**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**

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**REPLY OF THE O'HIGGINS PCR TO THE EVANS PCR**
**ON THE O'HIGGINS PCR'S PTA APPLICATION**

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1. The response of the Evans PCR to the O'Higgins PCR's application for permission to appeal (the "**Evans PTA Response**") contends that: (a) the Court of Appeal has no jurisdiction to hear an appeal on what the Evans PCR calls the 'Carriage Issue', or on any other issues absent a successful judicial review on the 'Carriage Issue'; and (b) in any event the O'Higgins PCR's appeal on the 'Carriage Issue' raises no point of law. Both contentions are wrong.

**Proper characterisation of the decision which the O'Higgins PCR seeks to appeal**

2. The Evans PCR sows confusion by seeking to fragment the decision of the Tribunal. The core decision of the Tribunal which the O'Higgins PCR seeks to appeal is the single decision that the O'Higgins PCR anticipates will be embodied in the Tribunal's order – namely, that the O'Higgins PCR's application to proceed as class representative by way of opt-out proceedings will be stayed or struck out. The O'Higgins PCR had contended (and wishes to contend on appeal) that the proper order is one in which it is certified as the class representative in opt-out proceedings. The O'Higgins PCR therefore seeks permission to appeal against that decision and wishes to invite the Court of Appeal to make the alternative order it sought (or alternatively to remit the issue to the Tribunal for redetermination).

**Jurisdiction**

3. The Evans PCR takes the position that the Tribunal has no jurisdiction to grant permission in respect of what he calls the 'Carriage Issue', on the claimed basis that the outcome on the 'Carriage Issue' is to be considered a discrete decision separate from the remainder of the Judgment and it is not a decision as to the amount of damages within the meaning of s.49(1A)(a) of the 1998 Act. In consequence, says the Evans PCR, the remainder of the O'Higgins PCR's appeal is academic.

4. The O'Higgins PCR intends to issue a protective claim for judicial review of the Tribunal's judgment, including in respect of the 'Carriage Issue'.[1]

[1] The O'Higgins PCR reserved its right to bring judicial review proceedings in para. 1 of its grounds of appeal dated 21 April 2022. Now that it is clear from the Evans PCR's 12 May 2022 submissions that the Evans PCR contests the Court of Appeal's jurisdiction to entertain an appeal by the O'Higgins PCR, the O'Higgins PCR will shortly be sending a letter before claim with a view to issuing a judicial review claim form on a protective basis.

5. However, the Evans PCR is wrong to say that the Tribunal does not have jurisdiction on this point.

6. It may be noted at the outset that the Evans PCR's current position is flatly contrary to the position adopted in clear terms by his counsel at the first CMC on 13 February 2020 listed to consider the way in which the 'carriage dispute' should be heard. On that occasion, counsel for the Evans PCR, invoking the (at that time recent) *Merricks* precedent, explained that the Evans PCR's position was that any challenge to a decision on the award of a CPO, including in relation to the "*carriage motion*", would be "*subject to the appellate jurisdiction rather than challengeable by way of judicial review*": Transcript, lines 14-21 **{E/15/51-52}**. That was said to be because, following a decision on carriage, "*the unsuccessful applicant, obviously, would have had their day, their claim would be over*", and so it was submitted that the proper way to proceed would be by way of an appeal.

7. It is respectfully submitted that this was the correct analysis. As noted above, the effect of the Tribunal's decision is that the O'Higgins PCR's claim cannot proceed. It puts the O'Higgins PCR's damages claim to an end. In consequence, the appropriate way to challenge the Tribunal's judgment, including the carriage element, is by way of appeal.

8. Further and in any event, the consequence of the Tribunal's *obiter* decision on carriage – were, in the fullness of time, the Evans PCR and not the O'Higgins PCR to be certified as a class representative in opt-out proceedings – will be significantly to narrow the scope and number of transactions covered by the proceedings, as compared with the transactions which would have been covered by opt-out proceedings led by the O'Higgins PCR as class representative. That is because – as indeed was noted at para. 1 of the O'Higgins PCR's grounds of appeal – the O'Higgins PCR's proposed class is wider than the Evans PCR's proposed class, so that the refusal to certify the O'Higgins PCR as class representative amounts to a denial of damages to the O'Higgins PCR's class at least to that extent.

