



THURSDAY 09 NOVEMBER 2023



**IN THE COURT OF APPEAL**

ON APPEAL FROM COMPETITION APPEAL TRIBUNAL  
1329/7/7/19

**BEFORE** THE CHANCELLOR OF THE HIGH COURT (SIR JULIAN FLAUX)  
LORD JUSTICE GREEN  
LORD JUSTICE SNOWDEN

CA-2022-002002

**B E T W E E N**

PHILLIP GWYN JAMES EVANS

APPELLANT

ON PAPER

Application No.

- and -

CA-2022-002002  
AND  
CA-2022-002003

1. BARCLAYS BANK PLC
2. BARCLAYS CAPITAL INC
3. BARCLAYS PLC
4. BARCLAYS EXECUTION SERVICES LIMITED
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. JPMORGAN CHASE BANK, N.A
12. JPMORGAN CHASE & CO
13. NATWEST MARKETS PLC
14. NATWEST GROUP PLC
15. UBS AG
16. MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

RESPONDENTS

**A N D B E T W E E N**

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

CA-2022-002003

APPELLANT/  
PROPOSED CLASS  
REPRESENTATIVE

- and -

BARCLAYS BANK PLC AND OTHERS

RESPONDENTS/  
PROPOSED  
DEFENDANTS

- and -

1. MUFG BANK, LTD
2. MITSUBISHI UFJ FINANCIAL GROUP, INC

RESPONDENTS /  
PROPOSED  
OBJECTORS

- and -

PHILLIP GWYN JAMES EVANS

RESPONDENT/  
PROPOSED CLASS  
REPRESENTATIVE

**UPON** the application for an opt-out collective proceedings order made by Michael O’Higgins FX Class Representative Limited (the “**O’Higgins PCR**”) on 29 July 2019 and the application for an opt-out collective proceedings order made by Phillip Evans (“**Mr Evans**”) on 11 December 2019

**AND UPON** the judgment of the Competition Appeal Tribunal (the “**CAT**”) of 31 March 2022 [2022] CAT 16 (the “**Judgment**”), by which it determined the competing applications for opt-out collective proceedings orders by Mr Evans and the O’Higgins PCR, following a five-day hearing on 12-16 July 2021 (the “**CPO Hearing**”)

**AND UPON** the O’Higgins PCR’s and Mr Evans’ applications for permission to apply for judicial review of the Judgment dated 21 June 2022 and 29 June 2022, respectively

**AND UPON** Mr Evans’ application to the CAT dated 21 April 2022 for an order that his costs of and occasioned by the carriage dispute (referred to in the Judgment as the “**Carriage Issue**”) between the O’Higgins PCR and the Claimant (the “**Carriage Dispute**”) be paid by the O’Higgins PCR (the “**Carriage Costs Application**”)

**AND UPON** the Order of the CAT dated 4 October 2022 (the “**October Order**”) (i) granting Mr Evans and the O’Higgins PCR permission to appeal in respect of all the grounds of appeal in Mr Evans’ and the O’Higgins PCR’s written grounds of appeal; (ii) ordering Mr Evans to pay £500,000 to MUFG on account and £540,000 to UBS on account within 14 days of the date of the order; and (iii) ordering the O’Higgins PCR and Mr Evans to each pay £500,000 on account of costs to each of the Respondents within 21 days of the date of the order to the extent not already paid under (ii)

**AND UPON** the decision of the CAT in its Reasoned Order of 28 November 2022 in relation to the Carriage Costs Application that there be no order as to costs in respect of the Carriage Dispute (the “**Carriage Costs Decision**”)

**AND UPON** Mr Evans’ application for permission to apply for judicial review of the Carriage Costs Decision dated 16 December 2022 (the “**Carriage Costs JR**”)

**AND UPON** the Court of Appeal (sitting also as a Divisional Court) hearing Aidan Robertson KC, Victoria Wakefield KC, Benjamin Williams KC, Jamie Carpenter

ORDER AMENDED  
UNDER THE SLIP  
RULE UNDERLINED  
IN RED THIS 9<sup>TH</sup>  
NOVEMBER 2023

KC, David Bailey and Sophie Bird for Mr Evans; Daniel Jowell KC, Gerard Rothschild, Shail Patel and Charlotte Thomas for the O’Higgins PCR; and Brian Kennelly KC, Paul Luckhurst, Thomas Sebastien and Hollie Higgins for Barclays, Citi, MUFG, JPMorgan, NatWest and UBS (together, the “**Respondent Banks**”) at a hearing on 25-28 April 2023

**AND UPON** the Court of Appeal giving judgment on 25 July 2023

**AND UPON** the Supreme Court giving judgment in *R (on application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 on 26 July 2023 (“**PACCAR**”)

**AND UPON** the Respondent Banks having applied for permission to appeal the Court of Appeal’s judgment to the Supreme Court on 28 July 2023 (the “**Respondent Banks’ PTA Application**”)

**AND UPON** the O’Higgins PCR having applied for permission to appeal the Court of Appeal’s judgment to the Supreme Court on 28 July 2023 (the “**O’Higgins PTA Application**”)

