

## OFT v BANKS

### NOTE

This note was read in open court on 26 February 2009 by the Master of the Rolls on behalf of the Court of Appeal.

1. The court is conscious that there are a large number of actions in the county court which raise the fairness of various bank charges and which are at present stayed or on hold pending the outcome of the OFT proceedings.

2. When those proceedings were before Andrew Smith J he twice referred to the position in the county courts. We refer only to the second occasion. He handed his judgment down on 24 April 2008 and at a subsequent case management conference held in late May 2008, at which permission to appeal to the Court of Appeal was given he said this:

“ ... as we are all conscious, the proceedings in the county courts have been on hold, if not formally stayed, pending guidance, we hope, from this litigation, and at each stage, I had been considering whether there is any reason that that position should change. I hardly need to acknowledge again that the management of the county court proceedings is not for me or the High Court but for the county courts. But the reasons that those actions should not proceed seem to me as strong as they were and will remain so until any appeal by the banks on whether regulation 6(2)(b) applies is resolved.

We understand that that guidance was subsequently communicated to the county courts by letters on behalf of all the Banks. It was in our opinion very sensible guidance.

3. The Banks' appeal to the Court of Appeal has now failed and we have now refused permission to appeal to the House of Lords. The Banks are of course entitled to apply to the House of Lords for permission to appeal. While recognising (as Andrew Smith J did) that management of county court proceedings is not in the first instance for us, any more than the High Court, it does seem to us that there is much to be said for the present position in the county courts to remain as it is until the House of Lords has decided whether to grant permission to appeal and, if it does, until the

determination of the appeal. We also think that, if the decision of the Court of Appeal stands, there is much to be said for the status quo to remain until the OFT has carried out its assessment of fairness.

4. We have asked Moore-Bick LJ, as the Deputy Head of Civil Justice to consider the position, and he has decided to send a letter in the following terms to all Designated Civil Judges:

“As you may already know, the Court of Appeal has dismissed the appeal in the Bank Charges litigation, holding that the OFT is entitled to investigate the fairness of the terms which provide for the payment of charges for unauthorised overdrawing etc. There was no appeal on the penalty issue on which the Banks won below.

Permission to appeal to the House of Lords has been refused, but the matter does not end there, both because the Banks may petition their Lordships for permission to appeal and because unless the decision of the Court of Appeal is overturned, the OFT will now have to complete its investigation in order to determine whether the charges are unfair or not.

As you will appreciate, apart from knocking out the penalty argument, the proceedings have not yet produced a final answer one way or the other to the claims pending in your courts. You may be faced with applications to lift the stays which are currently in place. Circumstances may differ, but you may think that, insofar as claims turn on whether the terms in question are unfair under the Regulations and therefore unenforceable, there is much to be said for continuing the existing stays pending a decision by the House of Lords and/or the outcome of the investigation by the OFT.”

5. In so far as it is for us to express a view, and without prejudice to any decision which may be made on the facts of a particular case, we entirely agree that that is a sensible approach.

6. In these circumstances we invite the Banks to communicate the position set out in this Note to the county courts.

Sir Anthony Clarke MR,  
for the Court of Appeal  
26 February 2009