

NOTICE OF FILING

Details of Filing

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File Title: J WISBEY & ASSOCIATES PTY LTD v UBS AG & ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 33
Rule 16.32

Amended pursuant to Order dated 31 January 2023

Amended Defence

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 567/2019

J Wisbey & Associates Pty Ltd

Applicant

UBS AG (ABN 47 088 129 613) and others

Respondents

To the Amended Statement of Claim dated 19 November 2021 filed by the Applicant, the Second Respondent (**Barclays**) says as follows (where practicable, using the same defined terms and headings as used in the Amended Statement of Claim) by way of Defence:

A. THE APPLICANT AND THE GROUP MEMBERS

1. Barclays does not plead to paragraph 1.
2. In respect of paragraph 2, Barclays:
 - (a) admits paragraph 2(a);
 - (b) otherwise does not know and therefore cannot admit the allegations.
3. In respect of paragraph 3, Barclays:
 - (a) denies that any person suffered loss or damage by reason of the conduct of Barclays;
and
 - (b) otherwise does not know and therefore cannot admit the allegations.

Filed on behalf of: The Second Respondent
Prepared by: Andrew Morrison and Elizabeth Richmond
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B. THE RESPONDENTS

4. In respect of paragraph 4, Barclays:
 - (a) admits paragraph 4(a);
 - (b) admits paragraph 4(b);
 - (c) admits paragraph 4(c); and
 - (d) otherwise does not know and therefore cannot admit the allegations.

5. In respect of paragraph 5, Barclays:
 - (a) as to paragraph 5(a):
 - (i) admits that it is and was at all material times a company registered pursuant to the laws of England and Wales; and
 - (ii) otherwise denies the allegations;
 - (b) admits paragraph 5(b);
 - (c) admits paragraph 5(c);
 - (d) as to paragraph 5(d):
 - (i) says that the reference to a “global business” is vague and embarrassing;
 - (ii) under cover of that objection:
 - A. admits that at all material times its business included being a Dealer in FX Instruments, including in Australia (through its Australian branch) and to customers in Australia; and
 - B. otherwise denies the allegations; and
 - (e) admits paragraph 5(e).

6. In respect of paragraph 6, Barclays:
 - (a) admits paragraph 6(a);
 - (b) admits paragraph 6(b);

- (c) admits paragraph 6(c); and
- (d) otherwise does not know and therefore cannot admit the allegations.

7. In respect of paragraph 7, Barclays:

- (a) admits paragraph 7(a);
- (b) admits paragraph 7(b);
- (c) admits paragraph 7(c); and
- (d) otherwise does not know and therefore cannot admit the allegations.

8. In respect of paragraph 8, Barclays:

- (a) admits paragraph 8(a);
- (b) admits paragraph 8(b);
- (c) admits paragraph 8(c); and
- (d) otherwise does not know and therefore cannot admit the allegations.

C. ALLEGED GLOBAL FX MARKET

9. In respect of paragraph 9, Barclays:

- (a) says that the definition of “Global Trading Centres” is vague and embarrassing;
- (b) under cover of that objection:
 - (i) admits that during the Relevant Period there was demand for FX Instruments from some customers in Europe, North America, South America, Asia, Africa, Australia and New Zealand; and
 - (ii) otherwise denies the allegations.

10. In respect of paragraph 10, Barclays:

- (a) refers to and repeats paragraph 9(a) above;
- (b) admits that, during the Relevant Period:

- (i) it entered into, and offered to enter into, FX Instruments with customers through FX sales desks, including in Sydney, Singapore, Hong Kong, Tokyo, Mumbai, London New York and San Francisco;
 - (ii) on occasions, customers with which it entered into an FX Instrument through a sales desk were in a different location to that sales desk;
 - (iii) it entered into, and offered to enter into, FX Instruments with customers through electronic trading platforms (**ETPs**), namely its proprietary ETP (**BARX**) and some multi-bank ETPs; and
 - (iv) **BARX** and some multi-bank ETPs could be accessed and used by customers from different locations including Australia;
- (c) does not know and therefore cannot admit the allegations insofar as they concern Dealers other than Barclays;
- (d) otherwise denies the allegations; and
- (e) says further that, during the Relevant Period:
- (i) it did not enter FX Instruments with a customer (through a sales desk, **BARX** or a multi-bank ETP) unless and until it had approved the customer for trading with it in FX Instruments;
 - (ii) its approval process for customers that wished to trade with it in FX Instruments typically included:
 - A. compliance with applicable anti-money laundering and other regulatory requirements;
 - B. due diligence with respect to the customer, including as to its trading history and financial performance;
 - C. determining a credit or trading limit for the customer (which could apply to individual trades and/or total trades over a period); and/or
 - D. negotiating and agreeing with the customer the terms on which the trading would occur;

