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Should Scottish bank charges claims be sisted pending the outcome of the OFT's English High Court case?

This note summarises the law in Scotland on the sisting or staying of civil proceedings pending the determination of another similar or identical case.

It makes particular reference to the issue of sheriff court claims for unfair bank charges in relation to the OFT's English High Court case against the Abbey National, Barclays, Clydesdale Bank, HBOS, HSBC, Lloyds TSB, Royal Bank of Scotland and Nationwide Building Society.

This note is provided for information only and must not be relied upon as professional legal advice. Claimants should obtain their own professional legal advice having regard to the particular facts and circumstances of their own case.

1. The general principle of civil procedure in Scotland is that an action should be litigated without interruption to a conclusion and that each party is entitled to insist upon the cause proceeding to judgment. Support for this view comes from **Connell v Grierson**, 1865 3 M 1166 at 1167 where Lord Deas said:

"Prima facie it is a matter of right to either party to insist upon the cause going on, and the onus lies on him who wishes to stop".

The onus is therefore on the bank to persuade the sheriff that a case should be sisted.

2. The general rule established from the case of **Clydesdale Bank v D & H Cohen**, 1943 SC 244 is that it is improper to sist a case pending the outcome of a similar one until the pleadings in both actions have been fully adjusted (i.e. finalised and closed). This decision has been upheld by the Inner House of the Court of Session and is therefore binding across Scotland.

In Cohen, an action was raised in the Sheriff Court at the instance of a bank against the guarantor of one of their customers. Subsequently the customer

brought an action in the Court of Session against the bank for reduction of a debit entry in its current account. Before the record (the written pleadings) in either action had been closed the defenders in the first action moved that it be sisted. The motion was refused by the sheriff *in hoc statu* (at this stage in the proceedings). That decision was upheld by the Second Division with the observation that it would be open to the defenders to renew their motion "at the appropriate stage".

The OFT case has just commenced its proceedings at the end of July 2007. Early next year parties will look at the preliminary procedural matter of whether the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR) apply to bank charges. If the court finds that they do, the case will then go on to look at the substantive issue of 'fairness' in terms of the UTCCR. Accordingly, it may take a year or more before the pleadings are fully adjusted.

The rule in **Cohen** has been upheld in the following cases: **N G Napier Ltd v Corbett**, 1963 70 Sh Ct Reps 23 and **Maley v Scottish Ministers**, the Sheriff Principal of Glasgow & Strathkelvin, 31 March 2004; reference to the rule has been made in **Higgins v Glasgow Corporation**, 1954 SLT (Sh Ct) 73 and **Purves v North British Railway Co**, 1848 10 D 853.

The leading civil court textbook in Scotland is Macphail *Sheriff Court Practice* 2nd Ed. Macphail states at para 13.73 that:

"Whether it is ... appropriate to sist a cause to await the decision in another action is a question of circumstances. It is in any event improper to sist until the pleadings in both actions are fully adjusted".

3. In **Maley v Scottish Ministers** (*cited supra*), Sheriff Principal Bowen QC found that the sheriff had misdirected himself in refusing to recall a sist in one of the 'slopping out' damages actions from HMP Barlinnie.

The sist had been granted pending judgment being issued in the case of **Napier v Scottish Ministers** (which was before the Court of Session). The sheriff had based his decision on the fact **Napier** had already heard 6 weeks of evidence and the written judgment was now expected; the current action raised the same issues; the outcome in **Napier** may make a proof in the current case futile; and the sheriff distinguished (and failed to apply) the decision in **Cohen**.

Sheriff Principal Bowen QC held that the sheriff had erred in law. He was then able to reconsider the matter afresh himself. Although the sheriff

principal decided to allow the action to remain sisted he did so because there were special circumstances: there were a multiplicity of actions with extensive pleadings in identical terms which raised fundamental issues of public law; allowing individual cases to progress could take up significant court resources – much of which could be unnecessary if the **Napier** decision reduced the areas of dispute; and bearing in mind the **Napier** hearing had concluded and written judgment was now imminent, the present case should remain sisted. That said the sheriff principal did not find the decision an easy one to make.

Applying these Scots law principles to the OFT High Court case and claims for bank charge refunds in Scotland, the following issues can be identified:

- (a) the OFT's case is at a very early stage and the written pleadings are unlikely to be fully adjusted for at least a year if not more given the complexity of dealing first with preliminary legal issues, dealing with multiple litigants all with different terms and conditions of contract, and all with different terms and conditions as revised over the years. The rule in **Cohen** applies and it is improper to sist a small claim in Scotland pending the English OFT case;
- (b) the OFT's case is primarily concerned with the application of the UTCCR and the issue of fairness in terms of regulation 5 (the OFT's statutory remit arises from the UTCCR, and the agreement between the 7 banks and the OFT dated 25 July 2007 expressly states the focus of the case: http://www.of.gov.uk/shared_of/press_release_attachments/bankagreement.pdf).

Accordingly, if a claim in Scotland can be determined on the law of penalty charges at Scots common law, the OFT case is not a 'test case' in relation to such claims. There is little point in waiting for the outcome of the OFT case, as it is cannot be determinative of a common law case in Scotland.

Claimants should check to see whether their bank's terms and conditions make reference to charges being applied in the event of a breach of contract (i.e. failing to adhere to the bank's terms and conditions – for example see the terms and conditions of HBOS, Clydesdale or the Abbey – that list is not exhaustive);

- (c) any claim founding on the law of penalty charges at Scots common law cannot be determined by a decision of the English High Court, as this decision is potentially persuasive and not binding. Moreover, as the OFT case is not looking at the Scottish common law position, the OFT case is of

minor relevance to common law claims in Scotland. In essence the OFT's case is a public law action, whereas an individual's claim at common law is a private law action based on their own particular facts and circumstances. Accordingly, allowing a common law claim to proceed is the proper course of action, and cannot be seen as a potential waste of court resources;

- (d) allowing a common law claim to progress will not take up significant court time as it is now within judicial knowledge that the UK banks have settled almost all claims prior to an evidential hearing. In the instance of a small claim written pleadings are relatively expedited, so allowing a small claim founding on Scots common law to progress will not result in any unnecessary duplication of court time in relation to the English High Court action;
- (e) Unlike in **Maley v Scottish Ministers** there is no imminent written judgment expected from a higher Scottish court capable of resolving common law claims. Instead, we have an action before the English High Court at an early stage, notwithstanding the desire to fast track. The OFT agreement with the banks makes clear provision for the possibility of appeals to the English Court of Appeal, House of Lords and European Court of Justice. The OFT case if appealed by either one of the eight litigants could take three to five years to be determined. Given that small claim litigants in Scotland are pursuing very modest sums of money it is inequitable and inappropriate to deny litigants access to the judgment of the court; and to do so may also dissuade potential litigants who may find themselves timebarred.

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17 August 2007