

Newsletter

Personal Current Accounts Work

Welcome to the first edition of the OFT Retail Banking Team's newsletter which is designed to update you, at key stages, about our work on personal current accounts ('PCAs'). On Wednesday, the High Court test case on unauthorised overdraft charges is set to commence and we are taking this opportunity to summarise the key facts.

We would also like to bring to your attention the PCA area of the OFT website, which is updated regularly to facilitate public access to comprehensive information about our work. Many people have found the information contained there very useful, and you are welcome to flag it to others.

It can be accessed at www.oft.gov.uk/advice_and_resources/resource_base/market-studies/personal



Background on OFT's work

The OFT takes a strategic view of financial services, with a focus on ensuring that consumers and competition drive innovation and value for money, and that companies treat customers fairly. We are currently carrying out the

following work within the personal current accounts sector:

The Market Study into Personal Current Accounts

This Market Study takes a broad view of the market, looking in particular at:

- Price transparency – do consumers understand what they are paying for their PCA? Can they predict the overall cost of their account?
- Switching – do consumers have confidence in the switching process?

This study is due to be published after the test case hearing. Subsequently there will be a consultation with stakeholders before final recommendations are published.

Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) Investigation

The Market Study also provides the context for the investigation into the fairness of the level and application of unauthorised overdraft charges and returned item fees.

The OFT is continuing to analyse information supplied by the banks.

The High Court test case

The High Court test case is a key part of the UTCCRs investigation. The hearing, being heard in the Commercial Court, part of the High Court, is due to begin on 16 January. It is seeking to get a ruling on whether the provisions of the UTCCRs that deal with unfairness apply to unauthorised overdraft charges. It will also

address the additional point of principle of whether the charges can be a penalty at common law.

It will not lead to a judgment as to whether terms and conditions or specific charges of individual banks are unfair. The OFT will decide after the initial judgment what steps to take should it win the test case and conclude from its financial investigation that any of the charges are unfair.

The hearing will be heard at the International Dispute Resolution Centre, 70 Fleet St, EC4Y 1EU.



Potential outcomes

Overall, the OFT wants a banking industry with a profitable, fair and sustainable business model in which:

- Active, informed consumers drive competition, efficiency and productivity, and
- Companies treat customers fairly without the need for significant regulatory intervention.

Timeline

Key dates in early 2008 for our work on PCAs:

- High Court test case: Jan16 lasting 3-4 weeks: Judgment to follow.
- Spring: Publication of market study

Roles of OFT, FSA & FOS

There has been some confusion lately, both within the press and amongst members of the public, as to the different roles of the OFT, the Financial Services Authority (FSA) and the Financial Ombudsman Service (FOS). **In explanation:**

The OFT mission is to make markets work well for consumers. It has lead responsibility for enforcing the UTCCRs across the economy, and particular expertise in issues regarding unauthorised overdraft charges following on from our credit card default charges work.



The FSA has responsibility for supervising the complaints handling procedures for all authorised firms. To facilitate the test case the FSA granted a waiver of its complaints handling rules, for any complaints relating to the level, fairness or lawfulness of unauthorised overdraft charges. The waiver does not interfere with firms' obligations under the Banking

Code, which sets out how firms should deal with cases of financial difficulty.

The FOS has responsibility for dealing with individual complaints by customers.

The OFT Retail Banking Team

The Retail Banking Team is based within the Services Group, part of Markets & Projects area in OFT which is headed by a Senior Director, **Cavendish Elithorn**.

Alan Williams is the project director for retail banking; **Gover James** is the team leader for the Retail Banking Team; and **Rob Williamson** is leading on the UTCCRs investigation and test case.

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Questions and answers for OFT personal current account work

The market study and UTCCRs investigation [announcement](#) was made on 29 March 2007 and the test case [announcement](#) was made on 26 July 2007.

Q&A updated 14 January 2008

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20. Does reference to voluntary cooperation mean that the OFT may simply do a deal with the banks behind closed doors?

Overview

1. What work is the OFT doing relating to current accounts?

There is widespread concern about whether current accounts provide value for the UK consumer, and in particular whether unauthorised overdraft charges and returned item charges are fair.