- (iii) when customers were approved for trading with it in FX Instruments, that approval was ordinarily limited to trading in FX Instruments with specified currency pairs and to trades up to a specified credit or trading limit;
- (iv) customers that entered into an FX Instrument with it through BARX:
 - A. were required to obtain, install and operate the BARX software;
 - B. could only enter into trades for which the customer had been approved by Barclays;
 - C. could only enter into FX Instruments that Barclays determined it was willing to enter into through BARX, which could vary at any point in time depending on matters such as:
 - 1) the liquidity of the currencies the subject of the instrument;
 - 2) the volume of the currencies to be traded pursuant to the instrument;
 - 3) Barclays' exposure to the currencies the subject of the instrument (i.e. whether, or the extent to which, Barclays had agreed to buy more of either currency than it had agreed to sell, or sell more of either currency than it had agreed to buy);
 - 4) the volatility or potential volatility of the currencies the subject of the instrument;
 - 5) Barclays traders' confidence in their understanding of factors that may affect the value of the currencies the subject of the instrument; and
 - 6) for FX Instruments with respect to certain currency pairs, the business hours of the Barclays trading desk responsible for that FX Instrument and currency pair; and
 - D. were unable to negotiate with Barclays on price;
- (v) customers that entered into an FX Instrument with Barclays through a multi-bank ETP:
 - A. required approval from the operator of the multi-bank ETP;

- B. could only enter into trades for which the customer had been approved by Barclays;
- C. could only enter into FX Instruments that Barclays determined it was willing to enter into through that multi-bank ETP, which could vary depending on the matters referred to in paragraph 10(e)(iv)C above; and
- D. were unable to negotiate with Barclays on price; and

(vi) the prices Barclays offered for FX Instruments on BARX and multi-bank ETPs were typically set using algorithms.

11. In respect of paragraph 11, Barclays:

(a) as to paragraph 11(a):

- (i) refers to and repeats paragraph 9(a) above;
- (ii) says that the reference to all currency being “fungible” is vague and embarrassing;
- (iii) under cover of that objection, admits that, at any point in time, one unit of each currency the subject of any FX Instrument was equivalent to any other unit of that same currency; and
- (iv) otherwise denies the allegations;

(b) as to paragraph 11(b):

- (i) denies the allegations;
- (ii) says that Barclays’ willingness to enter into an FX Instrument with a particular customer varied depending on matters that included:
 - A. whether Barclays had approved the customer entering into FX Instruments of that kind with it;
 - B. the risk that entering into the instrument would create for Barclays, which was influenced by matters which included those referred to in paragraph 10(e)(iv)C above:

- C. applicable regulations that limited Barclays' ability to buy or sell the currencies the subject of the instrument;
 - D. the volume of currency the subject of the instrument; and
 - E. the terms of the FX Instrument including with respect to price;
- (iii) says that customers' willingness to enter into FX Instruments with a particular Dealer varied depending on matters that could include:
- A. whether the Dealer had approved the customer for entering into FX Instruments of the relevant kind with it;
 - B. the currency pair the subject of the instrument;
 - C. the volume of currency the subject of the instrument;
 - D. the location of the Dealer, including whether it was in the same time zone as the customer;
 - E. the customer's relationship with the Dealer;
 - F. the nature and quality of any advice the Dealer provides with respect trading in FX Instruments;
 - G. the customer's perception of whether the bank could be relied upon to settle the transaction at the time and in the manner agreed; and
 - H. the terms of the instrument, including those relating to price and any requirement for the customer to provide security in respect of the transaction;
- (c) as to paragraph 11(c):
- (i) denies the allegations; and
 - (ii) refers to and repeats paragraph 11(b)(ii) and 11(b)(iii) above;

- (d) as to paragraph 11(d):
 - (i) says that the allegation is embarrassing because it is not alleged what constitutes the “service” that a Dealer provides when entering into an FX Instrument with a customer;
 - (ii) under cover of that objection, denies the allegations; and
 - (iii) refers to and repeats paragraphs 11(b)(ii) and 11(b)(iii) above;
- (e) as to paragraph 11(e):
 - (i) denies the allegations; and
 - (ii) refers to and repeats paragraph 11(b)(iii) above;
- (f) as to paragraph 11(f):
 - (i) admits that one way in which Dealers could, and at times did, seek to encourage customers to enter into an FX Instrument for a particular currency pair of a specific volume was to offer a price that the Dealer perceived would be more attractive to the customer than any price(s) other Dealers would offer to the customer for the same FX Instrument for the same currency pair and volume;
and
 - (ii) otherwise denies the allegations.

