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**

SUBMISSIONS OF THE O'HIGGINS PCR ON THE CARRIAGE ISSUE
dated 23 April 2021

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A. INTRODUCTION

1. These submissions are filed pursuant to paragraph 4(c) of the Tribunal's Order dated 15 January 2021. They address the issue of which proposed class representative – the O'Higgins PCR or the Evans PCR – would be the "*most suitable*" to act as class representative for the purposes of rule 78(2)(c) of the Tribunal Rules (the "**Carriage Issue**"). The answer is the O'Higgins PCR.

2. A central fact to recall when comparing the O'Higgins PCR with the Evans PCR is that the O'Higgins Application was filed 135 days before the Evans Application. The O'Higgins PCR was the pioneer who obtained funding and commissioned legal and economic expertise. The Evans PCR has piggy-backed on those efforts, belatedly.

3. It is unsurprising that, having seen the O'Higgins PCR's class definition and having observed the progress of the O'Higgins Application up to and beyond the first CMC, the Evans PCR largely reproduced the O'Higgins PCR's work when he then filed his own application. The regime should be rewarding initiative, and discouraging multiplication and delay. It would undermine the collective proceedings regime to reward such a latecomer unless that latecomer were substantially and distinctly better, which the Evans PCR is not. Rather, for the reasons explained below, to the extent there are substantive differences, the O'Higgins PCR's approach is clearly preferable and its funding is significantly greater and more robust.

B. RELEVANT FACTORS IN A CARRIAGE DISPUTE

B1. The Rules and Guide

4. CAT Rule 78(2)(c) requires consideration of whether:

> "*if there is more than one applicant seeking approval to act as the class representative in respect of the same claims,* [the proposed class representative] *would be the most suitable*."

5. As to the relevant factors in this consideration, the Guide (which of course pre-dates the Supreme Court's judgment in *Merricks v. Mastercard*[1] and is not binding) observes at para. 6.32:

> "*The Tribunal will seek to arrive at a decision which is in the best interests of all class members and is fair to the defendants. The factors that are likely to be relevant to this assessment include: the proposed class definition and scope of the claims; the quality of the litigation plan referred to above; and the experience of the lawyers of the competing proposed class representatives.*"

6. That is plainly not intended to be an exhaustive list.

B2. Canadian experience

7. The Supreme Court in *Merricks v. Mastercard* has endorsed the relevance of referring to the Canadian experience in relation to class certification.[2] The Tribunal itself referred to Canadian authority in its March 2020 judgment on the timing of the carriage dispute ("**the March 2020 Judgment**").[3]

8. It should be noted at the outset that all Canadian provinces regard the relative priority of commencement of action as an important factor in determining a carriage dispute, at least in circumstances where there is a significant gap between the filings of the proposed carriers. In Quebec, the rule which is applied by default (although not automatically) is that carriage is granted to the "*first to file*".[4] In other provinces, it is one of the relevant factors, although a significant one where there is a significant gap. Further, under amendments to the Ontario Class Proceedings Act 1992 which came into effect on 1 October 2020, there is no right to commence an overlapping class action more than 60 days after the first proceeding was commenced.[5] (Similarly, in Australia, the order of filing representative proceedings is a relevant consideration in ordering a stay of the subsequently filed proceedings, being stronger the greater the gap in time between commencement.[6]) This rewards the initiative and investment of the first mover, which would otherwise be undermined by subsequent applicants free-riding on its work. Such

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1 *Merricks v. Mastercard* [2021] Bus LR 25 (SC).
2 *Ibid.*, para. 42.
3 [2020] CAT 9.
4 See Branch, *Class Actions in Canada* (2nd ed., 2019), paras. 5.130-5.150.
5 Ontario Class Proceedings Act 1992 (as amended), s. 13.1(3). The Evans Application was lodged 135 days after the O'Higgins Application.
6 *Wigmans v. AMP Ltd.* [2021] HCA 7, para. 107.

an approach thereby serves the policy of facilitating access to justice and promoting economy.

9. If the "*first to file*" principle does not resolve the carriage dispute, then the Tribunal should have regard to the objectives which have been described in the Canadian jurisprudence as follows:

> "*The court will grant carriage to the putative Class Counsel whose proposed action is better for the interests of the putative Class Members while being fair to the defendants and promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy.*"[7]

10. These have led the Canadian courts to produce a long list of (overlapping and non-exhaustive) factors to take into account, in particular as set out in the table below.[8] The carriage inquiry is, however, case-specific; "*determinative factors in one case may have little or no significance in another*".[9] In response to the Tribunal's request in advance of the CMC on 15 January 2021, the O'Higgins PCR provided a table identifying the various factors and whether and to what extent it contends each factor should be accorded weight in UK proceedings generally. The table is reproduced below. It is colour coded as follows: some of the factors will usually be relevant, some rarely, some never. The rationale for much of the coding is the approach to certification laid down by the Supreme Court in *Merricks*, as explained in section B3 below.

Factor	**Relevance generally**
(1) Quality of the proposed representative plaintiffs	Usually: It will generally be appropriate to consider the quality and conduct of the representatives who are proposed to represent the class.
(2) Funding	Usually: It will generally be appropriate to consider which proposed carrier has better funding to prosecute the claim and to meet

7 *Winder v. Marriott International Inc.* 2019 ONSC 5766, para. 50.
8 See the March 2020 Judgment at para. 40. For further commentary, see Branch, *Class Actions in Canada* (2nd ed., 2019), para. 5.160.
9 *Mancinelli v. Barrick Gold Corp.* 2016 ONCA 571, para. 17.

