

e-bulletin

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Welcome to the December edition of our Retail Banking e-bulletin. If we can assist you with any retail banking issue, or you would like any further information on any of the items in this edition please do not hesitate to contact us.

John Lunn PARTNER
john.lunn@morton-fraser.com



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Supreme Court “bank charges” judgment

The Supreme Court handed down its decision in the long-running “bank charges” case on 25th November 2009. The Court held that charges for unauthorised overdrafts fell within the exclusion set out in Regulation 6(2) of the Unfair Contract Terms in Consumer Contracts Regulations 1999 and were part of the price paid by the customer for the banking services provided. As such, the Court decided in effect that the OFT could not launch an investigation into whether these charges were fair.

The Court left open the possibility that the OFT could still assess whether the charges were unfair on other grounds under Regulation 5 of the UTCCRs.

The OFT expressed its disappointment at the decision. It will consider the decision and will be seeking discussions with banks, consumer organisations, the FSA and the Government in light of the judgment. It will make a decision on whether to continue with its investigation into unarranged overdraft charging terms later and it expects to make a further announcement in December.

The British Bankers' Association (BBA) played down the significance of the decision, calling it a “clarification of the law” rather than a “victory”. Privately many bankers were both shocked and delighted by the decision. The BBA commented that the focus for banks will be on working with regulators to ensure that outstanding customer complaints are brought to a swift conclusion. Banks will no doubt be hoping to close the lid on their back books regarding these complaints, while moving forwards with the regulators with new overdraft charging structures.

PSD, BCOBS and the new Lending Code

On 1st November 2009 both the Payment Services Directive (PSD) and the Banking Conduct of Business Sourcebook (BCOBS) came into effect. These regulations and rules introduce a range of new requirements which will require extensive management by banks of their compliance obligations.

The PSD aims to promote competition and harmonise the way payments are made and received in the EU. It provides conduct rules for payment services providers and customers which sets out their rights and obligations. The FSA will be responsible for supervising firms who have operations that fall within the scope of PSD.

BCOBS will apply to the business of accepting deposits and providing services in relation to deposits. In addition the FSA's Principles of Business will apply to the activities of accepting deposits and issuing electronic money.

PSD and BCOBS bring into force a new FSA banking conduct regime while at the same time replacing the non lending aspects of the Banking Code. The new banking conduct regime does not apply to all banking retail products, with credit cards and other consumer debt continuing to be regulated by the OFT in tandem with the new industry led “Lending Code”.

The former Banking Code Standards Board has been relaunched as the Lending Standards Board (LSB) as from 1 November 2009. The LSB will oversee the operation of the new Lending Code, which sets out the relationship between lenders and borrowers. Broadly speaking, the Lending Code replaces those elements of the Banking Code and Business Banking Code which relate to lending (that is, their

credit and debit elements). It will cover good practice in relation to unsecured loans, credit card lending, and current account overdrafts. The Lending Code can be accessed through the LSB's new website at:

www.lendingstandardsboard.org.uk

Guidance on Payment Services Directive implementation

The European banking industry PSD Expert Group, established by the European Banking Federation in 2007, has issued guidance on the implementation of the Payment Services Directive. The guidance is intended to assist with the interpretation and implications of certain provisions of the PSD at a practical level. The guidance will be updated by the Expert Group as matters develop.

The guidance can be found at [here](#).

Draft Consumer Credit Regulations

There are currently various draft CCA regulations out for comment. The Department for Business, Innovation and Skills (BIS) are consulting with various industry bodies and in particular the BBA and the Finance & Leasing Association (FLA). The wording contained in the draft Standard European Consumer Credit Information (SECCI) has been substantially amended, though this again has yet to be finalised by BIS.

The indications are that it is unlikely that Parliamentary Counsel will be able to scrutinise the draft regulations until March 2010. On this basis BIS are gathering feedback from industry to build a case for delaying implementation past June 2010, with October 2010 being a possible date. Watch this space.

We will shortly be publishing a number of advice notes on the draft regulations on our website to help make sense of these.

Review of the regulation of credit cards and store cards: a consultation

BIS has issued a consultation document on the regulation of credit and store cards. The consultation is open for response until 19th January 2010.

The consultation considers four aspects; the allocation of payments, minimum payments, unsolicited credit limit increases and the re-pricing of existing debt. The options considered range from no action to banning certain practices in relation to the four aspects identified.

Cheque Guarantee Card Scheme to close on 30 June 2011

The UK Payments Administration recently announced that the Cheque Guarantee Card Scheme will close on 30 June 2011. After that date it will no longer be possible to guarantee a cheque under this scheme.

