Party: Applicant / Proposed Representative
Witness: N A Purslow
Number of Statement: Second
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

SECOND WITNESS STATEMENT OF NEIL ANDREW PURSLOW

I, **NEIL ANDREW PURSLOW**, of Therium Capital Management Limited, whose registered address is 11 Staple Inn, London WC1V 7QH, **WILL SAY**:

Introduction

1. I am a Director, Co-Founder, and Chief Investment Officer of Therium Capital Management Limited ("**TCML**"). TCML is a UK-based company, wholly owned by Therium Group Holdings Limited ("**TGHL**"), which is registered in Jersey. For ease, I will collectively refer to TCML, TGHL, Therium Litigation Finance Atlas AFP IC and their affiliates as "**Therium**" in this witness statement. Therium's business is litigation funding and it is funding the Applicant / Proposed Class Representative.

2. I have previously provided a witness statement in relation to the above matter (the "**Proposed Collective Proceedings**") dated 28 July 2019 (my "**First Statement**") which was filed with the Competition Appeal Tribunal (the "**Tribunal**") on 29 July 2019. This is my second witness statement in these proceedings. It is provided to the Tribunal by way of reply to certain points made by the Proposed Defendants in their response to the applications of Michael O'Higgins FX Class Representative Limited (the "**O'Higgins Application**") and Mr Phillip Evans (the "**Evans Application**") dated 26 February 2021 (the "**Response**").

3. In particular, in this witness statement I will:

    a. address, on the basis of my knowledge of litigation funding, facts relevant to the submission by the Proposed Defendants that the Proposed Collective Proceedings should only be permitted to proceed (if at all) as an opt-in action; and

    b. explain why Therium agreed to fund the claim on the basis that the Proposed Collective Proceedings should be run as an opt-out action.

4. As with my First Statement, I make this statement in my capacity as Chief Investment Officer of TCML and I am duly authorised by TCML.

5. 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. For the avoidance of doubt, I make the following statements without waiving privilege in the matters addressed.

Opt-out vs Opt-in

6. I have reviewed the Response. In it, the Proposed Defendants assert that the Proposed Collective Proceedings "*should only be permitted to proceed, if at all, as opt-in actions*"[1] and put forward arguments in support of this position. In particular, the Proposed Defendants state that it would have been practicable for the PCRs to bring the Proposed Collective Proceedings on an opt-in basis in respect of UK-domiciled class members. Collective proceedings are expensive to bring; funding is an essential pre-requisite. I address below the practical implications of the choice between opt-in and opt-out collective proceedings from a funder's perspective. I explain why, from Therium's perspective, opt-in proceedings would, in the present case, be likely to be impracticable.

Therium's general approach to risk assessment

7. As I explain in greater detail in paragraphs 8 to 11 of my First Statement, Therium was established in 2009 and is one of the longest-established funders in the world. Of relevance to the current case, Therium has, and I personally have, extensive experience of funding both opt-in and opt-out actions, not just before the Tribunal,[2] but also before the Courts of England and Wales[3] and in other jurisdictions.[4] The claimants in these cases range from sophisticated institutional investors (as may be the case in securities litigation cases) to individuals who may be claiming in their personal capacity as a consumer, employee, retail investor or data subject. Whilst Therium as a funder is not itself typically responsible for signing up claimants into opt-in cases, we have worked extensively with law firms and other third parties on this exercise and we are intimately familiar with the process of doing so, as well as the costs, risks and challenges associated with it. The prospects of successfully building a sufficiently large claimant group forms a critical part of our decision to fund an opt-in claim. We have direct experience of dealing with clients who are considering joining collective proceedings which we are

1 Paragraph 3 of the Response.
2 *Road Haulage Association Limited v Man SE and Others* ("**Trucks**").
3 See the Group Litigation Order actions in *Lloyds/HBOS Litigation* and *The VW NOx Emissions Group Litigation* as well as informal group claims which are not subject to a formal Group Litigation Order.
4 For example, in Australia, Germany, the Netherlands, the United States, Canada and Denmark.

funding and the varying manners in which such clients weigh up the cost and benefit of joining a claim.