12. In respect of paragraph 12, Barclays:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 11(b)(ii) and 11(b)(iii) above;
- (c) says further that the allegations are embarrassing because it is not alleged that:
 - (i) Spots with respect to different currency pairs are substitutable with one another;
 - (ii) Outright Forwards with respect to different currency pairs are substitutable with one another; or
 - (iii) Spots and Outright Forwards are substitutable with one another.

13. Barclays denies paragraph 13.

D. ALLEGED AUSTRALIAN FX MARKET

14. In respect of paragraph 14, Barclays:

- (a) admits that, during the Relevant Period, there was demand from customers located in Australia for the entry into FX Instruments with Dealers located in Australia;
- (b) says that, from time to time, during the Relevant Period, customers located in Australia interacted with a Dealer's FX sales desk located outside Australia, but does not know and cannot admit the extent or the circumstances of any demand from customers located in Australia for entry into FX Instruments with Dealers located outside Australia;
- (c) says that, from time to time during the Relevant Period, customers located outside Australia interacted with a Dealer's Australian FX sales desk, but does not know and cannot admit the extent or the circumstances of any demand from customers located outside Australia for entry into FX Instruments with Dealers located in Australia.

15. In respect of paragraph 15, Barclays:

- (a) refers to and repeats paragraphs 10(b)(iii), 10(e)(iv), 10(e)(v) and 14 above;
- (b) does not know and therefore cannot admit the allegations insofar as they concern Dealers other than Barclays; and
- (c) otherwise denies the allegations.

16. In respect of paragraph 16, Barclays:

- (a) as to paragraph 16(a);
 - (i) refers to and repeats paragraph 11(a)(ii) and 11(a)(iii) above; and
 - (ii) otherwise denies the allegations;
- (b) as to paragraph 16(b):
 - (i) denies the allegations; and
 - (ii) refers to and repeats paragraphs 11(b)(ii) and 11(b)(iii) above;

- (c) as to paragraph 16(c):
 - (i) denies the allegations;
 - (ii) refers to and repeats paragraphs 11(b)(ii) and 11(b)(iii) above;
- (d) as to paragraphs 16(d) and (e):
 - (i) says that the allegation is embarrassing because it is not alleged what constitutes the “service” that a Dealer provides when entering into an FX Instrument with a customer; and
 - (ii) under cover of that objection, denies the allegations;
- (e) as to paragraph 16(f):
 - (i) denies the allegations; and
 - (ii) refers to and repeats paragraph 11(b)(iii) above;
- (f) as to paragraph 16(g):
 - (i) refers to and repeats paragraphs 11(b)(ii) and 11(f)(i) above; and
 - (ii) otherwise denies the allegations.

17. In respect of paragraph 17, Barclays:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 11(b)(ii) and 11(b)(iii) above;
- (c) says further that the allegations are embarrassing because it is not alleged that:
 - (i) Spots with respect to different currency pairs are substitutable with one another;
 - (ii) Outright Forwards with respect to different currency pairs are substitutable with one another; or
 - (iii) Spots and Outright Forwards are substitutable with one another.

18. Barclays denies paragraph 18.

E. ALLEGED COMPETITION IN RELATION TO FX INSTRUMENTS

19. In respect of paragraph 19, Barclays:

- (a) refers to and repeats paragraph 9(a) above;
- (b) under cover of that objection:
 - (i) admits that, during the Relevant Period, it entered into, offered to enter into or was willing and able to enter into FX Instruments with some customers in Europe, North America, South America, Asia, Africa, Australia and New Zealand;
 - (ii) does not know and cannot admit the allegations insofar as they concern the other Respondents; and
 - (iii) otherwise denies the allegations.