**AND UPON** the Court of Appeal handing down a revised judgment on ~~27 October 2023~~ 9 November 2023 which supersedes the judgment of 25 July 2023

**IT IS ORDERED THAT:**

1. Mr Evans’ and the O’Higgins PCR’s appeals on the “opt-in vs. opt-out issue” are allowed.
2. The CAT’s decision in the Judgment ([2022] CAT 16) on the “opt-in vs. opt-out issue” is set aside.
3. Mr Evans’ and the O’Higgins PCR’s appeals are otherwise dismissed.
4. Mr Evans’ and the O’Higgins PCR’s applications for permission to claim judicial review are dismissed.
5. Mr Evans’ application for an opt-out collective proceedings order is remitted to the CAT for further decision and case management in accordance with the Court of Appeal’s judgment, with such remittal to consider the specific issues that were canvassed in the appeal, together with

what, if anything, follows for this litigation from the Supreme Court's judgment in *PACCAR*.

6. The O'Higgins PCR's appeal in relation to the Carriage Issue having been dismissed, its application for an opt-out collective proceedings order is remitted to the CAT for further decision and case management in accordance with the Court of Appeal's judgment on the basis set out in paragraphs 166-168 of the judgment, in particular for consideration of what, if anything, follows for this litigation from the Supreme Court's judgment in *PACCAR*.

#### **Repayment of sums paid pursuant to the October Order**

7. Paragraphs 2 to 4 of the October Order are set aside.
8. Each of the Respondent Banks shall repay the sums paid on account of costs under paragraphs 3 and 4 of the October Order within 14 days of the date of this order.
9. Each of the Respondent Banks shall pay interest to Mr Evans on the sums payable pursuant to paragraph 8 of this order from the date payment was made until the date of repayment, at a rate of 3% per annum above the Bank of England base rate from time to time.
10. Each of the Respondent Banks shall pay interest to the O'Higgins PCR on the sums payable pursuant to paragraph 8 of this order from the date payment was made until the date of repayment, at a rate of 3% per annum above the Bank of England base rate from time to time.

#### **Appeal costs**

11. The Respondent Banks shall pay to Mr Evans on a joint and several basis:
  - a. Mr Evans' costs of and occasioned by Mr Evans' appeal on the opt-in/opt-out dispute, to be subject to detailed assessment if not agreed.
  - b. 40% of Mr Evans' costs of and occasioned by Mr Evans' appeal on the strike out issue, to be subject to detailed assessment if not agreed.
  - c. Interest on those costs in subparagraphs (a) and (b) above from the date on which they were paid by or on behalf of Mr Evans to the

date of this Order at a rate of 3% per annum above the Bank of England base rate from time to time.

- d. Mr Evans shall have liberty to apply to the CAT for an interim payment on account of such costs and interest.

12. The O'Higgins PCR shall pay to Mr Evans:

- a. Mr Evans' costs of and occasioned by the O'Higgins PCR's appeal on the Carriage Dispute, to be subject to detailed assessment if not agreed.
- b. Interest on those costs from the date on which they were paid by or on behalf of Mr Evans to the date of this Order at a rate of 3% per annum above the Bank of England base rate from time to time.
- c. Mr Evans shall have liberty to apply to the CAT for an interim payment on account of such costs and interest.

13. There be no order as to:

- a. The O'Higgins PCR's costs of and occasioned by its appeal;
- b. The Respondent Banks' costs of and occasioned by the Carriage Dispute;
- c. The costs of and occasioned by the O'Higgins PCR's application for judicial review of the CAT's Judgment;
- d. The costs of and occasioned by Mr Evans' application for judicial review of the CAT's Judgment; and
- e. The costs of and occasioned by the Carriage Costs JR.

**CPO application costs**

14. The Respondent Banks shall pay to Mr Evans on a joint and several basis:

- a. 75% Mr Evans' costs of and occasioned by the CPO Application from 26 February 2021 to 24 September 2021 to be subject to detailed assessment if not agreed. The balance of the costs of Mr Evans' CPO Application shall be costs in the case. For the

avoidance of doubt, the costs of the CPO Application do not include Mr Evans' costs of and incidental to the Carriage Dispute.

- b. Interest on those costs from the date on which they were paid by or on behalf of Mr Evans to the date of this Order at a rate of 3% per annum above the Bank of England base rate from time to time.
- c. Mr Evans shall have liberty to apply to the CAT for an interim payment on account of such costs and interest.

15. There be no order as to the O'Higgins PCR's costs of and occasioned by its CPO Application.

**Permission to appeal**

16. The O'Higgins PCR's application for permission to appeal to the Supreme Court on the Carriage Issue is refused.

17. The Respondent Banks' application for permission to appeal to the Supreme Court is refused.

This order shall be served by Mr Evans upon the O'Higgins PCR and the Respondent Banks.

(The Court sat on 25 April 2023 from 10.32 to 16.22, and on 26 April 2023 from 10.32 to 16.26 and on 27 April 2023 from 10.05 to 16.30 and 28 April 2023 from 10.35 to 13.09)

**BY THE COURT**