Factor	Relevance generally
	adverse costs awards (e.g. after-the-event insurance).
(3) Fee and consortium agreements	Rarely: Lawyers' fees will be relevant only if they would materially impinge on recovery by class members. Consortium arrangements will be relevant only where they arise.
(4) Quality of proposed class counsel	Rarely: Whilst it is necessary to ensure that the class counsel have relevant experience of competition litigation, it is not appropriate to descend to invidious comparisons.
(5) Disqualifying conflicts of interest	Rarely: However, if there is such a conflict, this would be very significant.
(6) Relative priority of commencement of the action	Usually: At least where there is a significant gap between the dates of commencement – see paragraph 8 above.
(7) Preparation and readiness of the action	Rarely: This will rarely be a significant factor if it is the case that the competing carriers both meet the test for certification, because their litigation plans etc are then necessarily to be regarded as meeting the criteria for certification.
(8) Preparation and performance on carriage motion	Rarely: Save in a very clear case, it is not appropriate to engage in invidious comparisons.
(9) Case theory	Rarely: This will rarely be a factor if it is the case that the competing carriers both meet the test for certification, because their case theories are then necessarily to be regarded as meeting the criteria for certification (and, as such, viable).
(10) Scope of causes of action	Rarely: This could only be a relevant factor if there is a significant difference (which is unlikely where both claims are follow-on claims from the same regulatory decision(s)). In circumstances where all of the causes of action in both claims

Factor	Relevance generally
	meet the certification test then the causes of action would all be viable.
(11) Selection of defendants	Rarely: This will only be a relevant factor if there are conspicuous or egregious problems with the selection of defendants by one party.
(12) Correlation of plaintiffs and defendants	Rarely: This will only be a relevant factor if there are not viable claims against each defendant. In circumstances where both claims meet the certification test in respect of all defendants then the causes of action would all be viable.
(13) Class definition	Usually: It will usually be relevant to consider competing class definitions. However, it may not be possible to reach a clear adjudication on this at an interlocutory stage without delving too far into the merits.
(14) Class period	Usually: It will usually be relevant to consider competing class periods. However, it may not be possible to reach a clear adjudication on this at an interlocutory stage without delving too far into the merits.
(15) Prospect of success: leave and certification	Never, in circumstances where the carriage dispute is considered together with certification (rather than as a preliminary issue): This should never itself be a factor provided each claim reaches the strike out/summary judgment threshold required on certification.
(16) Prospect of success against the defendants	Never, in circumstances where the carriage dispute is considered together with certification (rather than as a preliminary issue): This should never itself be a factor provided each claim reaches the strike out/summary judgment threshold required on certification.

Factor	Relevance generally
(17) Interrelationship of class actions in more than one jurisdiction	Rarely: This is a particularly Canadian consideration, relating to the jurisdictions of the courts of the different provinces of Canada. However, it might be relevant if separate class actions were brought in relation to England and Scotland, or in other relevant jurisdictions.

B3. Limits of the comparative exercise

11. Detailed comparison of the prospects of success and merits of the applicants' respective cases will be very difficult to square with the approach laid down by the Supreme Court in *Merricks.*[10] In particular, the Supreme Court is clear that at the certification stage the Tribunal should not be concerned with seeking to adjudicate on the merits beyond the test for summary judgment, and should only rarely hear live evidence. In the present case, the Tribunal will be required to assess the merits to that threshold of certification for each of the O'Higgins PCR and the Evans PCR. If each passes that threshold, it would be surprising if a further assessment of the merits to some higher level were appropriate for the purposes of the carriage dispute. Leaving aside the inherent difficulties of making such an assessment at an interlocutory stage, such an approach to carriage disputes would threaten to undermine the approach laid down by the Supreme Court. In particular, it would encourage applicants at the filing stage to provide evidence that well surpassed the summary judgment threshold. If they failed to do so, they would be at risk of being 'gazumped' by subsequent applicants who had provided 'more detailed', or at least more voluminous, expert and other evidence (particularly as the second-mover will have access to the first-mover's class definition, case theory and other important details by way of

[10] Consistently with the approach that English courts and tribunals take generally to avoid a mini-trial or any detailed assessment of 'the merits' at an interlocutory stage. See, for a recent example in a different context, *Okpabi v. Royal Dutch Shell plc* [2021] 1 WLR 1294 (SC) at paras. 102-126. Moreover, such an approach is consistent with the approach to class actions in Canada, which also avoid detailed consideration of the merits. See, for example, *Wong v. Marriott International Inc.* 2020 BCSC 55 at paras. 82, 93, 103 and 107.

the claim website). This would not promote access to justice or judicial economy, as encouraged by the Supreme Court in *Merricks*.

C. PRIORITY OF COMMENCEMENT

12. The O'Higgins Application was brought substantially in advance of the Evans Application (which was filed 135 days later). The Evans PCR delayed in issuing his Application until long after he had received a copy of the Commission Decisions (which was on about the same date as the O'Higgins PCR obtained the Commission Decisions from the Proposed Defendants through this litigation).[11] According to his solicitor's witness statement, and paragraph 5 of his solicitor's letter to the Tribunal dated 29 November 2019, this was because of delays in making funding arrangements.[12] The basic class definition and case theory used in the O'Higgins Application and made publicly available on its website were largely replicated by the Evans Application (save for some amendments to the class definition which the O'Higgins PCR regards as inappropriate: see section E below).

13. It is not the case that the O'Higgins Application was in any sense premature, as the Evans PCR's representatives have suggested. It post-dated the Commission Decisions on which the proposed claim is based. Although it pre-dated the publication of the full non-confidential version of the Commission Decisions, the essential elements of the operative parts of those decisions were available at the time when the O'Higgins Application was prepared. Moreover, there was a wealth of information in the public domain about the unlawful conduct of the Proposed Defendants, including in decisions from other regulators from around the world. It is clear that the O'Higgins Application was viable and properly (and extensively) pleaded from the outset and has not since required major amendment.