20. ~~Barclays does not know and therefore cannot admit the allegations in paragraph 20. In respect of paragraph 20, Barclays:~~

- ~~(a) admits that, during the Relevant Period, Absa Bank Limited, an entity that was a related body corporate of Barclays, supplied and/or offered to supply some FX Instruments to some customers;~~
- ~~(b) does not know and therefore cannot admit the allegations insofar as they concern the other Respondents; and~~
- ~~(c) otherwise denies the allegations.~~

21. Barclays does not know and therefore cannot admit the allegations in paragraph 21.

22. Barclays denies paragraph 22.

F. ALLEGED ARRANGEMENTS OR UNDERSTANDINGS

F.1 Alleged FX Understanding

23. In respect of paragraph 23, Barclays:

- (a) denies the allegations; and

(b) does not plead to the particulars to paragraph 23.

24. Barclays denies paragraph 24.

F.2 Alleged Chatroom Understandings

25. In respect of paragraph 25, Barclays:

(a) denies the allegations; and

(b) does not plead to the particulars to paragraph 25.

26. Barclays denies paragraph 26.

G. RELEVANT CONTRAVENTIONS BY THE RESPONDENTS

G.1 FX Understanding: price fixing

G.1.1 Alleged price fixing conduct prior to 24 July 2009

27. Barclays denies paragraph 27.

28. Barclays denies paragraph 28.

29. Barclays denies paragraph 29.

30. Barclays denies paragraph 30.

G.1.2 Alleged price fixing conduct on or after 24 July 2009

31. Barclays denies paragraph 31.

32. Barclays denies paragraph 32.

33. Barclays denies paragraph 33.

G.2 Alleged FX Understanding: restricting supply

34. Barclays denies paragraph 34.

35. Barclays denies paragraph 35.

36. Barclays denies paragraph 36.

37. Barclays denies paragraph 37.

G.3 Alleged FX Understanding: substantially lessening competition

38. Barclays denies paragraph 38.

39. Barclays denies paragraph 39.

40. Barclays denies paragraph 40.

G.4 Alleged FX Chatroom Understandings: price fixing

G.4.1 Alleged price fixing conduct prior to 24 July 2009

41. Barclays denies paragraph 41.

42. Barclays denies paragraph 42.

43. Barclays denies paragraph 43.

44. Barclays denies paragraph 44.

G.4.2 Alleged price fixing conduct on or after 24 July 2009

45. Barclays denies paragraph 45.

46. Barclays denies paragraph 46.

47. Barclays denies paragraph 47.

G.5 Alleged FX Chatroom Understandings: restricting supply

48. Barclays denies paragraph 48.

49. Barclays denies paragraph 49.

50. Barclays denies paragraph 50.

51. Barclays denies paragraph 51.

G.6 Alleged FX Chatroom Understandings: substantially lessening competition

52. Barclays denies paragraph 52.

53. Barclays denies paragraph 53.

54. Barclays denies paragraph 54.

H. ALLEGED LOSS OR DAMAGE

55. Barclays does not know and therefore cannot admit paragraph 55.

56. Barclays denies paragraph 56.

H.1 Alleged FX Understanding

57. Barclays denies paragraph 57.

58. Barclays denies paragraph 58.

59. Barclays denies paragraph 59.

60. Barclays denies paragraph 60.

61. Barclays denies paragraph 61.

H.1 Alleged FX Understanding

62. Barclays denies paragraph 62.

63. Barclays denies paragraph 63.

64. Barclays denies paragraph 64.

65. Barclays denies paragraph 65.

66. Barclays denies paragraph 66.

H.3 Alleged damage suffered

67. Barclays denies paragraph 67.

68. As to paragraph 68, Barclays:

(a) denies the allegations; and

(b) says that insofar as the Applicant and Group Members claim any amount for loss or damage suffered prior to 27 May 2013:

- (i) they may not recover that loss or damage under s 82(1) of the CCA or s 82(1) of the TPA by reason of, respectively, s 82(2) of the CCA and s 82(2) of the TPA;
- (ii) any order under s 87(1) of the CCA or s 87(1) of the TPA would be inappropriate, having regard to the Applicant's delay in commencing this proceeding.

69. As to paragraph 69, Barclays:

- (a) denies the allegations; and
- (b) refers to and repeats paragraph 68(b) above.

I. ALLEGED COMMON QUESTIONS OF LAW OR FACT

70. Barclays does not plead to paragraph 70.

Date: ~~25 March 2022~~ 1 February 2023



.....
Signed by Andrew Morrison

Lawyer for the Second Respondent

This pleading was prepared by C M Caleo QC and Andrew Barraclough

Certificate of lawyer

I Andrew Morrison certify to the Court that, in relation to the defence filed on behalf of the Second Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~25 March 2022~~ 1 February 2023



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Signed by Andrew Morrison

Lawyer for the Second Respondent