

Gordian knots in Europeanised private law: unfair terms, bank charges and political compromises

JAMES P DEVENNEY*

Durham University

Introduction

In recent years there has been a significant amount of public concern in the United Kingdom about the charges levied by banks on personal account holders in respect of unauthorised overdrafts (and similar charges¹).² Indeed, it would appear that many of these account holders made complaints about such charges to the Office of Fair Trading (OFT).³ Moreover it seems that “many thousands”⁴ of these account holders have challenged such charges on the ground, inter alia, that they are unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations),⁵ the regulations which, as is well known, seek to transpose the (minimum harmonisation) EC Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (the Directive).⁶

In early 2007 the OFT commenced an investigation into such charges.⁷ It quickly transpired that a key issue related to whether or not Regulation 6(2) circumscribed any claim that the charges were unfair for the purposes of the Regulations. Regulation 6(2) owes its existence to Article 4(2) of the Directive. Article 4(2) provides:

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied [*vis*] in exchange, on the other, in so far as these terms are in plain intelligible language.

* Director, Durham University Institute of Commercial and Corporate Law. I would like to thank Dr Mel Kenny, Claire Devenney, Richard Coleman, Dr Amandine Garde, Dr Warren Swain and Karen Fairweather for their assistance. The usual caveats apply.

1 A useful summary of which can be found in the OFT’s joint reply and defence to the counterclaims (dated 11 November 2007) in *OFT v Abbey National plc* [2008] EWHC 875 (Comm), which is available at www.of.gov.uk/shared_of/personal-current-accounts/OFTs-joint-reply-and-def.pdf.

2 See, for example, OFT, *Personal Current Accounts in the UK* (OFT 918, April 2007), p. 2, which was followed by, inter alia, OFT, *Personal Current Accounts in the UK: A market study* (OFT 1005, July 2008).

3 *Ibid.*

4 *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, para. 17, per Lord Walker.

5 See, for example, the narrative in *OFT v Abbey National plc* [2008] EWHC 875 (Comm), para. 2, per Andrew Smith J.

6 (1993) OJ L95/29. In relation to the consequences of the Directive being one of minimum harmonisation, see *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios* C-484/08, [2010] 3 CMLR 43.

7 See, for example, www.of.gov.uk/news-and-updates/press/2007/67-07.

Ultimately, the OFT issued proceedings, against (and with the agreement of) various banks and building societies (the banks), centring on the correct interpretation of Regulation 6(2) and its contention that Regulation 6(2) did not circumscribe any claim that the relevant charges were unfair for the purposes of the Regulations.⁸ The issue was, for a period of time, considerably widened by the banks' counterclaim to include, for example, issues relating to whether or not the common law rule against penalties was engaged; yet, ultimately, the case focused on the Regulations. At first instance,⁹ and in the Court of Appeal,¹⁰ it was held (albeit for different reasons) that Regulation 6(2) did not prevent the relevant charges from being characterised as unfair under the Regulations.

Nevertheless a further appeal by the banks was subsequently allowed by the Supreme Court,¹¹ the immediate aftermath of which was that the OFT decided not to pursue its investigation into such terms under the Regulations.¹² This paper seeks to analyse the decision of the Supreme Court in *OFT v Abbey National plc*, and its implications for the Europeanisation of private law. More specifically this paper presents the decision of the Supreme Court in *Abbey* as another example of the uneven interpretation of the Regulations, and by implication the Directive, in the United Kingdom. Yet there is a wider issue in *Abbey*, viz. the potential impact of political compromises on EU harmonisation agendas; in particular it is argued that Article 4(2) is, essentially, an uneasy and somewhat opaque political compromise provision, the knot of which is only exacerbated by the backdrop of the (almost) chameleonic rationalisations of EU legislation in the consumer arena. Indeed, even leaving aside the evolving nature of internal market considerations,¹³ the courts of the Member States are only provided with, at best, vague co-ordinates on how to interpret Article 4(2). In such circumstances, a robust and efficient reference process to the European Court of Justice, to act as a compass, seems essential. Yet *Abbey* reveals a real reluctance on the part of the Supreme Court to refer this issue to the European Court of Justice, and this paper also explores some of the possible reasons behind such a stance.

The Unfair Terms in Consumer Contracts Regulations 1999

At the outset, it will be helpful to briefly outline the Unfair Terms in Consumer Contract Regulations 1999. As noted above, these Regulations seek to transpose the (minimum harmonisation) EC Council Directive on Unfair Terms in Consumer Contracts.¹⁴ In general

8 *OFT v Abbey National plc* [2009] UKSC 6, para. 18, per Lord Walker.

9 [2008] EWHC 875 (Comm).

10 [2009] EWCA Civ 116.

11 [2009] UKSC 6.

12 See www.offt.gov.uk/news-and-updates/press/2009/144-09 where the following is stated: "After detailed consideration of the judgment and of the various options available to it, the OFT has concluded that any investigation it were to continue into the fairness of current unarranged overdraft charging terms under the UTCCRs [the Regulations] would have a very limited scope and low prospects of success. Given this, it has decided against taking forward such an investigation. The OFT nevertheless continues to have significant concerns about the operation of the market for personal current accounts. Despite some recent and planned improvements by banks, particularly around transparency and customer switching, it believes fundamental changes are still required for the market to work in the best interests of bank customers. Banks earn around a third of their personal current account revenues from unarranged overdraft charges that are difficult to understand, not transparent and not subject to effective consumer control."

13 Cf. J H H Weiler, "The transformation of Europe" (1991) 100 *Yale Law Journal* 2043; L W Gormley, "Competition and free movement: is the internal market the same as the Common Market?" (2002) *EBL Rev* 522.

14 93/13/EEC.

terms, these freestanding Regulations follow closely the wording of the Directive.¹⁵ Regulation 4 states that the Regulations deal with “unfair terms in contracts concluded between a seller or a supplier and a consumer”; and Regulation 8 states that an “unfair term” is not binding on the consumer. A seller/supplier is defined as “any natural or legal person who . . . is acting for purposes relating to his trade, business or profession” whereas a consumer is defined as “any natural person who . . . is acting for purposes which are outside his trade, business or profession”.¹⁶ Regulation 5(1) (which is supplemented by an indicative but non-exhaustive list of the terms which might be regarded as unfair)¹⁷ states that:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

The test of “unfairness” in Regulation 5 is circumscribed by other parts of the Regulations. In particular, Regulation 6(2) provides:

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.

It was Regulation 6(2) which was at the centre of the bank charges litigation.

The bank charges litigation

The OFT is empowered to make collective challenges to unfair terms under the Regulations, as is envisaged by Article 7 of the Directive.¹⁸ Article 7 of the Directive provides:

Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers . . . The means . . . shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action . . . for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

As noted above, in 2007 the OFT issued proceedings, against (and with the agreement of) various banks and building societies, centring on the correct interpretation of Regulation 6(2) and its contention that Regulation 6(2) did not circumscribe any claim that the relevant charges were unfair for the purposes of the Regulations.¹⁹ At first instance, Andrew Smith J held that the relevant terms were not protected by Regulation 6(2) from being characterised as unfair under the Regulations; in particular the learned judge, focusing on the wording of Regulation 6(2), felt that the charges were not paid *in exchange* for any

15 The Explanatory Notes to the Regulations state: “These Regulations revoke and replace the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994/3159) which came into force on 1st July 1995. Those Regulations implemented Council Directive 93/13/EEC on unfair terms in consumer contracts (O.J. No. L95, 21.4.93, p. 29). Regulations 3 to 9 of these Regulations re-enact regulations 2 to 7 of the 1994 Regulations with modifications to reflect more closely the wording of the Directive.”

16 Regulation 3.

17 Schedule 2.

18 See also Enterprise Act 2002, Part 1.

19 *OFT v Abbey National plc* [2009] UKSC 6, para. 18, per Lord Walker.

services.²⁰ Such a stance is particularly attractive in relation to so-called “unpaid item charges” where a bank *refuses to* honour an instruction (and thereby provide a “service”) on an account with insufficient funds for the instruction.²¹

The Court of Appeal²² dismissed the appeal²³ although its reasoning did not entirely match the reasoning of the learned judge. Essentially, the Court of Appeal, taking its lead from *Director General of Fair Trading v First National Bank plc*,²⁴ made a distinction between core and ancillary terms, only the former of which come within Regulation 6(2);²⁵ and held that the charges in question were ancillary terms and, hence, not covered by Regulation 6(2).²⁶ Nevertheless a further appeal by the banks was subsequently allowed by the Supreme Court.