14. As 'first mover', the O'Higgins PCR made considerable investment and took considerable risk. The elements of that work are described in the Fourth Witness Statement of its solicitor Belinda Hollway ("**Hollway 4**"). Extensive time and resources

[11] Hollway 4, paras. 66 and 70-72.
[12] First Witness Statement of Anthony Maton, para. 37.

were dedicated to establishing the basis for a UK collective action, including its legal and economic basis and its financial viability, and presenting the case to potential funders.[13]

15. By contrast, the Evans PCR (and his funders) knew over four months before he finalised and filed the Evans Application that the O'Higgins PCR (and its funders) had concluded that the claim was legally viable and sufficiently attractive to be funded. It is inevitable that this provided the Evans PCR (and his funders) with a level of comfort that the O'Higgins PCR did not have when planning the O'Higgins Application.[14]

16. The Evans PCR also had the benefit of templates from which to work – not just the summary of the O'Higgins Application on the Tribunal's website, but also the Class Definition and the FAQs and other information on the O'Higgins PCR's claim website.[15] The Evans PCR's representatives made no secret of their presence as observers at the first CMC in the O'Higgins Application on 6 November 2019, through which by corresponding with the Tribunal in advance they were even able to test the Tribunal's reaction to the possibility of a rival application.[16] Further advantages would have been gained from observing the O'Higgins PCR's success in service out of the jurisdiction.[17]

17. In the circumstances, it is unsurprising that the Evans PCR's class definition and website – and indeed its claim generally – bear striking similarities with the O'Higgins PCR's.

18. In the premises, if the Tribunal were to grant carriage to the Evans PCR, it would be crediting the Evans PCR for taking the fruits of the O'Higgins PCR's work. This would send a message to the market that 'free-riders' are rewarded, and funders would be more hesitant to support the first mover in any future proposed claim, all to the detriment of the collective proceedings regime before this Tribunal.[18]

D. FUNDING

19. The O'Higgins PCR's funding package is superior to the Evans PCR's in a number of important respects; in other respects, there is no material difference between them.

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13 Hollway 4, paras. 49-57.
14 Hollway 4, paras. 58.
15 Hollway 4, para. 59.
16 Hollway 4, para. 60.
17 Hollway 4, para. 61(a).
18 Hollway 4, para. 63

D1. Funding for own costs

(a) Amount and terms

20. This is a significant point of distinction between the PCRs. As a starting point, the O'Higgins PCR's case is better funded to the tune of almost 60%:

    (1) Under the O'Higgins PCR's Litigation Funding Agreement dated 26 July 2019 (the "**O'Higgins LFA**"), the funding available from Therium for the O'Higgins PCR's own costs is **£29,375,043** (in tranches as set out in Schedule 1).

    (2) Under the Evans PCR's Litigation Funding Agreement dated 5 December 2019 (amended on 8 July 2020) (the "**Evans LFA**"), the funding available from Donnybrook Guernsey Limited ("**Donnybrook**") for the Evans PCR's own costs is subject to the "*Costs Limit*", which in turn is limited by the Budget appended to the Evans LFA. The final row of the Budget specifies that the "*Total funding under LFA (including VAT/IPT)*" is **£18,654,088**.

21. Clearly both PCRs envisage that this will be expensive litigation, and have obtained funding commitments to reflect that. If it turns out that the litigation can be fully and effectively prosecuted for £18.654m, the O'Higgins PCR will be no worse off. It is not required to draw down all the committed funding, and funder returns are only paid on the tranches that are formally incepted as committed funds.[19] If, however, the litigation turns out to be more expensive than that, the Evans PCR's funding will prove to be inadequate, and he will either need to obtain more or abandon the action.

22. The Evans PCR has filed witness statements from Mr Chopin of Bench Walk Advisers LLC. In his second witness statement at paragraph 9, Mr Chopin states that he is "*confident of the Funder's ability to fund Mr Evans' claim. This would remain the case even if the commitment under the LFA were increased substantially*". This of course is different from a contractual commitment to fund, and falls short of even a statement that if asked to do so, Donnybrook or Bench Walk Capital LLC (its owner) would in fact

[19] Confirmed in the First Witness Statement of Neil Purslow of Therium ("**Purslow 1**"), para. 18(b). This statement explains other features of the O'Higgins LFA in narrative form.

agree to increase the funding.[20] The reality is that Bench Walk would need to persuade its investors to put up more money. These are therefore uncertainties which the O'Higgins PCR's action would not face, unless and until the costs of the litigation exceeded the £29.375m committed under the O'Higgins LFA.

23. If Donnybrook / Bench Walk decline to fund further, the Evans PCR will need to obtain other litigation funding elsewhere. Self-evidently, if the litigation is partly progressed and the money runs out, Evans' bargaining power would be very weak. To make things worse, the Evans LFA requires that any additional funding obtained should not be less advantageous to Evans than the terms of the existing LFA (clause 5.8).[21] While this might be used to assist in negotiations with a new funder, the weak bargaining position of Donnybrook itself in that scenario could well lead to an amendment to clause 5.8. Again, the O'Higgins PCR would not face any such issues unless the costs of the litigation exceeded £29.375m.

