In reaching this conclusion, the Court of Appeal was mainly motivated by the inconvenience and injustice that, in its view, would result from interpreting the leave requirement in section 329 as imposing a total bar. But in construing it narrowly, the Court was also influenced by the fact that, as an unintended consequence of the way the provision has been drafted, its main beneficiaries are not householders but the police. As Sedley L.J. put it:

> In place of the principle painstakingly established in the course of two centuries and more, and fundamental to the civil rights enjoyed by the people of this country – that an arrest must be objectively justified and that no more force may be used in effecting it than is reasonably necessary – the section gives immunity from civil suits, not confined to those involving personal injury, to constables who make arrests on entirely unreasonable grounds, and accords them impunity for all but grossly unreasonable force in doing so.

Since 1965 there has existed in this country the Law Commission; a body which, unlike headline-hungry politicians, thinks calmly about thorny legal issues, and consults with those who understand them, before formulating a response. It was to the Law Commission that the Government should have referred the problem to which it produced section 329, like a rabbit from a hat, as an instant answer. And it is to the Law Commission that the Government now should refer the mess it has, all too predictably, created.

J.R. SPENCER

BANK CHARGES IN THE SUPREME COURT

BANKS make substantial amounts of money from charging customers for becoming, or attempting to become, overdrawn on their current accounts without prior authorisation. The Office of Fair Trading ("OFT"), concerned that such charges may be unfair, agreed with the leading banks that it should be determined by the courts whether standard terms imposing these insufficient funds charges fall within the scope of, which provides an exception to the assessment of fairness Regulation 6 of the Unfair Terms in Consumer Contract Regulations 1999. Andrew Smith J. ([2008] EWHC 975 (Comm), [2008] 2 All E.R. (Comm) 625; noted [2008] C.L.J. 466) and the Court of Appeal ([2009] EWCA Civ 116, [2009] 2 W.L.R. 1286) found that they did not. The Supreme Court, unanimously, disagreed: *Office of Fair Trading* v. *Abbey National plc. and others* [2009] UKSC 6, [2009] 3 W.L.R. 1215.

Regulation 6(2) states that:

> 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.

The Supreme Court focused upon Regulation 6(2)(b). It emphasised that this provision was unaffected by Regulation 6(2)(a) and was expressed in plain terms. Contrary to the decisions of the lower courts, the Justices concluded that if a term concerned only a *part* of the price or remuneration, it should still fall within the scope of Regulation 6(2)(b). Since the charges were a part of the price the bank received in exchange for providing customers with a current account, the relevant terms could not be assessed for fairness because of Regulation 6(2)(b).

This approach represents a more literal approach to the interpretation of the Regulations than is perhaps desirable. The Regulations implement European Council Directive 93/13/EEC; the trial judge and Court of Appeal both emphasised that the purpose of the Directive, and thus the Regulations, was to ensure adequate consumer protection. A pertinent principle, not expressly articulated by any of the judges but latent in the judgments of the lower courts, is that of "unfair surprise": if a reasonable consumer would be surprised by any term, then the assessment of the fairness of that term should not be excluded by Regulation 6. A reasonable consumer may well be flabbergasted to be charged £40 for being overdrawn by £1 for only a day; the vast majority of customers do not consider insufficient funds charges to be an essential element of the contract they enter into with the bank. Sheltering such terms from a test of fairness does little to further the goal of consumer protection.

In *Director General of Fair Trading* v. *First National Bank plc*. [2001] UKHL 52, [2002] 1 A.C. 481 the House of Lords emphasised that Regulation 6 should be interpreted restrictively, and held that there is a difference between "ancillary" and "core" terms: terms "ancillary" to the "core" of the bargain should still be subject to assessment for fairness. However, in *Abbey National* the Supreme Court thought that such language was simply not helpful: the only question for the court when applying Regulation 6(2)(b) is whether the term in question relates to any part of the contractual consideration. This has the advantage of absolving the courts from difficult questions regarding what is merely "ancillary", but greatly expands the scope of Regulation 6, thereby reducing the amount of protection given to consumers.

