IN THE COMPETITION APPEAL TRIBUNAL
IN THE MATTER OF PROPOSED COLLECTIVE PROCEEDINGS
UNDER SECTION 47B OF THE COMPETITION ACT 1998
RELATING TO FOREIGN EXCHANGE RATES

THE O'HIGGINS APPLICATION (Case no. 1329/7/7/19)

BETWEEN:-

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED
("THE O'HIGGINS PCR") **Applicant**

and

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK N.A.
(6) CITIGROUP INC.
(7) JPMORGAN CHASE & CO.
(8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) NATWEST MARKETS PLC
(12) NATWEST GROUP PLC
(13) UBS AG **Respondents**

and

(1) MUFG BANK LTD
(2) MITSUBISHI UFJ FINANCIAL GROUP INC. **Proposed Objectors**

THE EVANS APPLICATION (Case no. 1336/7/7/19)

BETWEEN:-

MR PHILLIP EVANS
("THE EVANS PCR") **Applicant**

and

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK N.A.
(6) CITIGROUP INC.
(7) MUFG BANK, LTD
(8) MITSUBISHSI UFJ FINANCIAL GROUP, INC.
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) JP MORGAN CHASE BANK, N.A.
(12) JPMORGAN CHASE & CO
(13) NATWEST MARKETS PLC
(14) NATWEST GROUP PLC
(15) UBS AG **Respondents**

GROUNDS OF APPEAL OF THE O'HIGGINS PCR

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1. The O'Higgins PCR seeks to appeal the judgment of the Tribunal in these proceedings dated 31 March 2022 ([2022] CAT 16) under s 49(1B) of the Competition Act 1998, on the footing that the denial of certification of collective proceedings on an opt-out basis amounts to a denial of damages to the class (in particular, in respect of the carriage dispute element of the case, in circumstances where the O'Higgins PCR's proposed class is wider than the Evans PCR's proposed class), and in any event pursuant to the Tribunal's letter of 11 April 2022 inviting applications for permission to appeal to be made. The O'Higgins PCR's rights in relation to the bringing of separate judicial review proceedings, should that be considered necessary, are fully reserved.

2. The Judgment wrongly and unjustly held that the application of the O'Higgins PCR should not be certified on an opt-out basis. In support of this contention, the O'Higgins PCR relies on the following three grounds of appeal.

Ground 1: The assessment of the strength of the O'Higgins PCR's case

3. The Judgment erred in law and was unjust in finding that the O'Higgins PCR did not have a strong case and that this factor pointed against its certification on an opt-out basis. In particular:

    (1) The Judgment wrongly held that the O'Higgins PCR's pleadings did not contain "*reasonable grounds for making the claim*", that its averments "*lack the specificity to enable them to be tried*" and that its application "*could be struck out*" on the basis that it failed to translate economic theory into an arguable claim (Judgment, para. 240), and that "*there is, in reality, no pleaded case on causation*" (Judgment, para. 241(1)). In fact, to the contrary:

        (a) The application of the O'Higgins PCR was pleaded with sufficient particularity.

        (b) In response to the Tribunal's request, the O'Higgins PCR's Statement of Case on Causation of Harm (i) alleged with specificity each of the causal links or steps that it alleged resulted in harm to the proposed class and (ii) explained why each such causal link was plausible and likely to have occurred.

(c) The causal links so alleged were rooted in the facts of the infringement as conclusively established by the infringement decisions of the European Commission, supported by well-established economic theory and by reference to the particular features of the market in question.

(d) The O'Higgins PCR's Statement of Case on Causation of Harm was cross-referenced to the detailed, extensive and cogent evidence that accompanied the O'Higgins PCR's application from experts of the utmost distinction in the fields of both financial economics specialising in FX market microstructures (Professor Breedon) and anti-trust economics (Professor Bernheim), each of whom attested to the likelihood of the causal steps alleged.

