



Neutral Citation [2009] CAT 15

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1109/6/8/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28th April 2009

Before:

THE HONOURABLE MR. JUSTICE BRIGGS
(Chairman)

PROFESSOR PAUL STONEMAN
DR. VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BARCLAYS BANK PLC

Applicant

- v -

THE COMPETITION COMMISSION

Respondent

and

**FINANCIAL SERVICES AUTHORITY
LLOYDS BANKING GROUP
SHOP DIRECT GROUP FINANCIAL SERVICES LTD
ROSEMARY CLARK**

Potential
Interveners

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JUDGMENT
(Permission to Intervene)

APPEARANCES

Mr. Matthew Cook (instructed by Clifford Chance LLP) appeared for the Applicant.

Mr. John Swift QC and Miss Kassie Smith (instructed by the Treasury Solicitor) appeared for the Respondent.

Miss Marie Demetriou instructed by and appearing for the potential Intervener, The Financial Services Authority.

Miss Kelyn Bacon (instructed by Herbert Smith LLP) appeared for the potential Intervener, Lloyds Banking Group.

Mr. Tim Ward (instructed by DLA Piper UK LLP) appeared for the potential Intervener, Shop Direct Group Financial Services Ltd.

The potential intervener, Ms. Rosemary Clark, did not attend and was not represented.

THE CHAIRMAN:

1 There are before us four applications to intervene in these proceedings which we decide as follows. Intervention applications of this kind are governed by Rule 16 of the Competition Appeal Tribunal Rules 2003 which provides broadly that any person who considers he has sufficient interest in the outcome of the proceedings may make a request to the Tribunal for permission to intervene in the proceedings. There are procedural provisions about that request with which we are not concerned, and sub-rule (6) provides:

“If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit.”

There is therefore a threshold question which may be summarised as a sufficient interest. There is then a discretion if that threshold is satisfied by any applicant to intervene as to whether the Tribunal should permit that intervention, and the Tribunal has powers to impose terms and conditions on an intervener sufficient to ensure that by permitting an intervention no unsatisfactory consequences for the proceedings as a whole thereby ensue.

2 Before dealing with each of the separate interventions, I place on record that both the parties presently in these proceedings, Barclays Bank plc and the Competition Commission, have impressed upon us their mutual concern that the proceedings should not, by the admission of uncontrolled interventions, get out of hand in the sense of leading to proliferation of documents or evidence, increased expense or increased delay before a hearing and length of hearing if that can be properly controlled either by a negative exercise of discretion to permit an intervention or by appropriate directions and conditions imposed at or shortly following permission to intervene. We have taken those submissions firmly on board in reaching our conclusions.

3 The four applicant interveners are: Lloyds Banking Group, Shop Direct Group Financial Services Ltd, the Financial Services Authority and a Mrs. Clark. The first three interveners have all applied both in writing and today by representatives; Mrs. Clark has applied in writing but has not appeared today through no fault of her own, and we have heard the submissions of the existing parties in relation to all four applications. We propose to deal first in each case

with the question whether a sufficient interest is shown by the intervener and whether, as a matter of discretion, we should permit that intervention and to deal with the question of terms and conditions and appropriate directions collectively at the end of this decision.

- 4 Taking Lloyds first, they have, it seems to us, plainly disclosed a sufficient interest. Their interest is broadly equivalent to the interest of Barclays on this application as major sellers of credit PPI insurance. There has been no opposition to the request for permission to intervene of Lloyds save for concern, as I have indicated, that that intervention should not lead to unnecessary proliferation, repetition or duplication – a matter which we propose to deal with by directions which will be common to all interveners.
- 5 Turning secondly to Shop Direct, we have come to the conclusion, notwithstanding submissions to the contrary from the Commission, that Shop Direct has shown a sufficient interest to pass the threshold test for intervention. The group is a major sellers of retail PPI and the reason why we have concluded that it has a sufficient interest in these proceedings derives from the breadth of Barclays' application which, if successful in accordance with its application notice, would or might lead to the quashing or remission for reconsideration of the imposition of the point of sale prohibition, not merely in relation to credit PPI, but also in relation to retail PPI, and there is a sufficient prospect that it would to give Shop Direct as a major seller of retail PPI a sufficient interest in these proceedings.
- 6 A major objection to admitting Shop Direct, whether on the grounds of sufficient interest or in discretion was that by admitting Shop Direct it would, in effect, be permitted to pursue its own application on its own separate grounds out of time. We agree that that is a reason against admitting Shop Direct as a matter of discretion but, in our view, it is outweighed by the factors in favour of admitting Shop Direct, the most important of which are as follows: first, that in our view submissions from Shop Direct are likely to help the Tribunal on issues as to how far the quashing or reference back of the point of sale prohibition should go if and to the extent that Barclays succeed on any of their grounds of appeal and, in particular, on their ground one.