Regulation 6(2)

Before considering the judgment of the Supreme Court in *OFT v Abbey National plc*, it is helpful to identify a number of issues which arise in relation to Regulation 6(2). The first issue which arises in relation to Regulation 6(2) concerns the rationale behind Article 4(2)²⁷ of the Directive (the Article which Regulation 6(2) seeks to transpose). One of the difficulties here is that the language employed by Article 4(2) and Recital (19)²⁸ of the Directive is not particularly helpful in this regard; indeed it is, perhaps, unsurprising that this should be so given that the legislative history of Article 4(2) reveals that it is essentially a, not entirely comfortable,²⁹ compromise provision.³⁰ Nevertheless, in general terms it seems that Article 4(2) owes its genesis to the distinction between core terms and ancillary terms found in the German Standard Contracts Act 1976;³¹ the essential idea being that in a general sense there is only real consent to core terms.³²

20 At paras 406–9 the learned judge stated: “In reality they are not charges in exchange for services involved in making payments, but charges levied because the services are supplied in particular circumstances. While the Banks’ evidence shows that additional processes are involved if the customer gives a payment instruction when he does not have funds or a facility to cover it, these are not explained in the documentation provided to customers and, even if the typical customer would suppose that this might be the case, the contract does not identify these additional processes as being provided in exchange for the charges . . . Undoubtedly, as the Banks point out, when a bank makes arrangements with a customer in advance for an overdraft facility, the customer might incur an arrangement fee for the facility as well as interest, but typically the fee for the facility is charged regardless of whether it is used and the interest is charged for the borrowing itself. Clearly the Relevant Charges are not levied in exchange for a facility in that sense.”

21 See *OFT v Abbey National plc* [2008] EWHC 875 (Comm), para. 403, per Andrew Smith J.

22 Sir Anthony Clarke MR, Lord Justice Waller V-P and Lloyd LJ.

23 [2009] EWCA Civ 116.

24 [2001] UKHL 52.

25 [2009] EWCA Civ 116, para. 69.

26 *Ibid.* para. 104.

27 Cf. M Chen Wishart, “Transparency and fairness in bank charges” (2010) 126 *Law Quarterly Review* 157.

28 Recital (19) states: “Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, *inter alia*, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer.”

29 Cf. also T Hartley, “Five forms of uncertainty in European Community law” (1996) *Cambridge Law Journal* 265.

30 Cf. H-W Micklitz, *The Politics of Judicial Co-Operation in the EU* (Cambridge: CUP 2005), p. 360.

31 See the excellent discussion in C Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot: Ashgate 2007), pp. 245–53.

32 A de Moor, “Common and civil law conceptions of contract and a European law of contract: the case of the Directive on Unfair Terms in Consumer Contracts” (1995) 3 *European Review of Private Law* 257, p. 268.

The second issue relates to the effect of Regulation 6(2). More specifically, it is debatable whether Regulation 6(2), where applicable, prohibits *any* claim that the term in question is “unfair” under the Regulations, or whether it *only* prohibits a claim that the term in question is “unfair” under the Regulations *on the ground* that it is, in effect, substantively unfair. The former construction might be classified as an “excluded term” approach, whereas the latter construction might be classified as an “excluded assessment” approach.³³ Here again the language employed by Article 4(2) and Recital (19) of the Directive, and Regulation 6(2), is not particularly helpful: Recital (19) arguably tends to the “excluded term” construction whereas Article 4(2) (and consequently Regulation 6(2)) arguably tends to an “excluded assessment” construction. Presumably, however, if the rationale suggested above for Regulation 6(2) is correct, then an “excluded assessment” construction should be adopted on the basis there may not be true consent to terms which were, for example, procured, in effect, by procedural unconscionability.³⁴

The third issue relates to the effect of the introductory words of Regulation 6(2) (“[i]n so far as it is in plain intelligible language”): does this mean that if a term which would normally be covered by the exception in Regulation 6(2) is not “in plain intelligible language”, the exception (whatever its parameters) provided by Regulation 6(2) ceases to be applicable? Again, presumably, if the rationale suggested above for Regulation 6(2) is correct, then it can be argued that the exception found in Regulation 6(2) does not necessarily apply at all as there may not have been, or at least there is a risk that there will not have been, true consent.³⁵ Indeed, this is the *result* that the Supreme Court in *Abbey*³⁶ tended towards when dealing with the problematic case of *OFT v Foxtons*.³⁷

The fourth issue relates to the applicability of Regulation 6(2). In particular, *if* (as seems to be the case)³⁸ Regulation 6(2) focuses on particular terms, *which* terms relate to “the price or remuneration”? In a sense, of course, all terms which confer a benefit on the seller/supplier, or impose a burden on the consumer, constitute part of “the price or remuneration”. Yet if such an interpretation were adopted in conjunction with an “excluded term” approach, the Directive (and the Regulations) would be almost redundant; and if such an interpretation were adopted in conjunction with an “excluded assessment” approach, the Directive (and the Regulations) would provide little, if any, relief against, so-called, substantive unfairness (which contrasts uncomfortably with some of the terms in the Schedule 2 grey-list).³⁹ Thus, the important point for this paper is that there must be some means of distinguishing between those parts of “the price or remuneration” (in its widest sense) which attract the attention of Regulation 6(2) and those parts which do not.

The narrow issue before the Supreme Court

The Supreme Court in *Abbey* was at pains to stress⁴⁰ that the appeal before it only concerned a relatively narrow issue, *viz.* whether or not it would be *possible*, at some point, for the OFT to challenge, under the Regulations, the relevant charges on the ground that they were, or might be, excessive in comparison to the services supplied in return. Indeed, Lord Phillips came close to allowing the appeal *partly* on a technical point of pleading: His

33 See *OFT v Abbey National plc* [2009] UKSC 6, paras 60–1, per Lord Phillips.

34 Willett, *Fairness in Consumer Contracts*, n. 31 above, pp. 245–53.

35 *Ibid.* p. 246.

36 See para. 37.

37 [2009] EWHC 1681.

38 E Peel, *Treitel: The Law of Contract* (London: Sweet & Maxwell 2007), p. 296.

39 See, for example, Schedule 2, 1(f).

40 See, for example, *OFT v Abbey National plc* [2009] UKSC 6, para. 3, per Lord Walker.

Lordship felt that the charges were not charges for individual services but were part of the banks' overall remuneration for the package of services provided to relevant customers (and, in Lord Phillips' opinion, the OFT had not sought to question the banks' overall charges);⁴¹ and therefore any claim that the charges were excessive, in comparison to the individual services which triggered those charges, was essentially misconceived.⁴²

On this basis, the issue of whether or not the relevant charges were unfair for the purposes of the Regulations was not directly at issue in the appeal. Nevertheless, as noted above, the Supreme Court did *seem* to prefer the "excluded assessment" approach to Regulation 6(2)⁴³ and it did, tantalisingly yet opaquely, suggest that – despite its finding that Regulation 6(2) prevented the OFT from claiming that the relevant charges were excessive in comparison to the services supplied in return – a challenge under the Regulations was still possible.⁴⁴ One might, therefore, take issue (notwithstanding any constraints in terms of pleadings) with the narrow approach of the Supreme Court on two grounds.

First, we were told that there were "many thousands"⁴⁵ of cases against banks, concerning the issue of whether or not the charges in question were unfair, stayed in the County Courts pending a decision in *Abbey*. Yet the narrow (even technical) approach of the Supreme Court in *Abbey*, combined with the fact that it seemed to leave the door open to challenging the relevant charges under the Regulations, does little for the effective case management of such claims (often brought by litigants in person).⁴⁶ As we shall see below, it is, therefore, ironic that the Supreme Court argued – as a reason not to make a reference to the European Court of Justice – that there was a "public interest" in resolving the issue quickly given, for example, the number of stayed cases awaiting its decision.⁴⁷

The second issue concerns the impact of the decision of the European Court of Justice in *Océano Group Editorial SA v Murciano Quintero*⁴⁸ relating to the issue of whether a national court could unilaterally raise the issue of unfairness (in the sense provided for by the Directive). The European Court of Justice noted:

As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms . . . *the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.*⁴⁹

41 See *OFT v Abbey National plc* [2009] UKSC 6, para. 64 and, particularly, para. 91.

42 See *ibid.* paras 62–3 and 89–91.

43 See *ibid.* para. 52, per Lord Walker, paras 61 and 91, per Lord Phillips, and, most clearly, para. 95, per Lord Mance.

44 See *ibid.* para. 52, per Lord Walker.

45 *Ibid.* para. 17, per Lord Walker.

46 *Ibid.*

47 See n. 169 below and text thereto.

48 C-240/98 to C-244/98.

49 *Ibid.* paras 25–9 (emphasis added).

Océano Group Editorial SA v Murciano Quintero, of course, concerned a jurisdiction clause; yet it is not limited to such clauses.⁵⁰ The rationale for national courts being able, and indeed it now seems *required*,⁵¹ to unilaterally raise the issue of fairness was set out in the following terms:

The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term . . . It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion . . . As the French Government has pointed out, it is hardly conceivable that, in a system requiring the implementation of specific group actions of a preventive nature intended to put a stop to unfair terms detrimental to consumers' interests, a court hearing a dispute on a specific contract containing an unfair term should not be able to set aside application of the relevant term solely because the consumer has not raised the fact that it is unfair. On the contrary, the court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.⁵²

In this spirit – and given the case management issue in the background – it is clearly arguable that the Supreme Court should have addressed the question of unfairness in *greater* detail.