9. This point is relied on at paras. 5(2)(b)(i) and 5(4)(d)(ii) of the O'Higgins PCR's grounds of appeal. In particular, the difference between the O'Higgins PCR's class definition and the Evans PCR's class definition is that, while both class definitions encompass both spot

and outright forward transactions,[2] the Evans PCR's class definition expressly excludes (a) transactions at the 'fix' (i.e., transactions to execute a spot or outright forward transaction at a specified benchmark rate – as identified at recitals 9(3) and 55 of the Commission's Decisions) and (b) transactions resulting from a class member leaving a limit order or a resting order (e.g. a 'take profit' or 'stop loss' order – as identified at recitals 9(2) and 55 of the Commission's Decisions).[3] The O'Higgins PCR's class definition includes transactions falling into these two categories, which the O'Higgins PCR's expert considers highly likely also to have been affected by the cartel conduct.[4] The O'Higgins PCR's class definition covers all three types of order identified by the European Commission in recitals 9 and 55 of the Decisions, while the Evans' class captures only one.

10. The consequence of the exclusion of these transactions from the Evans PCR's class is that, if the Evans PCR's claim rather than the O'Higgins PCR's claim goes ahead:

    a. Persons will be excluded from the Evans PCR's class who would have been covered by the O'Higgins PCR's class, because (e.g.) they always traded at the fix and did not engage in the 'vanilla' spot and outright forward transactions which are the only focus of the Evans PCR's claim. They will not be able to bring any damages claims at all in respect of the conduct described by the European Commission in its Decisions. A significant number of persons can be expected to have engaged in the transactions covered only by the O'Higgins PCR's class definition; those persons would be entirely excluded from recovering damages through collective proceedings with the Evans PCR as class representative.

    b. Persons who are members of the Evans PCR's class will find themselves able to claim in respect of only some of their transactions. They will be able to bring some damages claims, but will be prevented from bringing claims covering the full scope of the Decisions and of their losses.

11. It follows from this that, even if it were appropriate to dissect the decision and consider the 'Carriage Issue' as a discrete topic when assessing the Court of Appeal's jurisdiction,

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2 See para. 5(A)-(C) of the O'Higgins PCR's draft CPO at **{MOH-A/1/3}**, and the Evans PCR's class definition at **{EV/5/1}**.

3 See (g) and (h) of the definition of "Excluded Transactions" at **{EV/5/3}**.

4 See: Breedon 2, para. 5.5 **{C/1/40}**; Breedon 3, para. 2.4 **{C/3/8}**.

the Tribunal's decision on the 'Carriage Issue' amounts to a denial of damages to the class as defined by the O'Higgins PCR because of its *obiter* selection of the class representative putting forward a substantially narrower class definition not capturing the full scope of the Decisions. The submission at para. 6 of the Evans PTA Response that "*the determination of the Carriage Issue does not prevent the proposed class from obtaining an award of damages*" simply ignores the point that the O'Higgins PCR's "*proposed class*" is different from, and larger than, the Evans PCR's class.

12. In short, if the Tribunal's carriage decision stands, the additional claims for damages covered by the O'Higgins PCR's class definition are over. In consequence, there must be jurisdiction to hear an appeal in respect of this issue.

**The Carriage Issue appeal raises a point of law**

13. The Evans PCR next contends that the O'Higgins PCR's appeal on this issue should not be permitted to proceed on the basis of the allegation that it does not raise a point of law.[5] In essence, the Evans PCR's argument is based on the idea that the Tribunal's conclusion rested on a weighing-up of factors, and the appeal court should not interfere with an evaluative decision. He submits that the Tribunal directed itself correctly on principles applicable to the carriage dispute (para. 14 of the Evans PTA Response), and that the conclusion it reached was an evaluative judgment which did not involve any error of law.

14. The O'Higgins PCR respectfully disagrees. If the Tribunal has taken into account an irrelevant consideration or failed to take into account a relevant consideration in reaching its conclusion or has failed to adopt a fair procedure, it is no answer to say that it is engaging in an evaluative exercise. The evaluative exercise must still be conducted judicially and lawfully. In particular, as set out in its grounds of appeal:

    a. The Tribunal's conclusion rests on an error of law in that it impermissibly had regard to the relative merits of the two claims.

    b. Alternatively, the Tribunal's decision was inadequately reasoned and/or irrational.

[5] As required by s. 49(1A) of the 1998 Act, which applies to the O'Higgins PCR's appeal (please note the correction to the typographical error at para. 1 of the O'Higgins PCR's grounds of appeal).

