

News flash

Consumer Activism - Clamping down on unfair practises

No sooner had the Financial Services Authority ('FSA') and the Office of Fair Trading ('OFT') started its investigation into the alleged mis-selling of Payment Protection Insurance ('PPI'), than another full scale inquiry was launched by the OFT, this time, into the retail banking industry.

It seems that this regulatory duo have been stepping up the pressure on banks, building societies and credit card companies, in their mission to ensure consumers are treated fairly and are not exploited. For many years banks have levied charges, penalties and fees on its customers, and now consumer groups, regulators and MPs are fighting against these charges, citing them as illegal and unfair. To quell this consumer outcry, it is reported that banks and building societies have already paid out £50 million in refunded charges¹ but it is estimated that the overall compensation bill facing the banking industry could be closer to £10 billion.² **Misha Nateghi** and **Jennifer Drever** report on the newest consumer crusade to hit financial institutions.

The principle of 'fairness'

In February 2007 the UK banking industry published pre-tax profits of over £40 billion. At the same time, it is estimated that banks annually levy £1.2 billion in penalty charges on customers. Unsurprisingly customers have begun questioning these penalties, charges and fees imposed by the banks for borrowing money (with or without prior agreement) or to provide information. Consumer groups have been running a campaign entitled 'Anti Social Banking Order (ASBO)', condemning the banks for alleged "cartel like" activities, and claiming that illegal charges account for "high levels of profitability that is not justified".³ One reason is that banks should not be allowed to profit from these charges/penalties, and there are maximum fees in place for providing information.

In April 2006, the OFT published a report on credit card charges.⁴ The OFT concluded that the amounts charged to customers missing payments or exceeding credit limits was too high, and should be capped at a £12 maximum charge. In

fact, the average amount banks are currently charging can be as high as £34 a day. The OFT extended its investigation into other types of bank charges, since "...the basic principles set out here also apply to other analogist default charges and consumer contracts".⁵

To determine the 'fairness' of these charges, the OFT turned to the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR 1999'). **The UTCCR 1999 provides that a term is considered unfair if it "requires any consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation."**⁶ In September 2006, the OFT announced a follow-up investigation to examine the level of default charges on bank accounts, the real cost to the banks and ultimately whether the charges are 'fair'.⁷ On 30 March 2007, the OFT confirmed that this investigation would be a full blown study of the retail banking sector, and not a "quick fix solution".⁸ The results are unlikely to be available for another 9 months.

Joint Action

As with PPIs, the OFT is liaising with the FSA, who has voiced heavy criticism of the banking industry in recent months, as part of its 'Treating Customers Fairly' campaign. The key criticisms are:

- Disproportionately high charges.
- Charging customers for access to their records, contrary to the Freedom of Information Act 2000.
- Inadequate settlement offers.
- Closing customer accounts, once a complaint is made or claim is issued by the customer.

On 6 March 2007 the Treasury Select Committee ('TSC')

1. The Independent (9 March 2007)

2. Financial Times (24 February 2007)

3. The Independent (21 February 2007)

4. OFT: Calculating Fair Default Charges in Credit Card Contracts (April 2006)

5. OFT: Calculating Fair Default Charges in Credit Card Contracts (April 2006)

6. Unfair Terms and Consumer Contract Regulations 1999, Schedule 2(e)

7. OFT: Following success of credit card charges, the OFT turns its attention to bank accounts (September 2006)

8. The Financial Times (30 March 2007)



► announced that it would be making its own enquiries into banking practises, competition and the future of the retail banking sector. Many Insurers will recall the results of the TSC enquiry into the splits industry - could this lead to similar widespread disciplinary action by the Regulators and/or claims?

The European Union Competition Commission ('the Commission') has also threatened to clamp down on anti-trust abuses in the retail banking and credit card industry, which has been accused of 'ripping-off' customers. This is part of the Commission's probe into the fragmentation of the EU market in retail financial services, the high barriers to EU market entry, and anti-competitive practises, which it has vowed to tackle. The Commission first commenced an anti-trust investigation into the activities of Visa and MasterCard in June 2005.

The Banking Industry's response

While there has been no formal response from the banking industry as a whole, the British Bankers Association ('BBA') has commented that the charges are not penalties, but 'service fees',⁹ which are legal and "based on the costs we incur".¹⁰

Consumer groups argue that the fees/penalties are highly disproportionate to the actual costs incurred by the banks dealing with the charges. But banks appear to be fighting back, for example, by threatening to end free banking and charge customers for holding bank accounts to 'claw back' these lost earnings.¹¹

The fight goes on...

Back in the consumer corner, **a website has been set up for customers to reclaim penalty charges imposed by banks/credit card companies as unlawful and illegal.** The website includes a step by step guide and template letters, demanding a full refund of all default charges, unauthorised overdrafts and standing orders paid over the last 6 years. To date, 2 million people have downloaded template claim letters. The Information Commissioners' Office ('ICO'), an independent supervisory body set up to promote access to official information and protect personal information is taking steps to ensure the banks comply with the Data Protection Act 1998 and Freedom of Information Act 2000, so that public information is made available, without compromising personal information. **Reports suggest some lenders are receiving 500 claims a day for refunds.**¹²

The Financial Ombudsman Service ('FOS') has also received over 1000 complaints, albeit in most cases banks have agreed to refund customers in full.¹³

Where cases are being pursued via the Small Claims Court, banks are taking a tough line by declining to settle with claimants, on the basis that they will defend company policy in Court. However, a common tactic appears to be settling the claim shortly before the case is heard. This behaviour by the banks has been recently criticised by Judge Tooms in Lincoln County Court,¹⁴ who struck out the defence of Lloyds Bank, on the basis that it was abusing the procedural position - by having been sued many times, on each occasion it refused to compromise, forced proceedings to be issued and then settled ahead of a formal hearing. Judge Tooms was of the view that this fell within the doctrine of 'vexatious litigation', and that Lloyds Bank was attempting to frustrate, intimidate and obstruct claims, and acting abusively by failing in every case to defend its position in Court.

The last word

'Consumer activism' is very much on the regulatory radar, as is the fight against anti-competitive, abusive and unfair practises. The prospect of refunding bank charges to this number of potential claimants, together with the accumulated cost in terms of time and resources to address complaints/claims, and the negative publicity could have a tremendously far reaching impact on the banking sector. It is naive to underestimate the power of 'activism', whether driven by consumers, hedge funds, shareholders, pension funds or pressure groups. While the results of the OFT investigation are eagerly awaited, could we be on the verge of another scandal that will result in widespread disciplinary action and claims against financial institutions?

9. Angela Knight: BBC News (12 December 2006)

10. Sir Fred Goodwin: Treasury Select Committee, Thirteenth Report (7 November 2006)

11. The Times (15 November 2006)

12. The Financial Times (24 February 2007)

13. The Independent (20 February 2007)

14. www.consumeractiongroup.co.uk (Newsletter, February 2007)

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