Michaelmas Term
[2009] UKSC 6
On appeal from: [2009] EWCA Civ 116

JUDGMENT

The Office of Fair Trading (Respondents) *v* Abbey National plc & Others (Appellants)

before

Lord Phillips, President
Lord Walker
Lady Hale
Lord Mance
Lord Neuberger

JUDGMENT GIVEN ON

25 November 2009

Heard on 23, 24 and 25 June 2009

Appellant (Abbey National plc)
Ali Malek QC
Richard Brent
(Instructed by Ashurst LLP)

Respondent (The Office of Fair Trading)
Jonathan Crow QC

Richard Coleman
Jemima Stratford
Sarah Love
(Instructed by the General Counsel, Office of Fair Trading)

Appellant (Barclays Bank Plc)
Jonathan Sumption QC
Andrew Mitchell
(Instructed by Simmons & Simmons)

Appellant (Nationwide Building Society)
Geoffrey Vos QC
Sonia Tolaney
(Instructed by Slaughter and May)

Appellant (Clydesdale Bank Plc)
Richard Salter QC
John Odgers
(Instructed by Addleshaw Goddard LLP)

Appellant (The Royal Bank of Scotland Group Plc)
Laurence Rabinowitz QC
David Blayney
(Instructed by Linklaters LLP)

Appellant (HBOS Plc)
Robin Dicker QC
(Instructed by Allen & Overy LLP)

Appellant (HSBC Bank Plc)
Mark Hoskins QC
Daniel Toledano QC
Patrick Goodall
(Instructed by Freshfields Bruckhaus Deringer LLP)

Appellant (Lloyds TSB Bank Plc)
Bankim Thanki QC
James Duffy
(Instructed by Lovells LLP)

LORD WALKER

The limited nature of the issue

1. The members of the Court are well aware of the limited nature of the issue which we have to decide in this appeal. But many of the general public (who are understandably taking a close interest in the matter) are not so well aware of its limited scope. It is therefore appropriate to spell out at the outset that the Court does not have the task of deciding whether the system of charging personal current account customers adopted by United Kingdom banks is fair. The appellants are seven of the largest banks in the United Kingdom and one building society (but I shall for convenience refer to them all as "the banks"). The appellants accept that the system of "free if in credit" banking prevalent in this country involves a significant cross-subsidy (amounting to about 30 per cent of the banks' total revenue stream from current account customers) provided by those customers who regularly incur charges for unauthorised overdrafts (a cohort, we were told, of the order of twelve million people) to those customers (a cohort of about 42 million people) who are in the fortunate position of never (or very rarely) incurring such charges. Banks in other European countries adopt different forms of cross-subsidy; French banks for instance, concentrate their charges on processing standing orders and debit card transactions.

2. Some would regard the United Kingdom system as being, in some sense at least, obviously unfair, though Mr Sumption QC (for the banks) vigorously disputed Lord Mance's suggestion that his clients were engaged in a sort of "reverse Robin Hood exercise". That is an imponderable question which depends partly on whether one's perception of the average customer who incurs unauthorised overdraft charges is that he is spendthrift and improvident, or that she is disadvantaged and finding it hard to make ends meet. But it is not the question for the Court.

3. The question for the Court is much more limited, and more technical. It is whether as a matter of law the fairness of bank charges levied on personal current account customers in respect of unauthorised overdrafts (including unpaid item charges and other related charges as described below) can be challenged by the respondent the Office of Fair Trading (the "OFT") as excessive in relation to the services supplied to the customers.

4. That issue depends on the correct interpretation (in its European context) and application of Regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083 ("the 1999 Regulations"). Regulation 6(2) is as follows:

> "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."

The context requires "adequacy" to be read in the sense of "appropriateness," as Lord Rodger of Earlsferry pointed out in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, para 64.

The Directive and the Regulations

5. The 1999 Regulations were made under section 2(2) of the European Communities Act 1972 in order to transpose into national law Council Directive 93/13/EEC on unfair terms in consumer contracts ("the Directive"). The 1999 Regulations revoked and replaced similar regulations made in 1994 (SI 1994/3159) in order (as the explanatory note to the 1999 Regulations puts it) "to reflect more closely the wording of the Directive". Regulation 6(2) of the 1999 Regulations does indeed follow closely the English text of Article 4(2) of the Directive, which is as follows:

> "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."

The Court has had available the texts of Article 4(2) in French, German and some other languages, but they cast little light on the interpretation of the English text.

6. Both Mr Sumption (for the banks) and Mr Crow QC (for the OFT) made submissions about the background to the Directive, its *travaux préparatoires*, and academic commentaries on it. The Directive in its final form applies only to contractual terms which have not been individually negotiated. That is the effect of Article 3, which sets a fairly high threshold for meeting that test. The Council's original proposals had

been more far-reaching but they attracted a lot of criticism, especially from commentators in France and Germany, who were concerned at such extensive inroads into freedom of contract. An article by Professor Brandner and Professor Ulmer of the University of Heidelberg ((1991) 28 CML Rev 647) was particularly influential. In September 1992 the Council brought forward new proposals which can be described as a compromise solution balancing the need for consumer protection against residual freedom of contract. Recital (19) reflects part of this compromise, though it does not contribute very much to the understanding of Article 4(2):

> "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."

7. Another element of compromise is the so-called "greylist" set out in Schedule 2 to the 1999 Regulations, exactly reproducing the annex referred to in Article 3(3) of the Directive. This is an "indicative and non-exhaustive list of terms which may be regarded as unfair." Originally it was proposed as a blacklist of terms which would be conclusively presumed to be unfair. The list contains 17 items, four of which refer in one way or another to the monetary consideration paid by the consumer:

> "(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;
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> (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;

> . . .
>
> (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;"

8. The basic test of fairness is in Regulation 5(1) of the 1999 Regulations, transposing Article 3(1) of the Directive. Regulation 5(1) provides:

> "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."

The consequences of unfairness are set out in Regulation 8, transposing Article 6(1). Regulation 8 provides:

> "(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
>
> (2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term."

9. The Court of Justice has not yet had occasion to rule on the scope of Article 4(2). Not all the member states have precisely transposed the Directive into their national laws, since Article 8 provides that they may adopt or retain more stringent provisions for consumer protection, so long as they are compatible with the Treaty. France and Italy, like the United Kingdom, have precisely transposed the Directive. The Netherlands and Spain have enacted more far-reaching legislation affording greater protection to consumers. Germany considered it unnecessary to transpose the Directive in any form, as its national law already offered a greater degree of consumer protection.

The First National Bank case

10. The Law Lords have already considered Article 4(2) in *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481. They considered it in the slightly different form in which it was transposed by Regulation 3(2) of the 1994 Regulations:

> "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."

So in the old provision the words "in exchange" did not appear, and the nature of the assessment was expressed a little differently. Before your Lordships neither side attached much importance to these points of difference, since the dominant text (as Lord Steyn put it in *First National Bank* at para 31) is that of the Directive itself.

11. In *First National Bank* the Director General of Fair Trading (the predecessor of the OFT, which was established by Part 1 of the Enterprise Act 2002) sought an injunction to restrain the bank, which was active in the consumer credit market, from using a standard term under which (on enforcement of an overdue debt) interest was to continue to accrue at the contractual rate until payment "after as well as before any judgment (such obligation to be independent of and not to merge with the judgment)". At first instance Evans-Lombe J held ([2000] 1 WLR 98) that the term was a default term and not (as the bank's counsel had submitted) a "core term" within Regulation 3(2) of the 1994 Regulations, but that it was not unfair in the statutory sense. The Court of Appeal ([2000] QB 672) allowed the Director General's appeal, agreeing with the judge as to Regulation 3(2) but differing as to the fairness of the term. Peter Gibson LJ (giving the judgment of the Court) deprecated the expression "core term" (at p686):

> "The test in respect of the relevant term is not whether it can be called a 'core term' but whether it falls within one or both of paragraphs (a) and (b) of Regulation 3(2)."

12. On a further appeal by the bank the House of Lords allowed the appeal, unanimously agreeing with the Court of Appeal as to the Court's power to review the term, but unanimously reversing the Court of Appeal as to the term's fairness. The key passages on the scope of Regulation 3(2) of the 1994 Regulations (now Regulation 6(2)

of the 1999 Regulations) are para 12 of the opinion of Lord Bingham of Cornhill and para 34 of the opinion of Lord Steyn.

13. Lord Bingham observed in para 12, after references to the then current editions of two leading textbooks (Treitel, The Law of Contract, 10th ed. (1999) p248 and Chitty on Contracts, 28th ed. (1999) 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."

Later in that paragraph Lord Bingham referred to the term as an "ancillary provision."

14. Lord Steyn observed in para 34:

> "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."

The background and course of this litigation

15. A complaint of infringement of the 1999 Regulations may be pursued in proceedings in the county court commenced by an individual consumer by reference to the terms of a particular contract that he or she has entered into. It may also be pursued by the OFT which was established, as already mentioned, by Part 1 of the Enterprise Act 2002 and is a "general enforcer" of "Community infringements" under section 213(1)(a) of that Act (read with section 212 and Schedule 13, para 5). This dual system (of what Lord Steyn, in para 33 of his opinion in *First National Bank*, referred to as "ex casu challenges and pre-emptive or collective challenges") is provided for by Article 7 of the Directive.

16. Both types of challenge form part of the background to this appeal. As Andrew Smith J put it at first instance (para 2):

> "The Relevant Terms and Relevant Charges are being challenged on two fronts: the [OFT] is investigating under the [1999 Regulations] the fairness of the terms under which banks make such charges, and cases 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."

17. There have, we were told, been many thousands of individual claims in the county courts, many brought by litigants in person with the assistance of on-line forms and advice. All or virtually all of these proceedings have been stayed to await the outcome of these proceedings. The volume of litigation speaks for itself as to the dissatisfaction (to use no stronger an expression) felt by many thousands of customers affected by the challenged charges.

