
Test Case Fact Sheet

November 2009



The voice of banking
& financial services

Explanation of key terms and principles

Current accounts

A current account – often called a cheque account – is a bank account from which customers meet day-to-day payments and expenses. It generally comes with a cheque book and debit card so you can make one off payments or withdraw cash in a branch or from a cash machine. It also generally gives you the facility to make regular payments by standing order – where you instruct the bank to pay a regular sum to someone, or direct debit – where you allow a third party to take money from your account. Most people also access their accounts online using internet banking or via telephone banking. It is not meant to be a place to keep your savings. It is a bit like the cash you have in your purse or wallet and, just like paying in cash, customers are meant to have the money in their account before trying to make a payment.

Unarranged overdrafts

Banks have to decide, when customers don't have enough money in their current account for cheques, standing orders, direct debits or other commitments, whether they can help out their customers by lending them the money needed to make these payments.

Normally, in more than four out of five cases, customers make this arrangement in advance and the bank can have a discussion about how and when the overdraft can be paid back.

Sometimes, however, customers don't talk to the bank first or have committed to payments which take them over their limit.

When this happens the bank will still look to see if payments can be made and if they think the customer is good for the credit. If so, the bank may provide an unarranged overdraft to cover the payment. But, in cases like this, the bank is assuming a certain amount of risk as they have less information to make the lending decision. The bank will also get in touch with the customer to let them know what has happened and to notify them of any fees incurred.

The costs of services

When someone opens a current account, or when terms and conditions change, banks will tell them in writing how much every service costs. This information is also available in branches and on the internet. It is always made clear to customers how much it will cost them if they don't have enough money to meet their payments. It is also made clear what actions the bank will take if customers seek to use money without making an advance arrangement with the bank first.

The Court Case

Background

The banks decided in July 2007 to go to court along with the Office of Fair Trading to clarify the law on current account charges.

This is because some customers said that the charges levied when customers sought to borrow from banks without prior discussion were penalties or that they were unfair. They started to claim back bank charges they had built up, citing a piece of European regulation – the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) - to back up their action.

It became apparent to the banks, the Office of Fair Trading, the Financial Services Authority and the Financial Ombudsman Service that steps had to be taken to deal with the significant volumes of customer disputes in a fair and orderly way. In the end the only way this could be resolved was by seeking court guidance on these areas of law. As there was considerable public interest the banks and the Office of Fair Trading thought it was sufficiently important for the issues to be fully tested in court.

What has happened so far

The first stage of the test case process was heard by the Court between 17 January and 8 February 2008. It dealt with certain preliminary legal issues in relation to the terms and conditions used by the banks at that time.

On 24 April 2008 the High Court issued its judgment on the first stage of the test case process. It decided that the current charges could not be penalties but they could be assessed for fairness under the Unfair Terms in Consumer Contracts Regulations 1999. The banks appealed the decision, that the charges could be assessed for fairness, to the Court of Appeal at a hearing which ended on 5 November 2008.

Following further hearings, the High Court also decided that save for one term used by one bank, the terms and conditions previously used by the banks were incapable of being penalties but, like the banks' current charges, they can be assessed for fairness.

On 26 February 2009, the Court of Appeal issued its judgment on this first stage of the test case process and ruled the banks' current terms can be assessed for fairness under UTCCRs. The banks appealed the Court of Appeal's judgment.

The appeal hearing started in the House of Lords on Tuesday 23 June 2009. Again the House of Lords was not considering whether or not the terms were unfair, only whether they could be assessed for fairness. This will need to be decided later, if the banks' appeal is not successful.

The House of Lords, now the Supreme Court, is still to give its judgment.

Where are we now

The banks and the OFT are waiting for the outcome of an appeal which was heard by the House of Lords in June 2009. We expect a decision from the new Supreme Court in the near future.

Which banks are involved

THE CASE	THE OFT FAIRNESS INVESTIGATION
Abbey National plc	▪ Investigation on hold
Barclays Bank plc	▪ Investigation on hold
Clydesdale Bank plc	
HBOS plc	▪ Investigation on hold
HSBC Bank plc	
LloydsTSB Bank plc	
Nationwide Building Society	▪ Investigation on hold
Royal Bank of Scotland Group plc	▪ Investigation on hold

OFT 'fairness' investigation

The OFT is separately carrying out an investigation into the fairness of unarranged overdraft charges. This is running in parallel to the test case.

To streamline and potentially shorten the investigation, which commenced in March 2007, the OFT is now concentrating on a representative sample of current account terms and conditions from three UK banks – Clydesdale, HSBC and Lloyds TSB. The investigation into the other banks' charges is on hold.

Subject to the outcome of the Supreme Court judgment, the OFT has confirmed it expects to complete its investigation by the end of 2009.

