



Neutral Citation [2022] CAT 42

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1329/7/7/19
1336/7/7/19

BETWEEN:

MICHAEL O’HIGGINS FX CLASS REPRESENTATIVE LIMITED

Applicant / Proposed Class Representative

- v -

- (1) BARCLAYS BANK PLC
- (2) BARCLAYS CAPITAL INC.
- (3) BARCLAYS EXECUTION SERVICES LIMITED
- (4) BARCLAYS PLC
- (5) CITIBANK N.A.
- (6) CITIGROUP INC.
- (7) JPMORGAN CHASE & CO.
- (8) JP MORGAN CHASE BANK, NATIONAL ASSOCIATION
- (9) J.P. MORGAN EUROPE LIMITED
- (10) J.P. MORGAN LIMITED
- (11) NATWEST MARKETS PLC
- (12) THE ROYAL BANK OF SCOTLAND GROUP PLC
- (13) UBS AG

Respondents / Proposed Defendants

- (1) MUFG BANK, LTD
- (2) MITSUBUSHI UFJ FINANCIAL GROUP, INC.

Proposed Objectors

AND BETWEEN:

PHILLIP EVANS

Applicant / Proposed Class Representative

- v -

- (1) BARCLAYS BANK PLC
- (2) BARCLAYS CAPITAL INC.
- (3) BARCLAYS EXECUTION SERVICES LIMITED
- (4) BARCLAYS PLC
- (5) CITIBANK N.A.

- (6) CITIGROUP INC.
- (7) MUFG BANK, LTD
- (8) MITSUBISHI UFJ FINANCIAL GROUP, INC.
- (9) J.P. MORGAN EUROPE LIMITED
- (10) J.P. MORGAN LIMITED
- (11) JP MORGAN CHASE BANK, N.A.
- (12) JPMORGAN CHASE & CO
- (13) NATWEST MARKETS PLC
- (14) THE ROYAL BANK OF SCOTLAND GROUP PLC
- (15) UBS AG

Respondents / Proposed Defendants

ORDER

UPON judgment in these proceedings having been handed down on 31 March 2022 under Neutral Citation Number [2022] CAT 16 (the “**Judgment**”)

AND UPON the Tribunal having received the parties’ consequential applications in regard to the Judgment, including in particular in relation to permission to appeal and costs

AND UPON the Tribunal having considered the applications on the papers filed with the Tribunal

AND UPON the Tribunal considering it appropriate to determine the applications on the papers

AND UPON this Order adopting the terms and abbreviations defined in Annex 1 to the Judgment

AND UPON the Evans PCR having agreed to MUFG Bank, Ltd’s and Mitsubishi UFJ Financial Group Inc’s (collectively, “**MUFG**”) and UBS AG’s (“**UBS**”) respective costs of responding to the Evans Application on the standard basis, such costs to be the subject of detailed assessment if not agreed

AND UPON the Evans PCR agreeing to make interim payments of (i) the sum of £500,000 to MUFG on account; and (ii) the sum of £540,000 to UBS on account (together, the “**Evans PCR’s Agreed Payments**”)

AND WITHOUT PREJUDICE to the Evans PCR's right, in the event that the orders of the Tribunal are varied as a result of the Evans PTA Application or the Evans JR, to apply for paragraph 3 of the below order to be set aside

IT IS ORDERED THAT:

1. The application for permission to appeal of the O'Higgins PCR (contained in written grounds of appeal dated 21 April 2022, the "**O'Higgins PTA**") and of the Evans PCR (contained in written grounds of appeal dated 21 April 2022, the "**Evans PTA**") is granted in respect of all grounds of appeal articulated in the O'Higgins PTA and in the Evans PTA.
2. The O'Higgins PCR and the Evans PCR shall be jointly and severally liable for the costs of the Respondents, those costs to be the subject of detailed assessment on the standard basis, if not agreed, and apportioned according to the determination of the Costs Judge conducting the detailed assessment. The Tribunal considers that the starting point for any apportionment should be that each PCR should bear half of the total of these costs.
3. Within 14 days of the date of this Order the Evans PCR shall pay the Evans PCR's Agreed Payments.
4. In respect of all other interim payments that have not been made or agreed (for which credit should be given), the O'Higgins PCR and the Evans PCR shall each pay the sum of £500,000 to each of the Respondents within 21 days of the date this Order.

REASONS

1. The Judgment, so far as the main focus of the application for permission to appeal is concerned, determines a discretionary matter (namely, whether collective proceedings should be certified on an opt-in or an opt-out basis) against the O'Higgins and Evans PCRs. Ordinarily, the Tribunal would be slow to give permission to appeal on such a matter. However, as the Judgment demonstrates, the exercise of this discretion involved traversing the whole of a relatively new area of law in circumstances where one member of the Tribunal dissented. The Tribunal is, therefore, of the unanimous view that there is a real prospect of the O'Higgins and Evans PCRs persuading the Court of Appeal that

the discretion exercised by the majority of the Tribunal was sufficiently flawed as to be erroneous in law.

2. Although the Tribunal traversed multiple issues in the course of the Judgment, and although it cannot be said that the Respondents were successful in respect of each and every such issue (they were not), an issues-based costs order would be inappropriate in the circumstances of this case. The various factors under consideration by the Tribunal in the Judgment all (to a greater or lesser extent) went to the single, discretionary, question articulated in paragraph 1 above. On this question, the Respondents were unequivocally the winners, and the O'Higgins and Evans PCRs unequivocally the losers. Put another way, had the PCRs sought certification on an "opt-in" basis, not only would they have succeeded, but a very substantial part the costs of all of the parties would never have been incurred. In these circumstances, costs must follow the event, and the PCRs must pay the Respondents' costs on the standard basis and subject to a detailed assessment, subject to any contrary agreement reached by the parties.
3. There is no prospect of rationally separating the costs incurred by the Respondents in dealing with the O'Higgins PCR's application from the costs incurred by the Respondents in dealing with the Evans PCR's application. That includes the costs of MUFG, which was only party to the Evans PCR's application. The hearings that preceded the Judgment were conducted on a unitary basis by the Respondents (with the Respondents appropriately sharing the burden of responding to the applications). In these circumstances, an order making the PCRs jointly and severally liable for the Respondents' costs is appropriate, and it is appropriate to indicate that the starting point for any apportionment of the costs burden ought to be 50% paid by each PCR. However, this is without prejudice to the discretion of the Costs Judge conducting the detailed assessment to vary such apportionment, including to take account of the fact that MUFG was only party to the Evans PCR's application and including the payments on account ordered under paragraph 4 below.
4. A payment on account is also appropriate. Given that the Respondents acted co-operatively and in appropriate concert to the benefit of all, each PCR should pay to each Respondent £500,000 on account of costs within 21 days of the date of this Order, credit to be given for any payments already made. For the avoidance

of any doubt, the O'Higgins PCR is obliged to make a payment on account of MUFG's costs, but without prejudice to any adjustment that may be made on account of this fact on a detailed assessment pursuant to paragraph 3 above.

Sir Marcus Smith
President

Paul Lomas

Prof Anthony Neuberger

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 4 October 2022