Party: Applicant / Proposed Representative
Witness: B A Hollway
Number of Statement: Fourth
Exhibit: BAH24-BAH27
Dated: 23 April 2021

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) NATWEST GROUP PLC
(13) UBS AG
(a company incorporated under the laws of Switzerland)

Respondents / Proposed Defendants

FOURTH WITNESS STATEMENT OF BELINDA ANNE HOLLWAY

I, **BELINDA ANNE HOLLWAY**, of Scott+Scott UK LLP ("**SSU**")[1], whose registered address is St. Bartholomew House, 90-94 Fleet Street, London EC4Y 1DH, UK, **WILL SAY**:

1. I am a partner in SSU, solicitors for the Applicant. I have previously provided three witness statements in relation to the above proceedings, which are brought on a collective, opt-out basis pursuant to section 47B of the Competition Act 1998 (the "**Proposed Collective Proceedings**"): the first dated 28 July 2019 ("**my First Statement**") and filed with the Competition Appeal Tribunal (the "**Tribunal**") on 29 July 2019; a second statement dated 28 January 2020 ("**my Second Statement**"); and a third statement dated 31 January 2020 ("**my Third Statement**").

2. As with my First, Second and Third Statements, I make this statement in my role as the partner with carriage of the application by Michael O'Higgins FX Class Representative Limited ("**O'Higgins**") to bring the Proposed Collective Proceedings (the "**O'Higgins Application**").

3. I make this statement by way of evidence in support of the O'Higgins Application:

   a. in its reply to the Proposed Defendants' response to the O'Higgins Application dated 26 February 2021 (the "**Response**"); and

   b. regarding which of O'Higgins and Mr Phillip Evans would be the most suitable to act as class representative for the purposes of rule 78(2)(c) of the Competition Appeal Tribunal Rules 2015 (the "**2015 Rules**") (the "**Carriage Issue**").

4. I refer to Mr Evans' application, made in December 2019, as the "**Evans Application**".

5. Specifically, I will address the following:

   In relation to the Response

   a. My reply to relevant matters raised by the Proposed Defendants in the Response. In particular, I address the Proposed Defendants' arguments that the Proposed Collective Proceedings should only be permitted to proceed, if at all, as an opt-in action, including the points they raise about the practicability of such an opt-in claim in the context of the foreign exchange ("**FX**") market.

[1] We wrote to the Tribunal on 28 August 2019 to confirm that the company name of the firm had been changed from Scott+Scott Europe LLP to Scott+Scott UK LLP.

In relation to the Carriage Issue

b. With reference to paragraph 6.32 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the "**2015 Guide**"), I outline:

   i. the relevant experience of the legal team advising O'Higgins in the Proposed Collective Proceedings; and

   ii. the wider firm's experience in FX litigation through its leadership of the proceedings in *In re Foreign Exchange Benchmark Rates Antitrust Litigation*[2], a class action in the US against sixteen banks for manipulation of the FX market in breach of US antitrust law (the "**US Proceedings**") (I also provide an update on the relevant developments in the US Proceedings).

c. The work required to bring the O'Higgins Application, including the investment and risk analysis undertaken by O'Higgins (along with its advisers) as the first Proposed Class Representative to bring a collective action before the Tribunal in the United Kingdom ("**UK**") in relation to manipulation in the FX market.

d. The respective timings of the filing of the O'Higgins Application and the Evans Application.

e. The respective budgets of the O'Higgins Application and the Evans Application.

f. A brief overview of some of the other work undertaken for the O'Higgins Application since my previous statements.

g. An explanation of the genesis of the list of Relevant Financial Institutions used in the O'Higgins Application's class definition and the inquires we have made to seek to understand the difference between the O'Higgins Application's and Evans'' Application's respective lists of Relevant Financial Institutions.

6. 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. Save to the extent I refer explicitly to work undertaken or proposed to be undertaken in relation to the Proposed Collective Proceedings, no waiver of privilege is intended by this statement.

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[2] No. 1:13-cv-07789-LGS (S.D.N.Y.).

7. There is now produced and shown to me a number of exhibits marked "**BAH24**" to "**BAH27**" respectively which comprise true copies of the documents to which I will refer in this witness statement.

I. THE RESPONSE

8. In the Response, the Proposed Defendants assert that both the O'Higgins and Evans Applications should be dismissed in their current form and the Proposed Collective Proceedings "*should only be permitted to proceed, if at all, as opt-in actions*".[3] The Proposed Defendants base this position on three main arguments, which are set out at paragraphs 3a. to 3c. of the Response. In this statement, I focus on the first of those statements, i.e. that "*the characteristics of the proposed class members show that opt-in proceedings would be eminently practicable*".

9. I am aware that Rule 79(3) refers to two specific criteria for the CAT to take into account when determining whether proceedings should be certified as opt-in or opt out:

> "*(a) the strength of the claims; and*
>
> *(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover*".

10. The relevance of that Rule in the present case is a matter for submissions but, if it is relevant to consider the first criterion ("*strength of the claims*"), I note that the O'Higgins Application is a follow-on claim from two separate infringement decisions adopted by the European Commission (the "**Commission**") on 16 May 2019, in Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express) arising from two FX cartels (the "**FX Cartels**") (each a "**Settlement Decision**" and together the "**Settlement Decisions**"). *Prima facie*, therefore, the claim is strong. Detailed responses to the Proposed Defendants' criticism on the strength of the claim are contained in the Second Reports of Professor Breedon and Professor Bernheim.

11. In relation to the practicability criteria, I am aware that the CAT Guide states at paragraph 6.39:

> "*The Tribunal will consider all the circumstances, including the estimated amount of damages, that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the*

[3] See, for example, paragraph 3 of the Response.

interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

12. I address practicability and the indicators referred to above, but this is without prejudice to my client's legal submissions on whether or not this "*general preference*" is permissible or appropriate within the legislative framework.

13. The First Witness Statement of Mr Michael O'Higgins dated 28 July 2019 ("**O'Higgins 1**") explained in detail (at paragraph 27) the reasons why the Proposed Collective Proceedings were suitable to be brought as an opt-out claim. The Proposed Defendants disagree, but I note that they have filed no evidence to support the various bare assertions in the Response about the probable make-up of the potential class of victims (the "**Proposed Class**") or the likely amount and range of recovery. In this section of this statement, I provide evidence about practicability from: (a) information about the class members in the US Proceedings; and (b) my firm's learning from talking to victims of the FX cartel about factors motivating their participation in any potential action. Mr O'Higgins and Mr Damian Mitchell provide further evidence in their statements addressing the Proposed Defendants' assertions about the practicability of an opt-in claim.

Lessons from distribution in the US Proceedings

14. The US Proceedings are an opt-out class action. I am informed by my colleagues in the United States at SSU's affiliated firm Scott+Scott Attorneys at Law LLP ("**SSAAL**") (SSU and SSAAL together are "**Scott+Scott**") that the US class (the "**US Settlement Class**") – like the Proposed Class – includes entities such as hedge and investment funds, pension funds, asset managers and corporate entities. Like members of the UK Proposed Class, a small number of US Settlement Class members traded extremely large volumes of FX, while a large number of US Settlement Class members traded small volumes. Again like the Proposed Class, some US Settlement Class members traded multiple times a day, while others traded only infrequently. FX is traded globally and the UK was (and remains) the world's leading centre of FX trading with approximately 41% of trading taking place in the UK in 2013, while the US is the second main centre of FX trading with approximately 19% in 2013.[4] Accordingly, there are sufficient parallels between the members of the US Settlement Class and the Proposed Class that experiences in the US can provide some insights into the Proposed Class.

[4] See 2013 BIS report as referred to in footnote 6 of the Breedon Report, Exhibit U.

15. Indeed, some members of the Proposed Class will also be members of the US Settlement Class to the extent that they traded FX through the US, as the US class definition (which appears at Appendix 1 to my First Statement) includes the US trading of non-US domiciled entities. For example, as Mr Mitchell (Managing Director of Dsquare Trading Ltd) explains in his First Statement ("**Mitchell 1**"), his company is a member of the US Settlement Class for its US trading while also being a member of the Proposed Class because it is domiciled in the UK.

16. As set out in my first statement, in the US Proceedings, 15 out of 16 banks settled that litigation and the total settlement sum is in excess of $2.3 billion. The claims administrator in the US Proceedings, Epiq (also the proposed claims administrator retained by the O'Higgins Application), is in the process of distributing these sums.