Regulation 6(2) in the Supreme Court

APPROACH TO INTERPRETATION

The approach which national courts adopt when interpreting legislation which seeks to transpose an EU Directive will impact, of course, on the strength and depth of the EU harmonisation agenda.⁵³ Accordingly, it is axiomatic that national courts, normally, must adopt an “EU” approach to the interpretation of such implementing legislation: thus, for example, national courts are required to safeguard the effectiveness of the Directive in question⁵⁴ and are often required to give concepts used in directives “an autonomous and

50 Cf. *Cofidis SA v Fredout* Case C-473/2000.

51 See S Whittaker, “Judicial interventionism and consumer contracts” (2001) 117 *LQR* 215, p. 217. More recently, in *Pannon GSM Zrt v Erzsébet Sustikéné Győrfi*, C-243/08 the European Court of Justice stated (at para. 35): “The reply, therefore, to the second question is that the national court is *required* to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.” (emphasis added).

52 C-240/98 to C-244/98, paras 26–8.

53 Cf. A Colombi Ciacchi, “Non-legislative harmonisation of private law under the European constitution: the case of unfair suretyships” (2005) 13 *European Review of Private Law* 297.

54 Cf. Case 6/64 *Flaminio v ENEL* [1964] ECR 585.

uniform interpretation”.⁵⁵ Yet, subject to these overriding obligations, as noted below⁵⁶ directives *may* provide a unique opportunity to develop national law, and meet EU obligations, in a coherent manner (albeit that this opportunity is not always exploited).⁵⁷

At times the courts of England and Wales have taken, what seems like, a quintessentially EU approach to interpreting the Regulations. For example, in *R (on the application of Khatun) v Newham LBC*,⁵⁸ where the Court of Appeal essentially had to consider whether or not the Regulations were applicable to land transaction, Laws LJ concluded:

As for the bite of the various materials I have cited, I consider that the OFT had the better of the argument. First, Mr Underwood’s seemingly strong point on the language – that “goods and services” does not include land – is effectively demolished by the impact of the other language texts. “Biens” and its cognates in Italian, Spanish and Portuguese refer to immovables as readily as movables. This alone undercuts a good deal of what Mr Underwood had to say. But more than this: I think, with respect to Mr Underwood, that other aspects of his submissions on this part of the case place an implicit but illegitimate reliance on the large divide in the law of England between real and personal property. He submitted that the Directive should be interpreted as only applying to “contracts for goods and services as an English lawyer would understand those terms”. There is plainly no general principle to support such a proposition. Quite the contrary: European legislation has to be read as a single corpus of law binding across the member states. And the proposition leads to absurdity. A licence of land, which transfers no estate, might be covered by the Directive (as the provision of a service), but a lease or tenancy would not. The sale of a fixture, which by English law is treated as part of the land, would be excluded, but the sale of an identical object – say a statue – which was not fixed to the land would be included. In our domestic law these distinctions have a long history and a present utility. In the context of a Europe-wide scheme of consumer protection, they could be nothing but an embarrassing eccentricity.⁵⁹

Yet, overall, the approach to the interpretation of the Regulations (and, therefore, the Directive) by the Courts in England and Wales is a little uneven.⁶⁰ This point can be illustrated by reference to the case law in England and Wales on the vexed question of whether or not the Regulations apply to non-professional surety transactions.⁶¹ From a literal point of view, a difficulty with applying the Regulations to such transactions is that

55 See, for example, *Case C-287/98 Luxembourg v Linster* [2000] ECR I-6917, para. 43.

56 See text after n. 192 below.

57 Cf. G Teubner, “Legal irritants: good faith in British law or how unifying law ends up in new divergences” (1998) 61 *Modern Law Review* 11.

58 [2004] EWCA Civ 55.

59 *Ibid.* para. 78.

60 See also, for example, the European Commission’s *Report on Directive 93/13/EEC on Unfair Terms in Consumer Contracts* (Com (2000) 248 final), at p. 32, rather optimistically noted that: “An analysis of CLAB [European database on unfair terms in consumer contracts] shows that already 4.4% of the judgments handed down by national courts in the field covered by the Directive refer to the Community text. At the current stage of European construction this is a figure to be proud of and reflects the progressive impact of Community law on the national legal orders.” At p. 34 it is noted that: “National courts could have referred many cases to the Court of Justice for a preliminary ruling and it would have been very useful if the judgments of Court of Justice had been able to cast light on the scope of some of the Directive’s more obscure provisions. Indeed the doctrine reveals the reluctance of the national courts to refer cases to the Court of Justice in this legal field.”

61 See G McCormack, “Protection of surety guarantors in England – prophylactics and procedure” in A Colombi Ciacchi (ed.), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity* (Germany: Nomos 2007), pp. 172–3.

(assuming that the non-professional surety can be classified as a “consumer” for the purposes of the Regulations) it is the non-professional surety *who supplies the service*; whereas the creditor, as beneficiary of the agreement, will usually be acting in the course of business.⁶² Therefore, this question is part of the much wider debate as to whether or not, for the purposes of the Regulations, the consumer must be the *recipient of goods or services*.⁶³

Support for the view that the Regulations do apply to surety transactions can be found in the Opinion of the European Court of Justice in *Bayerische Hypothekbank v Dietzinger*.⁶⁴ In that case the European Court of Justice had to consider the applicability of Council Directive 85/577/EEC (on contracts negotiated away from business premises) – which applies to particular situations where “a trader supplies goods or services to a consumer”⁶⁵ – to surety transactions. In a judgment, which is not without controversy,⁶⁶ the European Court of Justice stated that:

... it is apparent from the wording of Article 1 of Directive 85/577 and from the ancillary nature of guarantees that the directive covers only a guarantee ancillary to a contract whereby, in the context of “doorstep selling”, a consumer assumes obligations towards the trader with a view to obtaining goods or services from him. Furthermore, since the directive is designed to protect only consumers, a guarantee comes within the scope of the directive only where, in accordance with the first indent of Article 2, the guarantor has entered into a commitment for a purpose which can be regarded as unconnected with his trade or profession.⁶⁷

In reaching this conclusion – which gives a glimpse of how the European Court of Justice might approach this issue in the context of the Directive⁶⁸ – the European Court of Justice noted that nothing in the directive required “the person concluding the contract under which goods or services are to be supplied be the person to whom they are supplied”⁶⁹ and that surety agreements are merely ancillary to the main contract.⁷⁰

Returning to the jurisprudence in England and Wales, in *Barclays Bank plc v Kufner*,⁷¹ Field J – relying heavily on the Opinion of the European Court of Justice in *Bayerische Hypothekbank v Dietzinger*⁷² – held that surety transactions are not excluded from the scope of the Regulations.⁷³ By contrast in *Bank of Scotland v Singh*,⁷⁴ Judge Kershaw QC, apparently

62 See also J O’Donovan and J Phillips, *The Modern Contract of Guarantee* (London: Sweet & Maxwell 2003), p. 223.

63 Cf. H G Beale (ed.), *Chitty on Contracts* 30th edn (London: Sweet & Maxwell 2008), para. 15-032.

64 Case C-45/96 [1998] ECR I-1199.

65 Article 1.

66 See M Kenny, “Standing Surety in Europe: Common Core or Tower of Babel” (2007) *Modern Law Review* 175, p. 180.

67 Case C-45/96 [1998] ECR I-1199, para. 20. Although cf. *Berliner Kindl Brauerei AG v Andreas Siepert* [2000] ECR I-1741, paras 25–6 where the European Court of Justice, in considering Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit, noted: “...the scope of the Directive cannot be widened to cover contracts of guarantee solely on the ground that such agreements are ancillary to the principal agreement whose performance they underwrite, since there is no support for such an interpretation in the wording of the Directive ... or in its scheme and aims”.

68 See. Beale (ed.), *Chitty on Contracts*, n. 63 above, paras 44–139.

69 Case C-45/96 [1998] ECR I-1199, para. 19.

70 *Ibid.* para. 18.

71 [2008] EWHC 2319 (Comm).

72 Case C-45/96 [1998] ECR I-1199.

73 [2008] EWHC 2319 (Comm), para. 28.

