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In *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm), [2008] All ER (D) 349 (Apr) Andrew Smith J considered a number of important issues relating to the interpretation and scope of regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999. His judgment is the first in what may turn out to be a number of judgments arising out of the investigation carried by the Office of Fair Trading into the charges levied by banks against their customers. The Regulations will be a key part in the OFT challenge to the fairness of the charges levied by the banks. The charges which are under scrutiny are charges 'made by banks to their customers who have personal current accounts with [the banks] when [the banks] 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.' One such charge was referred to as the 'overdraft excess charge' and it was levied if, during a specified period, an account is or goes overdrawn (and there is no overdraft facility) or the debit balance is or goes above the limit of an existing facility, in both cases irrespective of the reason why the excess has occurred.

The judgment is concerned with the fairness of the terms as such. Rather the proceedings concerned a prior issue, namely whether the Regulations were applicable to the terms at all. The banks argued that the terms were not subject to the fairness test because they were excluded from that test by virtue of the operation of Regulation 6(2)(b) which provides that 'in so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.' The judgment of Andrew Smith J is a substantial judgment (consisting of 450 paragraphs) and it is not possible to do more in this note than outline the central points which emerge from his judgment. The issues relate in large part to the meaning of the words in regulation 6(2)(b) quoted above. On the facts he concluded that most of the terms relied upon by the banks were in plain intelligible language, but he rejected the submission that the terms were exempt from assessment by virtue of regulation 6(2)(b). This does not mean that the terms are unfair and that they were not binding on consumers. Rather, it means that consideration must now be given to the fairness of the terms relied upon by the banks. Andrew Smith J also

declined to make any declaration as to the meaning and effect of the requirement of good faith.

Plain intelligible language

The first issue considered by Andrew Smith J was the meaning of the phrase 'plain intelligible language' in regulation 6(2). The first point which emerges from the judgment is that the 'plain intelligible language' requirement is not to be equated with the *contra proferentem* rule ([87]). It is not the case that a written term is necessarily in plain intelligible language unless there is a doubt about its true meaning. Second, the question whether terms are in plain intelligible language is to be considered from the point of view of the typical consumer or the average consumer ([89]). A term which is 'obscure and difficult to understand at all' may not be in plain intelligible language even if it can bear only one meaning 'for anyone who manages to fathom what it is saying' ([87]). Third, a court can have regard to non-contractual documents issued by the seller or supplier and the previous dealings between the parties when deciding whether or not term is in plain intelligible language. Non-contractual material made available to the consumer before the contract is made can assist the consumer to understand the contractual terms so that their language might the more readily be taken to be plain and intelligible to the typical consumer ([92]-[93]). Fourth, the plain intelligible language requirement does not require that the consumer be put in a position to be able to make a 'fully informed choice about whether to enter into a contract on the standard terms of the seller or supplier' ([99]). The Regulations do not require that the consumer be given all the information that he needs in order to make an informed decision whether or not to enter into the contract. There is no requirement that a seller or supplier should give the consumer advice about the contract terms that he is offered ([100]). Fifth, the test is directed towards the express terms of the contract and does not concern itself with whether the consumer is likely to understand any terms that will be implied into the contract ([102]). Sixth, the plain intelligible language requirement demands not only that the actual wording is comprehensible to the consumer 'but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract' ([103]).

Having established these points relating to the meaning of the phrase 'plain intelligible language', Andrew Smith J then turned to consider the standard against which the bank would be judged. He stated (at [119]):

‘the question of plain intelligible language is, as it seems to me, directed to 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. The procedures required to operate a current account are undoubtedly complex, and it would require a long explanation to cover them fully. The Banks submit with some justification that many customers would not welcome so detailed an explanation, and if this were attempted it would probably detract from explaining clearly what the customer does need to know. The application of the 1999 Regulations, it seems to me, calls for a more practical and moderate approach to what affords appropriate protection for the consumer. The current account customer of the Banks is entitled to understand essentially the types of charges which his Bank is entitled to levy, the circumstances in which it is entitled to levy them and for how much he will be liable. He does not need an education in the full complexities of banking systems, and the 1999 Regulations do not, in my judgment, require a supplier such as the Banks to provide it.’

This is a demanding standard. A bank does not discharge its obligations by making a ‘commendable effort’ to make the terms plain and intelligible ([121]). A term is exempt from assessment as to its fairness only if it **is** in plain and intelligible language.

On the facts of the case the terms of four of the banks were held to be in plain intelligible language and those of the other four banks were in plain intelligible language ‘except in certain specific and relatively minor respects.’ One final point should be noted about the plain intelligible language requirement which is that Andrew Smith J left open the question about the consequences which flow from a decision that a term is not in plain intelligible language. The banks argued that any assessment of fairness should be restricted to the ‘parts of the term’ that are not in plain intelligible language, whereas the OFT submitted that the term as a whole then becomes subject to the fairness test. This point therefore awaits resolution.

The interpretation of regulation 6(2)(b)

The second issue concerned the submission of the banks that the terms in question were exempt from review as a result of the operation of regulation 6(2)(b). The OFT submitted that it was for the banks to show that the terms were exempt under regulation

6(2)(b) and Andrew Smith J inclined to the view that this view was correct ([337]). A number of difficulties arose in relation to the interpretation of this provision.

First, Andrew Smith J accepted that regulation 6(2)(a) and 6(2)(b) provide for two separate exemptions from the fairness requirement and that the reference to the 'main subject matter' in 6(2)(a) does not 'on its face' limit the effect of 6(2)(b). In this sense regulation 6(2)(b) is not to be given a conjunctive interpretation ([344]). But it does not follow from this 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.