8. When Therium considers whether to fund any proceedings, whether an individual claim or collective proceedings as an opt-in or as an opt-out action (and whether before the Tribunal or elsewhere), we carry out an analysis of the viability of the proposal and its prospects of success. That naturally includes the merits of the claim, the quantum of the claim, and the budget required to bring that case to a successful conclusion. Also flowing from that is the economic viability of the claim both from our perspective as funder (factoring in the economic terms that we are proposing) and from the perspective of the claimants for whose benefit the claim is ultimately being brought. In an opt-in claim (whether opt-in collective proceedings before this Tribunal or litigation in the High Court which will be the subject of a Group Litigation Order ("**GLO**")), this analysis will factor in not only the direct cost of the legal proceedings themselves but also the cost of identifying and contacting potential claimants, of assisting them with their decision whether or not to join the group (which may for instance include running loss calculations for them if they have data available), and ultimately of signing them up. Such costs form part of the costs of the case as a whole and any funder who is providing capital to meet that expense will require a return on that investment in the same way as it would on the capital invested in the legal or expert costs themselves. Of critical importance to the analysis is also the prospects of the claimant group reaching the size that is necessary to make the case economic. I return below to the considerations relevant to this question. Another critical aspect of this analysis is whether the relevant Court or Tribunal will be attracted to the way in which group claim is put together. The considerations on this vary of course between jurisdictions and as legal practice develops over time.

9. One cannot say that either opt-in or opt-out is superior in every case. Within the same jurisdiction we may fund cases on both an opt-in and an opt-out basis where both regimes are available (as is the case before this Tribunal) depending on what we consider to be the better approach for the particular case. Our assessment factors in what we consider to be practically achievable (given an acceptable level of risk) and which option will likely deliver the best outcome for group members. It is based on a holistic view of the proposition, rather than a narrow checklist of considerations. Bearing in mind that this analysis is done at a very early stage – prior to proceedings and before claimants are

signed up – very often the risks and uncertainties involved in one approach will weigh at least as heavily in the analysis as the few data points that we may have available. Over the course of the case itself these matters will become clearer but, at such an early stage, a practical and pragmatic approach to assessing risk is necessary.

10. As stated above, of critical importance is the prospect of the claimant group reaching the necessary size to make the case economic. In common with other funders, Therium will decline to fund a case at all if we consider that there is too great a risk that the size of the claim will not justify the investment, even if the case is strong, as this situation is likely to lead to poor returns to the funder and/or poor outcomes for group members.

11. Whether a case is funded on an opt-out or opt-in basis, a funder such as Therium will wish to understand a number of points common to both. These would include the parameters of the proposed class, the scope of the claims, the approximate total quantum of the losses suffered market-wide by the class as a whole, and whether the class will be able to satisfy the threshold requirements for certification as collective proceedings on either basis.

12. Specifically, in order to fund a claim on an opt-in basis, the funder will need to address and get comfortable with the answers to a great many additional questions which go to its analysis of whether the claim will ultimately be economic. These would include:

    a. The average losses per class member and how losses are distributed between class members (e.g. whether losses are evenly distributed or concentrated among some class members);

    b. The cost and ease of estimating losses for class members;

    c. The approximate number of potential class members;

    d. Aspects of the makeup of the proposed class relevant to likelihood of signing up (e.g. whether there is a pre-existing body of class members that are likely to join the group, the types of people within the class, whether there are pre-existing representative organisations for some or all of the class, and diversity/homogeneity of class members);

e. The plan for approaching potential class members (e.g. who will undertake this exercise and how easy it will be for them to identify and make contact with appropriate decision-makers);

f. The barriers to class members joining the claim (e.g. familiarity with the claim, burden of deciding whether to join, likely value relative to cost and work involved, and financial/reputational/commercial risks); and

g. Whether there are any other particular factors that may make class members reluctant to join the claim.

This case

13. Having provided a general overview of Therium's approach, I now turn to Therium's specific decision-making in the present case – in particular why, as experienced funders of group and class litigation, we considered that it was right to run the case as opt-out collective proceedings.

14. One of the key reasons why Therium believed the opt-out approach to be appropriate was due to the likely difficulty of building a sufficiently large opt-in group of class members. This view was informed by a number of inter-related factors:

a. Our understanding was (and remains) that the losses which are the subject of the Proposed Collective Proceedings are likely to be distributed very widely across a large number of organisations. Further, our expectation was that there would be a small number of claimants with large claims, that might possibly justify them bringing actions individually or in small groups if they have a sufficient appetite for litigation (as we have seen in the *Allianz* proceedings,[5] which were filed in late December 2018), but that the levels of losses would quickly drop off such that there would be a long "tail" of a very large number of claimants with small(er) individual losses.

b. Secondly, at the time of funding, we did not have a precise number for the potential class members but we understood it to be a large number and likely in the tens of thousands. We were comfortable, based on our experience in other claims, that