The best way to get a good outcome for consumers is to ensure that consumers understand what they are paying and can vote with their feet and move to banks that offer better value for money.

To achieve this outcome, we launched an investigation into the fairness of personal current account unauthorised overdraft charges and returned item charges under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).

In parallel we also launched a market study in April 2007 to consider the wider questions about competition and value for money in the provision of personal current accounts, such as:

- transparency of costs to consumers
- ease of switching.

2. Where does the test case fit in?

One aspect of our work is considering whether unauthorised overdraft charges and returned item charges meet the fairness requirements of the UTCCRs.

In this work, the first question to consider is whether the test of unfairness under regulation 5 of the UTCCRs applies to such charges at all. We believe so, but the banks dispute this. The trial of this preliminary issue is currently scheduled to begin in the High Court on 16 January 2008. Download the [amended Particulars of Claim](#) (pdf 278 kb). We believe we have a strong case.

In the meantime, we are continuing to collect and analyse information from the banks to allow us to assess whether these charges are unfair. If, in the light of this information, the OFT decides that it is appropriate to take enforcement action because it thinks the charges are unfair but is

not able to secure voluntary compliance by the banks, it will expand the court case to include a claim for a ruling that the charges are unfair.

3. Why has the OFT launched the test case?

Tens of thousands of complaints that unauthorised overdraft charges and returned item fees on current accounts are unfair have been received by the county courts and the Financial Ombudsman Service. The banks do not accept that the legal test of unfairness set out in unfair contract terms legislation applies to the charges.

The OFT believes that it does and is seeking to establish this legal principle clearly in the High Court.

The OFT considers that a quick determination of this point of principle will assist in securing a clear and orderly resolution of the fairness of these charges.

Test case

4. What will the test case cover?

In assessing whether the charges are consistent with the UTCCRs:

- The first step is to assess whether the charges are subject to the test of unfairness.
- The second step is then to consider whether charges are unfair.

The OFT's legal action addresses the **first point** by seeking to establish that the provisions of the UTCCRs that deal with unfairness apply to unauthorised overdraft charges. The legal action is also covering some additional points of legal principle: in particular whether these charges can be a penalty at common law. It will not lead to a judgment as to whether charges themselves are fair or not. The OFT will decide after the initial judgment what steps to take should it win the test case and conclude from its financial investigation that any of the charges are unfair.

The legal action encompasses a representative selection of the banks current and previous terms and conditions.

5. How is the test case structured?

OFT has entered into a written agreement with seven banks, one building society and the Financial Services Authority aimed at ensuring that this inevitably complex process is orderly and well coordinated.

In particular, while recognising that the management and timing of litigation are ultimately matters for the court to decide, the agreement includes the following commitments:

- The banks have undertaken to co-operate with the OFT in its conduct of the UTCCRs investigation and expeditiously to provide documents and information sought by the OFT in so far as practicable.
- If, in the light of the investigation, the OFT decides that the charges are unfair and, as a result, requires the Banks to do anything which they are not prepared to undertake to do in connection with the charges, then the OFT may amend its court documents so as to include a claim for a court ruling that the charges are unfair and for appropriate relief against the banks, such as a declaration or an undertaking to the Court or a final injunction or enforcement order.
- All the Parties are committed to progressing the court proceedings speedily.
- The parties have agreed that each party is to pay its own costs of the court action.

Download the full text of the [agreement](#) (pdf 52 kb).

6. Which banks are taking part in the test case?

The following are parties to the agreement with OFT for the test case:

- Abbey National plc
- Barclays Bank plc
- Clydesdale Bank plc
- HBOS plc
- HSBC Bank plc
- Lloyds TSB Bank plc
- Nationwide Building Society
- Royal Bank of Scotland Group plc

This selection of banks covers the bulk of the PCA market (estimated to be over 90 per cent) and their terms and conditions are representative of agreements used currently in the retail banking market and of previous agreements of the kind which are in dispute in County Court claims.

7. What is the benefit of the OFT starting now with a test case on legal principles rather than waiting until it is ready to take enforcement action?

It should reduce the time taken to reach an outcome.

If the OFT waited until it could take enforcement action, it is quite likely that the court would then want to consider the legal principle we are pursuing now as a preliminary issue: pursuing it now saves time.