18. In March 2007, following complaints made to it, the OFT started a formal investigation of the fairness of terms relating to overdraft charges (these were referred to in the pleadings and in the lower courts as "the Relevant Terms" and "the Relevant Charges" and it is convenient to adopt the same terminology). At the same time the OFT began a market study in order to consider (in the words of the first witness statement of Mr Cavendish Elithorn, a senior director of the OFT) "wider questions about competition and value for money in the provision of personal current accounts in the UK, such as: (a) the low levels of cost transparency and; (b) the ease with which consumers can switch accounts." At an early stage of the investigation the banks raised a preliminary objection based on Regulation 6(2) of the 1999 Regulations. The same issue had been raised in many individual claims in the county courts.

19. In order to resolve the issue, and in accordance with written agreements reached between the OFT and the banks, the OFT on 27 July 2007 issued proceedings in the Commercial Court seeking a declaration that Regulation 6(2) did not apply to the banks' Relevant Terms then current. The banks, in order to obtain a more comprehensive answer covering related issues raised in individual claims, counterclaimed not only for declarations to the opposite effect to those sought by the OFT (including an express declaration as to plain and intelligible language) but also for further declarations that their Relevant Terms were not capable of amounting to a penalty at common law, and declarations relating to "good faith" under regulation 5(1). These issues were raised both in relation to the banks' then current sets of terms and in relation to terms which were no longer current. The judge heard argument only on the then current terms, for case management reasons. But our decision is likely to cover almost all the "historic" terms as well. We were told that the OFT and the banks have so far been able to agree that the lower courts' decisions on the current terms should be treated as applicable to the historic terms as well.

20. In these circumstances Andrew Smith J had three groups of issues to decide: issues as to Regulation 6(2) (including particular issues as to "plain intelligible language"); issues as to Regulation 5(1); and issues as to common law penalties. He gave judgment on 24 April 2008 after 14 days of hearings during January and February 2008. His judgment ([2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625) runs to 450 paragraphs and the Court of Appeal rightly paid tribute to its quality and clarity. In brief, the judge decided the issues as follows (the paragraph numbers specified below being the conclusions at the end of the relevant discussion):

> (1) on the first group of issues, that the Relevant Terms were in plain intelligible language except (in the case of four banks) "in certain specific and relatively minor respects" (para 293); that they were not exempt under Regulation 6(2) from assessment in point of fairness (para 421); and that the "excluded assessment" construction was correct (para 436);
>
> (2) that none of the terms amounted to the imposition of a common law penalty (para 323); and
>
> (3) that it was inappropriate to give any declaratory relief as regards Regulation 5(1) (para 447).

21. The banks appealed, with the permission of the judge, against the decision that Regulation 6(2) did not apply to the Relevant Charges. The judge refused permission to the four relevant banks on the "plain intelligible language" issue. The OFT did not seek to appeal but put in a respondent's notice with further grounds for supporting the judge's decision on Regulation 6(2). The argument in the Court of Appeal was therefore mainly focused on the scope of Regulation 6(2). The Court of Appeal (Sir Anthony Clarke MR, Lord Justice Waller V-P and Lloyd LJ), in a judgment of the Court delivered on 26 February 2009 by the Master of the Rolls ([2009] EWCA Civ 116), dismissed the banks'

appeal for reasons which the Court described (para 112) as "somewhat broader" than those of the judge. The Court refused to extend the permission to appeal to the "plain intelligible language" issue. The banks' further appeal to the House of Lords (with leave granted on 31 March 2009) was heard in June 2009 but our judgment is (under transitional provisions in the Constitutional Reform Act 2005 and the Supreme Court Rules) a judgment of the Supreme Court of the United Kingdom.

The Relevant Terms and Charges

22. It will be necessary to come back to a detailed consideration of the Court of Appeal's reasoning, which Mr Sumption has subjected to robust criticism. But I must first say more about the Relevant Terms and the Relevant Charges of the banks. They are the material to which Regulation 6(2), properly construed, has to be applied.

23. The Relevant Terms and the Relevant Charges were covered in detail in the pleadings, and annexes to the pleadings. There is a clear summary in annexes B-E to the OFT's joint reply and defence to the counterclaims. The judge gave a general description of the operation of current accounts and authorised and unauthorised overdrafts (paras 42-82). He then (in order to deal with a range of questions as to plain intelligible language) covered a mass of detail in a masterly fashion. His summaries of the eight banks' terms and charges starts with Abbey National (paras 130-154) and ends with Royal Bank of Scotland (paras 274-292). This part of his judgment has not been challenged in any way, and the Court of Appeal adopted it.

24. For present purposes it is sufficient to set out the summary in paras 7 and 8 of the Statement of Facts and Issue agreed by the parties:

> "There are four basic categories of Relevant Charges, as defined in the Judgments below, not all of which are charged by all Banks: Unpaid Item Charges; Paid Item Charges; Overdraft Excess Charges; and Guaranteed Paid Item Charges.
>
> a. 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 an arranged facility which covers it.

b. A ‘Paid Item Charge’ is levied when the customer gives an instruction for payment or, in some cases at least withdrawal, for which he does not have sufficient funds in his account, or an arranged facility which covers it, and which the bank honours.

c. 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 or a sufficient arranged facility.

d. 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.

Annexed hereto are summaries (one for each bank) that identify the relevant contractual documents, the Relevant Terms and the Relevant Charges. In all cases, there is a ‘terms and conditions’ document, and an accompanying leaflet or tariff, which it is the Banks’ practice to make available to the customer as part of the process of opening the account. This litigation assumes the incorporation of the Relevant Terms into the contract between the Banks and their respective customers. The Banks’ standard rates of interest and charges are usually set out in the tariff/leaflet. Prior notice of any material changes in the tariff (or terms generally) has to be given to the customer under the terms of the Banking Code to which the Banks voluntarily subscribe.”

The opposing arguments in summary

25. The appeal has been argued with conspicuous clarity and skill by Mr Sumption and Mr Vos QC (the latter instructed on behalf of Nationwide) for the banks and Mr

Crow for the OFT. This brief summary is no more than a sketch drawing attention to some salient points.

26. The general thrust of Mr Sumption's submissions for the banks was that both the judge and the Court of Appeal had adopted an over-complicated approach to an issue which, however important both for the consumers and for the banks, is ultimately quite a short point of construction. Article 4(2) of the Directive, now transposed by Regulation 6(2) of the 1999 Regulations, is expressed in fairly simple and non-technical language, as is appropriate for a Community measure which has to be applied across a variety of national systems of contract law. It represents a compromise between consumer protection and freedom of contract. The courts below, in seeking to identify and give effect to the underlying purpose of the Directive, misread Regulation 6(2) as concerned (in paragraph (b) as well as in paragraph (a)) only with what was a "core" or "essential" part of the bargain, to which the consumer may be supposed to have consented in a meaningful sense. The courts below had overlooked that "core term", if that expression is to be used at all, must be understood as no more than shorthand for the contents of paragraphs (a) and (b). Mr Vos supplemented Mr Sumption's submissions by what he referred to as the "debit/credit argument", which focuses on the fact that customers who incur Relevant Charges will view the essence of their contract with the bank differently from those customers who never (or rarely) incur those charges.

27. Against that Mr Crow's primary submission was that the Court of Appeal had reached the right conclusion for the right reasons. The fairness of payment obligations falling within Regulation 6(2)(b) is exempt from assessment in point of "adequacy" (appropriateness) only if they form part of the essential bargain between the parties. The essential bargain constitutes only so much of the contract as the consumer can be said to have consented to freely. The banks had misunderstood the *travaux préparatoires* and drawn the wrong conclusion from them. The Court of Appeal's decision was supported by the decision of the House of Lords in *First National Bank*. The Relevant Charges were ancillary payment obligations and were not incurred in the normal performance of the contract. The typical consumer would not clearly recognise them as the price of services supplied by the banks in exchange.

The Court of Appeal's reasoning

28. It is therefore necessary for the Court to look closely at the Court of Appeal's reasoning. The general structure of the reasoning on the construction issue is a summary, with some discussion, of the judge's main conclusions (paras 12 to 22); discussion of *First National Bank* (paras 40 to 58), the *travaux préparatoires* (paras 59 to 69), academic writings (paras 70 to 80) and the relevant principles and the Court's conclusions on the issue of construction (paras 81 to 92). This is followed by a relatively short section (paras 93 to 112) applying the Court's conclusions to the facts.

29. The first point to note (in order to get it out of the way) is the Court's treatment of the "excluded terms/excluded assessment" controversy which the judge had dealt with at some length. This point arose on the wording of Regulation 3(2) of the 1994 Regulations (and may have been one of the reasons for their replacement). It may appear an abstract point but it is potentially of great practical importance, as Lord Phillips explains in his judgment (paras 60 and 61). The judge put the issue in these terms (para 422):

> "If Regulation 6(2)(b) applies to a term, is any assessment of its fairness excluded (the 'excluded term' construction), or does the Regulation exclude only an assessment relating to the adequacy of the price (the 'excluded assessment' construction)?"

He decided in favour of the "excluded assessment" construction and that was not challenged in the Court of Appeal or before this Court. Mr Sumption described it as a distraction. For present purposes, I am inclined to agree. The precise nature of the exercise in assessing the fairness of a reviewable term is no more than marginally relevant to deciding whether or not a term is reviewable in the first place. But in the long run it may become an issue of great practical importance.

30. The Court of Appeal then addressed the issue whether paras (a) and (b) of Regulation 6(2) should be construed conjunctively (as the OFT had argued before the judge) or disjunctively (as the banks had argued). The judge decided that they should be construed disjunctively. The Court of Appeal commented (para 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)."

Here the Court of Appeal was, I think, putting down a marker for what was to become one of the most important themes in its decision.

31. I have to say that I do not find it particularly helpful to consider whether paragraphs (a) and (b) should be read conjunctively or disjunctively. The Court is not faced with a text (such as "charitable or benevolent" in the will of Caleb Diplock: *Chichester Diocesan Fund & Board of Finance v Simpson* [1944] AC 341, 349, 369) where the two approaches are stark alternatives. In my view the two paragraphs must be

given their natural meaning, and read in that way they set out tests which are separate but not unconnected. They reflect (but in slightly different ways) the two sides (or quid pro quo) of any consumer contract, that is (a) what it is that the trader is to sell or supply and (b) what it is that the consumer is to pay for what he gets. The definition of the former is not to be reviewed in point of fairness, nor is the "adequacy" (appropriateness) of the latter.

