expected to start proceedings, given his personal characteristics and psychological state after the injury, was properly dealt with under section 33. Applying this test, the House of Lords held the claim to be barred under section 11, but remitted the case to the judge for determining whether section 33 could apply.

The overruling of *Stubbings* is welcome. It has removed the anomaly by which a victim of an intentional trespass found herself in a weaker position than someone suffering accidental harm in situations where there had been a long delay in issuing proceedings. Happily, it has also removed the need for the victims in such cases to frame their claims in artificial ways. At the same time, the hardening of the law relating to "knowledge" within sections 11 and 14, in conjunction with the more generous approach under section 33, is likely to focus the attention of litigants on the latter. This renders even more important the way in which lower courts exercise the section 33 discretion. In view of the general reluctance of appellate courts to interfere with it, it is hoped that the approaches adopted by lower courts are consistent. Even more urgent is the hope that in the near future the entire law of limitation will receive a legislative overhaul along the lines suggested by the Law Commission in 2001 (Law Com. No. 270).

STELIOS TOFARIS

BANK CHARGES AND UNFAIR TERMS

BANKS regularly levy charges for unarranged overdrafts. Even if a customer's attempt to become overdrawn on an account without prior arrangement is blocked by a bank, the customer may still incur a charge. The Office of Fair Trading ("OFT") is investigating these "insufficient funds charges", and has found that, in 2006, over 23 per cent of active personal current accounts incurred at least one such charge (*Personal current accounts in the UK: An OFT market study* (OFT Market Study No. 1005)). The OFT plans to consider whether such charges are fair under Regulation 5 of the Unfair Terms in Consumer Contracts Regulations 1999, but first has had to establish that the banks' standard terms ("the relevant terms") relating to the imposition of insufficient funds charges are in principle subject to the fairness requirement imposed by the Regulations. *OFT* v. *Abbey National plc & others* [2008] EWHC 875 (Comm) dealt with this preliminary issue. Although opposed by seven banks and one building society ("the banks"), representing 90 per cent of all personal current accounts, the OFT was granted a declaration that the relevant terms are subject to a test of fairness.

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The crucial provision was Regulation 6(2):

"In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate –

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

Andrew Smith J. held that the relevant terms were in "plain intelligible language" except in certain specific and minor respects. Although expressing the terms as clearly as reasonably possible would not in itself have been good enough, the terms were "sufficiently clear to enable the consumer to have a proper understanding of them for sensible and practical purposes" (para. [119]). The Regulations do not impose any further burden on the banks to ensure that the customer makes a fully informed choice about whether to open a current account on the banks' standard terms.

The banks argued that a wide interpretation should be given to Regulation 6(2)(b). Although the judge found that this provision was not to be restricted to the "main subject matter of the contract" by virtue of those words appearing in Regulation 6(2)(a), he favoured a narrow interpretation of Regulation 6(2)(b): only the "core terms" of the contract, meaning the essential bargain between the parties, can be excluded from an assessment of fairness (*Director General of Fair Trading* v. *First National Bank* [2002] UKHL 52, [2002] 1 A.C. 481 applied). This gives proper effect to the goal, underlying both the Regulations and the European Directive behind it, of consumer protection. However, it remains unclear whether there is a difference between a term going to the "core" rather than the "main subject matter" of a contract.

The banks therefore needed to show that the relevant terms related to the core of the contract, and that the charges were in exchange for a service, in order to prevent those terms being subject to assessment for fairness. In those cases where the banks had considered, but rejected, a customer's attempt at unarranged borrowing, the judge held that Regulation 6(2)(b) could not apply because nothing was "supplied" to the customer, whereas when the banks did allow such borrowing, a service was supplied. The banks argued that when they allowed unarranged borrowing, Regulation 6(2)(b) applied because the insufficient funds charge was levied in exchange for either a specific service (the lending), or, alternatively, a whole package of services supplied by the banks. Andrew Smith J. rejected both alternatives. The specific service argument failed because the charges arose due to the *circumstances* in which the lending was provided, and not the actual lending itself (which was mainly paid for by interest). After all, even the banks acknowledged that there was no relationship between the

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charges imposed and the cost of the service which gave rise to those charges. Regarding the "whole package" argument, the judge found, first, that it was unrealistic to suggest that the charges were in exchange for services supplied when the account was in credit, and, secondly, that the typical customer would not recognise that the charges were the price or remuneration for those services supplied. Such a customer would assume that payment for the services provided by a bank was by lending money to the bank when in credit, and by paying interest when in debit.