17. I am informed by my colleagues in the US that the distribution process in the US Proceedings has been designed to prioritise distribution to small and medium sized class members with relatively modest claims in the first instance. The evidence shows that there are a large number of such claims. By way of illustration, based on the publicly available information contained in the the "Declaration of Shannon Casey in Support of Motion for Initial Distribution" dated 1 March 2019 in the US Proceedings (the "**Casey Statement**")[5]:

    a. At time of the Casey Statement, Epiq had processed 26,937 claims totalling $54,006,248.60 and estimated this represented 50.3 percent of the total number of claims that will be paid in the US Proceedings.[6]

    b. As I explained in paragraph 12b. of my First Statement, the claim forms in relation to distribution presented two options for claiming: (i) 'Option 1', under which Epiq estimated the class member's eligible transaction volume using data provided by the US defendant banks ("**Option 1 Claims**"); or (ii) 'Option 2', under which Epiq estimated the class member's eligible transaction volume using data submitted by the relevant class member itself ("**Option 2 Claims**"). Of the 26,937 claims processed:

        i. 23,019 had been submitted as Option 1 Claims and 3,918 had been submitted as Option 2 Claims;

        ii. the average US$ per claim amount across both Option 1 and Option 2 Claims was $2,005.91; and

5 Available at http://www.fxantitrustsettlement.com/courtdocs and as Exhibit BAH 24.
6 See paragraph 10 of the Casey Statement.

iii. 19,737 claims were for amounts of less than $150 (the automatic award level), with 11,609 being for as little as $15 (the *de minimis* award level).[7]

18. These figures demonstrate two things that are particularly relevant to the issue of practicability. First, that the class in the US Proceedings has a "long tail" of a large number of class members who are receiving comparatively modest amounts of compensation. In the US Proceedings, it is not the case that "*the class is small but the loss suffered by each class member is high*". While some class members are likely to receive large pay-outs, this is by no means true of all, or even the majority, of class members who have come forward to claim compensation. This is equally likely to be true of the Proposed Class that the O'Higgins Application seeks to represent and therefore I suggest weighs in favour of opt-out rather than opt-in on the basis of para 6.39 of the CAT Guide.

19. Second, the fact that the vast majority of the US class members with modest claims elected to follow the Option 1 route indicates that these class members were either unable, or did not regard it as worthwhile, to extract and provide their historical FX data to make an Option 2 claim. To the extent that the Proposed Defendants in the O'Higgins Application argue that a benefit of an opt-in claim is that opt-in class members would be required to provide their trading data, the US experience indicates that a substantial number of class members with modest claims simply would be unable or unwilling to provide such data when only a modest return is anticipated. If providing historical FX trading data is a requirement to participate in an opt-in class, it appears likely that many victims of the FX Cartel who suffered only modest losses would not elect to opt in, particularly if there is a risk that the costs of retrieving their data may exceed their individual recovery.

Proposed Class members' reluctance to sue banks

20. Mr O'Higgins, explained at paragraph 27d. of O'Higgins 1 that, in his extensive experience in the financial sector, "*commercial parties may be reluctant to commence proceedings against key suppliers, such as the banks with whom they deal, for fear of damaging commercial relationships or wider reputational harm.*" Mr O'Higgins has further elaborated on this in his Third Statement ("**O'Higgins 3**"), in which he explains the discussions that he has had with potential members of the Proposed Class and the concerns they have expressed to him about litigating against banks if their identities will become known to the banks. In Mitchell 1, Mr Mitchell has similarly explained his own initial concerns about the impact on his business' relationship with the banks if it participated in the US class settlement.

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[7] See paragraphs 12 to 13 of the Casey Statement.

21. My firm has observed this same reticence. Scott+Scott has been monitoring events in relation to the illicit conduct in the FX global market since these allegations began to surface. This has involved discussing the matter with clients, as well as with other entities that are likely victims of the Proposed Defendants' anticompetitive conduct. The content of those discussions is privileged. Nevertheless, my own experience and those of my colleagues gained through talking to these people is that, notwithstanding their desire for compensation, they are generally reticent to participate in an individual or an opt-in action due to nervousness about visibly taking legal action against the banks with whom they have an ongoing commercial relationship.

22. This reluctance to sue the banks is one key element that goes to the practicability of bringing an opt-in action. Whether or not class members would, in fact, face retaliation or harm to their relationship with the banks by joining an opt-in action is irrelevant (and for the avoidance of doubt, I express no view in this statement on the likelihood of this); the mere concern about the possibility of such retaliation or damage to important banking relationships is sufficient to be a significant hurdle to any opt-in action.

Issues with access to data

23. Another element of the practicability of building an opt-in class action is the requirement to obtain sufficiently complete and accurate data at an early stage that would permit an adequate "book build" for an opt-in FX action. The products relevant to the Proposed Collective Proceedings are not the archetypal "widgets" that competition lawyers classically theorise about, but instead complex financial instruments. Unlike a "widget" cartel where a homogenous or largely homogenous product may have been bought at the same price for considerable periods between price rises, FX prices change in milliseconds and many different currency pairs were affected by the FX Cartels. As I explained at paragraph 12b. of my First Statement, in the United States, US Settlement Class members who elected to have their share of the damages calculated on the basis of their own data were asked to provide: class member name, counterparty, location of executing bank, class member ID, venue, prime broker, transaction ID, FX transaction type, trade date, timestamp, time zone, trade rate, base currency, quoted currency, whether the class members bought or sold the base currency, base amount, contra amount, and the value date. Although not all this data is necessarily needed to calculate a class member's loss, it is indicative of the complexity of the data that is or may be recorded in relation to every individual FX trade.

24. The FX Cartels took place between 2007 and 2013, so the trading data relevant to the cartel period is now between 8 and 14 years old. Even in the case of sophisticated entities that trade significant volumes of FX products, a considerable effort is likely to be needed in order to

retrieve the relevant data. Mr Mitchell explains in Mitchell 1 the amount of work that was involved in retrieving data for his business in order to submit an Option 2 claim in the US Proceedings, even though his business maintained records of all its FX trading (other than for a short period where it had suffered from an IT systems failure).

25. Based on my and my firm's experience of speaking to potential class members about the losses that they may have suffered as a result of the FX cartel, I do not believe it typically to be a simple or quick exercise for entities that have traded FX to obtain sufficiently complete data to be of real utility for the experts with whom we work to analyse. In my view, many entities that traded FX during the Cartel Period, particularly smaller entities or those that traded a smaller volume (for example because it was only a peripheral activity for their business) are unlikely to want, or to be able to, undertake this exercise simply to form a view as to whether or not to opt in to a class action that has, at the time of opting-in, no guarantee of success (which can be contrasted with an opt-out scenario as I explain below). This raises a very real risk of leaving out many of the potential members of the Proposed Class.

26. As I explained at paragraph 12b. of my First Statement and at paragraph 17 above, distribution in the US Proceedings has been carried out based, in part, on the Option 1 Claim model whereby a class member's claim is valued by the US claims administrator based on an estimate of the class member's eligible transaction volume using data provided by the US defendant banks. My colleagues in the US believe the transaction database to be one of the largest ever assembled for use in a single piece of litigation, if not the largest.[8] The scale of the data collection – including the range of data, sources and nature of the information – is telling for the following relevant reasons:

    a. It demonstrates that the involvement of the Proposed Defendants is very helpful to obtaining a complete and "clean" data set. This is also reflected by the position Professor Francis Breedon takes at paragraphs 6.36 and 6.37 of his amended expert report dated 28 January 2020 (the "**Breedon Report**"). It is also notable that when Mr Mitchell's firm obtained its trading data from the banks and cross-checked it against its own records, the data was almost identical (see Mitchell 1 at 30).

    b. It also reinforces my comments above in relation to the difficulties the Proposed Class (in particular, the smaller members) would face in presenting adequate data in an opt-in action to be able to determine that their participation was worth the initial effort. Many members of the Proposed Class may be unable to do this alone without data from the defendant banks

[8] See paragraph 17 of my First Statement.

and without seeking further data from, for example, their prime broker and/or other non-Defendant banks with whom they traded. Again, while Mr Mitchell was able to obtain his business's trading data from the banks, it was not a quick process and he was nervous that seeking the data would damage his relationship with the banks (see Mitchell 1 at 29).

27. By structuring the Proposed Collective Proceedings as an opt-out action, the O'Higgins Application very significantly ameliorates these issues. It is a very different proposition to invite a class member to produce data to participate in a distribution of a damages pot that is already on the table than to ask a potential class member to undertake a time-consuming data collection exercise when the possibility of obtaining damages is still uncertain, is likely to occur years in the future (if at all), and when obtaining that data (e.g. from a prime broker bank) may be seen as risking harming important banking relationships by helping the instigation of litigation against the banks.

Costs of an opt-in action

28. In addition, I note that a key benefit of an opt-out action for class members is that they are not required to pay any portion of their recovery to lawyers or litigation funders. Rather, they keep the full amount determined by the claims administrator under the distribution model approved by the Tribunal, while the litigation funder funds the claim in anticipation that it will be paid out of undistributed damages. Based on my experience from contact with potential class members, I believe that this aspect is likely to be very appealing.