32. The Court of Appeal then discussed *First National Bank* at some length, focusing (entirely correctly, in my opinion) on Lord Bingham's and Lord Steyn's description of the relevant clause as a default provision. The Court also focused on Lord Bingham's description of it as "ancillary" and Lord Steyn's description of it as "subsidiary." That led to what I regard as a more questionable conclusion (para 49):

> "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."

The Court went on similarly (para 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."

The considerations referred to were that Regulation 6(2)(b) referred to "the price or remuneration" and not to *part of* the price or remuneration. This impressed both the judge and the Court of Appeal. I do not see much force in it, as the Directive is expressed in terse, simple language, and the 1999 Regulations follow the same style.

33. This part of the Court of Appeal's reasoning ends with a firm conclusion. After approving the judge's reliance on passages in successive editions of Treitel (11th ed. (2003) p273 and 12th ed. (2007) para 7-101) the Court went on (para 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."

34. The Court found support for this not only in *First National Bank* but also in the *travaux* and in some academic writings. It identified the purpose of the Article 4(2) exception as being (para 69) that standard form contracts should be subjected to a test of fairness except so far as their terms have been negotiated (the implication being that it was essential terms, both as to specification and as to price, that a consumer would actually negotiate). Therefore (para 69 (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."

The Court noted that a similar view had been taken in a Joint Consultation Paper issued in 2001 by the Law Commission and the Scottish Law Commission (though paragraph 3.32 of the Paper, set out in para 79 of the judgment, is expressed in terms of understanding rather than consent).

35. The next section of the judgment contains a discussion of the relevant principles of construction followed by a restatement of the conclusion that the Court had already reached (para 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."

These points are then elaborated in (ii), (iii) and (iv).

36. The Court of Appeal then went on to consider whether the Relevant Terms and the Relevant Charges were or formed part of the essential or core bargain between the parties. The Court recorded (para 99) fifteen points made by Mr Crow, the general thrust of which was that an unauthorised overdraft was something to which a customer was not entitled; it was exceptional and unnecessary; in consequence Relevant Charges were contingent, uneconomic, unadvertised and imperfectly understood. Against this Mr Vos (leading the banks' submissions in response to the fifteen points made by Mr Crow) pointed (para 101) to the banks having earned £2.56bn from Relevant Charges in 2006 (against £4.1bn in net interest earned on accounts in credit) and to over 12 million customers who had incurred Relevant Charges in that year. The majority of these incurred more than one Relevant Charge. In the circumstances it was wrong, Mr Vos submitted, to say that they were isolated incidents. It was a misuse of language to describe unarranged borrowing as an exception to an exception. The Court concluded (para 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."

The appeal was therefore dismissed.

37. The decision of the Court of Appeal was followed by Mann J. in *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), 10 July 2009. We received written submissions on this decision. The submissions vary markedly in their perceptions of how easily and satisfactorily the judge applied the Court of Appeal's test (which was of course

binding on him). I do not think it necessary to go further into the decision, especially as the relevant term was in any event not in plain intelligible language.

The meaning of Regulation 6(2)

38. After considering the judgments of Andrew Smith J and the Court of Appeal at length I am impressed, as no doubt all of us are, by the great care with which both courts have considered all the arguments and materials put before them. But I must respectfully say that I see force in Mr Sumption's criticisms of their approach as over-elaborate. The issue is a very important one, but it is essentially quite a short point, even when all the elements relevant to a purposive approach to construction are taken into account. I also respectfully think that the courts below, although cautioning themselves that "core terms" is a shorthand expression for the contents of paragraphs (a) and (b) of regulation 6(2), tended to slip into treating it as an autonomous expression which itself expressed the contents of both those paragraphs.

39. I start with the language of Article 4(2) and Regulation 6(2) (I can see no significant difference between them, although for no obvious reason Article 4(2) refers to assessing the unfair nature of a term whereas Regulation 6(2) refers to assessment of fairness of a term). Paragraphs (a) and (b) are, as I have said, concerned with the two sides of the *quid pro quo* inherent in any consumer contract. The main subject-matter may be goods or services. If it is goods, it may be a single item (a car or a dishwasher) or a multiplicity of items. If for instance a consumer orders a variety of goods from a mail-order catalogue – say clothing, blinds, kitchen utensils and toys – there is no possible basis on which the court can decide that some items are more essential to the contract than others. The main subject matter is simply consumer goods ordered from a catalogue. I think that the Court of Appeal was wrong (para 55) to dismiss the difficulties raised by the banks on this point as something that the court could decide as a question of fact in the circumstances of the particular case.

40. Similarly, a supply of services may be simple (an entertainer booked to perform for an hour at a children's party) or composite (a week's stay at a five-star hotel offering a wide variety of services). Again, there is no principled basis on which the court could decide that some services are more essential to the contract than others and again the main subject matter must be described in general terms—hotel services. The services that banks offer to their current account customers are a comparable package of services. These include the collection and payment of cheques, other money transmission services, facilities for cash distribution (mainly by ATM machines either at manned branches or elsewhere) and the provision of statements in printed or electronic form.

41. When one turns to the other part of the *quid pro quo* of a consumer contract, the price or remuneration, the difficulty of deciding which prices are essential is just the same, and Regulation 6(2)(b) contains no indication that only an "essential" price or remuneration is relevant. Any monetary price or remuneration payable under the contract would naturally fall within the language of paragraph (b) (I discount the absence of a reference to part of the price or remuneration for reasons already mentioned).

42. In the case of banking services supplied to a current account customer under the "free if in credit" regime, the principal monetary consideration received by the bank consists of interest and charges on authorised and unauthorised overdrafts, and specific charges for particular non-routine services (such as expedited or foreign money transmission services). The most important element of the consideration, however, consists of the interest forgone by customers whose current accounts are in credit, since whether their credit balance is large or small, they will be receiving a relatively low rate of interest on it (sometimes a very low rate or no interest at all). The scale of this benefit is indicated by the figure for 2006 already mentioned. Mr Sumption was wary about committing himself as to whether interest foregone constituted part of the bank's price or remuneration for the purposes of Regulation 6(2)(b). Whatever view is taken as to that, it is clear that just as banking services to current account customers can aptly be described as a package, so can the consideration that moves from the customer to the bank. Interest forgone is an important part of that package for customers whose accounts are in credit, and overdraft interest and charges are the most important element for those customers who are not in credit. Lawyers are very used to speaking of a package (or bundle) of rights and obligations, and in that sense every obligation which a consumer undertakes by a consumer contract could be seen as part of the price or remuneration received by the supplier. But non-monetary obligations undertaken by a consumer contract (for instance, to take proper care of goods on hire-purchase, or to treat material supplied for a distance-learning course as available only to the customer personally) are not part of the "price or remuneration" within the Regulation. That is the point of Lord Steyn's observation in *First National Bank*, in para 34, that "in a broad sense all terms of the contract are in some way related to the price or remuneration."

43. This House's decision in *First National Bank* shows that not every term that is in some way linked to monetary consideration falls within Regulation 6(2)(b). Paras (d), (e), (f) and (l) of the "greylist" in Schedule 2 to the 1999 Regulations are an illustration of that. But the relevant term in *First National Bank* was a default provision. Traders ought not to be able to outflank consumers by "drafting themselves" into a position where they can take advantage of a default provision. But *Bairstow Eves London Central Ltd v Smith* [2004] 2 EGLR 25 shows that the Court can and will be astute to prevent that. In *First National Bank* Lord Steyn indicated that what is now Regulation 6(2) should be construed restrictively, and Lord Bingham said that it should be limited to terms "falling squarely within it". I respectfully agree. But in my opinion the Relevant Terms and the Relevant Charges do fall squarely within Regulation 6(2)(b).

44. That conclusion is not to my mind at variance with the message to be derived from the *travaux*. It is a fairly complex message, reflecting not only a compromise between the opposing aims of consumer protection and freedom of contract, but also the contrast between consumer protection and consumer choice (the latter being more central, perhaps, to basic Community principles). This point was explored and explained in an article (not mentioned by the Court of Appeal) to which Mr Sumption referred, that is Good Faith in European Contract Law by Professor Hugh Collins, (1994) 14 OJLS 229. Mr Sumption placed particular emphasis on the following passage:

> "The history of the EC Directive on Unfair Terms in Consumer Contracts reveals the struggle between these two interpretations of the economic interests of consumers. Even at a late stage in the negotiations, the draft Directive proposed by the Commission envisaged the introduction of a general principle against substantive unfairness in consumer contracts. It invalidated terms in standard form consumer contracts which caused 'the performance of the contract to be significantly different from what the consumer could legitimately expect', or which caused 'the performance of the contract to be unduly detrimental to the consumer'. But in the battle between the advocates of consumer rights and the supporters of free competition, eventually the latter emerged victorious in the Council of Ministers. The fairness of the transaction in the sense of the price paid for the goods or services should not be subjected to review or control. This is the meaning of the obscure Article 4(2) [which is then set out]. The final reservation in this provision ['plain intelligible language'] is significant. The Directive does not require consumer contracts to be substantively fair, but it does require them to be clear. Clarity is essential for effective market competition between terms. What matters primarily for EC contract law is consumer choice, not consumer rights."

45. The Court of Appeal took account of the *travaux* and of some academic writing. It recognised as an underlying value the notion that freedom of contract should prevail where there has been meaningful negotiation between supplier and consumer, so that the latter does consent to the terms of the contract. But I respectfully think the Court went too far in interpreting the language of the Directive and the 1999 Regulations in order to meet that perceived aim. The Directive and the 1999 Regulations apply only to terms which have not been individually negotiated, and the Court departed from the natural meaning of the text in order to achieve an unnecessary duplication of the exception for individually negotiated terms.