(b) Continuity

24. The O'Higgins PCR's funding is provided by Therium, a well-known litigation funder. Mr Purslow's first witness statement explains the structure of the Therium entities and confirms the obligations on them to maintain adequate financial resources to meet their funding obligations as a consequence of their membership of the Association of Litigation Funders ("**ALF**"), and compliance with is Code.[22] In the Trucks litigation the Tribunal found as follows:

"*By their skeleton argument, counsel for the OEMs said that there was no evidence of how or where the two Therium entities that are parties to the RHA LFA acquire their funds nor was it clear that they were 'Associated Entities' of TCML for the purpose of the ALF Code. However, Mr Purslow states in his witness statement that they are indeed 'Associated Entities' of TCML for the purpose of the Code, and it seems that will be the case if TCML acts as exclusive adviser to the corporate parent of the Therium entities. This means that, pursuant to para 4 of the Code, TCML accepts responsibility to the ALF for their compliance with the Code and, pursuant to para 9.4 of the Code, that it will ensure that Therium will maintain the capacity to meet their funding obligations (see further para 60 below). Of course, this is a voluntary code and not a binding legal obligation, but we think that it is wholly unrealistic to suppose that a leading litigation*

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20 There is an obligation under clause 5.10 for the parties to discuss the budget in good faith after the CPO is obtained, but this falls short of a commitment and does not speak to the position later in the litigation.

21 No equivalent restriction exists in the O'Higgins LFA.

22 Purslow 1, paras. 10-11.

funder that is commercially active in this field would not honour these commitments to the Association of which it is a founder member, and thus place at risk the whole regime of self-regulation."[23]

25. There can be no credible argument that Therium would fail to meet its commitments under the O'Higgins LFA in view of its commitments under the ALF Code.

26. The Evans PCR has produced similar confirmations from Mr Chopin. However, Mr Chopin states that unlike Therium, Bench Walk Capital is not a member of the ALF, but that Donnybrook would comply with the ALF Code. This is a slightly different situation from the position of Therium. The holding company of Donnybrook (Bench Walk Capital LLC) is not itself committing to keep Donnybrook in funds as it would have to do if it were a member of the ALF or bound by its code. While Bench Walk Capital LLC has guaranteed Donnybrook's obligations, it does not need to keep itself adequately capitalised either. The O'Higgins PCR accepts that it may be relatively unlikely that Donnybrook would default on its funding obligations, but again, the O'Higgins PCR's position provides greater security to the Proposed Class.

(c) Termination rights

27. Both funders have comparable termination rights:

    (1) The funders can withdraw if the merits decline, but both provide for the safety valve of a QC opinion to that effect.[24]

    (2) Both funders can terminate for breach, and again, a QC-based dispute resolution mechanism can be invoked by the claimant.[25]

(d) Commitment to fund

28. Under the Evans' LFA, Donnybrook agrees to provide the "*Action Costs*" which are all the costs of the action in accordance with the Budget (in effect, the full £18.65m) at the outset subject to compliant notices of drawdown (per clauses 4.1.5, 5.2 and 7).

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23 [2019] CAT 26, para. 54.
24 O'Higgins LFA, cl. 16.3; Evans LFA, cl. 23.3.
25 O'Higgins LFA, cl. 16.4; Evans LFA, cl. 23.2.

29. The O'Higgins LFA is structured slightly differently:

(1) Under clause 2.1, the funder is to pay the "*Reasonable Costs incurred in respect of tranche 1 and any subsequent tranches or sub-tranches of Funding incepted*", but that is "*in accordance with the terms of this Agreement*".

(2) Under clauses 2.3-2.11, the funder is given an "*option*" after each tranche, to fund the next tranche.

(3) However, under clause 2.13 those options must be exercised in accordance with clause 16 (Termination).

30. The overall effect of this is neutral; Therium can refuse to fund further tranches but only on the same basis that it could terminate the O'Higgins LFA anyway, and subject to the same protections for the O'Higgins PCR.

31. Thus the position under the two LFAs is materially the same.

(e) Cost of funding

32. Unlike in conventional litigation, the cost of funding (i.e. the return and profit payable to the funder) is not borne out of damages which would be payable to the successful claimant, but instead out of the undistributed funds to the extent available. Each party has entered a 'deed of priorities' which is materially the same, under which distributions are made from the proceeds of the litigation as follows:

(1) Pro rata and *pari passu*:

(a) Reimbursement of funder's outlay;

(b) Reimbursement to ATE insurers of indemnity payments;

(2) Followed by pro rata and *pari passu*:[26]

[26] In the Evans PCR's waterfall, the funder outlay reappears on this level. This puts the funder in an advantageous position as against solicitors and counsel, who (unlike the O'Higgins PCR's) stand to have their unpaid contingent fees reduced pro rata with a second payment to the funder of "*an amount equal to the funder's outlay*".

(a) Solicitor unpaid Base Fees and Success Fees;

(b) Unpaid ATE premiums;

(3) Followed by the funder return in full;

(4) Remainder to charity.

33. Thus, the extent to which undistributed funds survive payment of contingent costs is potentially relevant:

(1) On a claim which succeeds at trial, to the amount which goes to charity.

(2) On a claim which settles, possibly to the amount which is returned to the Defendants (per the CAT Guide at para. 6.88 if the parties agree).

34. As to the actual cost of funding:

(1) Therium is entitled to:

(a) Repayment of funds advanced; and

(b) One of:

(i) 2x to 3x the committed funds depending on timing of recovery; or

(ii) if larger:

- 20% of the claim proceeds up to £1 billion;
- 10% of the claim proceeds above £1 billion;
- 5% of the claim proceeds above £2 billion.

(2) Donnybrook is entitled to:

(a) Two times the Funder's Outlay; plus

(b) An amount equal to the greater of:

(i) the funder’s outlay; or

(ii) 20% of Proceeds up to £500m, plus 15% of Proceeds thereafter up to £1bn, plus 10% of Proceeds thereafter up to £1.5bn, plus 5% of Proceeds thereafter up to £2bn; plus

(c) In consideration for providing the £3m Pre-CPO Security Sum, Donnybrook is entitled to a fee of 15% interest per annum (compounding annually) on it, for the period from which the monies are advanced until they are repaid.