The Supreme Court was content to allow a less restrictive interpretation of Regulation 6 since it identified the purpose of the

Regulations not to be consumer protection but rather consumer choice. This is a significant difference from the decisions below. There is no guidance from the European Court of Justice ("ECJ") on how Regulation 6 should be interpreted, but the Supreme Court nevertheless considered the matter to be *acte clair* and that there was no need to refer the issue to the ECJ. This is a dubious conclusion; after all, four experienced judges disagreed with the Supreme Court's interpretation. The Justices appear to have been influenced by the fact that both the OFT and the banks wanted to avoid any extra delay in the case. This is understandable. Less convincing is the explanation that, even if the correct interpretation of Regulation 6 is that favoured by the Court of Appeal (namely, whether or not the relevant terms were ancillary to the main bargain), then it wrongly applied the test to the facts: since the application of the Regulations is a matter of domestic law, there was no need to seek the ECJ's guidance. This might be thought to be an unsatisfactory fudge; the correct interpretation of the Regulations should be clearly understood.

Lord Phillips suggested that the OFT may still challenge the fairness of the relevant terms under the Regulations. This would be tremendously difficult, since the assessment of fairness could not relate to the services the banks provide in exchange (because of Regulation 6). Given the limited chances of such a challenge succeeding, the OFT has now stated that it will not pursue its investigation further (OFT 1154, *Personal Current Accounts – Unarranged Overdraft Charges: Decision on an investigation under the UTCCRs and next steps* (December 2009)). It seems that the OFT may now favour legislative intervention. In a similar vein, it may not be reading too much into the Supreme Court's decision to suggest that the Justices thought that insufficient funds charges should really be dealt with by Parliament rather than the judiciary, if indeed the charges are unfair. Lord Walker noted that it is open to the legislature to afford greater rights to consumers, and that other European countries, notably Germany, have chosen to do this.

It is to be hoped that the decision in *Abbey National* will prompt legislative intervention. The law regarding unfair terms in English law generally is something of a mess and can be difficult for consumers to understand; for example, the co-existence of the Regulations and the Unfair Contract Terms Act 1977 is unnecessarily complicated. A helpful first step would be to adopt the Law Commission's Report, *Unfair Terms in Contracts* (Law Com. No. 292 (2005)). The Law Commission thought that a term regarding price should only be excluded from assessment for fairness if the price is transparent, payable in circumstances substantially the same as the consumer expected, and calculated in a way substantially the same as the way the consumer reasonably expected (clause 4(3)). Although the Law Commission did

not think its proposals would alter the substance of the law, it is significant that terms imposing insufficient funds charges probably would have been subject to assessment for fairness under its scheme.

PAUL S. DAVIES

THE CONTRACTUAL NATURE OF REINSURANCE

IN *Wasa International Ins. Co. Ltd.* v. *Lexington Ins. Co.* [2009] UKHL 40, [2009] 3 W.L.R. 575 Lexington insured Alcoa, a mining company based in Massachusetts but operating throughout the United States and beyond, for a certain period of time against loss of or damage to property and business interruption risks (the primary insurance). Lexington obtained reinsurance cover on the London market for the same period on similar terms, under which various London underwriters, Wasa among them, agreed to cover Lexington's primary insurance of Alcoa. As usual the reinsurance was governed by English law.

In the early 1990s Alcoa was required by United States' environmental regulators to clean up pollution at some 35 Alcoa sites. The US Supreme Court held that the insurers on risk at the sites – including Lexington – were jointly and severally liable to Alcoa for all resulting property damage. Lexington settled Alcoa's claim in late 2003, agreeing to pay more than $103 m. The "joint and several" theory of liability applied by the Court is not one found in English law and even in the United States it applies in some but not all states. In London, Wasa commenced proceedings seeking negative declaratory relief. Lexington cross-claimed for sums due under the reinsurance policy.

The House of Lords held that the reinsurers were not bound by the settlement. To reach this conclusion the House had to decide various points specific to the case and, bearing in mind that London is a leading world market for reinsurance, one of considerable general importance – the essential nature of reinsurance itself.

One view of reinsurance is that it "is not an insurance of the primary insurer's potential liability or disbursement" but "an independent contract between reinsured and reinsurer in which the subject-matter of the insurance is the same as that of the primary insurance" (*Charter Re* v. *Fagan* [1997] A.C. 313, 392, *per* Lord Hoffmann). Lord Mustill expressed a similar view (*ibid*, 387). In spite of such powerful opinion the issue has not been regarded as sufficiently settled (see for example the scholarly judgment of the New South Wales Supreme Court in *New Cap Reinsurance* v. *Grant* [2008] NSWSC 1015, (2008) 221 F.L.R. 164).