74 QBD, unreported, 17 June 2005.

operating closer to the actual wording of the Regulations, held that the Regulations did not apply to surety transactions and his view has subsequently been described as “compelling”⁷⁵ and “convincing”.⁷⁶

This unevenness of approach is also evidenced by the Judgment of the Supreme Court in *OFT v Abbey National plc*. Although the Supreme Court, unsurprisingly, accepted that a purposive approach to interpretation should be adopted in relation to the Regulations,⁷⁷ the extent to which it successfully did so is debatable. For example, Lord Walker (with whom Lord Phillips, Lady Hale and Lord Neuberger expressed agreement), whilst (entirely appropriately) referring to both the Regulations and the text of the Directive, seems to have adopted a largely literal interpretation of the relevant provisions. Thus, His Lordship stated:

When one turns to the other part of the *quid pro quo* of a consumer contract, the price or remuneration, the difficulty of deciding which prices are essential is just the same, and Regulation 6(2)(b) contains no indication that only an “essential” price or remuneration is relevant. Any monetary price or remuneration payable under the contract would naturally fall within the language of paragraph (b) (I discount the absence of a reference to part of the price or remuneration for reasons already mentioned).⁷⁸

It is, of course, true that Lord Walker later noted that he believed his conclusions were in line with the *travaux préparatoires*.⁷⁹ In so doing, Lord Walker made a distinction between consumer protection and consumer choice; and referred, with apparent approval,⁸⁰ to an article by Professor Hugh Collins⁸¹ which stated:

The Directive does not require consumer contracts to be substantively fair, but it does require them to be clear. Clarity is essential for effective market competition between terms. What matters primarily for EC contract law is consumer choice, not consumer rights.⁸²

Yet, with respect (and ignoring Lord Walker’s apparent, possibly uneasy, conflation of “consumer choice” and “clarity”), such a view does not seem to do full justice to the different facets of the Directive (and consequently the Regulations). More specifically, the reach of the Directive and the Regulations is not limited to terms which are not in plain intelligible language;⁸³ nor is it possible to say that substantive unfairness is not relevant under the Directive or the Regulations (although the *extent* to which it is relevant might be, of course, intensely debated⁸⁴).⁸⁵ The backdrop to this discussion is, of course, the much-debated⁸⁶ issue of the purpose, and, indeed, the extent of the competence, of EU legislation in the consumer arena. Over the years various bases for EU legislation in this area

75 *Manches LLP v Carl Freer* [2006] EWHC 991, para. 25, per Judge Philip Price QC.

76 *Williamson v Governor of the Bank of Scotland* [2006] EWHC 1289, para. 46, per George Bompas QC, sitting as a deputy judge.

77 *OFT v Abbey National plc* [2009] UKSC 6, see, for example, para. 38, per Lord Walker.

78 *Ibid.* para. 41.

79 *Ibid.* para. 44.

80 *Ibid.*

81 H Collins, “Good faith in European contract law” (1994) 14 *OJLS* 229.

82 *Ibid.* p. 238.

83 See Regulation 5.

84 Nor is the interplay between substantive and procedural unconscionability under the Regulations not unproblematic following *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 above.

85 See, for example, Unfair Terms in Consumer Contracts Regulations 1999, Sch. 2.

86 Cf. M Kenny “The 2004 Communication on European Contract Law: those magnificent men in their unifying machines” (2005) 30 *European Law Review* 724.

have been advanced, such as establishing an internal market or preventing the distortion of competition.⁸⁷ Yet none of those bases proved entirely unproblematic⁸⁸ and, more recently, the desire to promote consumer confidence in the internal market has begun to emerge as a key base of EU intervention in the area of consumer law.⁸⁹ This is, for example, evidenced by the prominent appeal to “consumer confidence” notions in the recent proposed Consumer Rights Directive.⁹⁰

These disparities create significant internal market barriers affecting business and consumers. They increase compliance costs to business wishing to engage in cross border sale of goods or provision of services. Fragmentation also undermines consumer confidence in the internal market. The negative effect on consumer confidence is strengthened by an uneven level of consumer protection across the Community. This problem is particularly acute in the light of new market developments.⁹¹

The key point for present purposes is that it must, at least, be arguable that “consumer confidence” (even when counter-balanced by business interests) is not fostered solely through making sure contractual terms are in “plain intelligible language”.⁹²

Lord Mance’s judgment (with which Lady Hale and Lord Neuberger expressed agreement) traces the gestation of the Directive;⁹³ and Lord Mance places heavy reliance⁹⁴ on an influential article by Professors Brandner and Ulmer⁹⁵ to conclude:⁹⁶

In my opinion, the identification of the price or remuneration for the purposes of . . . regulation 6(2) is a matter of objective interpretation for the court. The court should no doubt read and interpret the contract in the usual manner, that is having regard to the view which the hypothetical reasonable person would take of its nature and terms. But there is no basis for requiring it to do so by attempting to identify a “typical consumer” or by confining the focus to matters on which it might conjecture that he or she would be likely to focus. The consumer’s protection under the Directive and Regulations is the requirement of transparency on which both insist. That being present, the consumer is to be assumed to be capable of reading the relevant terms and identifying whatever is objectively the price and remuneration under the contract . . .

87 C Twigg-Flesner, *The Europeanisation of Contract Law* (London: Routledge-Cavendish 2008), pp. 25ff.

88 Ibid.

89 Cf. T Wilhelmsson, “The abuse of the ‘confident consumer’ as a justification for EC consumer law” (2004) 27 *Journal of Consumer Policy* 317.

90 See, generally, G Howells and R Schulze, *Modernising and Harmonising Consumer Contract Law: With Reference to the Planned Horizontal Consumer Contract Directive* (Munich: Sellier 2009). The original proposed Directive is available at: http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf.

91 Recital (7) of the original proposal. See also *EU Consumer Policy Strategy 2007–2013: Empowering consumers, enhancing their welfare, effectively protecting them*, COM (2007) 99 Final.

92 Cf., for example, Recital (13) and Recital (16) of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

93 *OFT v Abbey National plc* [2009] UKSC 6, paras 109–112.

94 Ibid. para. 109.

95 H E Brandner and P Ulmer, “The Community Directive on Unfair Terms in Consumer Contracts: some critical remarks on the proposal submitted by the EC Commission” (1991) 28 *CMLR* 647.

96 *OFT v Abbey National plc* [2009] UKSC 6, para. 113.

Yet Lord Mance does not really unpack the coordinates within which this hypothetical, and reasonable, person is to operate;⁹⁷ how is this person to filter price from non-price terms? Moreover, in so far as Lord Mance's conclusions are based on the view that the protection afforded to consumers under the Directive and the Regulations is one of transparency, it is, with respect (and not necessarily meaning to suggest that "transparency" and "clarity" are coterminous), open to some of the same criticisms as Lord Walker's conclusion on this point. In particular, it is not possible to state that the unfairness test under the Directive and the Regulations is limited to questions of transparency.⁹⁸ Moreover, again, it must, at least, be arguable that "consumer confidence" objectives (even when counter-balanced by business interests) are not fostered solely through making sure contractual terms are "transparent".⁹⁹

Notwithstanding the foregoing criticisms, it must be acknowledged that the task of interpreting, in an appropriate fashion, Regulation 6(2) is not a straightforward task. In particular, the Supreme Court was faced with an ambiguous "compromise" provision in a directive; the purpose(s) of the Directive was debatable; the European Court of Justice had essentially not considered the relevant provision; and the provision has been transposed in different ways throughout the EU.¹⁰⁰ In such circumstances, a robust and efficient reference process to the European Court of Justice, to act as a compass, might have been helpful; yet, it seems that the reference process is not always perceived to have such qualities¹⁰¹ (even if the Supreme Court had been inclined to make a reference to the European Court of Justice).¹⁰²

THE RESULTANT INTERPRETATION OF REGULATION 6(2)(b) BY THE SUPREME COURT

As noted above, the Supreme Court was unanimous in finding that the charges in question were covered by Regulation 6(2)(b); thus precluding, at least, any challenge to the terms based merely on the assertion that these charges were excessive.¹⁰³ Nevertheless, it is possible to identify some differences of construction of Regulation 6(2)(b) within the Supreme Court. For example, Lord Walker, in effect, construed Regulation 6(2)(b) as referring to *some* forms of *monetary* consideration payable under the relevant contract.¹⁰⁴ Such a construction is noteworthy for, at least, two reasons. First, even when heeding Lord Steyn's note of caution in *Director General of Fair Trading v First National Bank plc*,¹⁰⁵ it implies that it is possible to review some central *non-monetary* payment terms for substantive fairness. Thus, for example, if a consumer part-exchanges their old home for a new home, on Lord Walker's view of Regulation 6(2)(b) it would seem that standard terms relating to how the "credit" for the old home is to be determined might be subject to review, under the Regulations, for substantive fairness. Yet *if*, as Lord Walker believes,¹⁰⁶ the Regulations are

97 Compare, in general terms, A Chandler and J Devenney, "Mistake as to identity and the threads of objectivity" (2004) *Journal of Obligations and Remedies* 7.