- 7 The second reason is that submissions from Shop Direct may also assist the Tribunal upon whether the Competition Commission correctly identified the relevant product and geographical market. It is right to say that they dealt with that issue separately in separate chapters of the report in relation to credit PPI on the one hand, and retail PPI on the other hand, but it is also to be observed that there are pronounced similarities in their conclusions in those two separate chapters which lead us to the view that it is at least possible that submissions from Shop Direct, from a retail PPI perspective may be of assistance. At this early stage we put that reason no higher than that. Accordingly, we propose to exercise our discretion so as to permit Shop Direct to intervene. I will return shortly to the conditions which we propose to impose in relation to that intervention.
- 8 Turning to the FSA, again we have reached the conclusion, notwithstanding submissions to the contrary from Barclays, that the FSA has a sufficient interest in these proceedings. The FSA is a regulator of the sale of PPI, closely affected by the outcome of this application, which ever way it goes. In particular it seems to us likely that which ever way this application goes the FSA will need to consider whether to amend, or to apply in a different way part of their regulatory regime covering the sale of PPI insurance and, in particular, what are called the “ICOBS Rules”. There is force in Barclays’ submission that any person, in particular any regulator, may artificially suggest they have a sufficient interest merely because some homework may arise from the outcome of an application of this kind. In our view, however, the FSA’s regulatory role is so closely engaged by the outcome of this application that it would be wrong merely by describing it as additional homework to conclude that the steps which they will have to take, which ever way this application goes, fail to disclose a sufficient interest.
- 9 As a matter of discretion it seems to us that submissions from the FSA may well assist the Tribunal in relation to that part of ground 4 of Barclays’ application which relates to the effect of recent regulatory change and we have it in mind that the different regulatory functions and duties of the FSA by comparison with the Competition Commission mean that, although they have an overlap in this area of regulation, it is likely that its submissions would be delivered from a significantly different perspective. The consequence of that is that its

submissions would not, we think, merely replicate those of the Competition Commission. It is also a consequence that, in our view, it would not be right to say that submissions from the Commission are bound fully to cover the interests of the FSA. We bear in mind that in the proceedings at the Report stage of this matter, the FSA made submissions to the Commission which were not entirely accepted.

10 As for Mrs. Clark, having considered her written application, and submissions, mainly from Barclays but also helpful submissions from the Commission, we have come to the conclusion that she has not shown a sufficient interest to satisfy the threshold test for intervention. Mrs. Clark is engaged in opposing possession proceedings arising out of a mortgage supported by a single premium PPI policy sold to her at the credit point of sale, and wishes to argue in the possession proceedings which are now in a District Registry of the High Court that those factors contribute to a case which she wishes to advance under the Consumer Credit Act 1974. It seems to us, putting it at its very highest, that can only be the most indirect type of interest for the purpose of intervention in these proceedings. It is entirely unclear to us whether the judge hearing the possession proceedings would consider the Report, let alone the application to quash parts of the Report, as going to the heart of her case under the Consumer Credit Act, and it seems to us in any event that since these proceedings will take place in public she will be able to obtain sufficient information about these proceedings so as to be able to inform the court in due course (if the possession proceedings follow these proceedings) about what has happened and to appraise the trial judge of such aspects of these proceedings as she thinks may serve her interests. In those circumstances we decline her application to intervene.

11 I come now to the question of terms and conditions. We accept the submission made by both the existing parties that it is necessary to ensure, as far as can be done, that the interventions which we have permitted do not unnecessarily prolong, increase the volume of papers or expense of these proceedings by repetition or by duplication of submissions and evidence advanced by either of the existing parties; indeed, we propose to permit their intervention specifically on condition that there be no duplication or repetition of the evidence or submissions of the existing parties in the contribution to the proceedings which the interveners propose to make. As a matter of case management we propose

to give – subject to hearing submissions from all the parties in the second stage of this CMC – directions which will ensure that each intervener will first be served with any submissions or evidence from the existing party which that intervener wishes to support, before the intervener serves evidence or submissions of its own, so that the intervener will be able to see and therefore avoid the risks of duplication and repetition. Specifically in relation to Shop Direct, but generally in relation to all the interveners, we also impose as a condition that the interveners advance no new and distinct grounds of application or grounds of intervention separate from the grounds of application of Barclays, or from the points of defence which in due course will be advanced by the Commission. What they may, however, be permitted to do, is to advance separate arguments. We consider that the submission that an Intervener should be permitted neither to advance new grounds nor new argument is so draconian as to make intervention altogether pointless, and cannot have been contemplated by the Rules. Accordingly, the interveners are to be permitted to advance fresh arguments and, in relation to the intervention of Shop Direct, we make it clear that those arguments may be arguments directed to supporting Barclays’ grounds of application from the perspective of a retail rather than credit PPI seller.