*Error of law in having regard to the relative merits of the two claims*

15. The Evans PCR appears to concede, at para. 15(b) of the Evans PTA Response, that it would have been wrong for the Tribunal to engage in an "*impermissible assessment of the relative merits of the two claims*". That reflects the Tribunal's position: the Tribunal itself emphasised, at para. 63 of the Judgment, that its relative assessment of the two applications had "*nothing to do with the merits of the proposed claims*" and at para. 64 emphasised that it was not concerned with the "*substantive merits*" (emphasis original).

16. However, the Evans PCR insists that, to "*the contrary*", the Tribunal was entitled to and did engage in "*an appropriate assessment at a high level of the relative plausibility and robustness of each PCR's application, including (but not limited to) their theories of harm*". He continues, at para. 15(b)(i), that "*The Tribunal was entitled to gauge the relative "strength" of the two claims*": para. 15(b)(i).

17. The supposed distinction which the Evans PCR is seeking to draw is impossible to understand. The factors mentioned by the Evans PCR all involve an inquiry into the relative substantive merits of the two applications (e.g., the plausibility of the applicants' respective theories of harm). The Tribunal had itself observed, at para. 41 of the Judgment, that the issue of the "*strength of the claims*" is one of merits – yet the Evans PCR is now contending that it is precisely the relative "*strength of the claims*" which the Tribunal took into account in its crucial determination in his favour at para. 389(5) – at para. 15(b)(i) of the Evans PTA Response. The Tribunal's reference to the Evans PCR's claims as representing a "*marginally better attempt at capturing an elusive loss*" can only be read as a reference to the Tribunal's evaluation, as a matter of substance, of the applicants' respective theories of harm as pleaded and supported by their experts.

18. In the O'Higgins PCR's submission, the Tribunal took into account the relative substantive merits in reaching its conclusion, and it was wrong in law to do so. It is at least arguable that it was not permissible, at the certification stage, for the Tribunal to seek to resolve carriage on the basis of a relative evaluation of the substantive merits of the case theories of the two applicants. The impermissibility of engaging in any such

relative merits assessment at the interlocutory stage is supported by the recent judgment of the Court of Appeal of *Le Patourel v. BT* [2022] EWCA Civ 593 (see [105]).[6]

19. Further, absent the Tribunal's relative evaluation of the merits, based on all other relevant factors evaluated by the Tribunal, the only possible outcome would have been the certification of the O'Higgins PCR in preference to the Evans PCR.

20. On this ground alone, Ground 3 of the O'Higgins PCR's appeal raises a point of law on which its appeal has a real prospect of success.

*Error of law in the approach taken by the Tribunal to reaching its conclusion*

21. Further, the meaning of an appeal being "*on a point of law*" extends to consideration of issues which could be raised in proceedings for judicial review, including inadequacy of reasons or irrationality.[7] The O'Higgins PCR's grounds of appeal accordingly rely on: (a) material considerations which the Judgment fails to address; and (b) the fact that the merits assessment at para. 389 of the Judgment is not only unlawful (in taking into account an irrelevant consideration, being the substantive merits), but essentially unreasoned. These are arguable points of law which are capable of being and ought to be considered on appeal.

22. As to the particular points made in the Evans PTA Response:

    a. The detailed criticisms made by the O'Higgins PCR at para. 5(2)(b) of its grounds of appeal, referred to at para. 15(b)(ii) of the Evans PTA Response, represent points which the Tribunal expressly declined to take into account, but ought to have, <u>if</u> it were going to engage in a relative merits assessment in any event (as it ultimately did at para. 389 of the Judgment).

    b. The comments at para. 15(b)(iii) of the Evans PTA Response show that it has either misunderstood or chooses to mischaracterise the significance of the 'tacit collusion' issue. On the O'Higgins PCR's theory of harm, tacit collusion <u>does not give rise to a distinct head of loss</u> and so the fact that it has not been pleaded as a distinct head of loss is no criticism. It is a 'supporting reason' which has formed

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6 See also the recent judgment in *Consumers' Association v. Qualcomm Incorporated* [2022] CAT 20 at [50]-[52] on the necessarily high-level assessment at the certification stage.