29. By contrast, in an opt-in claim, there would be no undistributed damages, as damages would be awarded in favour only of those entities who had proactively joined the claim. As explained by Mr Purslow in Purslow 2, a funder would therefore have to take a proportion of each class member's damages pay-out in order to be repaid and receive a return on the costs of funding a claim. For potential class members, the prospect of having to give up a proportion of the damages to a litigation funder, while not necessarily a bar to participation, may make opting-in less attractive, particularly for those who anticipate that their damages pay-out will be comparatively small even before paying the funder.

Conclusions on the Response

30. As illustrated in the preceding paragraphs, the Proposed Defendants' assertions about the make-up of the Proposed Class and the practicability of an opt-in action are factually wrong. Due to the reluctance of businesses to sue banks and to the effort involved in data collection, if the Proposed Collective Proceedings were to be run as an opt-in action, the result would likely be

that a significant number of potential members of the Proposed Class would be effectively precluded from joining the action.

II. THE CARRIAGE ISSUE

A. SSU and the firm's competition litigation experience

31. SSU was incorporated in October 2015 and, as explained above, is an affiliate of SSAAL, an internationally recognised law firm with market-leading expertise in, amongst other fields, competition and securities litigation in the US.

32. SSAAL was founded in 1975 and began its complex litigation (i.e. securities and antitrust) practice in 1997. SSAAL is today one of the leading plaintiff firms in the US. By way of example, a May 2019 report noted that SSAAL had in the period 2013 to 2018 filed 74 claims and obtained 38 settlements with an aggregate value of over USD 3.4 billion and an average value of USD 91.3 million (being the highest of the leading antitrust firms, with Quinn Emanuel having an average of USD 67.8 million and Hausfeld having an average of USD 61.07 million).[9]

33. Recent major settlements on which SSAAL has served as lead counsel include:

a. *Alaska Electrical Pension Fund v. Bank of America*, N.A., No. 14-cv-7126 (JMF) (S.D.N.Y.). SSAAL served as co-lead counsel in this antitrust class action that alleged 14 major banks and a broker conspired to manipulate the ISDAfix rate, a key benchmark interest rate for a broad range of interest rate derivatives and other financial instruments. The Court approved USD 504 million in class settlements.

b. *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388 (WGY) (D. Mass.). SSAAL served as co-lead counsel in this antitrust class action that alleged private equity firms colluded to restrain competition and depress prices paid to shareholders of public companies in connection with leveraged buyouts. Although the US Department of Justice declined to prosecute, the case recovered USD 590.5 million in settlements on behalf of the class.

c. *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR) (S.D.N.Y.). SSAAL served as co-lead counsel in this case brought against 16 major banks and financial institutions, alleging a conspiracy to fix the prices of government sponsored entity bonds and obtained settlements of USD 386.5 million.

[9] 2018 Antitrust Annual Report, Class Action Filings in Federal Court, Published May 2019, pages 25 to 27.

34. Ongoing cases on which SSAAL serves as lead counsel include:

a. *In re European Gov't Bonds Antitrust Litig*., No. 19-cv-02601 (S.D.N.Y): a class action alleging manipulation in the market for European Government Bonds.

b. *Klein v. Facebook, Inc., No. 20-CV-08570 (LHK) (N.D. Cal.)*: a class action representing advertisers challenging Facebook's alleged monopoly over the social advertising market.

c. *In re Cattle Antitrust Litig*., No. 19-cv-1222 (D. Minn.): a class action alleging a conspiracy among USA's dominant meat packers to suppress feed cattle prices.

35. SSAAL is also deeply experienced in securities, consumer, and data breach litigation.

36. In terms of Scott+Scott's UK office, SSU began operating as an English law firm on 1 April 2016. SSU is a specialist dispute resolution firm whose solicitors have extensive expertise in competition litigation. While SSU is primarily a claimant firm, its solicitors have experience acting for both claimants and defendants.

37. In the approximately five years since SSU began operating, the firm has been involved in some competition damages actions before the Courts of England & Wales and the Tribunal, including the following proceedings:

a. "**Maritime Car Carriers**": SSU is representing Mark McLaren Class Representative Limited in its application to commence collective proceedings before the Tribunal pursuant to section 47B of the Competition Act 1998 against various providers of maritime car carrier services (also referred to as "roll on-roll off" shipping). The claim was filed on 20 February 2020 and arises from the Commission's infringement decision adopted on 21 February 2018 which found that the proposed defendants were involved in horizontal anti-competitive and collusive arrangements concerning deep sea car carrier services. The proposed class that Mark McLaren Class Representative Limited is seeking to represent includes all persons (other than certain excluded persons) who between 18 October 2006 and 6 September 2015 purchased or financed in the UK new cars or light-medium weight commercial vehicles and were required to pay an unlawfully inflated delivery charge in respect of those vehicles as a result of the cartelists' unlawful and anti-competitive conduct. The hearing to consider the collective proceedings order application has been listed to commence on 29 November 2021.

b. "**Interchange**": SSU is representing over twenty different client groups (including Vodafone, Hermès, GrandVision (Vision Express), Pendragon and Soho House) in their claims against Visa and Mastercard relating to the multilateral interchange fees those

credit/debit card companies imposed and which have been found to infringe European competition law.

c. "**Aluminium**": SSU is advising companies within the Kodak group in a claim before the English High Court against certain companies that, Kodak alleges, engaged in coordinated, unlawful conduct to cartelise the market for aluminium warehousing licensed by the London Metal Exchange and restricted supplies of aluminium for purchase on the spot market.

38. In addition to its contentious competition law practice, SSU acts on general commercial litigation mandates, international arbitrations and data privacy claims. The following active cases give an illustration of the nature of the matters SSU advises on:

a. "**TikTok**": SSU is advising Ms Anne Longfield OBE (as litigation friend to the proposed class representative, a child) in a representative claim under Rule 19.6 of the Civil Procedure Rules against ByteDance/TikTok concerning the collection, processing and exploitation of children's personal data through the TikTok app in breach of the General Data Protection Regulation.

b. "**Benyatov**": SSU is advising Mr Vadim Benyatov in bringing a claim against his former employer, Credit Suisse, in relation to breaches of tortious and implied contractual duties which the Bank owed to Mr Benyatov. Despite acting at all times in accordance with international banking standards, Mr Benyatov was detained and wrongly convicted of various crimes in Romania as a result of carrying out his role as an investment banker. Mr Benyatov seeks damages for Credit Suisse's failure to adequately assess the risks of him carrying out his job, and for breach of Credit Suisse's obligation to indemnify him for the losses that he has suffered as a result of performing his duties for the bank. This case was highlighted by The Lawyer as one of its top 20 cases of 2020 and Law360 has listed it as one of the top 20 Financial Services claims to watch in 2021.

c. **Investor-state arbitration**: SSU is advising two Indian investors in an investor-state arbitration claim against a Southeast European State relating to the expropriation of two mines.

39. In addition to the US and UK offices, Scott+Scott has an office in Amsterdam which operates as part of SSAAL and which was established on 29 March 2019, and an office in Berlin which operates through Scott+Scott Germany LLP, established on 14 December 2020. The philosophy of Scott+Scott as a firm is that the network of offices should function as a single entity. In this regard, our London team work closely with our colleagues in the US, the

Netherlands and Germany, cross-staffing on matters before the courts of each relevant jurisdiction and, in doing so, leveraging the wealth of experience from across Scott+Scott's offices to the benefit of our clients. This is reflected in the biographies of the SSU "core team" in the Annex, with our London team playing an active role in supporting our Amsterdam colleagues in cases before the courts of the Netherlands, for example.

40. Our SSAAL colleagues in the Netherlands currently have a number of competition law cases active before the Dutch courts, including in relation to claims arising from cartels in the markets for cables, trucks and Italian corrugated cardboard.

B. The legal team advising O'Higgins

41. The "core team" of lawyers with carriage of the Claim at SSU have acted on some of the leading and formative competition law cases before the Tribunal and the Courts of England & Wales, as well as the courts and tribunal of other jurisdictions including: rail prices[10]; gas insulated switchgear[11]; synthetic rubber[12]; polyurethane foam[13], paraffin wax[14], mechanical carbon and graphite products[15], the enforceability of licences for standard essential patents in the mobile telephony market[16], power cables[17], and air cargo[18]. The core team also has experience of working in investigations by the Commission and other national competition authorities, including in relation to the financial sector (including LIBOR (EIRD, YIRD, and CHIRD) and loan syndication). The Annex contains short biographies of the core team's relevant experience.

42. SSU are working on the Proposed Collective Proceedings alongside team of barristers led by Daniel Jowell QC with a wealth of experience in competition law matters. Short biographies are included in the Annex and the full CVs of the counsel team are included at BAH25.