98 See, for example, Sch. 2, 1(f).

99 Again compare, for example, Recital (13) and Recital (16) of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

100 H Schulte-Nölke, *EC Consumer Law Compendium: Comparative Analysis* (2008), p. 345, available at: http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf.

101 Cf. C Turner and R Munoz, "Revisiting the judicial architecture of the European Union" (1999/2000) 19 *YBEL* 1.

102 On which see the text to n. 169 below.

103 See, for example, *OFT v Abbey National plc* [2009] UKSC 6, para. 51, per Lord Walker.

104 *Ibid.* para. 43.

105 [2001] UKHL 52, para. 34.

106 *OFT v Abbey National plc* [2009] UKSC 6, para. 44.

concerned with providing consumers with clarity rather than protection per se, it is difficult to maintain his distinction between monetary and non-monetary standard terms.

The second aspect of Lord Walker's construction of Regulation 6(2)(b) which is noteworthy is his view that only *some* forms of *monetary* consideration payable under the relevant contract are covered by that provision. Of course, even if Lord Walker had been considering this provision afresh, it would have been difficult for him not to have made this concession given some of the clauses listed in Schedule 2 as indicative of unfair terms.¹⁰⁷ Yet Regulation 6(2)(b) had already, in effect,¹⁰⁸ been considered by, inter alia, the House of Lords in *Director General of Fair Trading v First National Bank plc*.¹⁰⁹ The key issue in that case for present purposes was whether the predecessor to Regulation 6(2)(b) covered a term in a credit agreement which provided that interest, at the contractual rate, was to continue to accrue "after as well as before any judgment (such obligation to be independent of and not to merge with the judgment)". The House of Lords unanimously held that this term did not come within the predecessor of Regulation 6(2)(b). In so doing, Lord Steyn noted:

Clause 8 of the contract, the only provision in dispute, is a default provision. It prescribes remedies which only become available to the lender upon the default of the consumer. For this reason the escape route of regulation 3(2) is not available to the bank. So far as the description of terms covered by regulation 3(2) as core terms is helpful at all, I would say that clause 8 of the contract is a subsidiary term. In any event, regulation 3(2) must be given a restrictive interpretation. Unless that is done regulation 3(2)(a) will enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision. Similarly, regulation 3(2)(b) dealing with "the adequacy of the price or remuneration" must be given a restrictive interpretation. After all, in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended . . . It would be a gaping hole in the system if such clauses were not subject to the fairness requirement. For these further reasons I would reject the argument of the bank that regulation 3(2), and in particular 3(2)(b), take clause 8 outside the scope of the Regulations.¹¹⁰

In *Abbey*, Lord Walker used this passage to qualify his view that Regulation 6(2)(b) covers *monetary* consideration payable under the relevant contract; Lord Walker was apparently of the view that default provisions were not captured by Regulation 6(2)(b). Leaving aside the conundrum of why, for example, excessive default terms are covered by the Regulations whereas excessive non-default terms are not (and the fact that *Director General of Fair Trading v First National Bank plc* seemed to involve a *primary* obligation which was extended into the default zone by clause 8), this construction is intriguing. In particular, it is not difficult to conceive of situations where an enterprise with many customers relies on the statistical probability of default by individual customers (and the associated default charges) as part of its profitability calculations and forecasts.¹¹¹ Indeed, it may be that bank charges were at one time regarded as default clauses; whereas today, certainly in the aftermath of *Abbey*, they can be regarded as non-default clauses given, for example, the reliance which banks place upon them (and possibly different attitudes towards credit and debt).¹¹² Thus, Lord Phillips noted:

107 See, for example, Sch. 2, 1(e).

108 Under the then Unfair Terms in Consumer Contracts Regulations 1994 (1994/3159).

109 [2001] UKHL 52.

110 Ibid. para. 34.

111 Cf. in broad terms *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117.

112 On which see, generally, C. Scott and J. Black, *Cranston's Consumers and the Law* (London: Butterworths 2000), pp. 229–32.

When the relevant facts are viewed as a whole, it seems clear that the Relevant Charges 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.¹¹³

Returning to Lord Walker's judgment, it is also clear that His Lordship did not qualify his construction of Regulation 6(2)(b) *solely* by reference to default terms. Indeed, such a view would have been clearly unsustainable given that some of the terms listed in Schedule 2 (as indicative unfair terms) are monetary obligations which are not necessarily default terms.¹¹⁴ Again *if*, as Lord Walker believes,¹¹⁵ the Regulations are concerned with providing consumers with clarity rather than protection *per se*, it is difficult to maintain his distinction between different types of monetary standard terms.

Lord Walker provides little guidance on which monetary obligations come within Regulation 6(2)(b) and which monetary obligations do not do so; indeed, somewhat ironically after agreeing with a description of the Court of Appeal's approach as "over-elaborate",¹¹⁶ Lord Walker reverts to language (admittedly with a "health-warning")¹¹⁷ such as "ancillary" and "non-core".¹¹⁸ One might argue that this uncertainty may undermine "consumer confidence"; yet, it must be debatable the extent to which, if at all, the minutiae of consumer protection in a particular Member State (as opposed to the broad lines of consumer protection in any given Member State) actually affects "consumer confidence".¹¹⁹ On the other hand, such uncertainty might impact on business patterns,¹²⁰ and may also inefficiently expend some of the finite resources that bodies such as the OFT have for work in this area.

In broad agreement with Lord Walker, Lord Mance was of the opinion that not all of the payment provisions under a relevant contract are necessarily covered by Regulation 6(2)(b);¹²¹ and he, like Lord Walker, gave default provisions as an example of payment provisions which, seemingly, are not captured by Regulation 6(2)(b).¹²² As such, this aspect of Lord Mance's position attracts some of the same criticisms as Lord Walker's position. Yet, as noted above, Lord Mance's ultimate conclusion on Regulation 6(2)(b) has a rather different flavour to Lord Walker's conclusions; in particular, Lord Mance regards the determination of the "price or remuneration" as the province of the (coordinates lacking) "hypothetical reasonable person". The difficulty with such an approach, of course, is that – as is vividly illustrated by this litigation – the viewpoint of the banks and the viewpoint of their consumers on this issue is likely to be markedly different; and there may be little ground for the "hypothetical reasonable person" to steer a middle course. Ultimately,

113 *OFT v Abbey National plc* [2009] UKSC 6, para. 88.

114 See, for example, Sch. 2, 1(d).

115 *OFT v Abbey National plc* [2009] UKSC 6, para. 44.

116 *Ibid.* para. 38.

117 *Ibid.* para. 46.

118 *Ibid.*

119 Cf. R Goode, "Contract and commercial law: the logic and limits of harmonisation" in F W Grosheide and E Hondius, *International Contract Law* (Antwerp: Intersentia 2004).

120 See, for example, Recital (8) of the proposed Consumer Rights Directive.

121 *OFT v Abbey National plc* [2009] UKSC 6, para. 113.

122 *Ibid.*

therefore, Lord Mance's construction of Regulation 6(2)(b) may also result in uncertainty which impacts on business patterns,¹²³ and possibly inefficiently expends some of the finite resources that bodies such as the OFT have for work in this area.

THE INTERPRETATION OF REGULATION 6(2)(a) BY THE SUPREME COURT

Although the attention of the Supreme Court in *Abbey* was focused on Regulation 6(2)(b), the Supreme Court did make some interesting comments on the proper interpretation of Regulation 6(2)(a). As readers will, no doubt, remember, Regulation 6(2) provides “[i]n 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”; and some indication of the intended operation of Regulation 6(2)(a) can be found in Recital (19):

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, *inter alia*, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer.

One of the immediate difficulties that arises in relation to Regulation 6(2)(a) is that there is, *prima facie*, an *argument* that it renders exclusion clauses immune for review under the Regulations. More specifically, there is an argument that exclusion clauses define the obligations, and risks, of the parties (rather than merely exclude liability)¹²⁴ and, if so, it follows from Recital (19) that they are caught by Regulation 6(2)(a). Yet, whatever the true nature of exclusion clauses, it is clear that exclusion clauses are often regarded as prime candidates for the label of “unfair terms” under the Regulations.¹²⁵

Nevertheless difficulties do still persist. Recital (19) makes it clear that “terms which clearly define or circumscribe the insured risk and the insurer's liability” are captured by Regulation 6(2)(a); and it also seems beyond argument that exclusion clauses are not caught by Regulation 6(2)(a); but what about other types of exclusion? For example, in surety transactions the surety has the right to be discharged on the occurrence of certain events; thus the creditor has a well-established equitable duty not to release any security which it holds in relation to the principal debt.¹²⁶ As a result it is commonplace¹²⁷ for creditors to insert clauses into surety transactions which exclude a surety's right to be discharged on the happening of such events.¹²⁸ The key point to note about such clauses is that they aim to preserve the surety's liability rather than to exclude the creditor's liability.¹²⁹ Nevertheless, it is difficult to predict whether or not such clauses would fall within Regulation 6(2)(a).¹³⁰

123 Again see, for example, Recital (8) of the proposed Consumer Rights Directive.

124 See, for example, the speech of Lord Diplock in *Photo Production Ltd v Securitor Transport Ltd* [1980] AC 827. Cf. D Yates, *Exclusion Clauses in Contracts* 2nd edn (London: Sweet & Maxwell 1992), pp. 123–33.

