

Undertaking

Introduction

As a qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations) we can challenge firms that are using terms we view as unfair. We review contract terms referred to us by consumers, enforcement bodies and consumer organisations, among others. Our review of National Australia Bank Europe Limited (trading as Yorkshire Bank) terms has led to the firm undertaking not to use certain terms that we consider unfair.

Under the Regulations we must notify the Office of Fair Trading (OFT) of the undertakings we receive. The OFT has a duty to publish details of these undertakings and they appear on its Consumer Regulations Website. We also publish details on our website. Both publications will name the firm, identify the specific terms and explain why we think they are unfair under the Regulations.

Even if firms have not given an undertaking, or been subject to a court decision under the Regulations, they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These could give an indication of the view that the courts, the FSA, the OFT or other qualifying bodies may take of similar terms or terms with similar effects.

National Australia Group Europe Limited undertaking in relation to Yorkshire Bank's terms and conditions

Name of business	National Australia Group Europe Limited (trading as Yorkshire Bank)	Lead organisation	FSA
Trading sector	Mortgages	Contract identifier	Home Loan General Offer Conditions Rapid Repay Mortgage (Facility)
<p>Original terms 1</p> <p>Home Loan General Offer Conditions</p> <p>10. Repayment on Demand</p> <p>The Bank may:</p> <p>(a) withhold the Facility; or</p> <p>(b) forbid any further withdrawals which would increase your borrowing (which will include returning cheques or payment orders you have issued); and/or</p>			

(c) require immediate repayment of any borrowing on the Facility with interest and charges, if:

10.1 you permit the balance of your Account to exceed the then applicable Safety Limit;

10.2 you breach any of the terms and conditions of the Offer;

10.3 you default in payment on any monies due to the Bank under the Offer or the Security; please note that the Security contains an obligation to pay all sums due and all sums which may become due to the Bank;

10.4 you fail to pay any money due to us on any account with us or one of our Associated Companies;

10.5 you, or either or any of you if more than one shall be adjudicated bankrupt or become insolvent, bankruptcy proceedings are commenced against you or you enter into a voluntary trust deed with all or some of your creditors or you suffer any distress, or exercise of a creditor's rights that is not remedied within fourteen days;

10.6 you sell, or otherwise dispose of or create any further security over any property subject to any security given to the Bank under this or any other agreement you have with the Bank without obtaining the prior written consent of the Bank;

10.7 the Security held by the Bank has become significantly devalued;

10.8 your affairs or circumstances have changed to the extent that it is reasonable in all the circumstances for the Bank to discontinue the Facility;

10.9 circumstances exist which impact adversely and to a material extent on the Bank's ability to make the Facility available;

10.10 any information provided by you to us is materially incorrect; or

10.11 serious grounds for such action exist, provided that it is fair and reasonable in all the circumstances for the Bank to do so.

The Bank will write to you (or your personal representatives) advising you if it is withholding the Facility, forbidding further withdrawals and/or requiring immediate repayment in accordance with this Condition 10.

Upon the Bank making demand under the provisions contained in this Condition 10 you shall not make any further drawings under the Facility.

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Rapid Repay Mortgage (Facility)

The Bank is entitled to write to you (or your personal representatives) to forbid any further withdrawals which would increase your borrowing (which will include returning cheques or payment orders you have issued) and/or require immediate repayment of any borrowing on the Facility, with interest and charges, if:

11.1 you permit the balance of your Account to exceed the then applicable Safety Limit;

11.2 you breach any of the terms and conditions of this or any other agreement you have with the Bank;

11.3 you default in payment of any moneys due to the Bank, whether under this Agreement or

otherwise;

11.4 you or either or any of you if more than one, shall be adjudicated bankrupt or become insolvent;

11.5 you sell, or otherwise dispose of or create any further security over any property subject to any given security under this or any other agreement you have with the Bank without obtaining prior written consent of the Bank;

11.6 the security held by the Bank has, in the opinion of the Bank, become significantly devalued;

11.7 your affairs or circumstances have changed to the extent that in the opinion of the Bank discontinuation of the Facility is warranted; or

11.8 circumstances exist which in the Bank's opinion impact adversely on the Bank's ability to make the Facility available.

Upon the Bank making demand pursuant to the provisions contained in the above clause, you shall not make any further drawings pursuant to the Facility.

Application of the Regulations

Regulation 5 states that a contract term 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'.

These contracts reserved powers for the Bank to take action in certain specified circumstances. While we accept that the exercise of some of the powers in some of the circumstances outlined in the contracts may have been fair, we also consider that the ability to exercise some of the powers in some of the circumstances may have been unfair.

