

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID567/2019
File Title: J WISBEY & ASSOCIATES PTY LTD v UBS AG & ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 25/03/2022 3:20:46 PM AEDT

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

Registrar

Important Information

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Form 33
Rule 16.32

Defence

No. VID 567 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

J WISBEY & ASSOCIATES PTY LTD (ACN 001 959 851)

Applicant

UBS AG (ABN 47 088 129 613) and others named in the Schedule

First Respondent

To the Amended Statement of Claim (**ASOC**) dated 19 November 2021, the First Respondent (**UBS**) pleads as follows:

In this Defence:

- defined terms used in the ASOC are used for ease of reference only and without any admission as to the accuracy of the term or its definition in the ASOC; and
- UBS pleads to the allegations only insofar as they relate to it, unless otherwise stated.

A. THE APPLICANT AND THE GROUP MEMBERS

1. As to paragraph 1, it:

Filed on behalf of (name & role of party)	The First Respondent, UBS AG (ABN 47 088 129 613)		
Prepared by (name of person/lawyer)	Ruth Elizabeth Overington		
Law firm (if applicable)	Herbert Smith Freehills		
Tel	+61 3 9288 1234	Fax	+61 3 9288 1567
Email	Ruth.Overington@hsf.com		
Address for service (include state and postcode)	Level 24 80 Collins Street Melbourne VIC 3000		

- (a) admits that the proceeding is commenced as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth);
- (b) to paragraph 1(c), it denies that the Applicant or any Group Members suffered loss or damage by reason of any conduct by UBS;
- (c) otherwise does not know and therefore cannot admit the allegations in paragraph 1.

2. As to paragraph 2, it:

- (a) admits paragraph 2(a);
- (b) otherwise does not know and therefore cannot admit paragraph 2.

3. It does not plead to paragraph 3 as it does not know and therefore cannot admit the allegations.

B. THE RESPONDENTS

4. As to paragraph 4, it:

- (a) admits paragraphs 4(a);
- (b) admits paragraph 4(b);
- (c) admits paragraph 4(c);
- (d) as to paragraph 4(d),
 - (i) it says that during the Relevant Period it conducted trading in FX Instruments through the following means:
 - (A) foreign exchange trading desks in:
 - 1. Zurich (Switzerland), Stamford (USA) and the Republic of Singapore, in respect of G-10 currencies;
 - 2. Singapore, United States of America, China, Taiwan, South Korea, in respect of emerging currencies;

Particulars

By 'trading desk', UBS refers to UBS office locations where UBS employed licensed spot foreign exchange traders, and where the FX Instrument is executed.

- (B) foreign exchange sales desks: in Zurich (Switzerland), Stamford (USA), Sydney (Australia), Hong Kong (China), Tokyo (Japan), Singapore (the Republic of Singapore), and London (United Kingdom);

Particulars

By FX 'sales' desks, UBS refers to office locations where UBS had a foreign exchange sales desk which took orders for FX Instrument trades.

- (C) electronic platforms including the single-bank platforms owned and operated by UBS called "FX Trader Plus" and "UBS NEO" and multi-bank platforms called "360T" and "FX ALL";
- (ii) it says that during the Relevant Period in Australia, it:
- (A) did not employ any traders in FX Instruments in Australia;
- (B) did not have an FX trading desk in Australia, otherwise denies the allegations; and
- (e) admits paragraph 4(e).

5. To paragraph 5, it:

- (a) admits paragraph 5(a);
- (b) admits paragraph 5(b);
- (c) admits paragraph 5(c); and
- (d) otherwise does not know and therefore cannot admit the allegations.

6. To paragraph 6, it:

- (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. To paragraph 7, it:

- (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. To paragraph 8, it:

- (a) proceeds on the assumption that any reference in this Defence to a "Dealer" excludes proprietary trading, and pleads accordingly;
- (b) under cover of (a), admits paragraph 8(a);
- (c) under cover of (a), admits paragraph 8(b);
- (d) under cover of (a), admits paragraph 8(c); and
- (e) otherwise does not know and therefore cannot admit the allegations.