(e) As the experts made clear, they intend to demonstrate that harm has been caused in the manner alleged by making use of disclosure in due course. They explained that they anticipated that they would receive all of the necessary data to operate their model from the Proposed Defendants (whereas the Evans PCR's experts will rely on third-party disclosure).

(f) The O'Higgins PCR's case as to causation was therefore pleaded not merely at the level of economic theory, but as a matter of primary and specific averment to the effect that what sound economic theory predicts did in fact occur, and on the basis that this averment would be proved once the O'Higgins PCR obtains access to disclosure from the Proposed Defendants.

(g) Claimants in competition law infringement cases commonly face problems of information asymmetry and it is usual for pleadings in such cases to contain significantly less detail than provided by the O'Higgins PCR's claim form in this case without facing strike-out challenges. No doubt recognising this, the Proposed Defendants did not suggest that the O'Higgins PCR's claim should be struck out.

(h) The O'Higgins PCR has therefore established that the proposed class members are entitled to a trial, in that the claim as pleaded raises a triable issue that they have suffered some more than nominal loss from the Proposed Defendants' breach of duty (that breach of duty having been conclusively

established by the infringement decisions of the European Commission). The concerns expressed by the Tribunal amount to, at best, forensic difficulties, which do not deprive the proposed class members of their entitlement to a trial. In these circumstances, and as the majority of the Supreme Court made clear in *Merricks v Mastercard* [2020] UKSC 51; [2021] 3 All ER 285, justice requires that the damages suffered by the proposed class be quantified.

(2) Had the Judgment found (as it ought to have done) that the O'Higgins PCR's application was properly particularised to the required legal standard and in accordance with the guidance given by the majority of the Supreme Court in *Merricks v Mastercard* [2020] UKSC 51; [2021] 3 All ER 285, it would (and in any event should) also have found that the case of the O'Higgins PCR was strong, in particular in light of the facts that: (a) it was a follow-on claim; (b) similar class claims including the same defendants had been settled in the United States for over $2.3 billion; and (c) the claim was plausible and supported by cogent and detailed economic evidence. Accordingly, the Judgment ought to have found that strength of the case was a factor that, if anything, favoured opt-out certification over opt-in.

(3) The Judgment was unjust because of a serious procedural irregularity in relation to the use made of the Tribunal's conclusions in relation to whether the O'Higgins PCR's application was liable to be struck out. In particular:

(a) The Judgment rightly recognised that it would not be fair to strike out the claim of the O'Higgins PCR in circumstances where the O'Higgins PCR had not had an opportunity properly to address the concerns fully articulated for the first time in the Judgment regarding the sufficiency of its pleaded case (Judgment, para. 241(2)), including by considering possible refinements to its pleadings.

(b) However, the Judgment then proceeded to rely upon its (erroneous) finding that the O'Higgins PCR's application was defective and liable to be struck out as a basic and important premise of: (i) its findings that the application should not be certified on an opt-out basis; and (ii) its "*extremely marginal*" (at Judgment, para. 409) and *obiter* finding that carriage would be better awarded to the Evans PCR.

(c) Accordingly, a conclusion that ought to have been, at best, provisional, because it was arrived at in circumstances that did not respect principles of natural justice, was nonetheless deployed in reaching conclusions that were, in effect, final.

Ground 2: The interpretation and application of the criterion of practicability

4. The Judgment erred in law and was unjust in its interpretation and application of the criterion of practicability and should instead have adopted the approach taken by the minority (at Judgment, para. 415), with the result that it should have certified the O'Higgins PCR on an opt-out basis. In particular:

(1) The Judgment erred in treating 'buy-in' on the part of the proposed class as a material or determinative criterion, such that opt-out proceedings must be "*justified*" as being allowed to go forward in the absence of such buy-in (at Judgment, para. 96). The Judgment thereby treated the statute as providing for a presumption in favour of opt-in proceedings, when it does no such thing. The criterion of practicability simply considers whether opt-in proceedings are possible in principle, and allows the practicability of opt-in and opt-out proceedings to be assessed on a relative basis. A conclusion that some form of opt-in proceedings may be practicable does not mean that only opt-in proceedings should be certified. Where opt-in proceedings are not practicable, or would be very onerous, that factor points strongly in favour of certification on an opt-out basis.