[5] *Allianz Global Investors GmbH & Ors v Barclays Bank PLC & Ors*

this figure would be manageable for the purpose of distribution of damages, and that potential class members would be sufficiently identifiable for the purpose of distribution. However, we were not comfortable that it would be possible pro-actively to contact the relevant decision makers and sign up a sufficiently large group of class members from amongst a population of potential claimants of that size at a reasonable cost. This was particularly the case bearing in mind the point I raise above about our expectation that a significant number of class members would likely only have relatively small claims and therefore the proportion of potential class members that would affirmatively join the claim could be low. Furthermore, in our experience, institutional and large corporate clients typically need to be contacted and dealt with individually and require a higher degree of personal interaction before they will sign up in comparison to individuals who are more responsive to digital marketing techniques and are more likely to sign up to a group through a website without any direct interaction at the outset. Accordingly, the time and cost involved in reaching numerous institutional and large corporate clients could be expected to be substantial. It also follows from this that the focus of any opt-in book-building exercise would inevitably be the largest claimants who would contribute most to reaching a book-build threshold at which the claim is viable. There comes a point at which the marginal cost of approaching and signing up smaller claimants does not justify the additional investment of the sign-up exercise (which results in higher funding costs, ultimately paid for in an opt-in case by the rest of the class).

c. Thirdly, these anticipated difficulties were aggravated by the likely diverse nature of the claimant organisations themselves and the nature of the claim. At the time when the claim was launched, there was no pre-existing group of claimants of the kind which gives group actions momentum (as has been the case, for example, in some of the large GLO cases in the High Court[6]). Similarly, there was no one organisation or industry body that would be a natural "lightning rod" around which the group which would coalesce as in the case of other claims.[7] A feature of the FX market is that FX trading in volume is spread across a range of asset managers, pension funds, hedge funds, banks, multinational companies and many other

6 For example, *Lloyds/HBOS Litigation*.

7 In Trucks, for example, the Road Haulage Association is fulfilling this role.

businesses. Our experience is that it is harder (and therefore more time consuming and expensive) to reach the decision-makers in a diverse group of claimants than in a homogenous group that naturally coalesces around one organisation or trade body, especially in an area where the claimant group are not used to taking part in claims and where they do not have standing relationships with law firms to do so. I would contrast, for instance, institutional investors participating regularly in securities litigation claims, especially in jurisdictions outside the UK.

d. Fourthly, even if it were possible to reach the key decision makers, we had concerns over whether they would be willing to sign up and participate in an opt-in claim. This was not based on one single factor but an accumulation of factors which would, we anticipated, lead to a low proportion of potential claimants signing up to join opt-in proceedings prior to a damages award. This list of factors included the following:

    i. The relative novelty of collective proceedings of this nature, which meant that class members would be unlikely to be familiar with the process. A greater degree of education would be required before they would be willing to join the claim. Institutional claimants are typically likely to have internal processes to go through to get approval to affirmatively join a claim, which will require them to gain a full understanding of the claim, the structure and issues involved and the risks (including reputational risks). Such a decision is therefore not "*relatively straightforward*" as the Proposed Defendants describe it in paragraph 38 of the Response. The mere fact that claimants are sophisticated investors does not mean that they are experienced and comfortable in taking part in litigation of the nature of the Proposed Collective Proceedings. Indeed, in our experience such investors are commonly more risk adverse when it comes to affirmatively participating in litigation.

    ii. The small size of the damages relative to the volume of trading involved, the complexity of the calculation of those damages, and the effort involved in gathering trading data. As to this, I note the comments made by the Proposed Defendants about the relative size of these claims being in the tens of thousands of pounds rather than a few hundred pounds (as in consumer

claims where the Tribunal has been prepared, in principle, to certify opt-out proceedings). I believe this comparison is inapt. In our experience, institutional or corporate claimants will frequently look at the size of their claim relative to their own size. Larger clients are likely to expect a larger claim – relative to a smaller clients or consumers – before they see it as being commercially rational to affirmatively sign up. They are also likely to assess the value of claim in the context of the time, cost and risk incurred in getting involved. This includes not just the time and effort of pulling together trading data to determine if the claim is worthwhile, but also the cost of advice and the time involved in understanding the process and obtaining the necessary approvals required. Accordingly, a claim for tens or hundreds of thousands of pounds may not be considered worth pursuing by a large organisation whereas a consumer may be willing to sign up to a claim worth only a few hundreds of pounds, sometimes even just as a 'matter of principle'. This is not to say that such an organisation would not be willing to claim its share of damages at the conclusion of the claim when aggregate damages have been determined. But, for the same size of claim in the tens or hundreds of thousands of pounds, I would expect a significantly smaller proportion of institutional or large corporate clients to be willing to affirmatively join a claim prior to an award of damages than after. After the assessment of aggregate damages in opt-out proceedings, they are simply taking part in a claims administration process. At that stage of opt-out proceedings, the class representative is able to ask class members to provide the required data with the guarantee that those persons will receive compensation regardless of the size of their individual claim. Any class members with a desire to claim damages from the established aggregate "pot" will commit the resources to providing data in the knowledge that they are guaranteed some return on their investment in doing so. In this regard, I am aware from the First Witness Statement of Belinda Anne Hollway dated 28 July 2019 ("**Hollway 1**") that, in the FX proceedings in the US, the class members were given an option (referred to in those proceedings as "Option 1") in relation to the distribution of their claim under which the US claims administrator estimated the class member's eligible transaction volume using data provided by the US

defendant banks themselves.[8] If a similar approach to distribution were used in these proceedings, smaller claimants would not need to provide any (or, at least, no detailed) transaction data.