The decision to close the scheme was taken by the Payments Council as the use of guaranteed cheques is in terminal decline as a result of most supermarkets in the UK and many major retailers refusing to accept such cheques.

The announcement does not mean the end of the cheque which will continue to be used, but there will be no guarantee card available for use with cheques after the closure date of 30 June 2011. Two factsheets are available on the UK Payments Administration website answering likely questions that a business or a consumer may have on this issue.

Home Owner and Debtor Protection (Scotland) Bill

The Scottish Government has recently announced its proposals to introduce a new law to protect people affected by debt. This follows on from the final report of the Repossessions Working Group which had considered whether existing legal protection for homeowners was adequate and, if necessary, to make recommendations for strengthening those protections.

The Bill which has been published on the Scottish Parliament website includes various protections such as:

- all repossession actions will require the case to call in court, except where the borrower voluntarily surrenders possession;
- all lenders to demonstrate to a court that they have taken reasonable steps to avoid repossession;
- allowing lay representation from approved organisations to make it easier for home owners to present a defence in court;
- extending the period by which a sheriff may postpone the sale of a family home by a trustee in bankruptcy from 1 to 3 years, and the inclusion, for the first time, of sales by a trustee under a trust deed within that time limit;
- allowing the exclusion of specified assets, including the family home, from protected trust deeds.

We find it difficult to see how the proposal to require every repossession case to call in court as being in the best interests of the public.

FSA discussion paper on “Consumer Responsibility”

The Financial Ombudsman Service (FoS) and the Financial Services Consumer Panel (FSCP) have both recently published their responses to the FSA's discussion paper DP08/5.

Neither organisation was supportive of the FSA's approach as they considered that the FSA were attempting to impose legal duties and obligations on the consumer. FoS commented that the FSA do not have power to impose obligations on consumers.

The discussion paper included in Annex 1 a list of actions the consumer could take which FoS stated will be helpful, but they also indicated that the list should not be taken to be “a list of things, the absence of which would automatically indicate recklessness, carelessness or failure to mitigate loss”. This is a clear indication that FoS will not necessarily find against a consumer or reduce the level of compensation to be paid to the consumer simply because they have failed to take one or more of the actions listed in the Annex.

The FSCP support the FSA concept of simple products for simple needs but stressed the need for the industry to pay more attention to product design to ensure firms deliver products that are fit for purpose and designed to genuinely serve consumer needs. Alarmingly the FSCP believe that the FSA should consider taking more action to protect consumers and this included making more rules.

Stephen John Edmund Jones v (1) Kelly Churcher and (2) Abbey National PLC [2009] EWHC 722 (QB)

This is a case which considered whether a Bank and its customer were liable in restitution where a payment was credited to its customer's account in error.

In this case Mr Jones arranged for a CHAPS payment of £42,300 to be made by Lloyds TSB to an account in name of a Company held with the Bank of Scotland. Due to an error by him in completing the CHAPS form the payment was credited to Miss Churcher's account at Abbey in mistake. The next day Mr Jones realised the payment error and various telephone calls took place between Mr Jones and Lloyds and Abbey reporting the mistake and requesting return of the money. Despite this early notification Miss Churcher withdrew most of the money and paid it to a third party. None of the money paid by Jones to Churcher by mistake was recovered.

Jones issued proceedings which were defended by both Miss Churcher and by Abbey who raised defences of change of position. The court held that both defendants were liable in restitution for the mistaken payment. The court held that Abbey had delayed taking action despite being told of the error and that steps should have been taken to retain the money pending further inquiry.

This decision emphasises the need for banks to take swift action and make relevant inquiries if they suspect that a payment has been made by mistake. Where an allegation is made that a payment has been made by mistake they should urgently make further inquiry before allowing a customer to withdraw the funds. The banks may need to consider adopting a similar practice for allegations of a payment mistake as they adopt for allegations of suspected fraud.

Serious Organised Crime Agency v Pelekanos [2009] EWHC 2307 (QB)

This was a case in which Court rejected SOCA's claims that the defendant was guilty of money laundering and drug trafficking. However, the defendant was found guilty of a number of counts of deliberately providing false information about his income on mortgage application forms.

The Court granted SOCA a civil recovery order under Part 5 of the Proceeds of Crime Act 2002 enabling SOCA to recover the value of the properties where false information had been provided.

In his concluding remarks the judge stated “As the law stands, any person, however otherwise law abiding, may be the subject of a civil recovery order if he makes a deliberately false statement in a mortgage application form. It is important that this be more widely known, and it is desirable that mortgage providers spell out this possible consequence of a misstatement in their application forms.”