43. Although this "core team" of solicitors and barristers has carriage of the O'Higgins Application, SSU is able to call on the further assistance from others within both its London office and the wider Scott+Scott network. I also note that SSU has:

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10 *Enron Coal Services Ltd (in liquidation) v English, Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2.
11 *National Grid Electricity v ABB Ltd and Others* [2012] EWHC 869 (Ch).
12 *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2010] EWCA Civ 864.
13 *Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others* (1250/5/7/16).
14 *Sintesi e Ricerca S.p.A & Others v Royal Dutch Shell plc & Others (HC-09-C02672), Carberry Candles. Limited & Others v Royal Dutch Shell plc & Others* (HC-11-C03407).
15 *Emerson Electric Co and others v Morgan Crucible Company PLC* (Case 1077/5/7/07).
16 *Unwired Planet v Huawei* [2018] EWHC, HP-2014-000005.
17 *Britned Development Limited v ABB AB & anor* [2018] EWHC 2616 (Ch).
18 *Emerald Supplies Limited and Others v British Airways Plc* (HC-08-C02648).

a. a dedicated Litigation Support Director, who has a wealth of experience organising and running disclosure and other document reviews, as well as being the principal point of contact for third party vendors such as claims administrators and e-discovery companies;

b. a Data Protection Officer, who handles all aspects of data privacy for SSU and its affiliates, including in relation to compliance with the General Data Protection Regulation and related national legislation; and

c. extensive experience in organising and managing teams of contract paralegals, whether it be in the context of disclosure reviews or on other projects.

C. US Proceedings

Scott+Scott's experience in FX litigation

44. In addition to the considerable experience in competition litigation in general that I highlight above, SSU is able to draw from Scott+Scott's specific, detailed "institutional knowledge" of FX litigation in the US. For the avoidance of doubt, Scott+Scott has taken steps to ensure that there is no risk of a breach of any of the confidentiality provisions and arrangements in place in the US Proceedings (see paragraph 7 of my First Statement).

45. As I address in my First Statement, SSAAL instigated and is co-lead counsel in the US Proceedings. By way of recap of the background to the US Proceedings, as I explained in my First Statement:

a. On 1 November 2013, SSAAL filed the first FX claim in the US District Court for the Southern District of New York[19] (the "**District Court**").

b. After a hearing on 13 February 2014, the District Court consolidated all the cases into the US Proceedings and appointed SSAAL as interim lead counsel. SSAAL's appointment as lead counsel was based on factors including its work in identifying and investigating the claim, its experience in handling class actions and antitrust claims, its knowledge of applicable law and the resources it had committed.

c. SSAAL invited Hausfeld to join it as co-lead counsel and subsequently requested that the District Court approve Hausfeld's involvement. SSAAL's appointment by the District Court as lead counsel, and SSAAL's request to invite Hausfeld to serve as co-lead counsel, were contested by Quinn Emanuel Urquhart & Sullivan, LLP. At a hearing on 3 March

[19] *Haverhill Ret. Sys v Barclays Bank PLC*, Case No. 13-cv-77893

2014 the District Court reaffirmed its appointment of SSAAL and Hausfeld as interim co-lead counsel for the claims.

46. As explained in paragraph 8o. of my First Statement, SSAAL's contributed the most attorney hours to the prosecution of the US Proceedings, having worked 74,625.20 hours through to 31 December 2018,[20] compared to Hausfeld's 34,949.50 hours.

47. The result of the foregoing is that SSU is able to rely on the unparalleled expertise of the lawyers who have led the US Proceedings from the beginning and who have succeeded in obtaining settlements totalling $2,310,275,000 to date for the US Settlement Class.

48. For completeness, I take this opportunity to provide the Tribunal with an update in relation to the US Proceedings, as I did in my First and Second Witness Statements. Further to the District Court ordering certification of the US class on 3 September 2019, the following developments have taken place since then:

a. As noted in paragraph 10 of my Second Witness Statement, the proceedings against Credit Suisse were ongoing – this remains the case.

b. Plaintiffs filed their motion to approve the form and manner of notice to the certified litigation class on 30 September 2020. No oppositions to the notice were filed.

c. On 19 November 2020, the District Court approved the form and manner of notice to the certified litigation class. Notice to the Litigation Class commenced on 18 December 2020.

d. On 29 January 2021, Credit Suisse served its opening brief in support of a motion for summary judgment.

e. The deadline for class members to opt out of the Litigation Class was 17 February 2021.

f. Fact depositions were finished on 4 March 2021. In total, Credit Suisse took 27 depositions of the Plaintiffs and/or their investment advisers. The Plaintiffs took 55 fact depositions from the Defendants (both Credit Suisse and the Settling Defendants) and eight Rule 30(b)(6) depositions (which are depositions as to the knowledge of a corporation) from Credit Suisse, JPMorgan, Natwest/RBS, Barclays, Citi, UBS, BNP and Deutsche Bank.

[20] The last day included in US counsels' fee application in relation to approval of the settlements with 15 of the 16 bank defendants. See the Declaration of Daryl F. Scott filed on behalf of SSAAL as part of the Joint Declaration for Settlement Approval and Attorneys' Fees (**BAH4/95**) (exhibits omitted).

Due to restrictions caused by the COVID-19 pandemic, depositions have proceeded remotely in general in 2020-2021. Discovery has now closed.

g. On 5 March 2021, the Plaintiffs served their memorandum in opposition to Credit Suisse's motion for summary judgment and cross-motion for summary judgment. On 9 April 2021, Credit Suisse filed their responsive brief. The Plaintiffs' brief in response is due on 28 April 2021 and the parties will file the complete summary judgment briefing in the United States District Court for the Southern District of New York on 30 April 2021. The combined briefing includes several hundred exhibits, most of which are transcripts from multi-bank chat rooms. It is understood that a significant volume of information will be made public with the completion of the briefing, much of which may be relevant for this claim.

D. First mover investment

49. When considering the Carriage Issue, it is important to bear in mind the context of the Evans Application within the Proposed Collective Proceedings. As the Tribunal is aware, the Evans Application was filed on 10 December 2019, over four months after the filing of the O'Higgins Application on 29 July 2019. I address timings in further detail in section E below.

50. The reality faced by O'Higgins when bringing the Proposed Collective Proceedings was that there was a considerable investment to be made, risks to be taken and challenges to be overcome as the "first mover". There was no other action to copy or use as a starting point for developing the claim. The risks – in the form of the unknown – were disproportionately higher for O'Higgins than those faced by the Evans Application, which seeks to represent broadly the same class of affected persons as those described by the O'Higgins Application. This evident in a number of ways discussed below.

Case initiation and funding

51. As the first applicant to bring the Proposed Collective Proceedings, Mr O'Higgins (as sole director of O'Higgins) and his legal team had to dedicate extensive time and resources to establishing the basis for a UK collective action, including the legal basis for, and the financial viability of a collective action in relation to the FX market. Financial viability had to be considered from the perspective of the class members, the litigation funder, the after-the-event ("**ATE**") insurers, the solicitors and any other stakeholders.

Building the legal case

52. The following work was required to build a case that would be of sufficient quality to attract a litigation funder and ATE insurers:

a. Considering the anticipated scope of the Settlement Decisions and the fact pattern of the claim based on our extensive monitoring the Commission's investigation and careful analysis of the decisions of other competition regulators and financial authorities across the globe.

b. Assessing the best structure for the claim based on an extensive analysis of the nature, size and make-up of the FX market and the conduct in the FX Cartels and applying these facts to the Tribunal's legal test for granting a collective proceedings order ("**CPO**").

c. Developing the case theory, including considering likely defence arguments/strategies such as jurisdiction challenges, applicable law and pass-on.

d. Working with the team of experts[21] to estimate the losses arising from the Cartels (i.e. the basis for overcharge and damages), the number of members of UK-domiciled class and the likely aggregate loss suffered by that class.

53. This considerable work was undertaken with no guarantee that: (a) a strong case could be brought against the Proposed Defendants; or (b) that O'Higgins would have a sufficiently attractive case to convince a third party funder to take the case forward (and after the event ("**ATE**") insurers to provide cover in respect of it). In any circumstances, this lack of certainty would have presented a considerable risk, but in addition we were carrying out the analysis at a time when the precise landscape of the Tribunal's regime, and in particular the "threshold" for certification was not clear due to the pending appeals from the *Merricks* collective proceedings before the Tribunal. The O'Higgins Application was brought applying the CPO standard set out by the Court of Appeal in its judgment dated 19 April 2019.[22] On 24 July 2019, just five days before the O'Higgins Application was filed, however, the Supreme Court granted Mastercard's application for permission to appeal the judgment of the Court of Appeal in the *Merricks* case. As such, we were aware from the outset that we were seeking to bring a legal case in circumstances where the test for a CPO was shifting and could have changed materially for the worse depending on the outcome of the Supreme Court's judgment. As I address below, this added a further level of complexity in seeking to have the action funded.