The agreement between the OFT and banks commits all parties to seek a resolution of the issues as soon as is reasonably practicable and to seek to have any appeals heard on an expedited basis.

With the OFT taking the lead in acting now to clarify the law, this should help achieve an orderly and expeditious resolution of all of the relevant issues.

8. When will the test case take place?

The High Court trial is currently scheduled to begin on 16 January. The hearing may well run into February, with judgment to follow some time later.

9. How does this affect consumers in Northern Ireland and Scotland?

The unfair contract terms regulations apply across the UK and the outcome of the test case will be important for consumers right across the UK. On individual claims, other aspects of court cases may be different in Scotland.

10. Does the test case have any read across to credit card default charges?

The present case concerns only whether banks' charges for unauthorised overdrafts on personal current accounts are subject to the test of fairness in the UTCCRs and, if they are, the case may continue in order to determine whether those charges are unfair under the UTCCRs.

11. Does the law on penalties apply to unauthorised overdrafts?

The banks have contended that unauthorised overdraft charges do not amount to penalties at common law. Whether the common law on penalties applies to unauthorised overdraft charges will depend on the particulars of the Terms and Conditions that apply. It cannot be assumed that all such charges necessarily infringe penalty law, though they might and it is open to consumers to claim they do. The test case will provide guidance about this. The OFT considers that the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs) provide a better basis for determining whether these charges are unfair generally and its application for a declaration is about the UTCCRs.

12. Will you be publishing all the court documents on your website?

Wherever we can, we will seek to publish the court documents.

Broadly speaking, the Civil Procedure Rules ('CPRs') say that some documents – like Particulars of Claims - should be freely available publicly. They would usually be freely available from the court, but we will seek to make them available on our website. The CPRs also say that the availability of other documents - such as the witness evidence and the skeleton arguments – is more restricted, and they are only available on specific application to the court. We cannot publish these.

Accordingly, we have published the OFT's amended Particulars of Claim, the Banks' Defences and our Reply on our website.

13. Why have you amended your Particulars of Claim?

The OFT added to the original Particulars, to give further details about why it thinks the unfairness test in the UTCCRs applies to unauthorised overdraft charges. It thinks the additions will help clarify the case. Such changes are often part of the litigation process.

Banks/ Financial Services Authority/ Financial Ombudsman Service

14. What are the roles of the OFT, Financial Services Authority and Financial Ombudsman Service in all of this?

The OFT's responsibility is to make markets work well for consumers. This includes enforcement of the UTCCRs, where appropriate. However the OFT does not have the power to intervene in individual disputes between consumers and businesses.

The Financial Ombudsman Service has responsibility for dealing with individual complaints by customers.

The Financial Services Authority (FSA) regulates the financial services industry and in particular deals with how banks handle complaints, assessing both past performance and (as in the case of the present Waiver – see Qs 17 and 18 below) in giving directions going forward. The FSA, like the OFT, does not handle individual complaints but it does have an interest in ensuring that complaints about past actions are satisfactorily dealt with. The FSA is a Qualifying Body under the UTCCRs, meaning it too has the power to enforce them, where appropriate.

See the [FSA press release](#) on the FSA website.

15. How will you ensure joined up working with the Financial Services Authority (FSA) and Financial Ombudsman Service (FOS)?

We have a formal working agreement. The Wider Implications Process (WIP) is an arrangement under which complaints to the FOS are identified as having wider implications that need to be dealt with by the FSA, OFT, or possibly both. This action represents the first use of the WIP involving the OFT.

Outcomes

16. What happens to those wanting to reclaim, or in the process of reclaiming, charges while the OFT case is going on?

The OFT's action does not mean that consumers are too late to complain or that they cannot continue to do so.

Complaints can still be made. For now, however, the Financial Services Authority has allowed banks to suspend their work on complaints. And, the Financial Ombudsman Service has decided not to progress complaints about current account charges until the outcome of the legal action is known. The courts may also 'stay' claims made to them pending the outcome of the OFT's action (i.e. make them await the outcome). Each of these matters is dealt with in more detail in Qs 17 and 18 below.