46. I would add a postscript to this part of the discussion. A variety of expressions has been used, in the courts below and in argument (and to some extent by this House in *First National Bank*), to describe those contractual terms which are subject to review in point of fairness: ancillary, subordinate, incidental, non-core, collateral. These may all be of some assistance but it is important, in considering provisions which apply across an extraordinarily wide range of consumer contracts, to treat them with caution. I venture to repeat a paragraph from an opinion of mine (in which the other members of the Appellate Committee concurred) in *College of Estate Management v Customs & Excise Commissioners* [2005] STC 1957, para 30, an appeal raising questions of Community law about whether there is a single or multiple supply, and whether it is of goods or services, for the purposes of value added tax:

> "'Ancillary' means (as Ward LJ rightly observed ([2004] STC 1471 at [39]) subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in *British Telecommunications* (where the delivery of the car was subordinate to its sale) and in *Card Protection Plan* itself (where some peripheral parts of a package of services, and some goods of trivial value such as labels, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including *Faaborg*, *Beynon* and the present case) in which it is inappropriate to analyse the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. Food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of services (*Faaborg*). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (*Beynon*)."

Conversely, delivery of goods or peripheral extras may be disregarded as ancillary for the purposes of para (a) of Regulation 6(2), but the charges for them, if payable under the same contract, are part of the price for the purposes of para (b).

The application of Regulation 6(2)

47. I can state my opinion much more briefly on the second main issue in the appeal, that is the application of Regulation 6(2), properly construed, to the facts. Charges for unauthorised overdrafts are monetary consideration for the package of banking services supplied to personal current account customers. They are an important part of the banks'

charging structure, amounting to over 30 per cent of their revenue stream from all personal current account customers. The facts that the charges are contingent, and that the majority of customers do not incur them, are irrelevant. On the view that I take of the construction of Regulation 6(2), the fairness of the charges would be exempt from review in point of appropriateness under Regulation 6(2)(b) even if fewer customers paid them, and they formed a smaller part of the banks' revenue stream. Even if the Court of Appeal's interpretation had been correct, I do not see how it could have come to the conclusion that charges amounting to over 30 per cent of the revenue stream were (para 111) "not part of the core or essential bargain."

Should there be a reference under Article 234?

48. This Court, as the national court of last resort, is under an obligation to make a reference to the Court of Justice under Article 234 of the Treaty if a decision on the correct interpretation of the Directive is necessary to enable the Court to give judgment, and the point is not *acte clair*. Neither side showed any enthusiasm for a reference, because of the further delay that would be occasioned in a very large number of claims at present stayed. The Court is entitled to take the likely delay into account, although not as an overriding consideration, in deciding whether to make a reference.

49. If (as I understand to be the case) the Court is unanimous that the appeal should be allowed, then in my opinion we should treat the point as *acte clair*, and decide against making a reference. It may seem paradoxical for a court of last resort to conclude that a point is clear when it is differing from the carefully-considered judgments of the very experienced judges who have ruled on it in lower courts. But sometimes a court of last resort does conclude, without any disrespect, that the lower courts were clearly wrong, and in my respectful opinion this is such a case.

50. Even if some or all of the Court feel that the point is not *acte clair*, I would still propose that we ought not to incur the delay involved in a reference under Article 234, since a decision on the correct construction of Article 4(2) of the Directive is not essential for the determination of this appeal. The correct construction of Article 4(2) is a question of Community law, but the application of the Article, properly construed, to the facts is a question for national law. Even if the Court of Appeal was not clearly wrong on the issue of construction, it was in my respectful opinion clearly wrong in applying its construction to the facts. In other circumstances it might be regarded as rather unprincipled to take that means of avoiding an important issue of Community law, but in the special circumstances of this case I would regard it as the lesser of two evils. There is a strong public interest in resolving the matter without further delay.

Conclusion

51. For these reasons I would allow the appeal. The declaration sought by the banks in their counterclaims is inappropriate for the reasons explained by Lord Phillips at the beginning of his judgment. I would declare that the bank charges levied on personal current account customers in respect of unauthorised overdrafts (including unpaid item charges and other related charges) constitute part of the price or remuneration for the banking services provided and, in so far as the terms giving rise to the charges are in plain intelligible language, no assessment under the Unfair Terms in Consumer Contracts Regulations 1999 of the fairness of those terms may relate to their adequacy as against the services supplied.

52. If the Court allows this appeal the outcome may cause great disappointment and indeed dismay to a very large number of bank customers who feel that they have been subjected to unfairly high charges in respect of unauthorised overdrafts. But this decision is not the end of the matter, as Lord Phillips explains in his judgment. Moreover Ministers and Parliament may wish to consider the matter further. They decided, in an era of so-called "light-touch" regulation, to transpose the Directive as it stood rather than to confer the higher degree of consumer protection afforded by the national laws of some other member states. Parliament may wish to consider whether to revisit that decision.

LORD PHILLIPS

Introduction

53. In common with most members of the public all members of the Court have a current account with one or other of the appellants ("the Banks"). The Banks and the Respondent ("the OFT") have agreed that we should none the less hear this appeal. The operation of a current account by a Bank for its customer involves the provision of a number of different services. These include the collection of cheques drawn in favour of the customer, the honouring of cheques drawn by the customer, payments on behalf of the customer pursuant to the use by the customer of credit or debit cards and cash distribution facilities.

54. The customer rewards his Bank for the provision of these services in different ways, in accordance with standard terms agreed between the customer and the Bank. The majority of customers, who always keep their accounts in credit, reward the Bank by allowing it to use the funds standing to their credit without paying interest at the market rate. Somewhat misleadingly, the services provided by Banks to such customers are said to be "free of charge". The position is very different in the case of a customer who permits his current account to go into debit without having obtained, in advance, authority

from his Bank to overdraw. When this occurs, the customer becomes liable to pay charges. In some instances the charge will be triggered by the performance of an individual identifiable service, such as honouring a cheque. In other instances a sum becomes payable if, during a specified period, an account is overdrawn. These charges have collectively been described in this litigation as "the Relevant Charges" and the terms under which they are imposed as "the Relevant Terms". I shall adopt that terminology. Mr Sumption QC, who appeared for the Banks, preferred to call the charges "Insufficient Fund Charges".

55. Lord Walker has, in his judgment, explained the background to this litigation and set out the relevant provisions of the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083 ("the 1999 Regulations") and Council Directive 93/13/EEC ("the Directive"), which the 1999 Regulations implemented. Subject to one exception I shall not repeat that exercise.

56. The OFT is minded to attack the Relevant Terms under the 1999 Regulations on the ground that they are unfair. The Banks contend that any such attack will be circumscribed by the provisions of Regulation 6(2) of the 1999 Regulations, which provides:

> "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".

It is common ground that the Relevant Terms that are the subject of this appeal are largely in plain intelligible language except (in the case of four banks) in certain specific and relatively minor respects.

The issue

57. The agreed Statement of Facts and Issue describes the issue raised by this appeal as follows:

> "Whether an assessment of the fairness of the Relevant Terms (pursuant to which the Relevant Charges are levied) would relate to the adequacy of the price and remuneration, as against the services supplied in exchange, within the meaning of regulation 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999."

This does not accurately describe the issue raised by this appeal, which is very much more narrow. That issue is whether the Relevant Charges constitute "the price or remuneration, as against the services supplied in exchange" within the meaning of the Regulation. If they do not, the attack on the fairness of the terms that is open to the OFT will not be circumscribed by Regulation 6(2)(b). If they do, they will still be open to attack by the OFT on the ground that they are "unfair" as defined by Regulation 5(1), but that attack cannot be founded on an allegation that the Relevant Charges are excessive by comparison with the services which they purchase, for that is forbidden by Regulation 6(2)(b).

58. That this was indeed the issue was made clear by counsel on either side in their oral submissions. Towards the close of his reply, Mr Sumption QC said this:

> "All that I can ask the courts to declare, and all that my clients have ever asked the courts to declare, is that the insufficient fund charges are included in the price within the meaning of the word "price" in [Regulation] 6 and that no assessment of the fairness of the terms imposing the IFCs may relate to their adequacy as against the service supplied."

59. Mr Crow QC for his part submitted on behalf of the OFT that even if Article 4(2) of the Directive did apply, the Relevant Terms were still subject to assessment for fairness. In that event, while it would not be open to the OFT to assess the fairness of the price by reference to the adequacy of the goods or services supplied in exchange, it would be open to the OFT to assess the fairness of the price according to other criteria.

60. This agreement between the parties reflects acceptance by the Banks in the Court of Appeal of a finding by Andrew Smith J that was contrary to one of their submissions. The Banks had submitted that a term of a contract that provided the "price or remuneration" for "goods or services supplied" was absolutely exempt from assessment for fairness by reason of Regulation 6(2). This was described as the "excluded term" construction of the Regulation. Andrew Smith J held that this was not correct. Regulation 6(2) precluded assessing a price term for fairness by reference to its adequacy as payment

for the goods or services provided in exchange. It did not, however, preclude assessing a price term for fairness according to other criteria. This has been described as the "excluded assessment" construction of the Regulation.

61. Mr Sumption submitted that the difference between the "excluded term" and the "excluded assessment" constructions was "a distraction from the real issues". It is certainly a distraction from the narrow issue that the parties are now agreed is before the court. But it is only because the "excluded assessment" construction has prevailed that the issue has been narrowed from that in the Agreed Statement of Facts and Issue. Had the "excluded term" construction prevailed, a finding in favour of the Banks that the Relevant Terms were included within the meaning of the word "price" in Regulation 6(2) would have precluded any challenge to those terms on the ground of fairness. As it is, if the Banks succeed on the narrow issue, this will not close the door on the OFT's investigations and may well not resolve the myriad cases that are currently stayed in which customers have challenged Relevant Charges.

62. There is a further general point to be made. It seems likely that many of the customers who have challenged Relevant Charges have done so on the basis that they are excessive for the individual services to which they relate. They have treated the Relevant Charges as being levied in exchange for those services. Equally, one of the provisional grounds of attack advanced by the OFT has been that the Relevant Charges are out of all proportion to the cost of providing the services to which they relate. The Banks' primary case is that these attacks are founded on a misconception that the Relevant Charges are payment for the services that trigger them. According to the Banks the reality is that the Relevant Charges are simply part of the payment in exchange for a global package of services. If that is correct, it would seem to follow that the attack based on the disparity between the cost of providing the services that trigger the Relevant Charges and the amount of the Relevant Charges is based on a false premise and does not in fact involve an assessment of fairness that relates "to the adequacy of the price or remuneration, as against the goods or services supplied in exchange".