Acquiring funding

21 See paragraph 38(1)(d) of the O'Higgins Claim Form for details.

22 *Walter Hugh Merricks CBE v Mastercard Incorporated & Ors* [2019] EWCA Civ 674

54. As is made clear by Rule 78(2) of the 2015 Rules (and paragraph 6.33 of the Guide), the ability to demonstrate that an applicant has adequate funding arrangements is an important factor in the Tribunal's decision to award a CPO. As a general proposition, the first party to file will, inevitably, face a greater challenge in seeking to persuade third party funders to provide the very significant capital to fund any prospective claim. This is because the first mover must "start from scratch" in seeking to persuade funders of the viability of any application and its chance of success in order convince a funder that the investment of capital being made is worth the risks. The challenges facing O'Higgins when seeking funding were increased in light of the status of the Tribunal's collective action regime at the time we were approaching funders.

55. Even taking into account the considerable work outlined above, obtaining funding for the Proposed Collective Proceedings was not straightforward in 2019. Not only was the regime relatively new (only six[23] collective actions had been brought at the time the O'Higgins Application was filed on 29 July 2019 and none had received a "final" CPO, although of course no "final" CPOs have been ordered at time of this statement), as explained above, the *Merricks* claim was the subject of an appeal to the Supreme Court. In light of the relative uncertainty of the procedural landscape at the time, there was no guarantee that simply having a strong case would be sufficient to persuade funders to fund the action, particularly given the very large budgets needed to bring the O'Higgins Application. Both we and any potential funder were taking a substantial risk in bring the action.

Pre-filing work

56. Even once we had agreed funding terms with Therium, there was a considerable amount of work to be done to develop the original case planning into "filing form". This work involved, amongst other elements, the following:

a. Working with counsel to draft the claim form;

b. Liaising with Mr O'Higgins and Mr Purslow in relation to their witness statements filed with the O'Higgins Application and drafting my own.

c. Working with Epiq to devise a comprehensive litigation plan.

d. Creating, writing the content for and developing a claim website.

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[23] Case 1257/7/7/16 *Dorothy Gibson v Pride Mobility Products Limited* [2017]; Case 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*; Case 1282/7/7/18 *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others*; Case 1289/7/7/18 *Road Haulage Association Limited v Man SE and Others*; Case 1304/7/7/19 J*ustin Gutmann v First MTR South Western Trains Limited and Another*; Case 1305/7/7/19 *Justin Gutmann v London & South Eastern Railway Limited*.

e. Identifying, approaching and engaging Sir Christopher Clarke QC, Mr Damian Mitchell and Mr Ian Pearson as members of Mr O'Higgins advisory committee.[24]

f. Negotiating with insurers to obtain ATE insurance to protect against the risk of an adverse costs order. As with the funder, we were approaching such companies as the first applicant, needing to persuade them that the Proposed Collective Proceedings were sufficiently viable to pass the respective insurers' internal risk analyses.

57. Although we were assisted in relation to certain elements of this work by SSAAL's experience as lead counsel in the US Proceedings (e.g. working up the litigation plan and website with Epiq), given the differences such as the different legal regimes, the different documents required at filing, the different nature pleadings and the different tests for certification, and the confidentiality restrictions I explain above in paragraph 44, in the majority of aspects of the application we were starting afresh.

Advantages enjoyed by Mr Evans

58. By contrast, Mr Evans had the comfort of knowing over four months before he finalised and filed the Evans Application that O'Higgins had concluded that the claim was legally and financially viable and sufficiently attractive to be funded. Mr Evans' litigation funder Bench Walk Advisors would also have had the benefit of knowing that a leading, experienced and reputable litigation funder like Therium had already agreed to fund the O'Higgins Application and therefore had assessed the claim as likely to be financially worthwhile.

59. Beyond this level of comfort, Mr Evans and his advisors had access to a significant amount of information from the publicly available elements of the O'Higgins Application. This publicly available information included the summary of the application on the Tribunal's website and the substantial amount of information included on the O'Higgins claim website for the benefit of the Proposed Class, in particular the class definition and the detailed "FAQs".

60. Mr Evans first wrote to the Tribunal on 4 November 2019, over three months after the O'Higgins Application was filed and two days before the first case management conference in the O'Higgins Application on 6 November 2019, indicating Mr Evans' intention also to file an application for a collective proceedings order in relation to the FX Cartels. Solicitors for Mr Evans were present as observers at the case management conference. This early contact with the Tribunal gave Mr Evans the opportunity to "test the waters" to see if the Tribunal would give any indication as to how it would treat such an application. Had the Tribunal

[24] See paragraph 38(1)(c)(iii) of the O'Higgins Claim Form.

responded negatively to the possibility of a further application, it would have been open to Mr Evans at that point to change his mind about moving forward.

61. Mr Evans was also able to benefit from O'Higgins having to navigate the initial procedural issues once the O'Higgins Application was on file. This is apparent in the following ways:

a. Service out: The O'Higgins Application was served out of the jurisdiction on the Second, Sixth and Seventh Proposed Defendants following an application made on 13 August 2019 (amended on 16 August 2019), which resulted in an order from the Tribunal granting permission on 16 August 2019 (the "**Service Order**"). In light of the (publicly available) Service Order, Mr Evans could have full comfort that the same application made by him would be granted and on materially the same terms (which is in fact what happened in an order dated 17 December 2019).

b. Jurisdiction: As the first party to file, the O'Higgins Application faced the Proposed Defendants' application to contest jurisdiction, which was filed on 2 September 2019 (the "**Jurisdiction Challenges**"). Pursuant to paragraph 8(a) of the directions order dated 6 November 2019, each of the Proposed Defendants were required to provide the O'Higgins Application with 100 contracts per banking group with customers for spot and/or outright forward foreign exchange transactions concluded through an office in the EU or Switzerland in the period from 18 December 2007 to 31 January 2013. In total, SSU received and reviewed 746 documents between 4 December 2019 and 6 January 2020. On the basis of our review, O'Higgins concluded that the Jurisdiction Challenges were either entirely hypothetical and without any factual foundation or, at most, relevant to a numerically insignificant portion of the opt-out class. This conclusion was shared with the Proposed Defendants and Mr Evans in a letter sent by SSU on 5 February 2020. The Evans Application was therefore able to benefit directly from the work carried out by SSU on behalf of the O'Higgins Application in contesting the Jurisdiction Challenge. As far as I am aware, the Proposed Defendants have not brought a jurisdiction challenge application against Mr Evans. The result of this is that Mr Evans has been able to free ride directly on the work undertaken, and the costs incurred, by O'Higgins and his legal team in addressing the Jurisdiction Challenges, without having to invest any time or resources himself.

62. In light of the foregoing, it is clear that Scott+Scott and Therium, in particular, were required to take considerable legal and investment risks in preparing, agreeing to fund and bring the O'Higgins Application. By delaying for over four months before bringing his action, Mr Evans, on the other hand, was able to benefit directly and indirectly from the work done in relation to the O'Higgins Application.

63. As my firm hopes to be instructed to bring further collective actions in the Tribunal in the future, I am concerned about the precedent set by Mr Evans in bringing his rival application after such an extensive delay. The fear of "copy-cat" claims and costly carriage disputes are a disincentive for potential class representatives, law firms and funders to bring collective actions before the Tribunal in the first place. This concern is exacerbated if, as in the present case, the carriage dispute and CPO hearing are heard simultaneously, with the consequences that the funder must pay for both, facing the prospect that a case which is otherwise worthy of being granted a CPO will fail as a result of losing a carriage dispute.

E. Timing of the Applications

64. In this section, I address the temporal background to, and reasons behind, the timing of the filing of the O'Higgins Application.

The timing of the O'Higgins Application

65. Although O'Higgins was incorporated on 12 July 2019, discussions between SSU and Mr O'Higgins in relation to bringing a collective action commenced in early May 2019. With the publishing of the Commission's press release on 16 May 2019 (the "**Press Release**") a decision was taken between Mr O'Higgins and his advisers that the Proposed Collective Proceedings could be brought without the need to wait for the Commission to publish the Settlement Decisions. There were three key factors that drove this decision:

a. The Press Release provided us with the key parameters of the Settlement Decisions, including exact dates of the infringements, the addressees and a description of the central anticompetitive conduct on which the Settlement Decision were based. When combined with Scott+Scott's detailed background understanding of the anti-competitive conduct by the Proposed Defendants, including the numerous regulatory decisions and FX litigation in other jurisdictions, this gave Mr O'Higgins and the team advising him sufficient confidence to bring the O'Higgins Application prior to obtaining copies of the Settlement Decisions.

b. As indicated at paragraph 4 of the O'Higgins Claim Form, it was always O'Higgins' intention to obtain copies of the Settlement Decisions as soon as possible following filing, either through the Commission making the Settlement Decisions publicly available on its website or through disclosure by the Proposed Defendants. In my experience there is usually a delay of many months between the Commission issuing a press release announcing a cartel decision and the publication on the Commission's website of a non-confidential version of that decision. For this reason, claimants may choose to commence "follow-on" proceedings without the benefit of seeing the Commission decision, and then

use the disclosure process to obtain the relevant decision. For example, this was the approach taken by the claimants (advised by Mr Evans' solicitors Hausfeld LLP) in the Air Cargo litigation.[25]

c. We were aware from following its progress that the Commission's investigation was likely to result in a settlement(s), and this was confirmed by the press release in relation to the two Settlement Decisions. While access to the Settlement Decisions would ultimately be required in terms of setting the exact parameters of a strict "follow-on" claim (i.e. due to the application of Rule 119 of the 2015 Rules), we were aware that the Settlement Decisions would be "short form", with more information than the Press Release but very considerably less than in a contested cartel case, or indeed in some of the other regulatory decisions in relation to the FX Cartels which were already publicly available.