7 *Nipa Begum v. Tower Hamlets LBC* [2000] 1 WLR 306, 312-313 (Auld LJ).

part of the theory of harm which has been advanced by the O'Higgins PCR consistently from the outset.[8]

c. As explained at para. 5(3) of the O'Higgins PCR's grounds of appeal, it does not appear that the Tribunal relied on the issue of timing of filing at all in making its assessment at para. 389 of the Judgment. It said that this issue was "*immaterial*", at para. 349. The Evans PCR misrepresents the position at para. 15(c) of the Evans PTA Response. This factor cannot therefore be used to support the Tribunal's ultimate conclusion, as the Evans PCR contends. To the contrary, the O'Higgins PCR relies on the Tribunal's failure to treat 'first to file' as a positive factor as a misdirection in law and a failure to take into account a relevant consideration, in light of its view that the differences were otherwise extremely marginal (para. 5(4)(d)(iii)).

d. As to para. 15(d) of the Evans PTA Response, the essential point is that, in relation to all of these factors, the Tribunal took them into account markedly in the O'Higgins PCR's favour. Based only on those factors, the Tribunal would have been bound to award carriage to the O'Higgins PCR, as explained at para. 5(4) of the O'Higgins PCR's grounds of appeal.

e. At para. 15(e) of the Evans PTA Response, the Evans PCR argues that the factors mentioned at para. 5(d) of the O'Higgins PCR's grounds of appeal are "*either neutral or misconceived*". This misunderstands the point being made. The O'Higgins PCR does not seek to relitigate these points. Rather, it contends that the Tribunal failed to take them into account properly or at all, and that this amounted to an error of law.

f. As to para. 15(g), the Evans PCR suggests that the Tribunal's comments at para. 389 were adequately reasoned in that the expression "*"better thought through" reflected the Tribunal's assessment of the relative "strength" of the two claims*". As noted above, it is the O'Higgins PCR's contention that it was not lawful for the

[8] The point was made by Breedon 1 at para. 6.8(b) as filed with the application. See further, in particular, Bernheim 1, paras. 39 **{MOH-H/0/14}** and 44-48 **{MOH-H/0/16}**; Bernheim 3, paras. 17-20 **{C/4/10}**; O'Higgins PCR's annotations on the Evans PCR's Neutral Statement on Merits, para. 5 **{AB/17/3}**.

Tribunal to seek to embark on such a relative assessment of the merits at the certification stage.

g. Finally, as to para. 15(h) of the Evans PTA Response, the O'Higgins PCR maintains its points at para. 5(7) of its grounds of appeal.

**Conclusion**

23. In the O'Higgins PCR's submission, its appeal on the Carriage Issue (i.e., its Ground 3) raises points of law and has reasonable prospects of success, as explained above.

24. Moreover, there is a compelling reason why it should be heard. The Evans PCR agrees that the O'Higgins PCR's Grounds 1 and 2 have good prospects of success and ought to be considered by the Court of Appeal. Further to such consideration, in the event that the Court of Appeal does consider that something has gone wrong, it is highly likely that the CPO applications will need to be heard again, in light of the Court of Appeal's directions as to the proper way to approach such disputes (including the proper approach to the relevance of the merits where market-wide damages are sought). In that event, the Tribunal's current, *obiter* conclusion on the Carriage Issue will have been wholly superseded and it would be helpful for the Court of Appeal either to resolve the Carriage Issue itself or to establish the proper principles on the basis of which it should be reconsidered.

25. Justice will require that <u>both</u> applications be assessed against the authoritative standard. It would be wholly wrong for the O'Higgins PCR (with its broader claim reflecting the full scope of the Commission's Decisions) to be shut out now, in particular given the Tribunal's repeated emphasis on the "*extremely marginal*"/"*very marginal*" nature of its decision on the Carriage Issue (Judgment, paras. 389(1) & 409). The key para. 389(4) likewise only suggests that the Evans PCR made a "*marginally better attempt*" than the O'Higgins PCR. This is in circumstances where the Tribunal regarded both claims as liable to be struck out. In short, the Tribunal itself has emphasised that this was a decision which it found difficult, and was a decision taken in a context in which the Tribunal assessed both claims as to be so weak as to be liable to be struck out (assessments that both PCRs contest). It is fair and logical in such circumstances that the Tribunal should grant permission to the O'Higgins PCR to appeal in respect of the Carriage Issue.

DANIEL JOWELL Q.C.
GERARD ROTHSCHILD
CHARLOTTE THOMAS

Brick Court Chambers
7-8 Essex Street
London WC2R 3LD

SHAIL PATEL

4 New Square
Lincoln's Inn
London WC2A 3RJ

19 May 2022