

Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: Second
Exhibits: MOH5-7
Dated: 28 January 2020

IN THE COMPETITION APPEAL TRIBUNAL

Case no. 1329/7/7/19

B E T W E E N : -

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

**Applicant /
Proposed Representative**

-and-

- (1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(a company incorporated under the laws of the State of Connecticut,
United States of America)**
- (3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK N.A.
(a national banking association incorporated under the laws of the United
States of America)**
- (6) CITIGROUP INC.
(a company incorporated under the laws of the State of Delaware, United
States of America)**
- (7) JPMORGAN CHASE & CO.
(a company incorporated under the laws of the State of Delaware, United
States of America)**
- (8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(a national banking association incorporated under the laws of the United
States of America)**
- (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
(a company incorporated under the laws of Switzerland)**

**Respondents /
Proposed Defendants**

**SECOND WITNESS STATEMENT OF
MICHAEL O'HIGGINS**

I, **MICHAEL O’HIGGINS**, of Michael O’Higgins FX Class Representative Limited, whose registered address is c/o Scott+Scott UK LLP, St Bartholomew’s House, 90-94 Fleet Street, London, EC4Y 1DH, **WILL SAY**:

Introduction

1. I have previously provided a witness statement in relation to the above claim (the “**Claim**”) dated 28 July 2019 (my “**First Statement**”) and filed with the Competition Appeal Tribunal (the “**Tribunal**”) on 29 July 2019. This is my second witness statement in these proceedings and it is provided to the Tribunal by way of update on certain developments since the First Statement. I group the updates under the same headings as used in my First Statement and use the same definitions.
2. As with my First Statement, I make this statement in my role as sole director and sole member of the Proposed Representative and therefore as the individual with complete control over the Proposed Representative. As such, in this statement, references to the knowledge, conduct, etc. of the Proposed Representative are to be understood as being references to my own knowledge, conduct, etc.
3. Except where I state to the contrary, I am able to state the matters in this witness statement from my own knowledge. As such, the facts contained in this witness statement are true to the best of my knowledge, information and belief, save where otherwise indicated in which case I identify the source of my information.

Authorisation of the class representative: the UK collective action regime

4. In paragraph 13 of my First Statement, I stated that I was not aware of any other person(s) seeking approval to act as class representative in respect of claims covering the same subject matter and, as such, did not address Rule 78(2)(c) of the 2015 Rules in that statement. Since my First Statement, another person – Mr Phillip Evans – filed an application on 11 December

2019 seeking approval for a similar action.¹ I will address the requirements of Rule 78(2)(c) in due course, when I have been provided with more information about that claim.

My suitability to act as the individual with control over the Proposed Representative

Experience

5. I left my position as Chairman of the Channel Islands Competition and Regulatory Authority at the end of my term of appointment in December 2019, having been in the role since July 2016.
6. In paragraph 37 of my First Statement, I stated that I intended to put together a small group of advisers (the “**Advisory Committee**”) to assist me in my role as director of the Proposed Representative, as necessary, in considering aspects of the Claim. The Advisory Committee has now been constituted and is comprised of the following members:
 - a. **Sir Christopher Clarke**: As foreshadowed in paragraph 37 of my First Statement, Sir Christopher Clarke, a former Lord Justice of Appeal of the Courts of England and Wales and current president of the Court of Appeal of Bermuda, chairs the Advisory Committee. A copy of Sir Christopher’s *curriculum vitae* is exhibited at **MOH5**.
 - b. **Mr Damian Mitchell**: Mr Mitchell is the founder and managing partner of DSquare Trading Limited (“**DSquare**”), which is a high frequency and high volume FX trading company. Mr Mitchell has over 30 years’ experience in trading FX and other products. Prior to founding DSquare in 2006, Mr Mitchell worked as a trader at HSBC, Bankers Trust, Dresdner Kleinwort Wasserstein and as Head of FX Arbitrage at Société Générale. A copy of Mr Mitchell’s *curriculum vitae* is exhibited at **MOH6**. DSquare is an English domiciled

¹ 1336/7/7/19 Mr Phillip Evans v Barclays Bank PLC and Others.

company and a member of the Proposed Class. I regard Mr Mitchell's senior role with a member of the Proposed Class as a particular strength that Mr Mitchell brings to the Advisory Committee. Nevertheless, I recognise that there may be certain issues where it could be argued that Mr Mitchell's role with DSquare gives rise to a risk of apparent or actual bias, such as in relation to the methodology for the allocation of any proceeds of the proposed Claim to members of the Proposed Class. If I believe that there is such a risk on a particular issue, Mr Mitchell will not participate in Advisory Committee discussions on such an issue.

- c. **Mr Ian Pearson:** Mr Pearson was a Member of Parliament for 16 years, of which he spent 9 years as a government minister. As Economic Secretary to the Treasury for the period of October 2008 to January 2010, Mr Pearson has a particular understanding of the financial services industry. During this period, Mr Pearson had responsibility for the 2009 Banking Act and the 2010 Financial Services Act. He was also responsible, *inter alia*, for the Debt Management Office (which raised £180 billion in 2008-2009) and National Savings and Investments (which had £15 million in gross inflows and 27 million customers during his tenure). Mr Pearson also spent a year as Minister of State for Trade and Foreign Affairs. Mr Pearson also has extensive business experience. He spent five years on the Advisory Board of PwC UK (2011-2016) and is currently a non-executive director of Thames Water (15 million customers and £2 billion turnover) and the Chairman of CODE Investing (an FCA-regulated debt finance platform for SME growth capital), amongst other roles. A copy of Mr Pearson's *curriculum vitae* is exhibited at **MOH7**.

7. I consider that these advisers, collectively but also individually, are well qualified to advise me on the issues which are likely to arise as the Claim develops.

8. As set out in paragraph 38 of my First Statement, the Proposed Representative has instructed a legal team with extensive experience in competition damages actions and in class and collective action cases. Since my First Statement, the Proposed Representative has added a barrister to its counsel team to assist with specific issues relating to costs, Mr Nicholas Bacon QC of 4 New Square Chambers. Mr Bacon QC is to advise on issues related to costs and funding. Mr Bacon QC is a leading costs silk who, I am informed by my solicitors, has appeared before the Tribunal in two cases concerning collective proceedings order applications under the Consumer Rights Act, namely *Merricks*² and the Trucks cartel³.

Litigation Plan

9. The Litigation Plan exhibited as Exhibit MOH4 to my First Statement noted that DRD Partnership would assist the Proposed Representative with public relations and media strategy. Questor Consulting Partnership Limited is now undertaking this role.

Third party funding arrangements and adverse costs cover

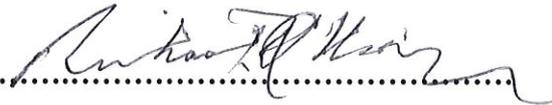
10. At the time of filing the Claim, the Proposed Representative had in place £21 million of after the event insurance (see paragraph 49 of my First Statement). Since then, the Proposed Representative:
- a. has obtained an additional £5.5 million of cover, bringing the total amount to £26.5 million (the Second Excess Layer); and
 - b. has accepted an offer for an additional £4 million of cover, and is in the process of formally incepting this Policy. This will bring the total amount of ATE insurance to £30.5 million (the Third Excess Layer).

² Case 1266/7/7/16.

³ Cases 1282/7/7/18 and 1289/7/7/18.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed: 

Michael O'Higgins

Date: 28 JANUARY 2020

Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: Second
Exhibits: MOH5-7
Dated: 28 January 2020

Case no.1329/7/719

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