63. This was a point that was appreciated by Andrew Smith J. At paragraph 400 of his judgment he says:

> "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."

64. Mr Crow did not submit before us that if the Relevant Charges formed part of the price paid in exchange for the package of services, they could not be included within the meaning of the word "price" in Regulation 6(2). I consider that Regulation 6(2) could apply to a complaint that the Banks' charges overall, of which the Relevant Charges are an important element, are unfair because those who pay them pay an excessive amount in exchange for the package of services in respect of which they constitute part of the payment. Thus the issue of whether or not the Relevant Charges form part of the "price or remuneration, as against the goods or services supplied in exchange" within Regulation 6(2) is not necessarily academic. No attack has yet been made, however, on the level of the Banks' charges overall.

The reasoning of the Courts below

65. Both Andrew Smith J and the Court of Appeal concluded that the Relevant Terms did not qualify as price or remuneration within the meaning of those words in Regulation 6(2).

66. At the heart of the reasoning of Andrew Smith J was the conclusion that the Relevant Charges were not covered by Regulation 6(2) because they were not the "price or remuneration" for "services supplied *in exchange*". They were not charged "*in exchange*" for anything. While most of the charges were triggered by the provision of an individual service they were not imposed by way of payment for those services. They were charges levied because the services in question were supplied by the Banks "in particular circumstances". One of the four types of Relevant Charges was not triggered by the provision of a service. Unpaid Item Charges were levied when a request to honour a cheque on an overdrawn account was refused. Refusing a request could not properly be described as a service at all.

67. Andrew Smith J rejected the Banks' case that the Relevant Charges were part payment for the entire package of services provided by the Banks to current account customers for the following reasons:

> "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."

68. The Court of Appeal reached the same conclusion as Andrew Smith J, but by a different process of reasoning. Lord Walker has set out that reasoning at length. Once again I shall restrict myself to the essence of the Court's conclusion. In relation to Unpaid Item Charges the Court held that giving consideration to a request to honour a cheque on an overdrawn account was a service, even if the request was turned down. Thus each of the events that triggered a liability to pay Relevant Charges involved the provision of a service. It was not, however, realistic to consider that each Relevant Charge was payment for the individual service that occasioned its imposition. Rather, the substance of the contract had to be analysed as a package.

69. The Court then went on to divide the package into the "core or essential bargain" and provisions that were "incidental or ancillary", holding that Regulation 6(2) only applied to the former. The core or essential bargain was comprised of those matters to which the typical consumer would have regard when deciding whether to enter into the agreement with the Bank. The latter would be those to which he would not attach importance when concluding the contract.

70. The Court decided that charges which were contingent upon the customer overdrawing on his current account would not have been considered of significance by the typical customer at the time of establishing the account. The charges would only be imposed in contingent circumstances and were akin to default charges triggered by a breach of contract, although they were not in fact triggered by a breach of contract because of the manner in which the contractual relationship had been expressly framed. The customer would not consider the contingent liability to pay the Relevant Charges in

the event of overdrawing on his account an essential part of the Bank's agreement to provide these services without charge provided that he remained in credit. It followed that the liability to pay the Relevant Charges was not part of the core or essential bargain and did not fall within the ambit of Regulation 6(2).

The approach to the issue

71. Early in his argument Mr Sumption said:

> "[T]here is…room for argument about whether the insufficient fund charges are part of the price for the package of services or just the particular service which occasions their being charged, but we will submit that it is unrealistic to say, as the judge did, that insufficient fund charges are not payable in exchange for any service at all and are, therefore, not a price at all."

72. This raises the questions by what criteria do you decide whether the charges are payment for services, if so, whether individual charges are payments for individual services or part payment for a package of services, and from whose viewpoint do you decide those questions? So far as the latter question is concerned, the choice would appear to be between the viewpoint of the customer, having regard to the facts that he would reasonably be expected to know, the viewpoint of the Banks, having regard to the more extensive knowledge held by the Banks, or no viewpoint at all, on the basis that these questions have to be answered by application of an objective test to all the material facts. There is an allied question of whether the language used to describe the obligations imposed by the terms is relevant or whether one looks simply at the nature and effect of those obligations.

73. The narrow issue raised by this appeal is only relevant as part of the wider issue that will arise if and when the Relevant Terms are challenged as being unfair. At that point the question may arise – are the terms being challenged on the ground that the Relevant Charges are excessive having regard to the services that are provided in exchange for them? The court before which the challenge is made may then have to decide whether any, and if so what, services are provided in exchange for the Relevant Charges as a stepping stone to deciding whether the challenge is one precluded by Regulation 6(2). To answer that question the court will, in my view, properly have to consider the role played by the Relevant Charges having regard to all the facts that are relevant to the operation of the contractual adventure and not just to those that are, or reasonably should be, within the knowledge of the customer.

Conclusions

74. I wish to express my admiration for the detailed and perceptive analysis of Andrew Smith J, although I do not share all the conclusions that he reached. He examined each of the Relevant Charges and the circumstances in which they fell to be paid. He concluded that it was impossible to say that each charge was given *in exchange for* the event that triggered it. I agree with that conclusion. It accords, of course, with the primary way in which the Banks put their case. The same conclusion would, I think, have been reached by a reasonably informed customer who applied his mind to the question. In each instance the Judge identified aspects of the provisions for payment of the Relevant Charges that would be anomalous if they were intended to be paid in exchange for the service to which they related. I will take one of the charges made by Barclays to illustrate such anomalies. A *'Paid Referral Fee'* is charged when the Bank honours a cheque, standing order or direct debit in circumstances where the account is overdrawn without prior arrangement. The fee is not charged per transaction but at £30 per day. But the fee is only charged on a maximum of three days per month. A customer would not conclude that the fee was charged in exchange for the transaction or transactions concluded on the days when the charges were made but that any other similar transactions in the course of the month were provided free.

75. I agree with Andrew Smith J that a careful analysis of the transactions giving rise to the obligation to pay the Relevant Charges leads to the conclusion that they are not the prices paid in exchange for the transactions in question.

76. I shall revert to the Judge's rejection of the Banks' case that the Relevant Charges were part of the remuneration paid for the package of services provided to holders of current accounts. First I wish to address the reason why the Court of Appeal rejected that case.

77. The Court of Appeal accepted that the contract between the Bank and its customer had to be treated as a package. They did not exclude from the package services that were supplied at a time when the current account was overdrawn. They accepted that the Relevant Terms were terms that provided for payment of price or remuneration. They held, however, that they were not "core" payment terms but "ancillary or incidental price, remuneration or payment terms" (paragraph 69(iii)) which did not constitute price or remuneration that fell within Regulation 6(2).

78. I can see no justification for excluding from the application of Regulation 6(2) price or remuneration on the ground that it is "ancillary or incidental price or remuneration". If it is possible to identify such price or remuneration as being paid in exchange for services, even if the services are fringe or optional extras, Regulation 6(2)

will preclude an attack on the price or remuneration in question if it is based on the contention that it was excessive by comparison with the services for which it was exchanged. If, on analysis, the charges are not given in exchange for individual services but are part of a package of different ways of charging for a package of varied services, this does not mean that they are not price or remuneration for the purpose of Regulation 6(2). As I observed earlier, an assessment of the fairness of the charges will be precluded if the basis of the attack is that, by reason of their inclusion in the pricing package, those who pay them are being charged an excessive amount in exchange for the overall package.

79. The Court of Appeal accepted the following argument advanced by the OFT. The object of Regulation 6(2) is to exclude from assessment for fairness that part of the bargain that will be the focus of a customer's attention when entering into a contract, that is to say the goods or services that he wishes to acquire and the price he will have to pay for doing so. Market forces could and should be relied upon to control the fairness of this part of the bargain. Contingencies that the customer does not expect to involve him will not be of concern to him. He will not focus on these when entering into the bargain. The Relevant Charges fall into this category. Free-if-in-credit current accounts are opened by customers who expect to be in credit. Customers who go into debit without making a prior agreement for an overdraft normally do so because of an unforeseen contingency. Customers do not have regard to the consequences of such a contingency when opening a current account. Accordingly, the Relevant Charges that are then levied do not fall within Regulation 6(2).

80. It seems to me that this reasoning is relevant not to the question of whether the Relevant Charges form part of the price or remuneration for the package of services provided but to whether the method of pricing is fair. It may be open to question whether it is fair to subsidise some customers by levies on others who experience contingencies that they did not foresee when entering into their contracts. If it is not it may then be open to question whether the Relevant Terms fall within Regulation 5(1). These questions do not, however, bear on the question of whether the Relevant Charges form part of the price or remuneration that is paid in exchange for the services provided to the holder of a current account. In agreement with Lord Walker, and for the additional reasons that he gives, I am not persuaded by the Court of Appeal's reasons for excluding the Relevant Charges from the "price or remuneration" in Regulation 6(2).

81. I now turn to the reasons given by Andrew Smith J for rejecting the Banks' case that the Relevant Charges are part of a package of prices or remuneration paid for a package of services – see paragraph 67 above. First he says that 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. It does not seem to me that this does full credit to the package approach. I do not imagine that there are many customers who run a current account that is permanently overdrawn in circumstances where they have not specifically agreed an overdraft facility. Most customers who incur Relevant Charges run current accounts that are in credit most of the time. I do not think that it is an unnatural

use of language to say that the Relevant Charges that they pay are paid as *part of* the price or remuneration provided in exchange for the package of services that they receive.

82. If the Relevant Charges are not part of the price or remuneration for the services provided, the question arises of how the charges should be classified. The answer suggested on behalf of the OFT is that they are in the nature of default payments, imposed not as a hefty element in the price that the Banks hope that customers will pay for their services but by way of sanctions to discourage them from overdrawing on their current accounts. At paragraph 107 the Court of Appeal held:

> "[The Relevant Charges] are…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 that they are not contingent charges…"

83. Andrew Smith J considered at paragraphs 295 to 324 whether the Relevant Charges were penalties at common law so as to be unenforceable for that reason. He held that they were not because a penalty at common law is a payment that becomes payable upon a breach of contract. Liability to pay Relevant Charges is not contingent upon breaches by the customers of their contracts. It is not a breach of any of the standard form contracts under consideration to overdraw, or attempt to overdraw, on a current account. Mr Sumption rightly conceded, however, that the Banks could not convert what were in effect penalties into "price" simply by wording their contracts so as to ensure that the contingencies that triggered liability to pay the charges did not constitute breaches of contract.