(2) In any event, the Judgment erred in holding that opt-in proceedings are practicable in this case (and in any event erred in not concluding that that an opt-out claim was more practicable). In particular:

(a) The Judgment erred in holding that practicability was to be adjudged from the standpoint of the class members, as opposed to the actual practicability of bringing an opt-in claim (and hence by reference to a prospective PCR and its ability to bring a collective claim on such a basis) (at Judgment, para. 122(2)).

(b) The Judgment erred in considering whether an opt-in claim might be practicable in respect of a small number of class members with especially

large claims, rather than considering the position of all class members (at Judgment para. 381(10)).

(c) The Judgment erred by taking a theoretical approach to the question of practicability rather than one grounded in the evidence before the Tribunal, and in particular in concluding that opt-in proceedings may be possible in theory even while accepting that it is unlikely that an opt-in CPO will, in fact, proceed (at Judgment, paras. 372(2)(ii) and 385(1)).

(d) The Judgment had regard to the issue of whether the O'Higgins PCR was a pre-existing body as one of the factors going to what it called the Authorisation Condition rather than in relation to the practicability criterion, and treated this as an indicator against certification of opt-out collective proceedings (at Judgment, para. 370(3)). In fact, were the proposed class representative a pre-existing trade body, this might plausibly have made opt-in proceedings more practicable; as it is, the factor is neutral.

(e) The Judgment had regard to the issue of funding as one of the factors going to what it called the Authorisation Condition rather than in relation to the practicability criterion, and concluded that the level of funding slightly inclined it against opt-out collective proceedings (at Judgment, para. 370(5)). In fact, as the evidence before the Tribunal showed, opt-in proceedings are significantly more expensive (because of the costs of liaising with the class members) and significantly more difficult to fund (because of the lower possible recovery for funders). The Tribunal ought to have concluded that this factor in fact pointed to opt-out proceedings being more suitable. In any event, the Tribunal erred and was unjust in reaching the apparent conclusion that the level of funding was in any way insufficient (at Judgment, para. 325), in circumstances where it had concluded in relation to the funding required that "*the O'Higgins PCR's assessment is more likely to be right*" (para. 324(4)), had had no submissions from any party to the effect that the O'Higgins PCR's funding arrangements were insufficient, had failed to raise these concerns such that further evidence and submissions could be provided concerning the sufficiency of the O'Higgins PCR's existing costs budget and/or availability of more funding as required, and had itself stated that it

assumed that further funding would be made available as required and any shortfall in the O'Higgins PCR's funding arrangements would be made good (at Judgment, para. 324(2) and (3)).

(f) Had the Judgment properly applied the criterion of practicability, it would have been bound to find that an opt-in claim was impracticable (and in any event that an opt-out claim was more practicable), in light of the clear evidence served by both PCRs to that effect, and for the reasons given by the minority (at Judgment, paras. 435-449).

(3) Further and in any event, the Judgment, by purporting prospectively to certify an application on an opt-in basis that was impracticable for the PCRs before it and for any realistic PCR, erred in law and amounted to a misuse of power. It was unlawful, and contrary to the purpose of the statute and to the principles of effectiveness and access to justice, to certify on a basis that had not been sought by the PCRs and would, in practice, stifle any collective claim for the class. In particular, the Judgment erred by accepting that the proceedings are in principle suitable for certification, and insisting that this ought to be on an opt-in basis, in circumstances where the Judgment also proceeded on the basis that an opt-in CPO will not, in fact, proceed (at Judgment, paras. 372(2)(ii) and 385(1)).