The Home Loan General Offer Conditions gave the Bank three powers to exercise in certain circumstances. Each of the sub-terms in Term 10 ((a) withhold facility, (b) forbid any further withdrawals, and (c) demand immediate repayment) conferred varying degrees of power on the Bank. We were concerned that the exercise of one or more of these powers may have been unfair in certain circumstances, specified in sub-clauses 10.1–10.11. For example:

- There may be circumstances where the exercise of the power to withhold the facility may have been unfair in the circumstance of, for example, 10.4 (a consumer failing to pay any money due to the Bank or one of the Bank's associated companies). We considered that the term may give too much power to the Bank to withhold the Facility for a relatively minor breach of contract, i.e. failing to pay money due to one of the Bank's associated companies, even if the sum due was a commensurately minor amount.
- Similarly we were concerned with the power to demand immediate repayment of the mortgage in certain circumstances, for example 10.1 of the Conditions (a consumer permitting the balance of the account to exceed the then applicable Safety Limit). We considered that the term may give too much power to the Bank to demand repayment of the mortgage for a relatively minor breach of contract, i.e. exceeding the Safety Limit (the consumer's overdraft) even by a relatively minor amount. In our view this may cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer.

We also had similar reservations about the exercise of some of the powers in some of the circumstances outlined in the Rapid Repay Mortgage (Facility) contract. For example, term 11.7 gave the Bank wide-ranging discretion to demand immediate repayment of the mortgage if, in the opinion of the Bank, the consumer's circumstances or affairs had changed sufficiently to warrant the discontinuation of the Facility. We were concerned that this too may give the Bank too much

discretion to demand repayment of the mortgage and could lead to a significant imbalance in the rights and obligations of the parties to the detriment of consumers.

In drafting their consumer contracts, firms need to consider carefully whether reserving the ability to exercise a power is fair in *each and every* circumstance (as outlined in the contract). Specifically they should consider whether the ability to exercise those powers in each and every circumstance might create a significant imbalance in the contract, which is detrimental to consumers.

How the term has changed

The new terms limit the scope for the Bank to exercise its powers. In our view this balances the contract - the Bank may only exercise its powers when there are commensurately serious grounds for doing so.

The Bank has agreed to amend these contracts and other contracts containing the same terms or terms with a similar effect.

New terms

6.5 We may demand repayment of the entire loan from you. If we do this then you must repay us the full amount outstanding when you receive the demand for repayment. We will only exercise our rights under this clause in the following circumstances:

- i. the loan has been obtained as a result of fraud;
- ii. the application for the loan contained information on which we based our lending decision that was untrue or misleading;
- iii. you are in breach of any material obligation under these terms and conditions and you have failed to remedy the breach within a reasonable time of us requesting you to do so;
- iv. the charge over the property used as security for the loan is not registered or it is not registered as a first legal charge and you have failed to cooperate with us to rectify the position;
- v. the property, or part of it, has been or will be acquired under any compulsory purchase order issued by a local authority, highways authority or any other authority that is empowered to issue such an order;
- vi. any substantial building forming part of the property is demolished or damaged to the extent that the value of the property is reduced;
- vii. you are adjudicated bankrupt or become insolvent;
- viii. you sell or create a further interest (such as a lease or trust) in the land, which forms the subject matter of the charge that you have given to us, unless we have consented in writing to you doing this.

14.5.1 We may reduce the amount available in the overdraft facility or remove it entirely for any of the following reasons:

- i. we are required to do so by the order of any Court;
- ii. we become aware that your circumstances have changed since the overdraft limit was set and that it is reasonable to reduce the overdraft to reflect that change;
- iii. the property on which the loan is secured has significantly diminished in value;
- iv. if there are two or more of you and we are notified by one of you that there is a dispute between you.

14.5.2 The amount by which we reduce the facility will depend upon the circumstances prevailing at the time and the reasons for us exercising this power. Wherever possible we will

give you notice of our intention to do so where the matters set out in 14.5.1 ii or iii apply. It may not be practicable for us to give notice in the circumstances set out in 14.5.1. i & iv.

Other information

The firm was fully cooperative in agreeing this undertaking.

The firm has agreed to not rely on the potentially unfair aspects of these two sets of terms in contracts with existing customers. The firm has told us that it has not relied on these conditions with its existing customers. It has changed its standard contract to reflect these changes for new customers from February 2009 and has taken steps to alert existing customers to the changes.

Undertaking published January 2009

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