84. Mr Crow argued that the Court of Appeal was correct to describe the Relevant Charges as akin to default charges. They were only payable in what he described as "aberrant circumstances". He pointed out that many of the terms that give the impression that the charges are the cost of exercising contractual options are of recent origin. Contracts that preceded them had terms which indicated that customers were not to go into overdraft without prior arrangement, even if doing so was not technically a breach of contract. He pointed out that this is still true of the following current term of the Nationwide Building Society's terms:

> "Your FlexAccount is a share of Nationwide Building Society. It will give membership rights to the account holder(s)….Your membership may be withdrawn if you

> overdraw without agreement or exceed an agreed overdraft."

85. Mr Sumption challenged that submission. He submitted that, at a time when virtually the whole population had a personal current account, the ability to overdraw informally and at short notice and without elaborate negotiation was an important tool of personal finance management. It was an extremely valuable facility, not properly to be described as an aberration.

86. Andrew Smith J rejected the OFT's submission that the Banks' terms that treat an instruction that involves overdrawing as a request for an overdraft were misleading. He held:

> "75. Thus, apart from Nationwide, the Banks' terms and conditions are couched in terms of the customer making a request of the Bank and the Bank responding to it, and in some cases they refer to the Bank considering the request. The OFT criticises this terminology as an artificial device recently introduced which disguises the true nature of the parties' dealings when a customer gives his bank an instruction which would, if paid, take the account into debit. Similarly, the OFT suggests that the use of the term 'overdraft' to describe the debit balance created in these circumstances has misleading connotations, and emphasises the differences between the debit balance resulting from such a payment and an overdraft facility that a bank and a customer might agree should be available on an account.
>
> 76. Certainly, this terminology has been introduced by the Banks into their documentation relatively recently. However, I am unable to accept that the references to the customer making a request for an overdraft when he gives a Relevant Instruction are inappropriate or create a fiction. On the contrary, they spell out what is, as a matter of legal analysis, implicitly done when a customer gives a Relevant Instruction. Of course, there are differences between any resulting overdraft and a facility arranged by a specific agreement between a customer and his bank. A facility for an overdraft typically, and as provided by the Banks under their current terms (to which I refer below), commits the bank to allow the customer to overdraw on his account for as long as the facility is in place and within its limits, and, while of course it is possible for a facility to be confined to use for a stipulated purpose, it does not typically cover only a specific payment by the customer. If a fee is charged, it is

> generally for the facility itself, regardless of whether it is in fact used by the customer to borrow or how much it is so used. (None of the Banks charges a customer for requesting a facility in advance if the request is refused.) However, none of this means that it is misleading to use the expression 'overdraft' to refer either to a facility or to borrowing under a facility or to unarranged borrowing. To my mind the expression is flexible enough naturally to encompass all these usages."

As Mr Sumption observed there has been no appeal against this finding.

87. In support of his submissions Mr Sumption relied upon the fact that a very significant number of customers incur Relevant Charges and upon the overall contribution that these charges make to the revenue earned by the Banks from operating current accounts. In the region of 20% of customers incur Relevant Charges but these account for over 30% of the revenue received by the Banks from current account customers. This compares with about 50% that represents the benefit of the use by the Banks of the funds in the accounts of customers who are in credit.

88. When the relevant facts are viewed as a whole, it seems clear that the Relevant Charges are not concealed default charges designed to discourage customers from overdrawing on their accounts without prior arrangement. Whatever may have been the position in the past, the Banks now rely on the Relevant Charges as an important part of the revenue that they generate from the current account services. If they did not receive the Relevant Charges they would not be able profitably to provide current account services to their customers in credit without making a charge to augment the value of the use of their funds.

89. For these reasons I have formed the conclusion that the Relevant Charges are, as the Banks submit, charges that they require their customers to agree to pay as part of the price or remuneration for the package of services that they agree to supply in exchange.

90. My conclusions accord with those of Lord Walker and, for the reasons that he gives as well as my own, I would allow this appeal.

91. I have not found this an easy case and I do not find the resolution of the narrow issue before the court to be *acte clair*. I agree, however, that it would not be appropriate to refer the issue to the European Court under Article 234. I do not believe any challenge

to the fairness of the Relevant Terms has been made on the basis that they cause the overall package of remuneration paid by those in debit to be excessive having regard to the package of services received in exchange. In these circumstances the basis on which I have answered the narrow issue would seem to render that issue academic. It may be that, if and when the OFT challenges the fairness of the Relevant Terms, issues will be raised that ought to be referred to Luxembourg. That stage has not yet been reached.

LADY HALE

92. For the reasons given by Lord Walker and Lord Mance, I too would allow this appeal and make the declaration proposed by Lord Walker.

93. I would only add that, should this or any other Parliament be minded to take up the invitation given in the last paragraph of Lord Walker's judgment, it may not be easy to find a satisfactory solution. The banks may not be the most popular institutions in the country at present, but that does not mean that their methods of charging for retail banking services are necessarily unfair when viewed as a whole. As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice. We buy all sorts of products which a sensible person might not buy and some of which are not good value for the money. We do so with our eyes open because we want the product in question more than we want the money. Should financial services be treated differently from other goods and services? Or is the real problem that we do not have a real choice because the suppliers all offer much the same product and do not compete on some of their terms? This is the situation here. But it is not clear to me whether the proper solution is to find some way of forcing the suppliers to compete with one another in the terms they offer or whether the solution is to condemn one particular model of charging for those services. Fortunately, however, that is for Parliament and not for this Court.

LORD MANCE

94. Council Directive 93/13/EEC of 5 April 1993 and The Unfair Terms in Consumer Contracts Regulations 1999 (S.I. No. 2083), which implement the Directive domestically, both relate to "unfair terms in contracts concluded between a seller or [a] supplier and a consumer". They make the validity of "a contractual term which has not been individually negotiated" subject generally to the criterion of fairness (defined by reference to whether "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"). This appeal concerns the exception to this rule, provided in Article 4(2) of the Directive and Regulation 6(2). It is not suggested that there is any material difference between these two provisions. As Regulation 6(2) puts it:

> "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."

"Adequacy" (the word also used in the Directive) means appropriateness or reasonableness (in amount).

95. This appeal is concerned with Relevant Charges in the form of unpaid item charges, paid item charges, overdraft excess charges and guaranteed paid item charges levied when a customer gives instructions or undertakes a transaction without having sufficient funds to back it. The Office of Fair Trading (OFT) has written to various banks expressing concerns about the fairness of the terms agreed by the banks with their customers so far as they provide for payment of Relevant Charges. The question for decision is whether the OFT would be entitled to challenge the fairness of such terms under regulation 12. It is now accepted that such terms are not individually negotiated within regulation 5(1). But it is also common ground (except in the case of four banks in certain specific and minor respects) that they are in "plain intelligible language" within regulation 6(2). The issue is whether the Relevant Charges or the agreement to pay them constitute "price or remuneration" in exchange for the supply of services within regulation 6(2). If they do, then any challenge to their fairness based on their appropriateness in relation to such services is excluded under regulation 6(2). Any assessment based on matters not relating to the appropriateness in amount of the price or remuneration is not excluded by regulation 6(2)(b). This regulation is clearer than its predecessor (regulation 3(2) of the 1994 Regulations) which suggested grammatically that it was only a "term which . . . concerns the appropriateness of the price or remuneration" that was immune from challenge (language reflected in some of the reasoning in *Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481, below).

96. The parties have in their written cases and oral submissions identified two broad issues for determination. The first concerns the proper interpretation of regulation 6(2)(b), the second whether the Relevant Charges fall within the scope of that regulation, properly interpreted. The first issue is one of European law. As to the second, however, no question of European law is involved in the determination of the relevant circumstances.

The parties also agree that no such question is in this case involved in applying the regulation, properly interpreted, to the circumstances – including identifying the price or remuneration in exchange for which goods or services are to be supplied. European Court of Justice authority for this differentiation appears to be limited to the assessment of unfairness under articles 3 and 4(1) of the Directive (regulations 5 and 6(1) of the Regulations): *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* (Case C-237/02); but I accept its correctness in principle.

97. Since the Directive and Regulations are concerned with terms in contracts, it is first of all necessary to identify the relevant contracts. This is a matter about which the judge, Andrew Smith J, and the Court of Appeal took different views, although again it is not suggested that it raises on the facts of this case any particular issue of European law. The banks' primary case is that the relevant contracts are the contracts for an overall package of banking facilities made by the banks with their customers. Andrew Smith J rejected this analysis as unnatural: payments by way of Relevant Charges could not be said to be paid in exchange for services supplied when an account is in credit; and the description "free-if-in-credit" connoted that there was no price to be paid when an account was in credit (paras. 398-9). Furthermore, if the relevant contract was taken to be the overall package, the Relevant Charges would represent no more than part of the price or remuneration, and an assessment of the fairness of such charges as against the package of services would be "beside the point" and "would not intrude upon the essential bargain" intended to be protected from assessment (para. 400).

98. There is in my opinion a flaw in this reasoning. It is not comparing like with like. Viewing the matter at the level of the banking contracts, the comparison is between, on the one hand, the package of services offered by the banks (some or all of which may or may not be used by any particular customer) and, on the other, the customer's commitment to pay such charges as may arise from whatever facilities he does use. At this level, the banks' case is that price or remuneration is or includes the customer's potential liability for charges, rather than the payments which he or she has actually to make if and when such charges are incurred. In my opinion the Court of Appeal was right in para. 97 of its judgment to identify the relevant contract as being in the first instance the banking contract for an overall package of facilities. That is the contract in which the Relevant Charges appear and were agreed.