125 See, generally, J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (Oxford: OUP 2010), p. 207.

126 See, for example, *Skepton Building Society Ltd v Stott* [2001] QB 261.

127 See *Barclays Bank plc v Kufner* [2008] EWHC 2319 (Comm), para. 16.

128 See further J Devenney, “Aspects of property, security and guarantees” in M Furmston and J Chuah, *Commercial and Consumer Law* (London: Pearson 2010), p. 42.

129 See McCormack, “Protection of surety guarantors”, n. 61 above, p. 171.

130 The point does not seem to have been raised in the relevant case law.

In *Abbey*, Lord Walker read Regulation 6(2)(a) and Regulation 6(2)(b) as representing the essential *quid pro quo*¹³¹ present in the relevant consumer contracts although he stopped short of stating that Regulation 6(2) should be read either conjunctively or disjunctively.¹³² Moreover, Lord Walker (seemingly in contradistinction to Lord Mance)¹³³ interpreted the phrase “main subject matter” of the contract in a rather generic fashion:

The main subject-matter may be goods or services. If it is goods, it may be a single item (a car or a dishwasher) or a multiplicity of items. If for instance a consumer orders a variety of goods from a mail-order catalogue . . . there is no possible basis on which the court can decide that some items are more essential to the contract than others. The main subject matter is simply consumer goods ordered from a catalogue . . . Similarly, a supply of services may be simple (an entertainer booked to perform for an hour at a children’s party) or composite (a week’s stay at a five-star hotel offering a wide variety of services). Again, there is no principled basis on which the court could decide that some services are more essential to the contract than others and again the main subject matter must be described in general terms—hotel services.¹³⁴

A number of points may be made in relation to this statement. The first point to make is that, initially at least, it seems that Lord Walker’s “generic” approach to Regulation 6(2)(a) – with its high level of abstraction – is simple to apply. Yet, on reflection, it is not clear that this is necessarily so. Again we may use the thorny question of whether or not the Regulations apply to non-professional surety transactions as an example.¹³⁵ As is well known, doctrinally (and in general terms) a surety assumes secondary and accessory liability.¹³⁶ In other words, the surety’s obligations are generally dependent on the existence of a primary obligation between the creditor and primary debtor,¹³⁷ and on the default of the primary debtor.¹³⁸ As is also well known, under the general law there are also various well-established situations where a surety’s obligations will be discharged (we have already referred to the creditor’s well-established equitable duty not to release any security which it holds in relation to the principal debt¹³⁹).¹⁴⁰ Nevertheless, as we have seen,¹⁴¹ creditors often seek to “exclude” the surety being discharged in such circumstances. However, such clauses – and indeed “principal debtor” clauses¹⁴² – do not necessarily lead to the conclusion that the contract is not a contract of suretyship.¹⁴³ Yet, on Lord Walker’s generic approach to Regulation 6(2)(a), how would the main subject matter of such contracts be

131 Although cf. His Lordship’s statement (*OFT v Abbey National plc* [2009] UKSC 6, para. 46): “. . . delivery of goods or peripheral extras may be disregarded as ancillary for the purposes of para (a) of Regulation 6(2), but the charges for them, if payable under the same contract, are part of the price for the purposes of para (b).”

132 *Ibid.* para. 31.

133 *Ibid.* para. 103, Lord Mance noted: “. . . since the deposit with or transfer to a bank of money is the main or part of the main subject matter of a banking contract, any assessment of the fairness of it or its legal consequences would appear to be excluded under regulation 6(2)(a), rather than (b).”

134 *Ibid.*; paras 39–40.

135 See McCormack, “Protection of surety guarantors”, n. 61 above, pp. 172–3.

136 See further Devenney, “Aspects of property”, n. 128 above, p. 24.

137 See L S Sealy and R J A Hooley, *Commercial Law* 4th ed (Oxford: OUP 2008), p. 1150.

138 See *Moschi v Lep Air Services Ltd* [1973] AC 331.

139 See, for example, *Skepton Building Society Ltd v Stott* [2001] QB 261.

140 See further Devenney, “Aspects of property”, n. 128 above, pp. 46–8.

141 See *Barclays Bank plc v Kufner* [2008] EWHC 2319 (Comm), para. 16.

142 See, for example, *Heald v O’Connor* [1971] 1 WLR 497 and *General Produce Co v United Bank Ltd* [1979] 2 Lloyd’s Rep 255.

143 See further Devenney, “Aspects of property”, n. 128 above, p. 27.

framed? More specifically would the main subject matter of such contracts be the provision of surety *stricto sensu*, or (at a higher level of abstraction) merely the provision of security? If the former approach is to be preferred over the latter approach then (subject to what follows) it is, perhaps, more likely that the Regulations do apply to non-professional surety transactions; and this question is not just one of academic indulgence. Such transactions perform an important economic role¹⁴⁴ and the application of the Regulations to such transactions may significantly alter the balance of interests between the surety and the creditor,¹⁴⁵ possibly resulting in suretyship transactions becoming less attractive to banks¹⁴⁶ and thus causing a narrowing in access to credit.¹⁴⁷

The second point to make (in respect of Lord Walker's "generic" approach to Regulation 6(2)(a)) is that it is clear – from the epithet "main" – that not all terms which describe the subject matter of the contract come within Regulation 6(2)(a). A question, therefore, arises as to how, in this context, the *main* subject matter of a contract is distinguished from the *remainder* of the subject matter of the contract; and this is a question upon which Lord Walker's judgment is less than helpful. Indeed, Lord Walker, again, refers to those terms not captured by Regulation 6(2) as "ancillary" terms,¹⁴⁸ and, as such, is subject to some of the same criticisms outlined above in relation to Regulation 6(2)(a).¹⁴⁹

The third point relates to the issue of whether or not Lord Walker's rather "generic" approach to part of Regulation 6(2)(a) should prevail throughout that (sub-) provision. More specifically, which terms form part of "*the definition of the main subject*"¹⁵⁰ for the purpose of Regulation 6(2)(a)? Readers will no doubt be familiar with the somewhat

144 For example, in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, paras 34–35, Lord Nicholls stated: "The problem . . . raised by the present appeals is of comparatively recent origin. It arises out of the substantial growth in home ownership over the last 30 or 40 years . . . More than two-thirds of householders in the United Kingdom now own their own homes. For most home-owning couples, their homes are their most valuable asset. They must surely be free, if they so wish, to use this asset as a means of raising money, whether for the purpose of the husband's business or for any other purpose . . . Bank finance is in fact by far the most important source of external capital for small businesses with fewer than ten employees. These businesses comprise about 95 percent of all businesses in the country, responsible for nearly one-third of all employment . . . If the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign. Otherwise banks will not be willing to lend money on the security of a jointly owned house or flat." See, generally, J Devenney and M Kenny, "Unfair terms, surety transactions and European harmonisation: a crucible of Europeanised private law?" (2009) *Conveyancer and Property Lawyer* 295.

145 G Andrews and R Millett, *The Law of Guarantees* 4th edn (London: Thompson 2005), argue (at p. 85) that: "If the regulations are applied to bank guarantees, it will be seen that there is considerable scope for an interventionist judiciary to redress the balance between creditor and surety significantly." Of course, the orthodox view is that before the Regulations the Law of England and Wales was unconcerned with the substantive fairness of surety transactions. Yet this is, perhaps, to overstate the case. As I have argued elsewhere, the doctrine of undue influence is the mainstay of the protection afforded to sureties: see J Devenney, L Fox-O'Mahony and M Kenny, "Standing surety in England and Wales: the Sphinx of procedural protection" (2008) *Lloyds Maritime and Commercial Law Quarterly* 527. In cases of undue influence, it is sometimes tempting to view the former manifest disadvantage requirement solely in evidential terms. Nevertheless, if undue influence is based on a notion of unconscionability (on which see J Devenney and A Chandler, "Unconscionability and the taxonomy of undue influence" (2007) *Journal of Business Law* 541) the relevance of the substantive fairness of the transaction will not merely be evidential: see, for example, *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876.

146 See M Kenny, "Standing Surety", n. 66 above, pp. 195–6.

147 See, generally, J Devenney and M Kenny, "Unfair terms", n. 144 above.

148 *OFT v Abbey National plc* [2009] UKSC 6, para. 46.

