal reasons which have led us to the conclusion that the Relevant Charges are not part of the core or essential bargain are not that the Banks do not render part of an essential service when a decision is made to debit an overdrawn account, but the reasons given in [94] to [98] and [104] to [109] above. In short, the Relevant Charges are not bargained for or in any real sense chosen by or on behalf of the customer and they are contingent both in the way described by the two Law Commissions and in a way similar to that in the *First National Bank* case.

112. In all these circumstances, in agreement with the judge, albeit for somewhat broader reasons, we conclude that an assessment of the fairness of the Relevant Charges in this case is not excluded by regulation 6(2)(b). It follows that the appeal must be dismissed.

113. This makes it unnecessary to engage with the Banks' submissions in relation to the whole package argument or the specific services argument. We only wish to add this in relation to the Relevant Charges generally -

i) No consumer is entitled to the benefit of unarranged borrowing, but only to consideration of the request, or deemed request, for an unarranged overdraft. The judge held at [370] and [371] that consideration of the position before deciding not to pay, which leads to an Unpaid Item Charge, is not a service because the real and essential service is that of paying on a customer's instruction. We have reached a different view on this point because it appears to us that that consideration is a service, if only because, as was accepted, the Banks owe a contractual duty to do so. However, although a service, we agree with the judge that it is a service of an ancillary or incidental kind.

ii) The Unpaid Item Charge is not sufficiently directly related to the essential bargain and seems to us to fall at the ancillary end of the spectrum of payment obligations.

iii) The Paid Item Charges, Guaranteed Paid Item charges and Overdraft Excess charges are also at the ancillary end of the spectrum. These charges are unlikely to be clearly recognisable by a typical consumer as part of the exchange for the current account services. It is particularly relevant that (unlike interest) the magnitude of these charges does not appear to bear a direct relationship to the services provided.

We stress that, in making these points, we are not making findings of fact or in any way seeking to prejudge the OFT's assessment of fairness on the facts.

114. We have already quoted [421] of the judgment but we set it out again by way of postscript:

> "I therefore conclude that the Relevant Terms are not exempt from assessment under the 1999 Regulations. This does not

> seem to me surprising. Regulation 6(2) exempts assessment of the fairness of the balance of the essential bargain between a seller or supplier and a consumer. As the Banks themselves explain, under a "free-if-in-credit" price structure the economic balance in a contract between a Bank and its current account customer is between the package of services supplied by the Bank and the total benefits to the Bank from operating the current account, not only by way of Relevant Charges but also in particular by way of the use of the funds if the account is in credit and interest if it is in debit. On no view does an assessment of the Relevant Charges (or the Relevant Terms) impinge upon the adequacy of the totality of the benefits received by the Bank in exchange for the package of services. The OFT's investigation might well involve consideration of the fairness of the structure of a "free-if-in-credit" pricing regime but that is very different from an assessment of the overall "adequacy" of the benefits to a Bank from operating it."

We agree.

Conclusion

115. For these reasons we agree with the judge that an assessment of the fairness of the Relevant Charges does 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, within the meaning of regulation 6(2) of the 1999 Regulations. It follows that such an assessment is not precluded by the 1999 Regulations and that the appeal must be dismissed.

Plain Intelligible Language

116. Abbey and HBOS applied for permission to appeal against the judge's order so far as it related to the issue of plain intelligible language, the judge having refused permission in relation to all his rulings on that point. The judge held that Abbey's documents failed this test in three respects, of which only two are under challenge on appeal, and that HBOS' documents failed in one respect. Both appellants accept that, if their main appeal fails, this aspect of the case is academic. We can therefore deal with it briefly.