99. Further, any challenge to the fairness of a term must be to its fairness in the context of the relevant contract in which it appears. It is "beside the point" if it is not. If, on a proper analysis, the customer's potential liability for the Relevant Charges is the or part of the "price or remuneration" in exchange for which the overall package of banking services is supplied, and it is challenged on the ground that it makes such price or remuneration disproportionate overall, then regulation 6(2)(b) excludes the challenge. If there is no challenge to the overall proportionality of the overall price or remuneration of the package, then I fail to see how a challenge to the proportionality of the Relevant Charges in relation to the cost of providing particular services in isolation can be

admissible or relevant. A term which is proportionate in context cannot become disproportionate viewed out of context.

100. It is true that Relevant Charges are only incurred when a customer, either deliberately or inadvertently, gives an instruction or enters into a transaction, by which as a matter of law and contract he or she requests the bank to provide overdraft facilities. So, each time such a request is made and acted upon (even if only with the result that the request is declined), it is possible to identify a more developed contractual relationship as arising. Under that relationship, the Relevant Charges become payable in respect of the request (although not, the judge thought, in exchange for any services provided in consequence of the request). I do not however consider that this relationship can be the contract to which the Directive and Regulations refer. If the agreement to incur the Relevant Charges is part of an overall package contract, its vulnerability to challenge and, if permissible, any assessment of its fairness under the Directive and Regulations must, as I have said, depend upon an analysis of such agreement as part of the package contract. Otherwise, as Mr Sumption pointed out, a customer could challenge each separate part of a package in isolation, although as a whole the price or remuneration charged was unchallengeable.

101. Issues arise under two heads: the first, the proper interpretation of Article 4(2) and Regulation 6(2) (I shall for convenience generally refer only to the latter); and the second, the application on the facts of whatever is that proper interpretation. As to the first, it is common ground that not every provision for payment contained in a contract for the supply of goods or services is rendered immune from scrutiny under Regulation 6(2). There can be payments which do not constitute either "price or remuneration" of goods or services supplied in exchange. Further, payments which do constitute price or remuneration in this sense can be challenged as unfair on grounds which do not relate to their appropriateness in amount as against the goods or services supplied in exchange. Heads (d), (e), (f) and (l) in the grey list of terms set out in Schedule 2 to the Regulations fall within one or both categories. *Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481 provides another example.

102. In the *First National Bank* case, the House was concerned with a provision in a regulated credit agreement for interest to continue at the credit agreement rate as against a borrower who had defaulted and against whom judgment had been entered for the principal and interest outstanding to judgment. The County Courts (Interest on Judgment Debts) Order 1991 (SI No 1991/1184) meant that there was no statutory claim for or right to post-judgment interest. Hence, the rationale for including a continuing interest provision in the credit agreement. The case arose under Regulation 3(2) of the Unfair Terms in Consumer Contracts Regulations 1994, which provided that "no assessment shall be made of the fairness of any term which …. (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied". (This is slightly, though possibly materially, different wording to that of Regulation 6(2) of the 1999 Regulations which replaced it.) The House held that Regulation 3(2) did not apply, but went on to hold the term to have been fair. Passages from the speeches of Lord Bingham

of Cornhill (para. 12) and Lord Steyn (para. 34) have been set out by Lord Walker. Both considered that clause 8 fell outside Regulation 3(2)(b), as a provision prescribing the consequences of default. Lord Bingham added in a sentence drawing on the particular wording of Regulation 3(2)(b) that "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". Lord Hope of Craighead's explanation is also relevant. He said (para. 43) that:

> "Condition 8 is a default provision. The last sentence of it is designed to enable interest to be recovered on the whole of the amount due on default. That amount includes legal and other costs, charges and expenses, so it is not confined to the outstanding balance due by the borrower. I do not think that it can be said to be directly related to the price charged for the loan or to its adequacy. It is concerned instead with the consequences of the borrower's breach of contract. It sets out what is to happen if he fails to make the repayments to the bank as they fall due. I agree that regulation 3(2)(b) does not apply to it, and that its fairness as defined in regulation 4(1) of the 1994 Regulations must be assessed."

This underlines the distinction between payments due in exchange for the original loan and the financial payments (including those relating to "costs, charges and expenses") due on default under the clause. The decision of Gross J in *Bairstow Eves London Central Ltd. v. Smith* [2004] EWHC 263 (QB); [2004] 2 EGLR 25 provides another example of the same distinction.

103. The contracts made by customers for an overall package of banking facilities have been described as on a "free-if-in-credit" basis. The OFT submits that this indicates or suggests that the agreement to pay Relevant Charges cannot be regarded as the or a part of the price or remuneration in exchange for which banking facilities are supplied. The banks submit, on the contrary, that the clear corollary of "free-if-in-credit" is that the services provided will not be free if the customer is not in credit. They ask rhetorically what other price or remuneration there is, if not the Relevant Charges. The OFT's response is that it is conceptually possible to have a contract for services without anything in exchange that counts in terms of regulation 6(2)(b) as either price or remuneration. That I would accept. The bank might (especially under a basic banking contract which did not allow any overdraft in any circumstances) be content to operate on the basis that its profit would come solely from its power to use money which customers deposited with or arranged to have transferred to it. That power follows from the bank's ownership of money deposited with or transferred to it. (Further, since the deposit with or transfer to a bank of money is the main or part of the main subject matter of a banking contract, any assessment of the fairness of it or its legal consequences would appear to be excluded under regulation 6(2)(a), rather than (b).) Alternatively, the OFT suggests, without committing itself, that, if there is any price or remuneration under a free-if-in-credit

banking contract, it is more easily found in the customer's agreement to pay overdraft interest.

104. In accordance with general European legal principle, article 4(2) and regulation 6(2) are as exceptions to be construed narrowly. Nevertheless, the concepts of "price or remuneration" must, I think, be capable in principle of covering, under a banking contract, an agreement to make a payment in a particular event. The language of regulation 6(2)(b) is on its face therefore capable of covering a customer's commitment, under the package contracts put before the House, to pay the Relevant Charges in the specified events. There is no reason why a customer should not be given free services in some circumstances, but, as a quid pro quo, be expected to pay for them in others.

105. At various points the submissions before the House addressed the policy underlying the free-if-in-credit system of charging. It is clear from the description free-if-in-credit itself that the system is likely to involve significant elements of cross-subsidy. Some customers (those remaining always or largely in credit) pay no or few charges, while others pay charges more regularly. Overall, around 30% of the banks' income from their customers is derived from the Relevant Charges. According to the OFT's own Market Study of July 2008, 77% of customers surveyed who had incurred a Relevant Charge in the past 12 months had heard of such charges before they incurred one. The Relevant Charges levied on any particular customer greatly exceed the actual net cost to the bank of complying with the request(s) impliedly made by the customer leading to the incurring of such charges. But it is obvious on reading the charging structure that charges cannot be directly related to the actual costs of providing any particular service triggering them. There are of course other obvious elements of cross-subsidy, even between customers who remain in credit. Customers who maintain large current accounts and receive no or limited interest on them subsidise in a sense customers who manage consistently to keep just in credit. Mr Jonathan Crow QC for the OFT made clear that the OFT does not contend that the element of cross-subsidy provided by the Relevant Charges affects the question whether regulation 6(2)(b) applies. Regulation 6(2)(b) would apply if the banks simply decided to charge more for particular services in order to pay their directors more or to earn more for their shareholders. It cannot make any difference to its application if the banks decide to adopt a business model which charges more for one type of transaction in order to subsidise another.

106. The OFT's case, essentially accepted by the Court of Appeal, is that the agreement to pay the Relevant Charges is not price or remuneration, because regulation 6(2)(b) is confined in scope to payments in exchange for sales or supplies on which payments the consumer can be taken to have focused and to which he can be taken truly to have consented. The Court of Appeal encapsulated this conclusion as "import[ing] the notion of essential bargain into the construction of article 4(2) and into both paragraphs (a) and (b) of regulation 6(2)" (para. 86). It added that "the concept of the essential bargain flows naturally" from the structure and purpose of the Directive because not every payment that a consumer makes falls within regulation 6(2)(b), and such a construction "prevents regulation 6(2)(b) being construed too widely". It considered that

its conclusion reflected "the reasoning both in the *travaux préparatoires* and in the *First National Bank* case", which it interpreted as indicating that ancillary or incidental payment terms were not intended to be exempt from assessment for their "adequacy" under regulation 6(2) (paras. 64, 69 and 86).

107. The considerations which the Court of Appeal saw as relevant to the broad test which it thus identified were as follows (para. 90):

> "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."

108. One difficulty about the Court of Appeal's reasoning lies in its reliance on the concept of negotiation or indeed bargain, as in para. 90(iii)(a) and (b) above – and elsewhere, repeatedly, in its judgment: see paras. 64, 87, 107 and 109 (negotiation) and 86, 90, 94-95 and 106 (bargain). The Court of Appeal suggested that the absence of any negotiation or bargain or of any ability to negotiate or bargain militated strongly against a conclusion that a particular charge constituted (part of) the price or remuneration. However, the Directive and Regulations are only concerned with contractual terms which have not been individually negotiated. Another difficulty is that the Court of Appeal's broad test, and the sliding scale of relevant considerations introduced by para. 90, convert the apparently simple language of regulation 6(2)(b) (or article 4(2)) into a complex and uncertain value judgment. This is rendered even more complex by the Court of Appeal's further conclusion that the judgment should be made by the court through the eyes of "the typical consumer" (para. 91). This led to considerable argument before the House as to who might be regarded as the typical consumer. Was it relevant to look at the whole body of customers, or at those who would or might be likely to incur Relevant Charges? Before the House Mr Crow for the OFT summarised three main considerations on which the OFT relied to determine whether a payment was part of the essential bargain, namely whether the payment was (a) ancillary, (b) readily recognisable or visible by a typical customer and (c) one arising in the normal performance of the contract.

109. The Directive was the result of an iterative process between the Commission, European Parliament and Council of Ministers. The outcome was, as not uncommonly happens, significantly different from that originally proposed. The Commission's original proposal of 24 July 1990 (COM(90) 322 fin) and its Explanatory Memorandum of 3 September 1990 were drafted with a view to regulating by reference to the test of fairness "every contract between a consumer and a party acting in the course of his trade, business or profession, whether the contract is a "take or leave it" contract, or is in standard form or is negotiated individually". The proposal was the subject of a critique by Hans Erich Brandner and Peter Ulmer (*The Community Directive on Unfair Terms in Consumer Contracts: some critical remarks on the proposal submitted by the EC Commission*, (1991) 28 CMLR 647); these authors argued that any control by the courts or administrative authorities of the reasonableness or equivalence of the relationship between the price and the goods or services provided was "anathema to the fundamental tenets of a free market economy", and that the focus should be on improving transparency in this area, the requirement of transparency being "directed against terms which may *conceal* the principal obligations or the price and thus make it difficult for the consumer to obtain an overview of the market and to make what would (relatively speaking) be the best choice in a given situation" (p.656).