C. ALLEGED GLOBAL FX MARKET

9. As to paragraph 9, it:

- (a) admits that during the Relevant Period, there was demand for some FX Instruments from customers in various locations in Europe, North America, South America, Asia, Africa, Australia and New Zealand (the **Identified Trading Locations**); and
- (b) otherwise denies paragraph 9.

10. As to paragraph 10, it says:

- (a) as to paragraph 10(a) that it admits that, during the Relevant Period it supplied, and/or offered to supply, some FX Instruments through FX sales desks and/or FX trading desks to customers at the same or different Identified Trading Locations;

- (b) as to paragraph 10(b) that it admits that, during the Relevant Period it supplied, and/or offered to supply, some FX Instruments to customers through electronic platforms including the single-bank platforms owned and operated by UBS called "FX Trader Plus" and "UBS NEO" and multi-bank platforms called "360T" and "FX ALL" that connected customers and was accessible in Australia;
 - (c) it refers to and repeats paragraph 9(a) above;
 - (d) it does not know and therefore cannot admit the allegations in respect of other Respondents; and
 - (e) it otherwise denies paragraph 10.
11. As to paragraph 11, it:
- (a) says that any one unit of a particular currency is fungible, as a medium of exchange, for any other one unit of that same currency, and otherwise denies paragraph 11(a);
 - (b) admits that price was ordinarily a factor of choice of Dealer for customers seeking to enter into an FX Instrument;
 - (c) otherwise denies paragraph 11 and says further:
 - (i) other factors in addition to price which may have affected the fungibility and/or substitutability of FX Instruments during the Relevant Period including, among other matters:
 - (A) customers would, at times, deal with UBS instead of other banks by reason of a pre-existing relationship with UBS and/or account with UBS;
 - (B) customers would, at times, deal with UBS instead of other banks for the additional services UBS offered;
 - (C) customers would, at times, choose a particular Dealer based on a perceived expertise the Dealer had in the local market or region;
 - (D) customers would, at times, choose a particular Dealer based on the time of the day and/or the urgency with which a customer was seeking to engage in trading.

- (E) that the trading of FX Instruments was subject to regulatory limits in some regions;
- (F) that some FX Instruments were unavailable to customers in some regions;

Particulars

Further particulars will be provided upon the completion of discovery and the service of UBS' expert evidence.

- (G) whether or not a customer held a registered account and was set up to trade FX Instruments with a particular Dealer; and
- (H) a customer's willingness to enter a transaction as a result of factors including:
 - (I) settlement risk; and
 - (II) credit risk; and
- (I) a Dealer's willingness to enter a transaction as a result of factors including:
 - (I) the creditworthiness of the customer; and
 - (II) the existing net market position of the Dealer.

12. It denies paragraph 12.

13. It denies paragraph 13.

D. ALLEGED AUSTRALIAN FX MARKET

14. As to paragraph 14, it:

- (a) admits that, during the Relevant Period, there was demand for some FX Instruments from customers located in and outside Australia to acquire FX Instruments from Dealers;
- (b) refers to and repeats paragraphs 4(d) and 9 above; and
- (c) otherwise denies paragraph 14.

15. As to paragraph 15, it says that:

- (a) as to paragraph 15(a), it:

- (i) admits that, during the Relevant Period UBS operated a sales desk in Sydney (Australia) in which FX Instruments were supplied and/or offered for supply to customers in Australia;
 - (ii) refers to and repeats paragraphs 4(d)(i)(B), 10(a), 10(b) above;
 - (iii) does not know and therefore cannot admit the allegations insofar as they concern Dealers other than UBS; and
 - (iv) otherwise denies the allegations; and
- (b) as to paragraph 15(b):
- (i) it refers to and repeats paragraph 15(a)(i) above;
 - (ii) refers to and repeats paragraph 10 above;
 - (iii) does not know and therefore cannot admit the allegations; and
 - (iv) otherwise denies the allegations.

16. As to paragraph 16, it:

- (a) refers to and repeats paragraphs 4(d) and 11 above; and
- (b) otherwise denies paragraph 16.

17. It denies paragraph 17.

18. It denies paragraph 18.

E. ALLEGED COMPETITION IN RELATION TO FX INSTRUMENTS

19. As to paragraph 19, it:

- (a) refers to and repeats paragraph 10(a), above; and
- (b) otherwise denies the allegations.

