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**

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

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1. The response of the Respondents to the O'Higgins PCR's application for permission to appeal ("**Respondents' PTA Response**") fails to rebut the fact that the O'Higgins PCR's grounds of appeal identify arguable errors of law that have real prospects of success.

Le Patourel

2. The Tribunal's Judgment was handed down before 6 May 2022, the date of publication of the judgment of the Court of Appeal in *Le Patourel v. BT* [2022] EWCA Civ 593. By that judgment, the Court of Appeal concluded:

   a. There is no "*general preference*" or presumption in favour of opt-in proceedings ([60]-[68]).

   b. The position of third-party funders is relevant and the Tribunal must take into account whether the proceedings are financially viable in the absence of an opt-out order. The Court of Appeal said, in particular, at [77]-[78] (emphasis added):

> "77. […] The financial position of the parties, which includes their ability to attract third party funding, is identified as a matter which the Tribunal should consider when making orders, pursuant to the Guiding Principles (Rule 4(2)(c)(iv)). **Those principles also highlight the importance of the Tribunal taking steps to facilitate equality of arms as between litigants, which also bears upon issues of funding and representation (Rule 4(2)(a)).** It is also an obvious consideration that would need to be considered under Rule 73. **If, in a given case, a claim is only viable if third party funding is secured then this is relevant to access to justice and is a factor the CAT should necessarily take into account.** It is self-evident that in many large-scale consumer based collective actions the availability or non-availability of third party funding might be dispositive of whether the claim ever gets off the ground.
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> 78. In the present case the CAT did not simply accept the position of the funder without more but took its decision based upon its own assessment of the facts and its own view of what was judicial common sense. Its conclusion took into account its own view of: the number of potential claimants that might sign up to opt-in proceedings; the impact of this upon the willingness of potential funders to invest; and, in consequence, the probability of the litigation ever becoming viable absent an opt-out order. Even assuming identifiability and contactability, the CAT accepted that: (i) very few claimants would sign up to an opt-in process; (ii) a third party funder would therefore find the litigation unattractive; and (iii) this being the case the Claim might never be commenced if the Claim proceeded upon an opt-in basis. **If the proceedings did not go ahead, because of lack of funding, then access to justice, which is a seminal principle lying at the epicentre of the jurisdiction, might be thwarted.** As to the risk of gaming by funders

> undermining the system, the importance of the CAT forming an independent view is supported by judicial comment in *Merricks* in both the Court of Appeal [2019] EWCA Civ 674 at paragraph [60] and per Lord Sales and Lord Leggatt in the Supreme Court at paragraph [98]. Commercial funders seek to profit from litigation and the Tribunal will no doubt be alert to curb the risk that the leverage that opt-out proceedings provide is being deployed oppressively and unfairly and/or that the costs spiral out of control relative to likely awards. Rule 4(1) emphasises that the CAT will "*ensure*" that cases are dealt with "*at proportionate cost*"."

c. The concept of 'practicability' does not merely mean 'possible or doable'. It "*goes further*". As the Court of Appeal put it at [83] (emphasis added):

> "Ms Ford QC for BT did not demur from this analysis of legislative language. She did argue that practicability meant "*doabilty*"; if it can be done then it is practicable and if it is therefore practicable then it pointed powerfully in favour of an opt-in process. With respect we do not agree. Practicability includes being "*doable"* but goes further; **it requires the court to ask whether it is not only "*doable*" but also reasonable, proportionate, expedient, sensible, cost effective, efficient etc, to do it. There are many things that might be doable but where to do them would amount to a poor exercise of judgment.**"

d. There is no merits threshold or safeguard applicable before the Tribunal can order opt-out proceedings ([108]). Nor it is correct to say, as a generalisation, that the merits need to be more immediately perceptible in an opt-out case as opposed to an opt-in case. That is because – in observations which apply directly to these proceedings ([107]):

> "It is not inevitably the case that an opt-out case is more complex than an opt-in case. If an opt-out case attracts third party funding it might be conducted on a better resourced and more efficient basis than an opt-in case where the representatives scrabble around to raise adequate funds to run the litigation efficiently. Where an order for aggregate damages is made in an opt-out case that will reduce the complexity of the litigation because it will significantly simplify the quantification, award and distribution stages."

e. It will generally not be possible for the Tribunal to form any sufficiently clear view on the merits at the interlocutory stage ([105]).[1] The position might be different

[1] 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.

"*following a **contested** summary procedure in which it finds that the claim has a realistic prospect of success*" (emphasis added) ([106]).