66. O'Higgins obtained the Settlement Decisions from the Proposed Defendants on the following dates:

a. *Three Way Banana Split* Settlement Decision on 30 September 2019; and

b. *The Essex Express* Settlement Decision on 4 October 2019.

67. Mr Evans chose instead to seek copies of the Settlement Decisions direct from the Commission through the Transparency Regulation[26] and received copies of them on 1 October 2019.[27]

68. I infer that this similarity of timings was not coincidental, and that the Commission was aware of O'Higgins' request to the Proposed Defendants for the Settlement Decisions. I regard it as quite possible that the fact that the Settlement Decisions had been sought in private litigation in England influenced the Commission's decision to provide the Settlement Decisions to Mr Evans. I recognise that the converse is possible – i.e. that the fact that Mr Evans had sought the Settlement Decisions from the Commission influenced the Proposed Defendants in their willingness to provide the Settlement Decisions to O'Higgins (presumably with the Commission's consent or at least knowledge). A third possibility is that the two requests – one in private litigation and one via the Commission – were mutually reinforcing.

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25 See *Emerald Supplies Ltd v British Airways Plc* [2014] EWHC 3513, by which judgment the High Court ordered the disclosure of an unredacted decision into a confidentiality ring after the Commission had failed to publish a non-confidential version despite four years elapsing from the date the decision was announced.

26 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2011 regarding public access to European Parliament, Council and Commission Documents. OJ L 145, 31.5.2001, pp.43-48.

27 Paragraph 14 of the Evans Application Claim Form.

69. Irrespective of which (if any) of these was in fact the case, I note that had the Commission refused Mr Evans' application for the Settlement Decisions, Mr Evans would have been no further advanced in bringing his claim. By contrast, had the Proposed Defendants refused O'Higgins' request, O'Higgins could have applied to the Tribunal for an order at the case management conference on 6 November 2019 that the Settlement Decisions be disclosed.

The timing of the Evans Application

70. In his first statement dated 10 December 2019 ("**Maton 1**"), Mr Anthony Maton at paragraphs 12 to 15, sets out at length the steps taken by Hausfeld LLP to obtain copies of the Settlement Decisions on behalf of Mr Evans. At paragraph 13 of Maton 1, Mr Maton indicates that the timing of the filing of the Evans Application was dependent upon receipt of copies of the Settlement Decisions.

71. However, I note in relation to the timing of the Evans Application the comments at paragraph 37 of Maton 1 that the relevant funding arrangements had not been finalised as at 29 November 2019. The Evans Application was then not filed until 10 December 2019.

72. It is apparent from the relevant timeline that the reasons for the substantial lag in time between the O'Higgins Application being filed and the filing of the Evans Application came down in no small part to issues with funding, as opposed to being solely driven by Mr Evans' desire to obtain copies of the Settlement Decisions prior to filing.

III. BUDGETS

73. At the January CMC,[28] the Tribunal showed an interest in how the O'Higgins Application and the Evans Application are funded, in part because funding is a potential factor in the determination of the Carriage Issue based on Canadian jurisprudence to which the Tribunal has been referred in previous hearings. I am aware that elements of the funding arrangements of the O'Higgins Application (including the budget) are addressed in the legal submissions, and that Mr Neil Purslow of Therium also addresses the budget in Purslow 2 from the perspective of the funder. In this section, I address the respective budgets of the O'Higgins Application and the Evans Application from the perspective of the solicitor with carriage of the O'Higgins Application. My focus is on what I see as the main areas of difference and discrepancy between the ways in which the proposed actions are to be funded and why, in my view, the O'Higgins Application's budget better serves the interests of the Proposed Class.

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[28] See, for example, the comments of the Chairman at page 5, lines 16-17 and page 21, lines 3-5 of the transcript of the January CMC.

74. At the outset, I note that the budget was prepared following extensive analysis by Scott+Scott and Therium in relation to the requirements of the Proposed Collective Proceedings, taking into consideration, among other things, the nature of the FX market, the profile of the Proposed Defendants, the make-up of the Proposed Class and the anticipated course of the litigation. The figures in the O'Higgins Application budget are calculated to allow the effective running of the Proposed Collective Proceedings in the interests of the Proposed Class.

75. At the expense of stating the obvious but for the avoidance of doubt, the budget represents my firm's best endeavours to prepare a realistic estimate at the time that funding was agreed and is not regarded as a "target" to hit. It is my working assumption that certain items in the budget will turn out to be over-estimates, while there may be other line items for which the proposed budget is exceeded. Part of my role as the partner with responsibility for this matter is to seek to run the case as efficiently as possible without compromising its effectiveness, and to seek to ensure that the overall budget is not exceeded. I and the Scott+Scott finance team discuss progress against budget with both the funder and Mr O'Higgins on a regular basis.

76. The overall budget of the O'Higgins Application is £29,375,043. The overall budget of the Evans application is £18,654,088. I note that two of the most significant reasons for this differences are:

a. **Distribution:** The O'Higgins Application provides for a budget of £3.7 million for the notice and administration of the damages in the event of success (whether by way of settlement or judgment). The equivalent line item in the Evans Application budget is £450,000. The O'Higgins Application's position is that – in line with the practice in other jurisdictions[29] – the cost of distribution should be borne by the Proposed Defendants (for example, out of the settlement/damages fund or through an order for costs). However, given the lack of any precedent in this jurisdiction, the O'Higgins Application took the prudent decision to include a sizeable budget for this critical phase of the Proposed Collective Proceedings. The O'Higgins Application's plan for distribution is discussed in the Litigation Plan and accompanying Notice and Administration Plan, exhibited to O'Higgins 1 at MOH4. Central to that plan is the need for a comprehensive notice process for class members and for a distribution process that is accessible and designed to ensure that the maximum possible number of class members participate in the distribution and claim the portion of any settlement sum or damages awarded to which they are entitled. More specifically:

[29] Including Canada and the US.

i. **Notice:** As well as significant time costs, including to make use of noticing methods established over the course of the litigation (such as the claim website, social media pages and emails to registrants), we currently envisage that there will be a number of additional expenses required to carry out an effective noticing process, including: direct mailing by post and email to specific class members and brokers in the financial services industry; paid print and online media; sponsored search listing on major online search engines; and a PR campaign.

ii. **Distribution**: For distribution, a dedicated website page will be carefully designed and constructed to make the claims process user-friendly, whilst having robust tools to minimise the risk of incomplete claims being filed, and processes to prevent fraudulent, erroneous or duplicative claims. While Proposed Class members will be encouraged to use the website to submit claims, they will have the option of submitting claim forms by post, requiring a similarly robust process for dealing with hard copy claim forms.

iii. **Verification and Payment**: Proposed Class members will have to provide certain information or data to verify the claims, which will have to be processed and analysed, and any follow-up questions asked. If a claim is rejected, the claims administrator will contact the relevant class member, requesting the necessary information to correct the claim and then process the responses. Finally, class members' payment details will have to be securely processed, with necessary anti-money laundering checks completed. Based on conversations with my colleagues about the experience in the US Proceedings, the claim verification process has involved, for example, the instruction of experts to verify that individual claims do not include trades that fall outside the scope of the action.

As such, we feel our approach to the budget for distribution to be robust and prudent in the best interests of the class members. Further, the very low figure for distribution in Mr Evans's budget potentially creates a conflict between the level of undistributed funds (out of which the legal advisors and funders are paid) and seeking to maximise distribution to the Proposed Class. At the very least, the Evans budget would not allow even a modicum of claims auditing which I understand has been an integral part of the US Proceedings and without which there exists the real probability that erroneous claims would be paid at the expense of class members with valid claims.

b. **Non-domiciled opt-ins:** The budget in the O'Higgins Application for communicating with potential claimants from outside the jurisdiction about the possibility of opting-in to the

Proposed Class is approximately £930,000 (identified in the budget with the label 'Bookbuilding'). By contrast, the Evans Application does not have an explicit budget for interacting with potential opt-in class members. There are a number of elements involved in this process, including notifying and communicating with potential opt-in class members, responding to their queries and potentially reviewing their transaction data to assist them in determining whether or not they wish to opt-in. Given both actions propose to include non-domiciled class members,[30] I believe this to be an important oversight on the part of Mr Evans that would be prejudicial to Mr Evans' ability to deal with non-domiciled potential class members adequately or fully.

c. **ATE:** O'Higgins has acquired £33.5 million of ATE cover; Mr Evans has £23 million. O'Higgins has budgeted £5,376,00 for ATE insurance deposit premiums (of which £4,855,000 has currently been spend; Mr Evans has budgeted £4,803,000 for ATE insurance deposit premiums.