What is happening to claims at the moment

Customer complaints relating to unarranged overdraft charges are currently on hold. This has been agreed with the Financial Services Authority which has issued a new waiver that extends until 26 January 2010. The banks and the building society continue to ask County and Sheriff Courts to keep cases relating to unarranged overdraft charges on hold until the test case process is concluded.

Test case timeline

2007	
March	<p>OFT fairness investigation</p> <p>OFT commenced investigation into 'fairness' of bank charges</p>
27 July	<p>Court Case</p> <p>Banks and Office of Fair Trading decide to go to Court to establish the law on unarranged overdraft charges</p>
2008	
17 January	<p>Hearing commenced</p>
17 January - 8 February	<p>The first stage of the test case process was heard by the Court. It dealt with issues of legal principle about the terms and conditions banks used at the time.</p> <p>The Court considered the following primary issues:</p> <ul style="list-style-type: none"> ▪ whether the terms imposing charges were subject to the test of fairness contained in the Unfair Terms in Consumer Contracts Regulations 1999 ('the UTCCRs) or whether they fell within exceptions provided by the UTCCRs meaning the fairness test could not apply; and ▪ if the relevant terms imposing the charges were capable of amounting to a penalty at common law.
24 April	<p>Judgment on current terms & conditions</p> <p>The Court issued its judgment on the first stage of the test case process.</p> <p>The Court decided the unarranged overdraft charges it looked at were not penalties, but could be assessed for fairness under the UTCCRs. However, the Judge was explicit that this did not mean the charges were unfair. He said a further hearing would be needed to determine the issue of fairness.</p> <p>The Court also reached the following conclusions:</p> <ul style="list-style-type: none"> ▪ unarranged overdrafts were one of the essential, real and identifiable services which banks provide their personal current account customers; ▪ as a matter of legal analysis the terms and conditions of many of the banks accurately reflect that, when a customer tries to make a payment without sufficient funds or an arranged overdraft, the customer is requesting an unarranged overdraft; and ▪ banks' current terms and conditions were in "plain intelligible language". The court found that although most were, in "certain specific and relatively minor respects" the current terms and conditions of some banks (namely Abbey, Barclays, Clydesdale and HBOS) were not.
23 May	<p>Permission to appeal</p> <p>As part of the ongoing test case process, a procedural hearing (known as a Case Management Conference) took place. At this hearing the banks were granted permission to appeal the question of whether the unarranged overdraft charges previously considered by the Court could be assessed for fairness.</p>
7-9 July	<p>Previous terms & conditions</p> <p>A second hearing asked the Court whether terms and conditions previously used by the Banks were capable of being penalties and were assessable for fairness. The terms and conditions previously used by Nationwide Building Society were not considered during this further hearing, as these terms and conditions were materially identical to those considered in April.</p>
22 July	<p>FSA waiver</p> <p>The FSA extended the waiver for six months until 26 January 2009 (this has now been extended to 26 January 2010).</p>

8	October	<p>The Court issued its judgment on the Banks' previous terms & conditions.</p> <p>The Judge had already decided that current terms and conditions could not be penalties and was looking at terms and conditions banks had in the past. He found most were not penalties and asked for more information on terms and conditions of three Banks. He decided terms and conditions previously used by the Banks were also assessable for fairness.</p>
28	October	<p>Court of Appeal hearing</p> <p>Start of Court of Appeal hearing</p>
28 October	- 5 November	Court of Appeal heard submissions
2009		
21	January	<p>Judgment on outstanding items</p> <p>Following on from the hearing on 8 October 2008, of the terms under consideration of the three Banks concerned, the court found that all except one term of one bank were incapable of being penalties. The term in question was held to prohibit customers from using a card to go overdrawn. This does not mean that it is a penalty.</p>
26	February	<p>Court of Appeal decision</p> <p>The Court of Appeal said charges could be looked at to see if they are fair or not. It did not say fees were unfair.</p> <p>The banks said they would apply to the House of Lords for permission to appeal the Court of Appeal's decision.</p>
31	March	<p>House of Lords</p> <p>Banks granted leave to appeal by the House of Lords.</p>
3	April	<p>OFT fairness investigation</p> <p>OFT limits scope of fairness enquiry by concentrating on a representative sample of current account terms and conditions from three Banks.</p>
23-25	June	<p>House of Lords</p> <p>The appeal hearing took place in the House of Lords concerning the question of whether the relevant terms are assessable for fairness.</p> <p>The House of Lords did not consider whether or not the terms were unfair. Subject to the outcome of the appeal, this will be decided by the Court after further hearings.</p> <p>The banks appealed as they continue to believe that the fairness test in the UTCCRs does not apply to these types of charges.</p> <p>Judgment is awaited, which will be handed down by the Supreme Court.</p>
22	July	<p>FSA waiver</p> <p>FSA issues new waiver to run until 26 January 2010.</p>