35. In short, as between the two funding regimes, the cost of funding is similar.

D2. Sufficiency of budgets

36. The two PCRs have each produced an anticipated budget for the litigation with their claim forms. The O'Higgins PCR makes the following observations in respect of the original budget appended to the Evans LFA:

(1) There is a significant disparity in the estimated costs of post-trial claims administration/distribution. The Evans PCR projects £450,000 whereas the O'Higgins PCR projects £3,700,000. Although the O'Higgins PCR's expectation (based, in particular, on the approach to claims administration in collective/class actions in other jurisdictions) is that the cost of distribution will be paid out of the settlement fund or by the Proposed Defendants, if this is not the case, it is not clear how the Evans PCR would be able to afford to distribute the damages, including notifying class members, analysing any data submitted, responding to questions, etc. Obviously, it is central to the interest of the class that any sums obtained are, in practice, distributed. Accordingly, it is essential to have sufficient sums in the budget for this stage. This point is addressed in greater detail at paragraph 76(a) of Hollway 4.

(2) The Evans PCR has not (it appears) included a budget for non-domiciled opt-in claimants. By way of contrast, the O'Higgins PCR has expressly budgeted approximately £930,000 to make sure that servicing actual and potential opt-ins from outside the jurisdiction will not have to be drawn from the budget set aside for the conduct of the litigation for the class members within the UK. The result of this is that any costs associated with the Evans PCR's interactions with potential

opt-in class members will have to be subsumed into the main budget. This is, again, a notable deficiency in the Evans budget. The point is addressed in greater detail at paragraph 76(b) of Hollway 4.

D3. ATE cover for adverse costs

(a) Level of Cover

37. The O'Higgins PCR has considerably more ATE insurance than Evans (£33.5m versus £23m).[27] This again, is a significant differentiating factor between the two packages.

38. If the claim were to fail, the O'Higgins PCR would therefore be better protected by the ATE insurance policies than the Evans PCR. Further, as a natural person, the Evans PCR could be made bankrupt without sufficient ATE insurance to cover adverse costs orders.

39. The higher limits of indemnity available to the O'Higgins PCR also provide better protection for the Proposed Defendants if the claims fail. The relative vulnerability of the Evans PCR to any substantial adverse costs orders has the potential to make him more susceptible to pressure to resolve the claim early and without risk and thereby may place him in a weaker position when negotiating any settlement.

40. Equally significantly, the lower level of cover available to the Evans PCR makes him the more susceptible claimant to an application for security for costs. This would arise if the Proposed Defendants' position is that the existing ATE program provides them with adequate security within the limits of indemnity (which seems likely), but that their reasonable costs are likely to exceed £23m. No doubt both PCRs would resist such an application on numerous grounds, but all other things being equal, the O'Higgins PCR is in a better position to do so.

(b) Avoidance of Cover

41. The O'Higgins PCR's insurers have entered an Anti-Avoidance Endorsement ("**AAE**"), as a consequence of points raised by the Proposed Defendants in 2019. This endorsement restricts insurers' right to decline to pay or avoid (i.e. "*notwithstanding the Policy*

[27] Hollway 4, para. 76(c).

provisions or conclusions or any other entitlement to avoid") except in very limited circumstances, principally being a fraudulent or reckless presentation of risk. The effect of the AAE is not merely to limit avoidance rights but also eliminate any rights to decline claims for breach of policy conditions.

42. The standard policy wording obtained by the Evans PCR for the policies in his ATE tower is less beneficial:

    (1) Insurers can refuse to pay on breach of the policy conditions listed in clause 4.1, "*Insured's Conduct*". The rider to clause 4.1 provides that "*Where an Insured fails to comply with the above, but where such failure was neither deliberate nor reckless, the Insurer shall indemnify that Insured in full, subject to the other conditions of the Policy*".[28] This creates risk for the Evans PCR; to use a perhaps flippant example, arguably if he deliberately decided to attend another professional commitment instead of a conference, insurers would be entitled to refuse cover (condition 4.1(d)).

    (2) There are similar potential problems[29] under policy condition 4.4 requiring the Evans PCR to obtain written consent from Insurers in various circumstances, failure to do which could amount to a breach of condition entitling insurers to decline cover.

    (3) Breach of claims and general notification conditions under clause 4.5 can also result in declinature so long as they are "*deliberate or reckless*".

43. Thus the O'Higgins PCR's ATE program has more robust anti-avoidance provisions than that of the Evans PCR. Consequently, the Evans PCR (and any successful Proposed Defendants) face a greater risk of non-payment under his ATE insurance. Again, this puts him in a more financially vulnerable position that might adversely affect settlement negotiations.

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[28] The precise legal nature of the "*Policy Conditions"* (e.g. whether they are conditions precedent to liability) is not particularly clear, which is also an unhelpful point for the Evans PCR, but the rider quoted certainly implies that a breach could entitled Insurers to refuse to indemnify.

[29] The wording is rather loose: "*the Insured <u>should</u> obtain*".

E. CLASS DEFINITION

44. Although the Evans PCR has largely replicated the O'Higgins PCR's class definition, there are some significant differences. The O'Higgins PCR's version is to be preferred.

