Bank charges class action: how would that play out under new NZ consumer law, and implications for other suppliers?

April 2013

Speedread

This continues our series of articles following our piece, *New NZ Law – many consumer supply contracts potentially illegal by late 2013.*[1]

Do fees for services, such as dishonour fees for banks, or reconnection charges for Telcos and utilities, come within the forthcoming NZ unfair contract terms regime? It's a big issue as such charges can be quite a large chunk of the suppliers' revenues (for example, around 30% of the UK banks' revenues on current account services to consumers come from such bank charges).

So-called experts got it badly wrong in media comments dissing the proposed class action, as we said in our article, *Bank class action: "expert" media comments astray, and implications for service contracts.*[2] There are challenges with a class action but not for the reasons they give. One "expert" said that the regulators had unsuccessfully had a crack against the UK banks on their charges for particular services, and so such claims shouldn't succeed here. And it's true they were unsuccessful all the way up to the highest court in the UK. But that case has absolutely nothing to do with the proposed class action, as it is based on different law.

But where the UK case is particularly interesting for NZ are the pointers it has as to how bank charges and other suppliers' similar charges would be treated under the forthcoming unfair contract terms regime, as the UK case was all about similar legislation in that country. Such charges – which in the UK case were well above the actual cost of supplying the service – could escape the new regime (contrary to the likely position in Australia as our law will deviate from its source Australian law in this regard). But the key thing is that those charges would need to be transparent, in the sense used in the new legislation. We deal with the important transparency requirement at the end of this note.

Suppliers will need to structure and disclose such charges transparently. At the end of this article, we deal with that key obligation to have transparency to take advantage of the carve out.

The forthcoming NZ legislation carves out from the unfair contract terms regime, terms "*defining the main subject matter of the contract*" and "*setting the upfront price payable under the contract*". That is similar to the UK and Australian regimes. But there is a key difference between the NZ and Australian provisions. "*Upfront price*" in NZ is defined to mean consideration payable under the contract, and that includes "*consideration that is contingent upon the occurrence or non-occurrence of a particular event*". The opposite applies in Australia: consideration contingent on a particular event is not carved out from the unfair contract term regime.

Interpreting the NZ legislation in the usual way, bank charges (and similar charges in other sectors payable on a contingent event) are therefore carved out of the regime. Therefore, even if such charges are seen as excessive, they would not be struck down by the forthcoming legislation.

Bank charges class action: how would that play out under new NZ consumer law, and implications for other suppliers?

The implications for NZ of the UK position

Support for that view comes from the 2010 UK Supreme Court decision of *Director of Fair Trading v Abbey National*.[3] Such charges, when current account services are provided for free, amount to 30% of the bank's revenues. In that sense, they were said to be core charges, as they cross-subsidised the overall service. Charges due on a contingency, such as dishonour, were included in the equivalent of the upfront price. As Lord Phillips said:

> *When the relevant facts are viewed as a whole, it seems clear that the Relevant Charges [i.e. the bank fees] are not concealed default charges designed to discourage customers from overdrawing on their accounts without prior arrangement. Whatever may have been the position in the past, the Banks now rely on the Relevant Charges as an important part of the revenue that they generate from the current account services. If they did not receive the Relevant Charges they would not be able profitably to provide current account services to their customers in credit without making a charge to augment the value of the use of their funds.*

All this was known when the forthcoming legislation was drafted, and yet the NZ Bill departs from the Australian legislation on which it is based. So it may be that there is a conscious choice to exclude all such charges from the regime.

Plus, all this goes to show too the importance of looking at the contract as a whole, and not just isolated terms such as for bank charges.

Complex policy and legal issues

Having noted this, the legislation and its application is complex, and involves some difficult judgment calls. Further it is quite possible another court would not take the same line as the UK Supreme Court: its conclusions can be hotly debated. That this is a difficult area as a matter of policy and of interpretation is demonstrated by two of the Supreme Court judgments in *Abbey National*. Lord Walker said:

> *"If the Court allows this appeal the outcome may cause great disappointment and indeed dismay to a very large number of bank customers who feel that they have been subjected to unfairly high charges in respect of unauthorised overdrafts. But this decision is not the end of the matter, as Lord Phillips explains in his judgment. Moreover Ministers and Parliament may wish to consider the matter further. They decided, in an era of so called "light-touch" regulation, to transpose the [EU] Directive as it stood rather than to confer the higher degree of consumer protection afforded by the national laws of some other member states. Parliament may wish to consider whether to revisit that decision."*

Lady Hale then stated:

> *"I would only add that, should this or any other Parliament be minded to take upon the invitation given in the last paragraph of Lord Walker's judgment, it may not be easy to find a satisfactory solution. The banks may not be the most popular institutions in the country at present, but that does not mean that their methods of charging for retail banking services are necessarily unfair when viewed as a whole. As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the*

consumer from making an unwise choice. We buy all sorts of products which a sensible person might not buy and some of which are not good value for the money. We do so with our eyes open because we want the product in question more than we want the money. Should financial services be treated differently from other goods and services? Or is the real problem that we do not have a real choice because the suppliers all offer much the same product and do not compete on some of their terms?

This is the situation here. But it is not clear to me whether the proper solution is to find some way of forcing the suppliers to compete with one another in the terms they offer or whether the solution is to condemn one particular model of charging for those services. Fortunately, however, that is for Parliament and not for this Court."

Assuming the drafters of the NZ Bill are across *Abbey National*, the election here appears to be to stay with the position on charges contingent on events as set out in *Abbey National*.

Transparency requirement

This is important, and some may say provides the answer to the difficulties noted above. The carve-out applies only if the relevant price term is "*transparent*". "*Transparent*" is defined as describing the extent to which the term is:

- Expressed in reasonably plain language; and
- Legible; and
- Presented clearly; and
- Readily available to the customer.

And that is a tall order in relation to peripheral terms such as bank charges and similar charges in other sectors. That is explained in our article, *8 clauses in Telco retail contracts requiring change due to new NZ law.*[4]

1. http://www.wigleylaw.com/assets/pdfs/2013/New-NZ-Law-many-consumer-supply-contracts-potentially-illegal-by-late-2013.pdf
2. http://www.wigleylaw.com/assets/Uploads/Bank-class-action.pdf
3. [2010] 1 AC 696
4. http://www.wigleylaw.com/assets/Uploads/8-clauses-in-Telco-retail-contracts-requiring-change-due-to-new-NZ-law.pdf

Wigley+Company
PO Box 10842
Level7/107 Customhouse Quay, Wellington
T +64(4) 472 3023 E info@wigleylaw.com
and in Auckland
T +64(9) 307 5957
www.wigleylaw.com