149 See J Devenney and M Kenny, "Unfair terms", n. 144 above.

150 Emphasis added.

“generic” (and, indeed, controversial)¹⁵¹ approach adopted by the House of Lords in *Aslington Piggeries Ltd v Christopher Hill Ltd*¹⁵² to the question of which descriptive words form part of the description of goods for the purposes of s. 13 of the Sale of Goods Act 1979. If a similar approach were adopted in this context, the scope of the exception in Regulation 6(2)(a) would be much curtailed and, potentially, consumer protection (and, possibly, consumer confidence) would be increased; for example, if a consumer purchases a painting believing it to be by a famous painter (and pays a price which reflects this fact), a term in the contract which, in effect (and assuming it is not an exclusion clause), states that the seller does not warrant that the painting is by the famous painter in question might not be caught by the exception in Regulation 6(2)(a) if an *Aslington Piggeries*-like approach is adopted.

Overall our analysis of Regulation 6(2)(a), in the light of the comments of the Supreme Court in *Abbey* on that provision, serves to highlight the uneasy compromise made in Article 4(2) of the Directive against the backdrop of a not entirely coherent legislative basis. Moreover, our discussion also underlines the fact that a (largely) passively reproductive¹⁵³ approach to transposing EU legislation places the onus of untangling any knots, and maintaining some coherence in domestic law, firmly on the doorstep of the judiciary.

ECJ reference?

As noted above, the Supreme Court in *Abbey* was faced with an ambiguous “compromise” provision in a directive; the purpose(s) of the Directive was debatable; the European Court of Justice had essentially not considered the relevant provision; and the provision has been transposed in different ways throughout the EU.¹⁵⁴ In such circumstances it must, at least, be arguable that an interpretative reference to the European Court of Justice was required in *Abbey*.¹⁵⁵ Yet the Supreme Court, with variable assurance (and some controversy),¹⁵⁶ felt that it was unnecessary to make such a reference. Spearheading this stance was the view of Lord Walker¹⁵⁷ (which was essentially supported by Lord Mance¹⁵⁸ and Lady Hale)¹⁵⁹ that the issue was *acte clair*. However, as even Lord Walker came close to conceding,¹⁶⁰ such a view is difficult to sustain given the differing views of “very experienced”¹⁶¹ judges in the course of this litigation; and, one might add, the views of judges in other cases (and, indeed, in *Abbey* Lord Phillips (supported to some extent by Lord Neuberger)¹⁶² did not find the issue *acte clair*).¹⁶³ Perhaps as a result of these difficulties, Lord Mance sought to buttress the *acte clair* argument by stating:

151 See, for example, I Brown, *Commercial Law* (London: Butterworths 2000), pp. 457–8.

152 [1972] AC 441.

153 See n. 15 above.

154 Schulte-Nölke, *EC Consumer Law Compendium*, n. 100 above.

155 Cf. P Davies, ‘Bank charges in the Supreme Court’ (2010) 69 *Cambridge Law Journal* 21, p. 23.

156 *Ibid.*

157 *OFT v Abbey National plc* [2009] UKSC 6, paras 48–50.

158 *Ibid.* paras 115–17.

159 *Ibid.* para. 92.

160 *Ibid.* para. 49.

161 *Ibid.*

162 *Ibid.* para. 120.

163 *Ibid.* para. 91.

In the present case, we are concerned with a relatively simple sentence, using simple and basic concepts, and the scope for different readings of different language texts seems very limited.¹⁶⁴

The task, of course, may be relatively straightforward if a literal-leaning approach is to be adopted; yet, as noted above, Article 4(2) of the Directive is an uneasy compromise provision, the purpose(s) for which is debatable; and, given the fact that internal market goals may evolve as the internal market itself evolves,¹⁶⁵ the fact that a provision has been transposed in different ways throughout the EU is not without significance.

A secondary argument, advanced by Lords Walker and Mance for not referring the matter to the European Court of Justice, relied on a distinction between the *construction* of Article 4(2) and the *application* of Article 4(2); they argued, with some justification,¹⁶⁶ that the former was a matter for EU law whereas the latter was a matter for domestic law.¹⁶⁷ More specifically, they argued that *even if* the Court of Appeal were correct in its construction of Article 4(2), the Court of Appeal was incorrect in its application of this construction of Article 4(2) to the facts;¹⁶⁸ accordingly, so the argument went, the correct interpretation of Article 4(2) was not central to the determination of the appeal and, therefore, a reference to the European Court of Justice was not necessary.

Such reasoning is, of course, superficially attractive. Yet, it is not clear that this reasoning entirely separates questions of law from questions of fact; more specifically the conclusion that the Court of Appeal wrongly applied its interpretation of Article 4(2) is dependent on a *particular view* of the core/ancillary-terms dichotomy which, surely, is partly a question of law. There is also a wider issue: this argument effectively concedes that the Supreme Court may have been wrong on the question of interpretation!

Whatever the “formal” reasons for concluding that a reference to the European Court of Justice was not necessary, it seems that there were wider considerations at play. In particular, the Supreme Court seemed concerned by the delay which a reference might entail.¹⁶⁹ This was, of course, not the first time that concerns about the efficiency of the reference process had been raised. For example, in *Page v Combined Shipping and Trading Co. Ltd*¹⁷⁰ Staughton LJ stated:

We have been shown the French, German and Italian versions all of which use the word “normal/normale” instead of “proper”. That does not necessarily mean the same as “normal” in English; similarities in language can be deceptive. It seems to me, in short, that we ought to conclude that Mr Page has a good arguable case for recovering a substantial sum. It may well be that when this comes to trial we shall have to refer the problem to the European court, and it will take another two years after that before a decision emerges as to what the

164 *OFT v Abbey National plc* [2009] UKSC 6, para. 115.

165 See also the comment of Bingham J in *Customs and Excise Commissioners v Sames*: [1983] 3 CMLR 194, para. 31, that the ECJ “has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve”.

166 Cf. *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR-I 3403, para. 22, where the European Court of Justice noted that it “may interpret general criteria used by the Community legislation in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term.”

167 *OFT v Abbey National plc* [2009] UKSC 6, paras 50 and 116 respectively.

168 *Ibid.*

169 See, for example, *ibid.* para. 50, per Lord Walker (with whom Lady Hale and Lord Neuberger agreed).

170 [1996] CLC 1952.

regulation really means. Maybe the parties will think there are better methods of spending their time and their money than disputing that for a long period of time. But for the present it is enough for us to say, I think, that there is a good arguable case.¹⁷¹

Yet, *even if* such considerations are legitimate as a matter of EU Law,¹⁷² it is somewhat ironic that the Supreme Court argued – as a reason not to make a reference to the European Court of Justice – that there was a “public interest” in resolving the issue quickly given, for example, the number of stayed cases awaiting its decision:¹⁷³ we have already seen, that by focusing on a very narrow issue whilst opaquely hinting¹⁷⁴ that there may be a possibility to challenge the charges in question under the Regulations, the Supreme Court’s decision is less than helpful from a case management point of view! But were there other drivers behind the Supreme Court’s decision?

The impact of the banking crisis?

The Supreme Court ruled on the *Abbey* appeal in the immediate aftermath of the banking crisis; and one does not have to be a conspiracy-theorist to wonder whether or not a (perhaps perceived) vulnerability on the part of banks¹⁷⁵ (and the associated impact on the economy)¹⁷⁶ in any way impacted (not necessarily illegitimately) on the Supreme Court’s ruling in *Abbey*.¹⁷⁷ Of course, we will probably never know for sure but the consequences of a ruling against the banks in *Abbey* do make for stark reading: Lord Walker noted that in 2006 alone the banks (by which he presumably meant the banks involved in the *Abbey* appeal) made approximately £2.56 billion from these charges¹⁷⁸ (which equated to approximately one-third of the revenue made on current accounts);¹⁷⁹ “many thousands”¹⁸⁰ of cases against banks on this issue were stayed in the County Courts pending a decision in *Abbey*; and, presumably, the limitation clock would only begin ticking once the Supreme Court handed down its judgment.¹⁸¹

171 [1996] CLC 1952, p. 1956.

172 Cf. Twigg-Flesner, *The Europeanisation of Contract Law*, n. 87 above, pp. 130–3.

173 Lord Walker suggested that there may be thousands of such cases: *OFT v Abbey National plc* [2009] UKSC 6, para. 17.

174 See, for example, *ibid.* para. 91, per Lord Phillips.

175 See M Kenny, J Devenney and L. Fox-O’Mahony, “Conceptualising unconscionability in Europe: in the kaleidoscope of private and public law” in M Kenny, J Devenney and L Fox-O’Mahony, *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge: CUP 2010), p. 377, at p. 378.

176 Cf. Wishart, “Transparency and fairness”, n. 27 above, p. 158.

177 *Ibid.*

178 *OFT v Abbey National plc* [2009] UKSC 6, para. 36.

179 *Ibid.* para. 47.

180 *Ibid.* para. 17, per Lord Walker.