(4) The Judgment was unjust because of a serious procedural irregularity in respect of its assessment of the evidence pertaining to the interpretation and application of the criterion of practicability, in that it failed to have regard to material facts and matters which were before it. In particular:

(a) At Judgment, para. 381(9), the Tribunal stated, "*We are conscious that we have not heard directly from any members of the putative classes.*" However, the Tribunal had before it, and the O'Higgins PCR relied on, a witness statement from an individual whose company is a member of the proposed class, Damian Mitchell, in which Mr Mitchell explained why he would have participated in an opt-out claim but not an opt-in claim, and the reasons why he believed other class members to be likely to take a similar view. The Judgment failed to mention Mr Mitchell's witness evidence. The Tribunal also had before it, and the O'Higgins PCR relied on, a witness statement from

Michael O'Higgins himself, in which he explained the extensive contact he has had with class members, and the views which they have expressed to him concerning their willingness to participate in opt-in proceedings. The Judgment failed to mention this evidence.

(b) The Tribunal also had before it, and the O'Higgins PCR relied on, a witness statement from Neil Purslow, explaining the views of the O'Higgins PCR's funder in respect of why it was willing to fund an opt-out claim but would likely be unwilling to fund any opt-in claim. The Judgment failed to mention Mr Purslow's witness evidence.

Ground 3: The *obiter* carriage dispute decision

5. The Judgment erred in law and was unjust in its *obiter* finding that the Evans PCR was "*extremely*" marginally preferable to the O'Higgins PCR (at Judgment, para. 409). Such a finding was unreasoned and, insofar as it can be understood, irrational and/or unlawful. In particular:

(1) The finding was premised on the erroneous assumption that the O'Higgins PCR's application was so weak that it was liable to be struck out. Given that the premise (viz., that the O'Higgins PCR's application could be struck out) was wrong and unjust (as to which see Ground 1 above) it must follow that the decision on carriage also cannot stand.

(2) Further, a finding that one claim is "*better thought through*" than another claim (Judgment, para. 389(4)) is, ostensibly at least and notwithstanding the Judgment's assertion to the contrary, an assessment (albeit unreasoned) of the relative merits of the two applications. It was unlawful, inappropriate and inherently unreliable for the Tribunal to seek to assess the relative substantive merits of two competing case theories at an interlocutory stage. In particular:

(a) Insofar as there are differences between the O'Higgins PCR's and Evans PCR's respective theories of harm, these differences were not based upon the O'Higgins PCR and its appointed experts having overlooked matters relied upon by the Evans PCR's assessment. The differences are based instead upon a different expert assessment of the importance, or relative importance, of the

matters relied upon. Such differences of expert assessment cannot in any event fairly or adequately be resolved one way or another within the inherent limitations of an interlocutory hearing (and still less without putting the relevant points – whatever they may be – to the expert witnesses in the course of that hearing).

(b) The Tribunal had itself refused to take into account the fact that the O'Higgins PCR's application is more sophisticated than the Evans PCR's application (at Judgment, paras. 290-293), in particular in that the quantification model proposed by the O'Higgins PCR's experts:

(i) seeks to claim for a wider group and therefore more class members and in respect of more types of trading than the model proposed by the Evans PCR's experts by using the more accurate realised spread measure in addition to the effective spread measure, whereas the Evans PCR appears to have misapplied the legal standard of commonality and thus defined his class unduly narrowly;

(ii) is feasible to implement because it does not require stripping certain types of trades out of the data, which experience from the US litigation suggests will not be possible, unlike the model proposed by the Evans PCR's experts; and

(iii) is less dependent on acquiring access to third-party data than the model proposed by the Evans PCR's experts.

In these regards, at least, the O'Higgins PCR's application was 'better thought through', but the Tribunal stated that it would not be drawn into a relative consideration of the merits of the two claims and so would not take these factors into account.