77. While the Evans Application does provide a line item for "Contingency", I believe that this fund alone would be insufficient to cover the various contingencies that may arise given the substantial oversights I raise above. In light of this, it is my view that the Evans Application is underfunded in certain key areas to the detriment of those he seeks to represent.

IV. WORK UNDERTAKEN AND ANTICIPATED

78. Since the O'Higgins Application was filed, in addition to the work that has been done for the proceedings, our firm and the wider team acting for the Proposed Representative has continued to keep abreast of wider developments that may affect the case. This is evident in the following ways:

Third Commission Investigation

79. We have been in contact with both the Proposed Defendants and the Commission about the status and progress of the Commission's third investigation into anti-competitive conduct in the FX market (the "**Third EC Investigation**"), the existence of which was referenced at paragraph 4 of the O'Higgins Claim Form, and which may be an issue for the ultimate class representative to address post-certification[31]. Scott+Scott raised the matter initially in a letter to the Proposed Defendants on 3 September 2019. We received responses from:

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30 See paragraphs 23 and 49 of the O'Higgins Claim Form and paragraph 106 of the Evans Claim Form.

31 The Sterling Lads Investigation will be a 'continued competence' case capable of being relied upon for follow-on damages purposes in the UK Courts pursuant to the *Competition (Amendment etc.) (EU Exit) Regulations 2020* (SI 2020/1343).

a. Slaughter & May on 25 September 2019 and Allen & Overy LLP on 16 October 2019, in which they confirmed that the JPMorgan and Citibank Proposed Defendants respectively were not subject to the Third Investigation.

b. Gibson, Dunn & Crutcher UK LLP ("**Gibson Dunn**") on 24 September 2019, Baker & McKenzie LLP ("**Baker & McKenzie**") on 4 October 2019, and Macfarlanes LLP ("**Macfarlanes**") on 7 October 2019, in which they refused to comment on whether or not the UBS, Barclays and Natwest/RBS Proposed Defendants respectively were subject to the Third Investigation;

80. At a case management conference on 6 November 2019 we enquired as to the possibility of the Tribunal writing to the Commission to enquire as to the status of the Third Investigation. The Chairman indicated that he would not write to the Commission, but that the parties should be prepared to respond swiftly if one was published.[32]

81. Having waited a reasonable period of time to permit developments, and with the July Hearing in mind, we wrote to Gibson Dunn, Baker & McKenzie and Macfarlanes (on the grounds that their clients had not confirmed they were not subject to the Third Investigation) on 28 January 2021 to request an update. The Proposed Defendants provided no substantive update, although Baker & McKenzie LLP, acting for Barclays, suggested writing to the Commission directly, which we did on 17 February 2021. The Commission responded in an email dated 3 March 2021 stating the following: "*Although we can confirm that there is an ongoing investigation involving Credit Suisse related to the Forex market, I cannot confirm the rest of the elements put forward in your letter or provide further comments or indications on this matter*." We have continued to monitor the situation and note that the legal press reported on 22 March 2021 that a supplementary statement of objections has been sent to Credit Suisse.[33] On this basis, and based on my previous experience of Commission cartel investigations, the chances of any third decision being handed down prior to the CPO hearing seem very small. This correspondence can be found at Exhibit BAH26.

The Allianz Proceedings

82. My firm has closely followed the developments in the *Allianz Global Investors GmbH & Ors v Barclays Bank PLC & Ors* (the "**Allianz Proceedings**"), which are stand-alone proceedings by

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32 See page 22, lines 11 to 16 of the transcript of the November CMC.

33 *Credit Suisse gets new chargesheet in EU's ongoing forex antitrust inquiry*, Nicholas Hirst, MLex, 22 March 2021, available at: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1273519&siteid=190&rdir=1; *Credit Suisse to contest supplementary EC charge sheet*, Jacob Parry, PaRR, 22 March 2021, available at: https://app.parr-global.com/intelligence/view/intelcms-fnkfmm. Copies provided at Exhibit BAH27.

a number of individual victims of anticompetitive conduct in the FX market brought in the Commercial Court, and we have communicated with Quinn Emanuel Urquhart & Sullivan UK LLP ("**Quinn Emanuel**"), solicitors to the claimants. While we recognise the clear differences between the structure and framework of the Proposed Collective Proceedings and the Allianz Proceedings, we believe it may be of benefit to the Proposed Collective Proceedings to keep fully abreast of developments in the Allianz proceedings and potentially to explore the possibility for synergy between the two sets of proceedings, and to ensure we can keep the Tribunal informed of developments in the Allianz Proceedings to the extent that this may become relevant.

The Israeli Proceedings

83. We are also in contact with Elran Shapira Bar-Or & Co. ("**Elran Shapira**"), one of the firms with carriage of the class action proceedings filed in 2018 before the Israeli courts. Elran Shapira have provided us with translations of various documents from the Israeli FX proceedings and we intend to remain in communication with them going forward.

Contact with US colleagues

84. While acknowledging and respecting the confidentiality arrangements I discuss at paragraph 44 above, we remain in regular contact with our colleagues at SSAAL in the US about developments in the US Proceedings. A main focus of this communication is to assess how materials that become public in the US Proceedings may prove relevant to the Proposed Collective Proceedings. As illustrated by the Casey Statement I referenced at 17 above, the settlement documents from the US Proceedings are a good example of such a resource that has application in the present action.

85. As indicated at paragraph 45(3) of the O'Higgins Claim Form, one area of particular interest to us is the potential availability of the disclosure in the US Proceedings. As I explain above, the Option 1 claims in the US Proceedings are estimated using data provided by the US defendant banks. Given the extensive crossover in defendants in the Proposed Collective Proceedings and the US Proceedings, obtaining the data disclosed in the US could lead to major costs savings in the present proceedings. I believe the close collaboration with our colleagues leading the US Proceedings will be of great benefit to the Proposed Class when the time comes to seek disclosure of the data provided by the banks in the US.

V. RELEVANT FINANCIAL INSTITUTIONS

86. Mr Evans has copied the term "*Relevant Financial Institution*" used in the class definition in the O'Higgins Application and used the term in a strikingly similar way in his class definition, albeit with a longer list of such Relevant Financial Institutions. In light of this, I take this opportunity to explain the process behind the creation of the list of Relevant Financial Institutions used by O'Higgins.

87. The list of Relevant Financial Institutions included in part F of the class definition in the O'Higgins Application comprises 39 banking groups. As described in paragraph 33(1) of the O'Higgins Claim Form, the list comprises (a) the Proposed Defendants and (b) other major 'market maker' or 'dealer' banks. The inclusion of other market maker banks is explained in sections 4 and 5 of the First Breedon Report. In short, given the combined market share of the cartelist banks, if the Proposed Defendants and MUFG succeeded in moving the mid-price at any point in time, such anticompetitive behaviour is likely to have affected all FX transactions then being executed with other "market maker" banks.

88. The Breedon Report describes in paragraphs 4.28 to 4.31 how the list of Relevant Financial Institutions is comprised of banks which are "*Reporting Dealers*" to the Bank of England in relation to FX dealing. The Bank of England defines "*Reporting Dealers*" as: "*…financial institutions that are participating in the globally co-ordinated survey. These institutions actively participate in local and global FX and derivatives markets*." There are two potential sources for the identity of Reporting Dealers:

    a. The Bank of England's BIS Triennial Central Bank Survey of Foreign Exchange and Over-the-Counter ("**OTC**") Derivatives Markets (the "**BIS Triennial Survey**"), which was published during the cartel period in 2007, 2010 and 2013. These surveys cover dealing of both (a) FX and (b) OTC derivatives (e.g. interest rate derivatives) which are unconnected to FX.

    b. The semi-annual FX turnover surveys compiled by the UK Foreign Exchange Joint Standing Committee of the Bank of England ("**FXJSC**").

89. As indicated in paragraph 4.29 of the Breedon Report, the 2013 BIS Triennial Survey did not publicise its list of Reporting Dealers. However, the semi-annual FX turnover surveys compiled by the FXJSC do contain the lists of the Reporting Dealers. Accordingly, the O'Higgins PCR's list of relevant financial institutions includes the banking groups featured in

the FXJSC surveys for April and October 2007, 2010 and 2013 as those are the years during which the FX Cartels operated coinciding with the BIS Triennial Surveys.[34]

90. As I explain above, Mr Evans has similarly included a list of "*Relevant Financial Institutions*" in his claim form. This list comprises 57 banking groups which have been identified from: (i) the FXJSC semi-annual turnover surveys between 2007 and 2019; and (ii) the BIS Triennial Survey. Mr Evans confirms in paragraph 99 of his claim form that he has used the list of reporting dealers from the BIS Triennial Survey for 2016, as this is the only publicly available version that he has been able to identify – although the relevant list has since been taken off the BIS website.