181 See Limitation Act 1980, s. 32(1) and *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349. Indeed, one is reminded of the words of Lord Browne-Wilkinson in that case, at p. 363: “Much commercial and property activity occurs on the basis of law which is not laid down by judicial decision. Such ‘law’ consists of the practice and understanding of lawyers skilled in the field. If, before payment, the payer had sought advice in some cases he would have been told that the law was dubious: if having received such advice he paid over, he must have taken the risk that the law was otherwise and cannot subsequently recover what he has paid. In other cases, he would have been told that the law was clear and he could safely act on it. If in this latter case the payer acted on the law as so advised and subsequently a court held that the law was not as advised, can the payer recover his payment as moneys paid under a mistake of law? In the ordinary case, the payer’s adviser will just have given wrong legal advice: as a result the payment will have been paid under a mistake of law and will be recoverable. But in a limited number of cases, of which this may be one, it is not really possible to say that the legal adviser made a mistake in advising as he did . . . It used to be said that the practice of conveyancers of repute was strong evidence of real property law: see *In re Hollis’ Hospital Trustees and Hague’s*

Implications for EU harmonisation

As suggested above, there are various lessons in *Abbey* for any EU harmonisation agenda: lessons relating the role of the judiciary in EU harmonisation;¹⁸² lessons for the EU harmonisation agenda on the role of the legislatures in individual Member States; the need for an efficient and robust reference procedure to the European Court of Justice, and so forth. There is also a wider issue relating to the exercise of determining whether or not a particular clause is “unfair”. As noted above, the key provision is Regulation 5:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

An insight into (part of) this exercise can be found in *Director General of Fair Trading v First National Bank plc*¹⁸³ where Lord Bingham stated:

Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.¹⁸⁴

The important point for present purposes is that this exercise appears to be loaded with social, economic and behavioural norms and, as I have argued elsewhere,¹⁸⁵ there are clear differences in such norms throughout the EU in the broad context of financial transactions. For example, one might refer to the significant differences in the operation of the doctrine of undue influence, in the context of non-professional surety protection, when comparing Ireland with England and Wales.¹⁸⁶

Returning to *Abbey*, the Supreme Court did not state that the charges in question could never be challenged under the Regulations. As Lord Phillips stated:

I do not believe any challenge to the fairness of the Relevant Terms has been made on the basis that they cause the overall package of remuneration paid by those in debit to be excessive having regard to the package of services received in exchange. In these circumstances the basis on which I have answered the narrow issue would seem to render that issue academic. It may be that, if and when the OFT challenges the fairness of the Relevant Terms, issues will be raised that ought to be referred to Luxembourg. That stage has not yet been reached.¹⁸⁷

181 [cont.] *Contract* [1899] 2 Ch. 540, 551 . . . [and] Denning L.J. said in *In re Downshire Settled Estates; Marquess of Downshire v. Royal Bank of Scotland* [1953] Ch. 218 , 279: ‘The practice of the profession in these cases is the best evidence of what the law is; indeed, it makes law’ . . . I doubt whether today anyone would claim that a uniform practice of the profession makes the law. But in the present context it does have a significant impact. In holding that money paid under a mistake of law is recoverable, an essential factor is that the retention of the money so paid would constitute an unjust enrichment of the payee . . . If, at the date of payment, it was settled law that payment was legally due, I can see nothing unjust in permitting the payee to retain moneys he received at a time when all lawyers skilled in the field would have advised that he was entitled to receive them and the payer was bound to pay them.’

182 Cf. Colombi Ciacchi, “Non-legislative harmonisation”, n. 53 above.

183 [2002] UKHL 52.

184 *Ibid.* para. 17.

185 M Kenny and J Devenney, “The fallacy of the common core: polycontextualism in surety protection – a hard case in harmonisation discourse” in M Andenas and C Andersen (eds), *The Theory and Practice of Harmonisation* (Cheltenham: Edward Elgar 2011).

186 See P O’Callaghan, “Protection from unfair suretyships in Ireland” in Colombi Ciacchi (ed.), *Protection of Non-Professional Sureties*, n. 61 above; J Mee, “Undue influence and bank guarantees” (2002) 37 *Irish Jurist* 292.

187 *OFT v Abbey National plc* [2009] UKSC 6, para. 91.

Yet any such challenge would probably, at least by implication, need to challenge the particular cross-subsidy which banks employ in the United Kingdom's largely "free if in credit" banking system; and it is submitted that it would be a brave court that would categorise such an ingrained system as "unfair". The point is, of course, that any EU harmonisation agenda in this area is constrained by, for example, social and cultural norms:

different benchmarks in member states when reviewing contractual terms . . . Accordingly, traders cannot use a contractual clause which is valid across the EU, but must instead formulate different clauses for each member state. Hence, considerable obstacles to the functioning of the internal market exist. Providers can only perform pre-formulated contracts across borders with considerable transaction costs.¹⁸⁸

Nor is there any real EU jurisprudence on unfair terms¹⁸⁹ to inform the exercise, meaning that "harmonisation under the Directive is more apparent than real".¹⁹⁰

Conclusions

As Lord Walker candidly acknowledged,¹⁹¹ the decision of the Supreme Court in *OFT v Abbey National plc* is likely to be a disappointment for many consumers. It is, of course, true that the Supreme Court did not fully shut the door on the possibility of a successful challenge to the relevant charges under the Regulations. Yet – given that any such challenge would probably, at least by implication, need to challenge the particular cross-subsidy which banks employ in the United Kingdom's largely "free if in credit" banking system – the chances of such a challenge being successful seem remote. This underlines the difficulty of harmonising across the EU concepts, such as "unfairness", which are loaded with social, economic and behavioural norms.¹⁹² Indeed, *Abbey* illustrates some of the other challenges for any EU harmonisation agenda. In particular, *Abbey* raises issues in relation to the transposition of EU Directives. As noted above, the Regulations follow very closely the wording of the Directive. Whilst such an approach to the implementation of the Directive might be viewed as ensuring compliance with the obligations of the Directive, it can also, to an extent, be viewed as regrettable for, at least, three inter-related reasons. First, subject to overriding EU obligations, EU Directives may provide a unique opportunity to develop national law in a rational, and non-fragmented, manner so as to meet EU obligations. One may, of course, lament the overlap between the Regulations and the Unfair Contract Terms Act 1977;¹⁹³ and one might, encouraged by the views of the Law Commission,¹⁹⁴ wish for one discrete, self-contained piece of legislation on unfair terms. Yet, there is a wider issue here: the method used to transpose the Directive does little to promote coherence in domestic law by, *for example*, seeking to accommodate it within the traditional theoretical dichotomy in English law between procedural and substantive unconscionability¹⁹⁵ (even if that theoretical framework might have needed to be developed for such a purpose).¹⁹⁶

188 Schulte-Nölke, *EC Consumer Law Compendium*, n. 100 above. Cf. also the German cases on bank charges which are discussed by M Kenny, "Orchestrating sub-prime consumer protection in retail banking: *Abbey National* in the context of Europeanised private law" (forthcoming 2011) *European Review of Private Law*.

189 See n. 60 above.

190 Report on Directive 93/13/EEC on Unfair Terms in Consumer Contracts (Com (2000) 248 final), p. 30.

191 *OFT v Abbey National plc* [2009] UKSC 6, para. 52.

192 See Kenny et al., "Conceptualising unconscionability", n. 175 above.

193 Cf. Peel, *Treitel*, n. 38 above, pp. 290–2.

194 Law Commission, *Unfair Terms in Contracts*, Law Comm. No 292 (2005).

195 See, for example, *Hart v O'Connor* [1985] 2 WLR 944, para. 958, per Lord Brightman, discussed in Devenney and Chandler, "Unconscionability", n. 145 above, pp. 544–51.

196 Cf. Teubner, "Legal irritants", n. 57 above.

Secondly, such an approach *may* (as was arguably the case in *Abbey*) encourage, and ostensibly legitimise, a purely literal approach to the interpretation of measures which transpose EU directives. Thirdly, where the relevant directive, as is argued to be the case here, contains essentially an uneasy and somewhat opaque political compromise provision, which needs to be interpreted against complex economic and social considerations, this approach to transposition essentially abdicates the task of cutting through the knot to the judiciary. Yet it is not clear that the judiciary is always best placed to provide the Alexandrian-like solution; and, indeed, to some extent in *Abbey*, Lord Walker¹⁹⁷ and Lady Hale¹⁹⁸ pushed the responsibility back to Parliament.¹⁹⁹

197 *OFT v Abbey National plc* [2009] UKSC 6, para. 50.

198 *Ibid.* para. 92.

199 See also BBC interview with Vince Cable MP, “Vince Cable: banks continue to rip customers off”, available at www.bbc.co.uk/news/uk-10664533. Cf. position of OFT, available at www.of.gov.uk/OFTwork/markets-work/completed/personal/.