(c) Moreover, insofar as this aspect of the Judgment is premised on the finding in para. 238(3)(i) of the Judgment that the O'Higgins PCR had, in para. 20(3) of its Statement of Case on Causation of Harm , introduced a novel allegation that reflected a point already relied upon by the Evans PCR, this finding is wrong. The O'Higgins PCR had consistently (in the evidence filed with its

original application, in its amended application and in its subsequent evidence and submissions) relied upon the traders' coordination of spreads as a *supporting* reason for why its principal theory of harm (based on raising rivals' costs owing to increased adverse selection risk) was liable to lead the Respondent colluding dealers to choose to widen their spreads (rather than narrow them) through tacit coordination in response to the non-Respondent dealers' widening of spreads. That was a distinct allegation from the approach taken by the Evans PCR's theory of harm, which saw the collusion as a direct and independent cause of harm, and which, unlike the O'Higgins PCR's case, depended on showing that the cartelist banks possessed sufficient market power to collude directly. For the avoidance of doubt, had it sought to do so, it would not have been appropriate for the Tribunal to seek to resolve this type of difference between the formulation of the two PCRs' cases (based upon differing expert views and emphasis) at an interlocutory stage of the proceedings.

(3) Insofar as the finding that the Evans PCR's application is 'better thought through' is based upon the fact that the Evans PCR's application was brought later than the O'Higgins PCR's application (as might be inferred from the Judgment at para. 389(2)) such a finding would be inconsistent with para. 349 of the Judgment which expressly found that the timing of filing between the two PCRs was an immaterial factor. In any event, insofar as the Judgment found that the fact that the Evans PCR's application was filed over 4 months after the O'Higgins PCR's application was a factor in favour of the Evans PCR, such a finding would be irrational. The priority of filing is a matter that could reasonably only have been a factor that favoured the O'Higgins PCR's application, particularly in circumstances where the Evans PCR delayed over two months after the Commission decisions were received before filing his competing claim.

(4) Had the Tribunal not based its decision in relation to carriage on its unreasoned and unlawful assessment of the perceived merits of the two applications, it would, based upon its assessment of the other relevant factors, have been bound to award carriage to the O'Higgins PCR. In particular:

(a) All of the factors assessed in the Judgment were (i) found to be either immaterial, or it was said that there was no difference between the competing PCRs, or (ii) were in substance found to favour the O'Higgins PCR. In those circumstances the only logical conclusion was that the O'Higgins PCR was (other things being equal) the appropriate PCR.

(b) Further, even where the factors favouring the O'Higgins PCR were found to be individually of small weight, the Tribunal should have stepped back and concluded that in the aggregate they did materially favour the O'Higgins PCR.

(c) As to the features where the Tribunal found that the O'Higgins PCR had a superior offering:

(i) *Funding.* On the Tribunal's assessment, the O'Higgins PCR has £2.5m funding remaining and available more than the Evans PCR - £16,630,320 compared to Evans' £14,165,362, so 17% more. The difference is particularly significant in circumstances where the contingency fees arrangement entered into by the Evans PCR's solicitors and counsel had the effect of artificially inflating its assumed funding and so increasing the settlement pressure about which the Tribunal had expressed concerns (at Judgment, para. 325). Inconsistently with these concerns about settlement pressure, the Judgment suggests that the Evans PCR stretches his funding further by means of the contingency fee arrangements entered into by his solicitors and counsel (para. 320). This was wrong in respect of Hausfeld's fees because the pre-CPO contingency arrangements were already taken into account in calculating the £2.5m difference. As to Counsel, the Tribunal did not suggest that this was capable of wholly eliminating the difference (nor could it, given the modest level of discounting (average 22%) on the Evans PCR's counsel fees. Further still, the Tribunal did not take account (or sufficient account) of the impact of the Evans' PCR's solicitors' higher 'burn rate' in considering the remaining budget.

(ii) *ATE – Amount.* The Tribunal found a material difference between the two PCRs was the respective levels of the ATE insurance they had each obtained. In relation to this, the O'Higgins PCR had a full £10m in additional ATE insurance, a matter that was, as the Judgment records, a "*significant difference*" and an "*undoubted advantage*" (at Judgment, para. 340(2)). Contrary to the finding in the Judgment at para. 383(3), this was a particularly material factor: £2 million additional sums per Defendant is, on any reasonable view, a significant difference.