91. The difference between the "*Relevant Financial Institutions*" in the two claims is that Mr Evans has also used the 2016 BIS Triennial Survey banks, which has the effect of adding an extra 18 banking groups as institutions which potential class members can have transacted with to form part of the claim. The additional 18 'banking groups' which are included in Mr Evans' Proposed Class Definition but not in the O'Higgins' Proposed Class Definition are: Adam & Co, Banco Bilbao Vizcaya Argentaria SA (BBVA), Bank of China, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, CIBC World Markets, China Construction Bank, Commerzbank, Coutts & Co, Danske Bank, ICBC Standard Bank, Macquarie Bank, Mizuho Corporate Bank, Nationwide Building Society, Norinchukin Bank, Sumitomo Mitsui Banking Corporation and Svenska Handelsbanken (see Annex for a table comparing the different lists). Of these 18 'banking groups', two (Adam & Co and Coutts & Co) are RBS group companies which should be considered as forming part of the RBS banking group. In practice, therefore, the difference between the respective class definitions relates to 16 banking groups.

92. As noted above, the BIS Triennial survey covers market makers in both FX and in OTC derivatives. The banks listed in that survey are not categorised as being FX or derivatives traders, so it is impossible to determine if such banks would be market makers in both FX and OTC derivatives. In a call between Mr Mansfield of my firm, BDO LLP (Tom Robinson and Inderpal Dhillon) and the Bank of England Data and Statistics Division (Elias Razak and John Lowes) on 27 April 2020, the Bank of England confirmed that all of the banks who report on FX for the purposes of the BIS Triennial also report on derivatives, but that the FXJSC Surveys in comparison focus solely on FX dealing. The Bank of England could not confirm if the additional 18 banks were included in the BIS Triennial Survey for 2016 solely as a result of their derivatives trading, as they did not know if that was the case and as, in any event, such

[34] While the Breedon Report refers to a 2015 list of Reporting Dealers, the actual list of financial institutions in the Class Definition is based on the 2007, 2010, and 2013 lists.

information is confidential. Even if they were to determine whether the additional banks were included as a result of their derivatives trading, they were not prepared to disclose this. In addition, the Bank of England confirmed in that call that the 2016 BIS Triennial list would not generally be online as BIS normally only allows that list to be online during the period for the reporting to the Bank of England. BIS subsequently removed that list from the internet (although it appears to be embedded in the Evans Application's claim form at footnote 69).

STATEMENT OF TRUTH

I believe the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

……

BELINDA ANNE HOLLWAY

Date: 23 April 2021

ANNEX –

Biographies of Legal Team

1. Taking each member of the "Core Team" in turn in relation to their competition damages litigation (and investigations) experience:

    a. **Belinda Hollway, Partner**: During my time at my previous firm, I advised clients defending claims by customers arising from cartels in the markets for: gas insulated switchgear[35] ("**GIS**"); synthetic rubber[36] ("**Rubber**"); and polyurethane foam. I advised English, Welsh and Scottish Railways ("**EWS**") in the successful defence of a claim by Enron arising from a decision of the Office of Rail Regulation that EWS had abused its dominant position by offering discriminatory prices[37]. I also acted for clients in investigations by the Commission and other national competition authorities in relation to the financial sector. Since I joined Scott+Scott as founding partner of SSU, I have had carriage of the Interchange, Maritime Car Carriers and Aluminium damages actions mentioned above.

    b. **James Hain-Cole, Counsel**: At his previous firms, Mr Hain-Cole acted for major industrial clients defending follow-on damages claims before the English & Welsh courts arising from cartels in the markets for paraffin wax[38], rubber, mechanical carbon and graphite products,[39] and for Daimler in the defence of claims before the Spanish courts brought by customers alleging harm suffered as a result of a cartel in the market for trucks. He also represented international clients bringing claims before the English & Welsh courts arising from anticompetitive conduct in the market for multilateral interchange fees and acted for Ericsson in relation to the competition law elements of an action brought by Unwired Planet against Google, Huawei and others relating to the enforceability of licences for standard essential patents in the mobile telephony market.[40] In terms of public enforcement, Mr Hain-Cole acted for clients facing investigations by the Commission and other national competition authorities and financial regulators, including the Japan Fair Trade Commission, the Korea Fair Trade Commission, the Swiss Competition Commission and the Monetary Authority of Singapore. Since joining Scott+Scott, Mr Hain-Cole has

35 *National Grid Electricity v ABB Ltd and Others* [2012] EWHC 869 (Ch).
36 *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2010] EWCA Civ 864.
37 *Enron Coal Services Ltd (in liquidation) v English, Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2.
38 *Sintesi e Ricerca S.p.A & Others v Royal Dutch Shell plc & Others (HC-09-C02672), Carberry Candles Limited & Others v Royal Dutch Shell plc & Others* (HC-11-C03407).
39 *Emerson Electric Co and others v Morgan Crucible Company PLC* (Case 1077/5/7/07).
40 *Unwired Planet v Huawei* EWHC, HP-2014-000005.

acted on behalf of Unilever in its claim in the Amsterdam District Court for damages arising from the Italian corrugated cardboard cartels.

c. **Cian Mansfield, Senior Associate**: At his previous firm, Mr Mansfield acted for ABB in its defence of claims before the Courts of England & Wales arising from the GIS and cables cartels, including for ABB in *BritNed v ABB*[41], and acted for clients in investigations by the Commission and other national competition authorities, including the Turkish Competition Authority in relation to the financial sector. Since joining Scott+Scott, Mr Mansfield has been advising our clients in Interchange and in a follow-on damages action from two CMA decisions, and is also part of the team advising some of Europe's largest multinational companies (Unilever, Danone, AkzoNobel, Mondelez, ArcelorMittal and Aperam) in their claims in the Amsterdam District Court arising from the trucks cartel. He was also previously a *stagiaire* in the Commission Legal Service in Brussels.

d. **Douglas Campbell, Senior Associate**: At his previous firm, Mr Campbell acted for a Part 20 defendant in the air cargo[42] litigation ("**Air Cargo**") and for a money transfer company in an abuse of dominance claim against Barclays Bank. Mr Campbell's competition damages experience includes currently acting for the proposed class representative in Maritime Car Carriers, and representing a number of major retailers in Interchange.

e. **Ruth Manson, Associate**: At her previous firm, Ms Manson assisted on the defence side of the damages claims in Air Cargo. Since joining Scott+Scott, Ms Manson has worked on the Interchange and Maritime Car Carriers matters. She is also part of the Scott+Scott team advising a number of multinational companies in their claims in the Amsterdam District Court arising from the trucks cartel.

2. Taking each member of the counsel team in turn:

a. **Daniel Jowell QC:** A leading competition law silk, Mr Jowell has an academic background in both EU law and economics. He has appeared in a number of the landmark competition law cases of recent years and has considerable experience in collective action proceedings before the Tribunal, including in relation to trucks.

b. **Gerard Rothschild:** Mr Rothschild has appeared before all levels of domestic courts and tribunals from the Supreme Court to the Competition Appeal Tribunal on a number of

41 *BritNed v ABB* [2018] EWHC 2616 (Ch).
42 *Emerald Supplies Limited and Others v British Airways Plc* (HC-08-C02648).

competition law matters. He also advises on procedural issues. He is a contributing author of "Competition Litigation: UK Practice and Procedure (OUP)".

c. **Charlotte Thomas:** Ms Thomas has acted in a range of cartel damages cases (including concerning the trucks, cables, air cargo and copper fixings cartels), as well as in abuse of dominance claims (including arising from the Commission's Google Search decision) and cases concerning substantive breach of competition law (in particular pay-for-delay litigation).

d. **Emma Mockford:** Ms Mockford's practice covers all areas of EU and competition law, including both stand-alone and follow-on competition law claims. She acts for both claimants and defendants and is recommended in the field of competition law by both Chambers & Partners and the Legal 500. She has particular expertise in the emerging area of collective actions, having acted in connection with four applications for collective proceedings orders to date.

Witness: B A Hollway
Number of Statement: Fourth
Exhibit: BAH24-BAH27
Dated: 23 April 2021

Case no. 1329/7/7/19

IN THE COMPETITION APPEAL TRIBUNAL

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)
(5) 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) NATWEST GROUP PLC
(13) UBS AG
(a company incorporated under the laws of Switzerland)

Respondents / Proposed Defendants

FOURTH WITNESS STATEMENT OF BELINDA ANNE HOLLWAY