3. In view of the Court of Appeal's conclusions in *Le Patourel*, it is, in the submission of the O'Higgins PCR, impossible not to conclude that the O'Higgins PCR's grounds of appeal are arguable. The Tribunal is invited to give permission to appeal in full. Nonetheless, the O'Higgins PCR now addresses the various specific points made in the Respondents' PTA Response.

The Respondents' PTA Response

4. Paras. 6-10 of the Respondents' PTA Response state that the Tribunal made a "*finding that* [the] *proposed claims were very weak*" and that the O'Higgins PCR's grounds of appeal seek to argue that the Tribunal erred in its assessment of the strength of its case. That fails to engage with the O'Higgins PCR's Ground 1, which explains its case that the Tribunal erred in treating the O'Higgins PCR's case as being based merely in economic theory, which was the foundation of its view that the pleadings lacked the specificity to enable them to be tried. (See Judgment, para. 144.) The view reached by the Tribunal is a legal conclusion based on what it says it required to bring forward a claim of this type. It is hard to reconcile with the Tribunal's conclusion in the recent judgment in *Consumers' Association v. Qualcomm Incorporated* [2022] CAT 20, where an economic theory to be tested in due course against factual evidence was held to suffice at the certification stage.[2] It accordingly deserves consideration by an appellate tribunal which can resolve the apparent inconsistency between the two judgments. The O'Higgins PCR accordingly maintains its contention that the Judgment is arguably wrong in law, as well as arrived at following a procedure that was unfair.

5. Paras. 11-12 of the Respondents' PTA Response mis-state the argument made by the O'Higgins PCR in its grounds of appeal, at para. 4(3), and are therefore irrelevant. The O'Higgins PCR does not contend that the Tribunal could not as a matter of jurisdiction even raise the question of whether opt-in proceedings might be more suitable, notwithstanding that no opt-in application was before it. The O'Higgins PCR's contention is that the Judgment's approach "*would, in practice, stifle any collective claim for the class*", including because the Judgment has found as a matter of fact that no opt-

[2] See [63], [67]-[73], [77]-[82] and [100].

in proceeding will go ahead (as well as because certifying on an opt-in basis was impracticable for the PCRs before it, and for any realistic PCR). This is not therefore a case of a PCR who could very well have brought opt-in proceedings, but chose not to do so as a matter of litigation strategy. There is no "*fiat*" as the Respondents claim. It is a case of a PCR who could not and did not bring an opt-in claim, in particular, for funding reasons. As the Tribunal recognised, its decision not to allow opt-out proceedings to go forward will stop any claim from proceeding and so make it impossible for the class to obtain access to justice.[3]

6. Paras. 14-16 rest on a different argument, which is that the Tribunal's conclusion was based on the idea that opt-in proceedings were 'practicable', but, should they not proceed, that would be because class members did not wish to participate. That conclusion itself, however, was based on a particular interpretation of law as to what it means to say that proceedings are 'practicable', which seems to be akin to the idea that as long as opting in is possible or 'doable' for any individual class member, the test is met. The O'Higgins PCR respectfully disagrees with the Tribunal's interpretation as to what this means. The O'Higgins PCR's approach has real prospects of success on appeal, not least given the Court of Appeal's conclusions at [83] of *Le Patourel v. BT* [2022] EWCA Civ 593.

7. Para. 17 of the Respondents' PTA Response argues that the Tribunal was correct in law in the manner in which the Tribunal applied the 'practicability' criterion. These arguments are arguably wrong for the reasons set out in the O'Higgins PCR's grounds of appeal. The O'Higgins PCR relies, in particular, on the point that <u>all</u> victims of the Respondents' cartels are entitled to have their claims adjudicated by a judge, and it is inappropriate to focus only on those class members whose claims might be large enough to make it worthwhile for them to opt in. As to this, the Respondents' suggestion that the Tribunal held that "*most, if not all*" class members were likely to be large (and to have large claims) is inconsistent with the Tribunal's acceptance of the fact that there likely existed a 'long tail' of small claims, which it chose to disregard in its assessment as to practicability (Judgment, para. 381(10)).