The judge therefore concluded that the relevant terms, although in plain intelligible language, did not concern the adequacy of the price or remuneration charged by the banks in exchange for the services supplied. As a result, Regulation 6 does not exclude the relevant terms from an assessment of fairness under Regulation 5. Regulation 5 involves the requirement of good faith, and the banks asked for guidance regarding the meaning of this phrase. However, Andrew Smith J. felt unable to deal with the point without deciding when the contract was made, which was the relevant time for the assessment of good faith and was inappropriate for resolution in a preliminary hearing. All substantive matters regarding the fairness of the relevant terms will need to be resolved in subsequent proceedings which will actually determine the fairness of the charges.

The banks did succeed in establishing that the charges were not unenforceable penalties at common law. A customer who instructs a bank to make a payment without having the necessary funds is taken to request overdraft facilities rather than breach his contract (*Barclays Bank* v. *W J Simms & Cooke (Southern) Ltd.* [1980] 1 Q.B. 677). Since the charge does not arise upon a breach of contract, the penalty rule cannot apply. That a person is protected by the rule against penalties if he breaches his contract, but receives no protection from the common law if there is no breach, has previously been described by Lord Denning as an "absurd paradox" (*Bridge* v. *Campbell Discount Co. Ltd.* [1962] A.C. 600, 629). This should no longer cause such alarm: terms requiring payment in circumstances not amounting to a breach of contract are subject to the test of fairness under the Regulations, providing they are contained in a consumer contract.

The conclusion that the relevant terms are subject to an assessment of fairness is welcome; any other outcome would undermine the principle of consumer protection. However, the lengthy judgment only concerns the banks' present terms and (with minor exceptions) does not consider the terms the banks previously used or the vexed issues of good faith and the substantive test of fairness, concepts which remain difficult to apply. It is far from obvious that under a "free-if-in-credit" pricing structure the relevant terms and charges are unfair, and a

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future court may well not agree with the conclusion reached by the OFT (*cf. First National Bank*) or any agreement reached between the OFT and the banks regarding what charges, if any, would be fair. These issues are important, and many challenges to insufficient funds charges brought by individuals in the county courts have been stayed pending the outcome of the litigation in the High Court. Yet a speedy resolution seems unlikely; with 29 barristers involved, the banks are appealing the decision in this case. In 2006 the banks made around £2.5 billion from insufficient funds charges on an average daily unarranged overdraft of £0.6 billion (para. [415]). The banks are in no hurry for an end to this affair. Customers will still have to wait.

PAUL S. DAVIES

TOO MANY COOKS: THREE PARTIES, CONTRACTS AND UNJUST ENRICHMENT

SOMEONE else owes contractual duties to a third party. If you perform those duties, do you have any right to remuneration from that third party?

This tricky question faced the High Court of Australia in *Lumbers* v. *W Cook Builders Pty. Ltd. (in liquidation)* [2008] HCA 27. Lumbers wanted a house of "distinctive" design to be built on his land and picked a reputable firm, W Cook & Sons ("Sons"), for the job. A contract between them was duly created. Sons did much of the work itself, for which it was paid promptly by Lumbers. However, following some corporate re-organisation, Sons subcontracted a related company, W Cook and Builders ("Builders"), to complete the house. Lumbers knew nothing of Builders' involvement with the project. Therefore it must have come as rather a shock when, five years after the house was completed, he was sued by Builders, by then in liquidation, for $261,000.

Builders' most obvious claim was against Sons, not Lumbers, as they were in a direct legal relationship with Sons under the subcontract. However, Builders abandoned this claim at trial after being ordered to give security for Sons' costs. Pursuing Lumbers was more difficult. No contract linked the parties; furthermore, there was little evidence to support Builders' assertion that they had been assigned the benefit of Sons' contract with Lumbers. However, could the law of unjust enrichment provide a solution for Builders where contract law failed to do so? Builders sued for a *quantum meruit* on this basis.

In a typical two-party situation, unjust enrichment is subsidiary to any subsisting contract between the parties (see *e.g. Boake Allen* v.

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