45. First, the Evans PCR excludes benchmark trades, limit orders and resting orders.[30] In consequence, if a CPO were awarded to the Evans PCR, those who suffered losses on such transactions as a result of the cartels would be denied the opportunity to recover those losses through collective proceedings.[31] This is despite the fact that all of the publicly available chats in the Three Way Banana Split chatroom and the Essex Express chatroom relate to benchmark manipulation.[32]

46. Secondly, the list of "*Relevant Financial Institutions*" differs. The Evans PCR's list is slightly longer. Relevant Financial Institutions are excluded from being class members. In the opinion of the O'Higgins PCR's expert, the additional 16 institutions[33] were unlikely to have acted themselves as active dealers in G10 currencies. Accordingly, it is not apparent why they should be in the list. The only material effect of adding them to the list is to exclude those institutions and their associated entities from claiming in the collective proceedings, thereby reducing the scale of and likely recovery in those proceedings.[34]

47. Thirdly, the Evans PCR proposes two classes, not one, yet proposes to represent both. This seems likely to create a conflict. The case theory, damages methodology and/or settlement strategy which best advance the interests of one class may not be the best for the other class. By contrast, the O'Higgins PCR has not committed itself to any such division at this stage, rather reserving the right to propose sub-classes if this should become appropriate as the case develops and data is analysed.[35]

48. Fourthly, the Evans PCR proposes a different test for assessing whether a transaction is entered into in the EEA:

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30 Evans PCR Class Definition, "*Excluded Transactions*", paras. (g)-(h). In market microstructure, there is no meaningful difference between resting orders and limit orders: Breedon 2, fn. 56.
31 On this topic, see Breedon 2, paras. 4.3-4.5.
32 See examples in the table at Breedon 2, para. 4.4.
33 For the calculation of this number, see Hollway 4, paras. 91-92.
34 Breedon 2, para. 5.8.
35 O'Higgins PCR Re-Amended Collective Proceedings Claim Form, para. 35.

(1) The O'Higgins PCR's test is relatively straightforward to understand and to apply, and provides for a clear jurisdictional link reflecting the economic reality of where a transaction occurs. A transaction is entered into in the EEA where:

"*the Relevant Foreign Exchange Transaction is priced and/or accepted by the Relevant Financial Institution or through the ECN within the European Economic Area.*"[36]

The pricing or acceptance by the Relevant Financial Institution or via the ECN is likely to be documented.

(2) By contrast, the Evans PCR's test is complicated and over-broad. It is as follows (emphasis original):

"*An FX Spot Transaction and/or an FX Outright Forward Transaction is 'entered into… in the European Economic Area' where:*

(a) The Defendant or Relevant Financial Institution entering into that transaction is located in the European Economic Area.

For these purposes, a Defendant or Relevant Financial Institution is located in the European Economic Area where their individual representative, sales desk or other business unit (such as an agency, branch or office) entering into the transaction is located in the European Economic Area.

and/or

(b) The class member entering into the transaction is located in the European Economic Area.

For these purposes, a class member domiciled in the European Economic Area shall be considered located there.

For the avoidance of doubt, the above definition applies irrespective of whether the class member entered into an FX Spot Transaction and/or FX Outright Forward Transaction with a Defendant or Relevant Financial Institution directly or indirectly via an Intermediary."

Under the Evans PCR's approach, either limb (a) or limb (b) suffices. Accordingly, the following would, it seems, be caught by the definition:

[36] O'Higgins PCR Class Definition, limb (I).

(i) a Chinese high net worth individual who happened to be passing through London (and therefore located there) when entering into an FX transaction with the China Construction Bank in Hong Kong;

(ii) an Intermediary in New Zealand entering into an FX transaction on behalf of a Liechtenstein (and therefore EEA-domiciled) entity with ANZ in Auckland.

That is plainly over-broad, and likely to cause significant difficulties for estimating the value of commerce.

F. CASE THEORY

49. The first expert report of Professor Douglas Bernheim ("**Bernheim 1**") compares and contrasts the O'Higgins PCR's proposed methodology for calculating aggregate damages with that advanced by the Evans PCR. He highlights differences in four specific areas, and explains why the O'Higgins PCR's approach will produce more reliable estimates of cartel overcharges and damages.[37]

50. The first category of differences relates to cartel analysis and mechanisms:

(1) Unlike the O'Higgins PCR, the Evans PCR focuses exclusively on cartel mechanisms that potentially widened the effective spread. The Evans PCR's proposed plan of analysis does not encompass the likelihood that other cartel mechanisms impacted the economic price of market-making services in ways that would not necessarily alter the effective spread. It might therefore miss the impact of other types of conduct by the cartels recorded in the Commission Decisions. For example, some of the cartels' coordinated trading strategies, such as front-running (as described in the Commission Decisions), would tend to widen the average realised spread by inducing favourable post-trade price movements, rather than by widening the effective spread.[38]

(2) Unlike the O'Higgins PCR, the Evans PCR splits its analysis into two classes, hypothesising that the cartel mechanisms impacted those two classes

[37] Bernheim 1, para. 19.
[38] Bernheim 1, para. 136.

differentially.[39] By contrast, the O'Higgins PCR's proposed use of regression models with multiple dummy variables is more flexible; it accounts for the impact of different cartel mechanisms and allows that impact to differ over time or by type of trade.[40]

51. The second area of difference is spread measures. The Evans PCR plans to examine only the effective spread, due to its narrow focus on a subset of cartel mechanisms. By contrast, the O'Higgins PCR recognises that both effective spreads and realised spreads will be useful for measuring the impact of different types of wrongdoing.[41] Accordingly, the O'Higgins PCR's plan of analysis encompasses effects of cartel conduct that manifest through systematic price movements subsequent to trades, whereas the Evans PCR's does not. Those post-trade movements are particularly important for coordinated trading strategies such as front-running.[42]

52. The third area relates to excluded transactions. Unlike the O'Higgins PCR, the Evans PCR intends to exclude limit orders, resting orders and benchmark trades from his damages analysis. However, the widening of the bid-ask spread would have impacted limit/resting orders,[43] and potentially also benchmark trades.[44] All of the publicly available chats in the Three Way Banana Split chatroom and the Essex Express chatroom relate to benchmark manipulation.[45] The Evans PCR's approach would deny recovery in respect of losses on such trades. Further, by excluding such trades from consideration, it reduces the available data for analysis, contrary to standard principles of econometrics which encourage a larger sample size.[46]

53. The fourth area relates to regression modelling:

    (1) By using both the effective half-spread and the realised half-spread (as opposed to merely the effective half-spread) as the dependent variable in the regression, the

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39 Bernheim 1, para. 137.
40 Bernheim 1, para. 138.
41 First (Amended) Expert Report of Professor Francis Breedon dated 28 January 2020 ("**Breedon 1**"), para. 6.20; Second Expert Report of Professor Francis Breedon dated 23 April 2021 ("**Breedon 2**"), paras. 5.10-5.12.
42 Bernheim 1, para. 139.
43 Bernheim 1, paras. 55-60 and 141.
44 Bernheim 1, para. 142.
45 See examples in the table at Breedon 2, para. 4.4.
46 Bernheim 1, paras. 143-145.