Second, he held, after considering the speeches of the House of Lords in *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 AC 481, that the exemption in regulation 6(2)(b) should not be construed in a way that would frustrate the purposes of the Directive in providing protection for consumers. In particular, he stated (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.'

Third, he considered the meaning of the word 'services' in regulation 6(2)(b). The OFT sought to draw a distinction between the supply of a service and acts done by a supplier which are preparatory to supplying a service and submitted that the latter were irrelevant for the purposes of the interpretation of regulation 6(2)(b). Andrew Smith J concluded (at [370]) that there is no 'fixed rule' as to whether or not distinct and preliminary acts done by a seller or supplier with a view to supplying or deciding whether to supply the benefit which the consumer ultimately seeks are 'services' within the meaning of the Regulations. On the facts he concluded that a bank does supply a service to a consumer when it makes a payment in accordance with a relevant instruction from a customer and that the provision of an unarranged overdraft is part of the essential services supplied by a bank operating current accounts. However, a bank does not

provide a service in the case when it deals with a relevant instruction upon which it does not make payment.

Fourth, he held that the words ‘the price or remuneration’ were to be confined to payments that ‘can properly be said to be payable by way of exchange.’ The problem here is the obvious one, namely that every contractual payment can be said to be payable by way of exchange. But Andrew Smith J stated (at [385]) that ‘it seems to me that the 1999 Regulations contemplate something clearly recognisable as an exchange as will typically be at the core of a consumer contract.’ The important words here are ‘clearly recognisable’ and ‘core.’ In considering whether something is or is not ‘clearly recognisable’ regard must be had to the views of the typical consumer. Thus Andrew Smith J concluded (at [388])

‘I consider that the question whether typical parties to a transaction of the kind under consideration would recognize a payment as the price or remuneration is a useful guide as to whether a payment falls within the Regulation.’

Further, the question whether a payment is a 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.’ Finally, a payment is ‘likely to be the less recognisable as the price or remuneration for services if it is payable only in circumstances which might well not happen and which both parties are likely to hope will not come about.’

Fifth, he held, following in this respect the analysis of Lord Rodger of Earlsferry in *First National Bank*, that, when assessing the ‘adequacy’ of the price or remuneration, regard must be had to the equivalence between the services or goods and the consideration for them. In other words, the expression ‘adequacy’ imports reference to a relationship and the relationship on the facts of the case was that between the relevant charges levied by the banks and the services supplied by the banks. On the facts of the case Andrew Smith J held that the charges levied by the banks were not charges in exchange for the services involved in making payment, but were charges levied because the services were performed in particular circumstances (that is to say, they were performed when the account was overdrawn). Thus the charges levied by the banks were not related to the cost of providing the specific service which triggered the obligation to pay the charge but rather were levied as part of the ‘free-if-in-credit’ pricing structure operated by the banks. On this point Andrew Smith J stated (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.'

Sixth, Andrew Smith J considered whether, if regulation 6(2)(b) applies to a term, any assessment of its fairness excluded or whether it only excludes an assessment relating to the adequacy of the price? The issue did not arise on the facts, given the conclusion that regulation 6(2)(b) was not applicable on the facts of the case. But he considered the issue nonetheless and concluded that the Regulation only excluded an assessment relating to the adequacy of the price and that the term is not otherwise exempt from assessment.

The good faith requirement

The banks sought a declaration that, in order to obtain relief, the OFT had to establish that the banks had not 'dealt fairly and openly with its customers' as regards the process by which the bank charges were agreed or became part of the contract between the bank and its customers. Andrew Smith J declined to make the declaration. In his judgment it was inappropriate to consider in the abstract, and without reference to specific facts, whether the relevant terms satisfied the requirement of fairness.

Conclusion

Thus Andrew Smith J rejected the submission of the banks that the terms were exempt from assessment as to fairness under regulation 6(2) of the 1999 Regulations. However, it does not follow from this that the terms are necessarily unfair or that they are not binding on consumers. That is an issue which will have to be established at the next stage in the proceedings. All that has been established is that the terms are subject to the Regulations and that it is now necessary to consider whether or not they are unfair contract terms.

Difficulties are likely to arise in deciding whether or not the terms are unfair. One difficulty is whether attention should focus upon the individual relationship between the customer and the bank or whether regard is to be had to the generality of contracts between banks and their customers. In this connection it is important to note that Andrew Smith J observed (at [415]) that ‘the Directive and the 1999 Regulations are concerned with the fairness of the individual contract between the seller or supplier and a particular consumer and are not directly concerned with whether a seller or supplier treats fairly consumers as a body.’ He also stated (at [16]) that, whether the challenge is one brought by an individual consumer or, as in the present case, it assumes the form of a pre-emptive or collective challenge, ‘the assessment is of the fairness of the terms in an individual contract made by a seller or supplier with a 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.’

However, it does not follow from this that there is no distinction to be drawn between an individual and a collective challenge. In the case of an individual challenge the court can apply the requirements of the Regulations to the specific facts of the case, whereas in the case of a collective or pre-emptive challenge the court must consider the case of a ‘typical party’ (see *Office of Fair Trading v Foxtons Ltd* [2008] EWHC 1662 (Ch), [2008] All ER (D) 234 (Jul)). This difference may have the consequence that a term which would not be regarded as unfair when considered as part of a collective challenge, could be regarded as unfair on an individual challenge. Equally, a term which is considered unfair as part of a collective challenge could be considered to be fair on an individual challenge (*Office of Fair Trading v Foxtons Ltd* [2008] EWHC 1662 (Ch), [2008] All ER (D) 234 (Jul), [30] – [31]).