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[3] Judgment, para. 372(2)(ii): "*the litigation will, as the Applicants contend and we accept, end if we do not (as the Applicants seek) certify on an opt-out basis.*"

8. Further, and as noted, the issue of 'practicability' has now been considered by the Court of Appeal in *Le Patourel v. BT* [2022] EWCA Civ 593 – handed down on 6 May 2022, after the Judgment – which held, in particular:

   a. There is "*no prior legislative predisposition*" in favour of either opt-in or opt-out proceedings (at [68]). The Tribunal, however, took the approach of assuming that the ability to bring opt-out proceedings required to be "*justified*" in the face of the fact that such proceedings are conducted without the express buy-in of class members – the point on which the Tribunal said its choice turned: Judgment, para. 96. Its entire assessment of the practicability issue is arguably affected by this starting-point, which is now arguably inconsistent with Court of Appeal authority.

   b. At [71], there was an "*important advantage of opt-out proceedings in overcoming the low-participation rates associated with opt-in proceedings*", as the Supreme Court had highlighted in *Lloyd v. Google* [2021] UKSC 50; [2021] 3 WLR 1268 (by reference to materials on behavioural economics echoed in the evidence of Professor Bernheim and Mr O'Higgins to the Tribunal in the present case).

   c. At [77]: "*If, in a given case, a claim is only viable if third party funding is secured then this is relevant to access to justice and is a factor the CAT should necessarily take into account.*" It is at least arguable that this entails that practicability must be assessed from the perspective of the PCR, or at least its funders. The O'Higgins PCR, including through a witness statement on behalf of its funder, has explained that funding is available only for an opt-out claim and not an opt-in claim. The Tribunal's disregard of this point, because of its refusal to consider the perspective of the PCRs, was therefore at least arguably a legal error.

9. Para. 18 of the Respondents' PTA Response asserts that it is clear that the Tribunal was "*well aware*" of the witness statements of Messrs Mitchell, O'Higgins and Purslow concerning the 'practicability' issue. The Tribunal does not, however, consider any of that evidence in its Judgment (referring to those statements, together with all others filed, only within a list annexed to the Judgment). Indeed, the Tribunal asserts that it had before it no evidence from any member of the class, which was, with respect, self-evidently incorrect (as Mr Mitchell's company is a member of the class and Mr O'Higgins gave evidence of his discussions with other class members). Further, that evidence ostensibly

contradicts the factual conclusion drawn by the Tribunal as to the likely reaction of class members to an opt-in claim. Further and in any event, in light of the Court of Appeal's emphasis on the relevance of such evidence at [77] of *Le Patourel v. BT* [2022] EWCA Civ 593, the Tribunal ought expressly to have taken such evidence into account. Its failure to do so amounts to a failure to take into account a material consideration and is an error of law.

10. Para. 19 of the Respondents' PTA Response addresses the Tribunal's approach to the 'strength of the claims' factor. It focuses on the Evans PCR's grounds of appeal. It fails to grapple with (still less show to be unarguable) the arguments raised by the O'Higgins PCR, in particular: that the members of the proposed class are entitled to a trial, as long as their claims are not struck out; and so justice requires that their claims be quantified, even if this is difficult (see para. 3(1)(h) of the O'Higgins PCR's grounds of appeal): their claims can best (and can only) be quantified in opt-out proceedings, which ought therefore have been permitted to proceed. In any event, as the Court of Appeal found in *Le Patourel v. BT* [2022] EWCA Civ 593, at [107]-[108], it is wrong to assume that stronger claims are necessarily more entitled to proceed by way of opt-out claims than weaker ones.

11. Finally, para. 20 deals with what is described as a "*miscellany*" of points going to the opt-in/opt-out decision. The O'Higgins PCR relies on all of its grounds of appeal. However, it highlights several points which are significant. In particular:

    a. Para. 20(b) addresses the Tribunal's approach to the level of funding, which inclined it against opt-out proceedings. This put the point precisely the wrong way around, for the reasons given by Mr Lomas: see para. 4(2)(e) of the O'Higgins PCR's grounds of appeal. The approach of Mr Lomas, and the O'Higgins PCR, have now been authoritatively endorsed by the Court of Appeal in *Le Patourel v. BT* [2022] EWCA Civ 593 at [77]-[78], which explained that it is necessary to take into account funding as an access to justice issue.

    b. Para. 20(d) argues that the Tribunal was entitled to take into account the fact that opt-in proceedings do not (by definition) involve express buy-in from class members. However, in so doing, it committed an error of law, by requiring opt-out

proceedings to meet a higher threshold than opt-in proceedings, as explained at para. 8.a above.

12. As to para. 23, the carriage dispute issue is addressed in the O'Higgins PCR's response to the Evans PCR's response to its application for permission to appeal.

13. The Tribunal is accordingly requested to grant permission to appeal in respect of each of the O'Higgins PCR's grounds of appeal. They have, on any reasonable view, sufficient prospects of success and, in any event, the wider significance of the issues raised amount to compelling reasons to grant permission to appeal.

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19 May 2022