O'Higgins PCR's method is more likely to capture the full effects of the cartel conduct described in the Commission Decisions.[47]

(2) As to cartel dummy variables, whereas the Evans PCR proposes using one only, the O'Higgins PCR's approach contemplates the possibility of multiple dummy variables. The Evans PCR's approach is too simplistic. The O'Higgins PCR's approach is superior because it accommodates complex variations in the effectiveness and impact of the cartels over time.[48]

(3) The Evans PCR proposes using a regression specification in which the dependent variable (the half-spread) undergoes a logarithmic transformation. This implies the assumption that the effect of the cartels is (subject to statistical noise) a constant percentage of the half-spread during the clean period (as opposed to allowing the possibility that it is a fixed number of pips). This is a bold assumption to make prior to data exploration. The O'Higgins PCR does not commit to any such assumption at this early stage.[49] The Evans PCR's methodology also fails to accommodate for the half-spread being zero or negative (because in such instances the natural logarithm is not defined).[50]

(4) The Evans PCR plans to use one regression equation for Class A and several regression equations for Class B. The O'Higgins PCR's approach is more flexible; it also permits the possibility of pooling of data across the Class A and Class B transactions and for coefficients to be shared across the two in a consistent manner. This greater flexibility is a clear advantage.[51]

G. QUALITY OF PROPOSED REPRESENTATIVES

54. Mr O'Higgins, the sole director and member of the O'Higgins PCR, is an accomplished individual whose skills relevant to overseeing the Proposed Collective Proceedings are well evidenced. The Tribunal is referred in particular to:

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47 Bernheim 1, para. 146.
48 Bernheim 1, para. 147; Breedon 2, para. 5.13.
49 Bernheim 1, para. 148.
50 Bernheim 1, para. 149.
51 Bernheim 1, paras. 151-153.

(1) Paragraphs 30 to 35 of his First Witness Statement ("**O'Higgins 1**"), setting out his reasons for wanting to bring the O'Higgins Application, stemming from strong personal belief in responsible capitalism and economic regulation and in companies being held to account, and his relevant CV. His academic and practical experience of economics, and his financial, pensions and competition/regulatory roles are directly pertinent to the present proceedings.

(2) The further description of his experience of running complex projects with large budgets, and specifically in relation to investments/pensions, as set out in his Third Witness Statement ("**O'Higgins 3**") at paras. 5-7.

(3) The explanation of the proactive steps which he has taken to communicate with members of the Proposed Class and to keep them informed of progress, including via webinars, face-to-face meetings, conferences, emails and social media: O'Higgins 3, paras. 11-17.

(4) His explanation of why he did not delay in initiating the O'Higgins Application, which underlines his passion for the cause. He believed that "*the members of the Proposed Class had waited long enough.*"[52]

(5) His description of his wish to be open and transparent to class members, borne out by the approach he has taken to publication of the claim materials.[53]

(6) His careful oversight of the O'Higgins Application to date, including his three witness statements, and scheduled quarterly reviews of expenditure against budget.[54]

55. Mr O'Higgins is supported and advised by an Advisory Committee of the highest calibre, with whom he has continued to liaise despite the pandemic,[55] comprising:

(1) Sir Christopher Clarke (retired Lord Justice of Appeal);

(2) Damian Mitchell (founder and managing director of Dsquare Trading Ltd., a high-frequency and high-volume FX trading company, who has over 30 years'

52 O'Higgins 3, para. 37.
53 O'Higgins 3, paras. 40-42.
54 O'Higgins 3, para. 45.
55 O'Higgins 3, para. 8.

experience of trading FX, who has himself provided a witness statement in support of the O'Higgins PCR's application);

(3) Ian Pearson (former MP and government minister, whose particular understanding of the financial services industry includes knowledge derived from having been Economic Secretary to the Treasury during the period of the cartels).[56]

56. It is respectfully submitted that these qualifications are more directly pertinent to the circumstances of the present case than, and exceed, those of the Evans PCR.

H. QUALITY OF PROPOSED CLASS COUNSEL

57. The O'Higgins PCR's solicitors at Scott+Scott UK LLP are not only themselves highly experienced in competition litigation, individually[57] and collectively[58], but they are also affiliated with a US law firm (Scott+Scott Attorneys at Law LLP) with extensive antitrust class action experience. Scott+Scott Attorneys at Law LLP has filed 74 claims and obtained 38 settlements with an aggregate value of over $3.4 billion and an average value of $91.3 million (the highest of the leading US antitrust firms).[59] Scott+Scott has other European offices in Amsterdam and Berlin; the philosophy of Scott+Scott as a firm is that its global network of offices should function as a single entity.[60]

58. Scott+Scott Attorneys at Law LLP is co-lead counsel in the US FX class action proceedings (the "**US Proceedings**"), which were described in the First Witness Statement of Belinda Hollway.[61] It instigated those proceedings.[62]

59. Hausfeld is co-lead counsel in the US Proceedings because it was invited by Scott+Scott. Scott+Scott's involvement has been by far the largest, having directed all aspects of the litigation and administration of its settlement, and having by 12 January 2018 spent 74,625 hours on the US Proceedings, compared with Hausfeld's 34,949 hours.[63]

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56 O'Higgins 2, para. 6.
57 Hollway 4, para. 41 & Annex, para. 1.
58 Hollway 4, para. 37.
59 Hollway 4, paras. 31-35.
60 Hollway 4, para. 39
61 For an update, see Hollway 4, para. 48.
62 Hollway 4, para. 45.
63 Hollway 4, para. 46.