iii. We were specifically concerned in this case that potential claimants would be reluctant to be involved in proceedings suing the bank with which they have an important ongoing commercial relationship. Further, our more general experience is that institutional and large corporate claimants are less likely to join a claim where their name may be known to the defendant. Our experience in other jurisdictions shows that the comfort of anonymity is recognised in the way collective action regimes are designed. In Australia, for example, class actions are typically fronted by an individual retail client. This person is the only named claimant and, even in an opt-in scenario the identity of any further individuals who join the class – whether other natural persons or large corporates – remains confidential throughout the entire proceedings. This provides purported class members with confidence to join collective proceedings in the knowledge that they expose themselves to no reputational or relationship risk vis-à-vis the defendant(s). By structuring the Proposed Collective Proceedings as an opt-out action, the potential class members are able to participate in the claim without having to take such risks that may cause internal concerns given their commercial relationships with banks.

e. Fifthly, the cost / benefit analysis for potential claimants is further worsened on an opt-in basis by the fact that the legal and funding costs are borne on that approach by the class members out of their damages, whereas in an opt-out action before the Tribunal the legal and funding costs are recouped from undistributed damages and class members can expect to receive 100% of their damages. This means that, all other factors being equal, opt-out collective proceedings should inevitably deliver a better return to group members than an opt-in approach.

15. The Proposed Defendants submit in paragraph 40 of the Response that "*If it is practicable for <u>foreign</u> class members to opt in to a class action, it stands to reason that it must be*

[8] See Hollway 1, paragraph 12 b.

equally practicable (if not more so) for domestic class members to do so." I disagree with this statement. The reason that it is practicable in this case to open up the claim to non-UK-domiciled claimants on an opt-in basis is because the opt-out claim for UK-domiciled claimants makes the whole case viable. The investment required for the foreign class members is justified by the core value from the opt-out claim which is not reliant on such sign-ups. It is the case that many of the obstacles to potential claimants joining an opt-in class are the same for non-UK-domiciled claimants as well, which we considered would limit sign-ups, but this would not be an obstacle to funding if we were funding the opt-out claim as well.

Conclusion

16. For the reasons stated above, the Proposed Defendants' submission that the Proposed Collective Proceedings should only be allowed to continue on an opt-in basis totally fails to address viability from a funding perspective. As I have sought to explain, Therium's agreement to fund was predicated on the opt-out approach. We did not have available a detailed, costed and credible plan to run the Proposed Collective Proceedings on an opt-in basis and so were not in a position to make a positive decision to fund the Proposed Collective Proceedings on that basis but, as I have sought to explain above, we considered the practicability of an opt-in action and concluded that an opt-out approach would in any event be superior and have much greater prospects of succeeding, such that we were willing to fund the claim on the condition that it was brought on the opt-out basis.

17. If the Tribunal were to agree with the Proposed Defendants' position and to order the Proposed Collective Proceedings to continue as an opt-in action with Michael O'Higgins FX Class Representative Limited as representative, that would be to disregard the basis on which Therium has undertaken to fund the case. Therium would be forced to consider afresh (for example) the additional costs of running the Proposed Collective Proceedings in this way. In particular, it would be necessary for Therium to be convinced that we could sign up sufficient claimants on an opt-in basis prior to a damages award so as to make the claim economically viable. At present we have not seen a viable plan to achieve this and for the reasons above such an approach would face significant challenges. Even if it may be possible to achieve a sufficient claim size to make the Proposed Collective Proceedings economically viable, for the reasons I have stated, such an approach would

favour claimants with larger losses over those with smaller losses meaning that, ultimately, a smaller proportion of potential class members would be compensated. In addition, substantial additional cost would be incurred in recruiting group members and the level of compensation as a percentage of each claimant's losses would likely be lower. Any switch to an opt-in model would mean (at the very least) revisiting the budget for the proceedings. Any such opt-in action could not proceed to be funded by Therium without fresh Investment Committee approval, which – on present information – I do not think we would get.

STATEMENT OF TRUTH

I believe that 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.

Signed: ……

NEIL ANDREW PURSLOW

Date: 23 April 2021

Party: Applicant / Proposed Representative
Witness: N A Purslow
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