20. As to paragraph 20, it:

- (a) admits that Related Bodies Corporate of UBS supplied and/or offered to supply some FX Instruments to customers in one or more of the Identified Trading Locations;

- (b) does not know and therefore cannot admit the allegations insofar as they concern Respondents other than UBS and its Related Bodies Corporate; and
- (c) otherwise does not admit paragraph 20.

21. It does not know and therefore cannot admit paragraph 21.

22. It denies paragraph 22.

F. RELEVANT ARRANGEMENTS OR UNDERSTANDINGS

F.1 Alleged FX Understanding

23. As to paragraph 23, it:

- (a) denies the paragraph; and
- (b) says further that it does not plead to the particulars therein.

24. As to paragraph 24, it:

- (a) denies the paragraph; and
- (b) says further that it does not plead to the particulars therein.

F.2 Alleged FX Chatroom Understandings

25. As to paragraph 25, it:

- (a) denies the paragraph; and
- (b) says further that it does not plead to the particulars therein.

26. As to paragraph 26, it:

- (a) denies the paragraph; and
- (b) says further that it does not plead to the particulars therein.

G. RELEVANT CONTRAVENTIONS BY THE RESPONDENTS

G.1 Alleged FX Understanding: price fixing

G.1.1 Alleged Price fixing conduct prior to 24 July 2009: TPA Contraventions

- 27. It denies paragraph 27.
- 28. It denies paragraph 28.
- 29. It denies paragraph 29.
- 30. It denies paragraph 30.

G.1.2 Alleged Price fixing conduct on or after 24 July 2009: TPA and CCA contraventions

- 31. It denies paragraph 31.
- 32. It denies paragraph 32.
- 33. It denies paragraph 33.

G.2 Alleged FX Understanding: restricting supply

- 34. It denies paragraph 34.
- 35. It denies paragraph 35.
- 36. It denies paragraph 36.
- 37. It denies paragraph 37.

G.3 Alleged FX Understanding: substantially lessening competition

- 38. It denies paragraph 38.
- 39. It denies paragraph 39.
- 40. It denies paragraph 40.

G.4 Alleged FX Chatroom Understandings: price-fixing

G.4.1 Alleged Price fixing conduct prior to 24 July 2009: TPA Contraventions

- 41. It denies paragraph 41
- 42. It denies paragraph 42.
- 43. It denies paragraph 43.

44. It denies paragraph 44.

G.4.2 Alleged Price fixing conduct on or after 24 July 2009: TPA and CCA contraventions

45. It denies paragraph 45.

46. It denies paragraph 46.

47. It denies paragraph 47.

G.5 Alleged FX Chatroom Understandings: restricting supply

48. It denies paragraph 48.

49. It denies paragraph 49.

50. It denies paragraph 50.

51. It denies paragraph 51.

G.6 Alleged FX Chatroom Understandings: substantially lessening competition

52. It denies paragraph 52.

53. It denies paragraph 53.

54. It denies paragraph 54.

H. LOSS OR DAMAGE

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

56. It denies paragraph 56.

H1. Alleged FX Understanding

57. It denies paragraph 57.

58. It denies paragraph 58.

59. It denies paragraph 59.

60. As to paragraph 60, it:

- (a) says that even if the alleged effect existed and was passed on to some or all down-stream sellers and buyers of FX Instruments, some such sellers and buyers avoided or mitigated any loss, including by passing on the alleged effect further down-stream to others including other sellers or buyers or their own clients or customers or service providers; and
- (b) otherwise denies paragraph 60.

