

Overdrawn but not over

Andrew Head examines the impact of the bank charges ruling on the thousands of cases that were stayed pending the outcome of the case

THE SUPREME COURT in its judgment on the bank charges test case has lobbed a carefully aimed grenade in the direction of thousands of claimants whose cases have been stayed pending the outcome of this judgment. On the face of it, this is a resounding victory for the banks. A closer look at the judgment and the reaction to it, however, suggests that the position is less clear cut. The banks may have won an important battle but the war is far from over.

The judgment dealt with a very narrow issue: whether as a matter of law and fairness the bank charges levied on personal current account customers in respect of unauthorised overdrafts could be challenged by the OFT as excessive in relation to the service supplied to the customer. This involved a very careful analysis of the correct interpretation of regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999 (UTC-CRS). Put simply, the judges concluded that the OFT could not challenge such charges. This was because the levying of such charges formed part of the price or remuneration for the banking services provided. They were not an ancillary payment obligation, as the OFT had argued. Such charges therefore fell within the exception of regulation 6(2) and were therefore exempt from a challenge.

Stayed claims

What is the likely impact of such a decision on the thousands of claimants who have made claims for refunds of charges? Claimants who have already settled with the banks will be unaffected, as the banks made these payments as goodwill gestures. But what of the claims that were stayed by the courts, pending the outcome of this judgment? The banks could apply to have the majority of these claims struck out. They are likely, however, to tread warily before doing so, not just for reasons of bad publicity but because of the potential legal pitfalls ahead.

The first potential area of challenge arises out of remarks made by Lord Phillips in his judgment to the effect that the terms and conditions of the banks (as opposed to the charges levied by them) may be open to challenge under article 5(1) of the UTC-CRS if it was determined that it was unfair to subsidise



No case under 'value for money' principle but still scope for further action

some customers as a result of the level of charges levied on other customers who incurred unauthorised overdrafts. This point is being investigated further by consumer campaigners such as moneysavingexpert.com, and they are currently instructing a QC to draft new template letters in an attempt to stop the banks striking out existing claims. The OFT will also shortly put out a statement confirming whether it will continue with its investigations into bank charging.

The second area involves potential legislation. The Supreme Court went out of its way to stress that it was not ruling on the unfairness of bank charges per se but on the much narrower point as to whether the OFT had the power under the UTC-CRS to investigate such claims. Lord Walker pointedly remarked that: "Ministers and Parliament may wish to consider the matter further. They decided in an era of '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." The government in response to the decision has made it clear that it would work with the OFT and FSA "to reach a new framework for banking charges going forward".

As far as consumer campaigns involving

repayments of charges are concerned, the judgment is likely to have a limited impact.

Credit card charges and mortgage exit fees

In the case of credit card charges, the OFT issued a statement of its position on calculating fair default charges in credit card contracts in April 2006. Its reasoning for concluding that many costs arising from default were unfair is based in large part on its analysis of the UTC-CRS, which was rejected by the Supreme Court. In particular, the OFT argued that terms providing for default charges were not "core terms" and therefore fell outside the exception in regulation 6(2).

Following the release of this statement, the OFT expected all credit card companies to recalculate their default charges in line with the principles set out in the statement and made it clear that where credit card charges were set at more than £12, it would presume that they were unfair.

The OFT also made it clear that "the broad principles set out in this statement are likely to be relevant to other default charges in standard agreements with consumers such as those for mortgages, store cards and bank accounts".

Although the credit card companies have not accepted the OFT's interpretation of the regulations, and could now in theory mount a challenge, there is no indication that they are gearing up to do so.

In relation to claims for mortgage exit fees, the judgment is of little relevance. These claims commenced following the statement of the FSA dated 26 January 2007. Although it based its findings of unfairness on the UTC-CRS, the practice that it disapproved of concerned the charging of fees that were higher than the customer expected to pay and not the fairness or otherwise of the fees themselves.

As far as claims for repayments of payment protection insurance and council tax are concerned, these are based on different legislation and will remain unaffected by the judgment.

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