60. The institutional knowledge acquired from the US Proceedings is considerable.[64] Those proceedings – led by Scott+Scott from the outset – have so far recovered $2,310,275,000 for the affected class.[65]

61. The UK counsel team's extensive experience and complementary skills as a team are, it is suggested, apparent from their CVs.[66]

62. Together, the O'Higgins PCR's legal team are at least as well, if not better, qualified than the Evans PCR's team.

I. PREPARATION AND READINESS OF ACTION

63. Examples of the better preparation and readiness of the O'Higgins Application include:

(1) The claims administrator in the US Proceedings (Epiq) is also the O'Higgins PCR's proposed claims administrator.[67] Epiq (itself very experienced in claims administration generally) can be expected to bring the specific knowledge and expertise which it has acquired in a highly analogous case involving very similar claimants.

(2) The O'Higgins PCR has already undertaken the significant exercise of reviewing and analysing the sample of 746 contractual documents that the Proposed Defendants disclosed pursuant to paragraph 8 of the Tribunal's Order dated 6 November 2019. The Evans PCR was not involved in this exercise.[68]

(3) The O'Higgins PCR's legal team have proactively taken the lead on a number of important areas in the Proposed Collective Proceedings, including coordinating efforts to obtain information from the European Commission in relation to the status of its third investigation into cartels in the FX sector.[69]

(4) The O'Higgins PCR's legal team has established lines of communication with those involved in other related proceedings, including the claimants' solicitors in

64 Hollway 4, para. 44.
65 Hollway 4, para. 47.
66 Summarised at Hollway 4, Annex, para. 2, and exhibited at BAH25.
67 Hollway 1, para. 14; Hollway 4, para. 16.
68 Hollway 4, para. 61(b).
69 Hollway 4, paras. 79-82.

the standalone FX claims proceedings before the Commercial Court,[70] and the claimant lawyers in the pending Israeli class action proceedings.[71] Their links with the US Proceedings have already been described in section H above.[72]

J. FEE AGREEMENTS

64. A comparison of the fee arrangements which have been disclosed reveals comparable levels of incentives.

65. The O'Higgins PCR's solicitors (Scott+Scott) are conducting the case under a 50% reduced rate Conditional Fee Agreement ("**CFA**"). This means that on a normal hourly rate of £300ph: the firm would receive £150ph from the funder during the conduct of the case; if the case succeeds, it would be entitled to the remaining £150 per hour plus a £150 per hour uplift, i.e. a total of £450ph; the difference would be paid from undistributed damages to the extent available.

66. The Evans PCR's solicitors (Hausfeld) also act on a CFA. The percentage uplift has not been stated but it can be inferred from Hausfeld's budget to be similar. Thus both firms are similarly incentivised by success fees to prosecute the claim diligently.

67. The Evans PCR's counsel team are also on CFAs (though the rates are not known). The O'Higgins PCR's currently are not. The O'Higgins PCR considers that this is likely to be a neutral factor.

68. It is not relevant to speak of funder incentives since the funders are contractually committed to advance the sums agreed under the LFAs, and prohibited by the ALF Code from interfering in the conduct of the claim. As noted however, the funders stand to gain similar sums and so are equally (and similarly) invested in the outcome.

K. OTHER FACTORS

69. On the other Canadian factors that the O'Higgins PCR contends are of lesser relevance, the O'Higgins PCR nevertheless considers that it is at least as strong as the Evans PCR:

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70 Hollway 4, para. 82.
71 Hollway 4, para. 83.
72 See also Hollway 4, paras. 84-85.

(1) Prospects of success: The superiority of the O'Higgins PCR's expert analysis has been described in section F above. It is premature, especially in light of the Supreme Court's judgment in *Merricks v. Mastercard*, to make a detailed assessment of the prospects of success of either proposed claim.

(2) Scope of causes of action: There are no material differences between the causes of action in the two proposed claims. Both follow on from the Commission Decisions and rely on the same provisions of law. However, there are material differences in the scope of the claims: the scope of the O'Higgins PCR's is preferable for the reasons set out in section E above.

(3) Disqualifying conflicts of interest: None have been identified.

(4) Preparation and performance on carriage motion: The O'Higgins PCR considers that it would be invidious to draw comparisons under this heading.

(5) Selection of defendants: The Evans PCR names two additional defendants ("**MUFG**"). The omission of these defendants from the O'Higgins PCR's claim is of no practical import. MUFG was involved in only one of the Cartels (Essex Express) and for a relatively short period of time (barely more than one year[73]). MUFG is however jointly and severally liable for the Essex Express cartel, and can therefore be expected to be joined as a contribution defendant by the other Proposed Defendants in the O'Higgins PCR's claim in practice in any event.

(6) Correlation of plaintiffs and defendants: This factor is not relevant in the present case, there being viable claims against all defendants.

(7) Interrelationship of class actions in more than one jurisdiction: This factor is only relevant in the present case to the extent of the connection of the Proposed Collective Proceedings with the US Proceedings, as to which the O'Higgins PCR's advantageous connections have been identified in section H and paragraph 63(1) above.

[73] 8 September 2010 to 12 September 2011.

L. CONCLUSION

70. For all the above reasons, the O'Higgins PCR is the most suitable for the purposes of Rule 78(2)(c).

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