(iii) *ATE – Quality.* The Tribunal concluded that the O'Higgins PCR's ATE insurance was "*marginally more robust"* (para 340(1)). This was therefore, on the Tribunal's own reasoning, a factor favouring O'Higgins and not a neutral factor.

(iv) *Litigation Plan and budgeting.* The Tribunal concluded that the Evans PCR's budget was "*likely to be too low*", and that for several phases it had "*adopted too rosy a view and that the O'Higgins PCR's assessment is more likely to be right*" (para. 324(4)). It follows that the O'Higgins PCR's litigation funding plan was better thought through. This was a factor favouring O'Higgins and not (as the Tribunal appeared to suggest) a neutral factor.

(d) As to the matters which were said to be immaterial or neutral, see: Judgment, paras. 249-271 (nature and qualification of each PCR – neutral); 274-293 (class definitions – neutral, or requires consideration of the merits into which the Tribunal should not be drawn); 299-321 (funding – neutral, though the O'Higgins PCR has £2.5m more available); 322-326 (costs budgets – no difference as between the two PCRs despite O'Higgins PCR's budget being more accurate,); 327-332 (legal teams – neutral); 340(1) (terms of ATE policies – the O'Higgins PCR's policy was "*marginally more robust*", but this was not a material factor); 342-346 (ability to represent the class – neutral); 347-350 (timing of applications – neutral). As a matter of fact, and in addition to those set out above, the Tribunal ought to have found that several of these factors weighed in the O'Higgins PCR's favour:

(i) *Nature and qualification of each PCR.* The Tribunal should have placed weight on the O'Higgins PCR's closer connection with and efforts to communicate with members of the class.

(ii) *Class definition.* The Evans PCR's class definition is unduly narrow compared with the O'Higgins PCR's class definition, and moreover will be unworkable in practice as it requires stripping out certain types of trades from the data, which experience from the US litigation suggests will not be possible, as well as requiring additional third-party disclosure: see point 5(2)(b) above.

(iii) *Timing.* The Tribunal should have given preference to the first applicant to file (that is, the O'Higgins PCR), given that its assessment was that the differences between the PCRs were marginal and the carriage dispute would have been unnecessary if the Evans PCR had not brought its own separate application in circumstances where one already existed: see point 5(3) above.

(5) Accordingly, the Judgment ought rationally to have found that the O'Higgins PCR should have succeeded in relation to the carriage dispute.

(6) The finding on carriage was, in any event, and as noted, manifestly inadequately reasoned, and so unjust because of a serious procedural irregularity. In particular, the assessment that the Evans PCR's application (although itself also found liable to be struck out) was "*better thought through*" than the O'Higgins PCR's application is justified solely by the assertion that it was "*a marginally better attempt at capturing an elusive loss than that attempted by the O'Higgins PCR*". The meaning of this assertion is wholly unclear, in particular, in circumstances where the Tribunal otherwise disclaimed any assessment of the relative substantive merits of the two applications as part of the carriage dispute assessment (e.g., in relation to comparison of the two proposed class definitions, at paras. 274-293 of the Judgment), and, as such, does not amount to understandable reasoning.

(7) The finding on carriage was also unjust because of a serious procedural irregularity in light of the approach of the Judgment to the evidence submitted by the Evans PCR long after the hearing concluded to improve its offering, in that:

(a) Such evidence ought to have been disregarded in the interests of fairness and finality.

(b) In any event, such evidence can carry no weight in favour of the Evans PCR before the O'Higgins PCR has been given an opportunity to 'match' it, as the Judgment recognises it ought to have been at para. 406 (and as foreshadowed in the Tribunal's indication in its letter to the parties dated 1 October 2021).

Conclusion

6. For all the above reasons, an appeal has a real prospect of success. Moreover, the limited appellate authority on the legal issues before the Tribunal, their relative novelty, and the fact of a dissenting judgment, provide further compelling reasons for the grant of permission to appeal.

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