110. The Committee on Legal Affairs and Citizens' Rights of the European Parliament issued a report on 9 April 1991 (A3-0091/91), which suggested the amendment of the proposal to exclude individually negotiated contract terms. The Economic and Social Committee (consulted by the Council of Ministers) issued its opinion on 24 April 1991, suggesting both that individually negotiated contractual terms required different treatment and that an additional criterion of unfairness should be introduced, namely "the non-transparency of a contract term" (OJ No C 159, 17.6.1991). The European Parliament

repeated its stance that individually negotiated terms should fall outside the proposal, and proposed that terms containing clauses "which are unreadable or likely to be misunderstood by consumers because they are not in plain language" should be regarded as unfair (OJ No C 326, 16.12.1991). The Commission on 5 March 1992 responded with an amended proposal (COM(92) 66 fin). This distinguished between the treatment of non-negotiated and negotiated terms, but would have continued to regulate the latter where "imposed upon the consumer" as a result of the seller/supplier's economic power or the consumer's economic and/or intellectual weakness. The amended proposal also contained a requirement (in terms which become part of the final article 5) that all written terms offered to the consumer in writing "must always be drafted in plain, intelligible language".

111. On 22 September 1992 the Council of Ministers adopted its Common Position on the basis of article 100a of the Treaty (8406/92). This restricted the proposal to contractual terms which had not been individually negotiated. It introduced article 4(2) in its final form and accepted the requirement under article 5 that all written terms offered to the consumer in writing "must always be drafted in plain, intelligible language". The accompanying reasons explained in relation to article 4 that "the new wording …. 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 (e.g. quality/price relationship)". The Parliament accepted the Council's Common Position on 16 December 1992, and the Directive was finalised on this basis.

112. The legislative history shows therefore an extensive process of development, during which the original proposal was replaced by an amended proposal which was itself very largely amended. The measure ultimately agreed was confined to non-negotiated terms. It stressed the need for transparency ("plain, intelligible language") in relation to all such terms. But, provided such transparency existed, any assessment of the fairness of such terms was excluded in relation to "the definition of the main subject-matter of the contract" and "the adequacy of the price and remuneration …. as against the services or goods supplied in exchange ….". The general approach and the rationale as explained in the Council's Reasons match those of Brandner and Ulmer in their article cited above. It would re-write the legislation to read article 4(2) of the Directive or regulation 6(2) as if they introduced as the test a complex enquiry as to whether or how far consumers had actually exercised contractual freedom when agreeing upon a price or remuneration stated in plain and intelligible language in a contract into which they entered. Article 4(2) and regulation 6(2) can loosely be described as being concerned with the assessment of "core terms" (see e.g. *First National Bank*). But that is on the basis that price and remuneration always fall within them. The Court of Appeal erred in introducing a yet further restriction, whereby it would be only "essential core terms" which could attract immunity.

113. In my opinion, the identification of the price or remuneration for the purposes of article 4(2) and regulation 6(2) is a matter of objective interpretation for the court. The court should no doubt read and interpret the contract in the usual manner, that is having regard to the view which the hypothetical reasonable person would take of its nature and

terms. But there is no basis for requiring it to do so by attempting to identify a "typical consumer" or by confining the focus to matters on which it might conjecture that he or she would be likely to focus. The consumer's protection under the Directive and Regulations is the requirement of transparency on which both insist. That being present, the consumer is to be assumed to be capable of reading the relevant terms and identifying whatever is objectively the price and remuneration under the contract into which he or she enters. A contract may of course require ancillary payments to be made which are not part of the price or remuneration for goods or services to be supplied under its terms. The *First National Bank* and *Bairstow Eves* cases illustrate the distinction by reference to default terms.

114. Andrew Smith J considered and rejected a submission that the Relevant Charges constituted in reality no more than penalties, disguised (at least in the case of all the terms save those of Nationwide Building Society) by drafting which expressed the charges as arising in respect of services to be provided by the banks. He held that, far from being inappropriate or artificial, the language of request reflected the true legal analysis of a situation where the customer gives an instruction or enters into a transaction for which insufficient funds exist in his or her account (paras. 75-76). There has been no appeal against that conclusion, and the fact that the relevant contractual arrangement is an overall package contract made between a bank and each customer tends in my view to confirm the conclusion. A customer making such a contract accepts that the free-if-in-credit system involves substantial charges if instructions are given or transactions entered into which involve putting the account into debit. While the incurring of Relevant Charges is no doubt something that customers would like to avoid, it is a clearly explained and, objectively viewed, very important feature of the overall package. The OFT's case that such charges are not "readily visible" or "recognisable" as the price is in my view untenable. In so far as it relies on the consideration that the charges are out of proportion to the actual cost of rendering any services in respect of an instruction or transaction which would involve an (or an increase in an) unauthorised overdraft, it also presents the paradox, that the higher the Relevant Charges, the less visible or recognisable they are said to be as the price of the overall package.

115. Taking the view that I do of the meaning of both the Directive and the Regulations, the question arises whether it is nevertheless incumbent on us to refer the interpretation of the Directive to the Court of Justice. Under *CILFIT v Ministry of Health* (Case 283/81; [1982] ECR 3415) and in the absence of any prior Court of Justice authority, this depends upon (a) whether the question is relevant to the outcome of the case and (b) "whether the correct application of Community law is so obvious as to leave no scope for reasonable doubt". In the latter connection we have to ask ourselves whether the answer we consider correct would be equally obvious to the courts of other Member States and to the Court of Justice itself; and in this regard we have to bear in mind the fact that Community legislation is drafted in different languages which may convey different meanings to different readers, that the Community concepts it uses (here "price and remuneration") are autonomous concepts and that every provision of Community law must be placed in the context of Community law as a whole. In the present case, we are concerned with a relatively simple sentence, using simple and basic concepts, and the

scope for different readings of different language texts seems very limited. The complex and unpredictable value judgment involved in the Court of Appeal's approach was based in large measure upon a clear error, in treating the existence or absence of negotiation as significant in a context dealing by definition only with non-negotiated terms. The suggested test of what is "not . . . ancillary to the main bargain" involves a restatement of the language of the Directive and Regulations; that language treats the "price or remuneration" as axiomatically part of the core bargain and so immune from scrutiny for reasonableness. Bearing in mind the general Community aim of legal certainty, the likelihood of the Court of Justice (or any other Member State's courts) accepting the Court of Appeal's approach to the interpretation of article 4(2) seems to me remote indeed. I would regard the position as *acte clair* and not as requiring a reference.

116. However, if one takes a different view on whether the position is *acte clair*, there remains the question of relevance. Eliminating the Court of Appeal's clear error in introducing as part of the test whether the relevant term had been "directly negotiated", and assuming that the Court of Appeal was generally right in adopting as a test whether the term was "not . . . ancillary to the main bargain", the question would be whether the Court was right to treat the terms of the package contracts relating to the Relevant Charges as ancillary terms, rather than as part of the agreed price or remuneration in exchange for which the banks undertook to provide their whole package of services. That question would involve the application of the Directive and Regulations, which is, as I have said, a matter for domestic, not European, law. The starting point would be that the banks' customers committed themselves, under plain, intelligible language, to pay the Relevant Charges in respect of instructions given or transactions entered into without sufficient funds and in return for the package of services offered by the banks. The Court of Appeal identified a series of considerations, relating to the nature of personal current accounts, the contingent circumstances in which such instructions or transactions could come about, the uneconomic nature (from the customers' viewpoint) of the Relevant Charges and the absence of any marketing of the banks' services by reference to such Charges (para. 99). It summarised the incurring of Relevant Charges as being "simply outside (or outwith) the ordinary conduct of the contractual relationship" (para. 99(xv)).

117. Mr Crow repeated and expanded on these points in his case (para. 81) and in his oral submissions before the House; he suggested that, if any price or remuneration could be identified at all, then the bank interest charged on any unauthorised overdraft was "more readily recognisable as the payment made in exchange for the overdraft" (case, para. 81(r)). But there is no reason why the price or remuneration payable for a package of services should not consist of a contingent liability. The uneconomic nature of the Relevant Charges from the customers' viewpoint constitutes the importance of the charges from the banks' viewpoint, and the plain intelligible language of the banking contracts made evident that there must be a considerable element of cross-subsidy in respect of customers while they remained in credit. Like Lord Walker, I would therefore disagree with the Court of Appeal's application of its test, even had I considered that test to be correct so far as it focused on what was or was not "ancillary" to the main bargain. In these circumstances, it would be unnecessary to make a reference, even if the view

were to be taken that the meaning of price and remuneration in article 4(2) of the Directive is not *acte clair*.

118. I would therefore allow the appeal and grant the relief proposed by Lord Walker in paragraph 51. I would also endorse Lord Walker's final paragraph.

LORD NEUBERGER

119. I also would allow this appeal for the reasons given by Lord Walker and Lord Mance, and would grant the relief proposed by Lord Walker in paragraph 51.

120. I also agree with Lord Phillips, whose reasons are, I think essentially the same as those of Lord Walker and Lord Mance. On the one issue on which there may be some disagreement, namely whether the resolution of the dispute as to the interpretation of article 4(2) is *acte clair*, I share Lord Mance's scepticism as to whether the Court of Justice would adopt the meaning accepted by the Court of Appeal. However, like Lord Phillips, I consider that it is possible that the Court of Justice would adopt such an interpretation, and therefore, if the resolution of that issue were essential to the determination of this appeal, I would, very reluctantly, have concluded that a reference was required. However, as he says, it is unnecessary for the issue to be resolved for the purpose of this appeal – as explained by Lord Walker in para 50, and by Lord Mance in paras 116 and 117.