17. Why can the banks continue to levy charges until the OFT's action is resolved, while consumer actions to reclaim charges are being suspended?

Until the outcome of this legal action is known, the Financial Services Authority (FSA) has allowed banks to suspend their work on complaints about the charges (referred to as the 'Waiver'). This means that for one year or until the test case is resolved, any bank or building society that complies with the conditions of the Waiver will not be required to handle complaints relating to unauthorised overdraft charges within the normal time periods.

We acknowledge that this and court stays (see below) may mean consumers' individual complaints are not resolved pending resolution of our action. However, prior to the test case, the scale of consumer litigation for the return of bank charges was resulting in conflicting outcomes and significant costs to individual consumers. By bringing this action on behalf of consumers we will gain the legal clarity necessary to achieve the fair and consistent handling of consumer complaints.

As we have not yet completed our investigation into the fairness of the current levels of charges, it would not be appropriate for us to ask banks to make changes to their charging structure at the moment. Further, we have not yet completed our market study assessment of the potential impact of such changes. However, we have been working closely with the FSA and the Financial Ombudsman Service (FOS), who hold complaint

handling responsibilities for the banking industry, to ensure that the test case process is as well co-ordinated as possible and that consumers will not be disadvantaged.

Again because the legal issues have not yet been determined, the FSA has also not intervened in the levying of the charges themselves. However, it has set strict conditions on the Waiver that banks must follow, designed to ensure that consumers' ability to recoup charges levied prior to or during the test case will be unaffected.

Under the conditions of the Waiver, amongst other things, banks must:

- not take the period during which the Waiver is in place into consideration in any decisions made about limitation periods or time limits for complaints
- not make materially adverse changes to the level of charges during the Waiver
- do all they can to help account holders avoid incurring these charges in the first place
- apply the relevant principle(s) established in the test case when dealing with complaints about charges, and
- continue to deal with genuine hardship cases during the Waiver period.

A review of the Waiver was completed in November 2007 and concluded that it is operating effectively and can remain in place. See the [FSA's press release](#). The FSA will review compliance with the Waiver regularly to ensure that consumer interests are protected and can revoke it at any time if satisfied that it is no longer appropriate.

As far as the FOS is concerned, the UTCCRs are one factor that must be taken into account in its decisions. As the OFT's action is expected to provide certainty about the law, the FOS has decided not to progress complaints about current account charges until the outcome of the legal action is known.

18. What is the OFT's position on the county courts staying individual consumers' claims pending the test case?

It is not for the OFT to determine how the courts should handle claims before them (including deciding whether to stay proceedings) in light of the test case or the Waiver (both of which are intended to achieve the legal clarity necessary to achieve the fair and consistent handling of consumer complaints). That is for the courts to decide.

19. When will the OFT say what level of charges is fair and bring enforcement action into the process?

Our focus is on the test case on whether the unfairness test in the UTCCRs applies to the charges, the trial of which issue is currently due to start in the High Court on 16 January 2008.

In the meantime, our investigation into whether we think the charges are unfair is continuing alongside our market study. We will determine our position in light of these, taking into account the test case. If the conclusion of our investigation is that the charges are unfair we would then take appropriate steps to enforce our view, including enforcement action if the banks do not voluntarily co-operate.

We are committed to ensuring this process is resolved quickly and efficiently and have made an agreement with the banks and the financial services authority to ensure that.

20. Does reference to voluntary cooperation mean that the OFT may simply do a deal with the banks behind closed doors?

No. The OFT wants to see fair treatment of consumers. Its position is simply that, if any concerns it has about the fairness of the relevant charges can be resolved without the need for further lengthy court action, then this would be in the best interest of consumers. This would be the case if, for example, the banks provided the necessary undertakings as to their conduct. This is no different to the approach the OFT would take in any case.

In any event, before the OFT could seek an injunction or enforcement order under the Enterprise Act 2002, it is required by that legislation to consult with the banks for the purpose of bringing any unlawful charges to an end. This is a statutory reinforcement for the idea that court proceedings could (indeed, should) be avoided if the OFT's concerns about the charges are resolved successfully without the need for those proceedings.

These points are entirely consistent with our determination to secure successful resolution of these charges for the benefit of consumers.