61. It denies paragraph 61.

H2. Alleged FX Chatroom Understandings

62. It denies paragraph 62.

63. It denies paragraph 63.

64. It denies paragraph 64.

65. It repeats paragraph 60(a) above and otherwise denies paragraph 65.

66. It denies paragraph 66.

H3. Damage suffered

67. It denies paragraph 67.

68. As to paragraph 68, it:

- (a) says that any claim for loss or damage that accrued prior to 27 May 2013, is precluded by operation of s 82(2) of the CCA and/or the TPA;
- (b) says 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;
- (c) says that even if there was a claim for loss or damage (which is denied), some such sellers and buyers of FX Instruments the subject of this proceeding may have avoided, mitigated, or recovered loss or damage, or are likely to recover loss or damage by their participation in overseas proceedings in respect of their entry into the same FX Instrument;

Particulars

In respect of whether any Group Members have already recovered any alleged loss or damage, UBS refers to any

Group Members who signed releases in any of the following proceedings:

- (A) the United States of America class action proceeding known as In re Foreign Exchange Benchmark Rates Antitrust Litigation, No 1:13-cv-07789-LGS (District Court for the Southern District of New York);
- (B) the United States of America class action proceeding known as Contant v Bank of America Corporation, No 17-cv-03139-LGS (District Court for the Southern District of New York);
- (C) the Canadian class action proceeding known as Mancinelli v Royal Bank of Canada et al, case CV-15-536174 (Superior Court of Ontario); and
- (D) the Canadian class action proceeding known as Staines v Royal Bank of Canada et al, case 200-06-000189-152 (Superior Court of Quebec).

In respect of whether any Group Members are already seeking to recover any alleged loss or damage, UBS refers to any Group Members who are party to any of the following proceedings:

- (A) the United States of America class action proceeding known as Nypl v JP Morgan Chase & Co, No 1:15-cv-09300-LGS (District Court for the Southern District of New York);
- (B) the a Dutch group proceeding known as the 'Stichting Forex Claims';
- (C) the United States of America class action proceeding known as Allianz Global Investors Gmbh v Bank of America Corporation, No 1:18-cv-10364-LGS (District Court for the Southern District of New York)
- (D) the United Kingdom class action proceeding known as Michael O'Higgins FX Class Representative Ltd. v. Barclays Bank PLC and others, case number 1329/7/7/19 (Competition Appeals Tribunal);

- (E) the United Kingdom class action proceeding known as Phillip Evans v. Barclays Bank PLC and others, case number 1336/7/7/19 (Competition Appeals Tribunal)
- (F) the United Kingdom proceeding known as *Allianz Global Investors GmbH and others v. Barclays Bank PLC and others*, case number CL-2018-000840 (High Court of Justice of England and Wales); and
- (G) the Israel class action proceeding known as Ilan Gertler, Avidor Ziv, Zoheret Ziv, Itai Lenuel, T. Barka Ltd v Deutsche Bank AG, and others, CIA 29013-09-18 (Central District Court of Israel).

Further particulars will be provided prior to trial.

- (d) refers to and repeats paragraph 60(a); and
- (e) otherwise denies paragraph 68.

69. As to paragraph 69, it:

- (a) refers to and repeats paragraph 68;
- (b) says further that even assuming the truth of the Concealment allegation at paragraph 23(b) (which is denied), that could not have deprived the Applicant or Group Members of an opportunity to commence proceedings for recovery of the alleged loss or damage on a date earlier than 27 May 2019; and
- (c) otherwise denies paragraph 69.

I. COMMON QUESTIONS OF LAW OR FACT

70. It does not plead to paragraph 70 as the paragraph contains no allegations against it.

J. RELIEF CLAIMED

It denies that the Applicant and Group Members are entitled to the relief set out in the originating application or any relief.

Date: 25 March 2022



.....
Signed by Ruth Elizabeth Overington
Herbert Smith Freehills
Lawyer for the First Respondent

This pleading was prepared by W A Harris, M I Borsky, J Kirkwood and J D Williams of counsel.



.....
Herbert Smith Freehills
Solicitors for the First Respondent

Certificate of lawyer

I, Ruth Elizabeth Overington, certify to the Court that, in relation to the defence filed on behalf of the First 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



Signed by Ruth Elizabeth Overington

Herbert Smith Freehills

Lawyer for the First Respondent

Schedule

No. VID 567 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

Applicant

J Wisbey & Associates Pty Ltd J (ACN 001 959 851)

Respondents

Second Respondent: Barclays Bank Plc (01026167)

Third Respondent: Citibank N.A. (ABN 34 072 814 058)

Fourth Respondent: JPMorgan Chase Bank N.A. (ABN 43 074 112 011)

Fifth Respondent: NatWest Markets Plc (SC090312)

Date: 25 March 2022