117. The judge dealt with the subject of plain intelligible language generally at [83] to [104] and [119] to [122]. Neither appellant challenges what he said in those passages. In particular, he said that the question whether terms are in plain intelligible language was to be considered from the point of view of the average consumer who is reasonably well informed and reasonably observant and circumspect: see [89]. He held that non-contractual material made available to the customer before or at the time the contract was made could and should be taken into account in deciding whether the contractual language was plain and intelligible: see [92] to [94]. He said that the standard to be achieved was whether the contractual terms put forward by the seller or supplier are sufficiently clear to enable the typical consumer to have a proper understanding of them for sensible and practical purposes: see [119]. These conclusions are not in issue on the appeals, nor are the judge's other general

observations about plain intelligible language. It is common ground, not only that the typical customer is reasonably well-informed and reasonably observant and circumspect, but also that he or she is taken to read the relevant documents and to seek to understand the contractual terms from that reading. It is also to be noted that at [294] the judge reserved for eventual future argument, if it became necessary (as it did not on his conclusion, and as it does not on ours on the main appeal), the issue as to the effect of a failure to satisfy the plain intelligible language obligation.

118. What is said by each of Abbey and HBOS is that the judge did not apply his own test when he came to consider their respective documents, but rather applied an incorrect, narrow and legalistic test.

119. In each case the respect in which he held that the documents failed the test, and which is challenged on appeal, fell within the area of uncertainty as to the scope of a Relevant Charge, by way of inconsistencies or conflicts in the wording relating to the levying of the Relevant Charges: [116]. The points now at issue are as follows:

i) He held that two of Abbey's conditions are in conflict as to whether a Paid Item Charge is incurred when a payment instruction does not cause the account to become overdrawn (because it already is overdrawn) but increases the amount of the overdraft, and that this meant that the terms were not in plain intelligible language: see [150] to [151].

ii) He also held that the plain intelligible language test was not met by Abbey's terms as to whether an Instant Overdraft Monthly Fee was charged if a customer gives a Relevant Instruction during the month but payment is refused, because of a lack of clarity as to the meaning of the phrase "used the Instant Overdraft service": see [152] to [153].

iii) In relation to HBOS he held that there was a conflict as between the contractual terms and a non-contractual leaflet, causing uncertainty as to whether the Unarranged Overdraft Fee is charged only during the month in which the account goes into unarranged overdraft, or also during succeeding months if the account remains in that position: see [218] to [220].

120. Even if we had not concluded that the main appeal ought to be dismissed, we would not have granted permission to appeal to Abbey or HBOS on these issues. No point of wider importance arises, given that the parties accept the correctness of what the judge said about the applicable principles. Therefore the points decided by the judge only relate to the respective banks and to their current documents. For those reasons, we do not accept the submission made on behalf of both banks that permission to appeal should be given on the ground of a compelling reason, regardless of whether there is a reasonable prospect of success on the appeal.

121. The judge expressed his conclusions quite briefly on each point, but the points are, in their nature, apt for decision as a matter of impression and not suitable as the subject of detailed textual analysis. As to the merits of the issues, it seems to us that the judge was correct in the conclusion that he reached, for the reasons he gave, as to the conflicts within the documentation and their resultant lack of clarity to the hypothetical customer.

122. For HBOS Mr Dicker criticised one sentence in [219] of the judgment on the basis that the judge had considered the position on the basis of only selective reading on the part of the hypothetical typical customer. Any substance that there might have been in that point is taken away by the next sentence in which the judge correctly addressed the effect of the documents as a whole.

123. For those reasons, briefly expressed both because of the nature of the issues and also because the question is academic, we refuse permission to appeal to Abbey and HBOS on the plain intelligible language appeals.

CONCLUSION

124. For these reasons we conclude:

i) that an assessment of the fairness of the Relevant Charges is not precluded by regulation 6(2) of the 1999 Regulations and that the appeal must be dismissed; and

ii) that the applications by Abbey and HBOS for permission to appeal on the basis that the judge was wrong to hold that some of their Relevant Terms imposing Relevant Charges were not in plain intelligible language should be refused.

125. We wish to add by way of postscript that in the course of this appeal we have had the great assistance of two judicial assistants, Katherine Apps and Rebecca Wright. We would like to take this opportunity of thanking them for all their help.