The Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: Third
Exhibits: MOH8-MOH11
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

THIRD WITNESS STATEMENT OF MICHAEL O'HIGGINS

I, **MICHAEL O'HIGGINS**, of Michael O'Higgins FX Class Representative Limited, whose registered address is c/o Scott+Scott UK LLP, St Bartholomew's House, 90-94 Fleet Street, London, EC4Y 1DH, **WILL SAY**:

Introduction

1. I have previously provided two witness statements in relation to the above claim (the "**O'Higgins Application**" or the "**Claim**"): the first was dated 28 July 2019 and filed with the Competition Appeal Tribunal (the "**Tribunal**") on 29 July 2019 (my "**First Statement**"); and the second was dated 28 January 2020 and filed with the Tribunal on 5 February 2020 (my "**Second Statement**"). This is my third witness statement in these proceedings and it is provided to the Tribunal by way of update on certain developments since my Second Statement and in response to: (a) the joint response of the Proposed Defendants dated 26 February 2021 to the O'Higgins and Evans Applications (the "**CPO Response**"); and (b) the case documents filed in Case Number 1336/7/7/19 *Mr Phillip Evans v Barclays Bank PLC and Others* (the "**Evans Application**").

2. In this statement, I:

    a. Provide further information about my suitability to act as the individual with control of the Proposed Representative;

    b. Outline my ongoing communications and engagement with the members of the proposed class that the O'Higgins Application seeks to represent (the "**Proposed Class**");

    c. Provide further detail on the reasons why the O'Higgins Application is made on an opt-out basis and respond to various points made by the Proposed Defendants in relation to the relative merits of opt-in and opt-out claims;

    d. Explain the timing of the filing of the O'Higgins Application and why I do not regard that timing as premature;

    e. Identify the information on funding and after-the-event insurance which has been made available as part of the O'Higgins Application; and

f. Address the budget for the O'Higgins Application and how I review and monitor it.

3. As with my First and Second Statements, I make this statement in my role as sole director and sole member of the Proposed Representative and therefore as the individual with complete control over the Proposed Representative. As such, in this statement, references to the knowledge, conduct, etc., of the Proposed Representative are to be understood as being references to my own knowledge, conduct, etc., and vice versa.

4. 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. Nothing in this statement is intended to waive any privilege.

My suitability to act as the individual with control over the Proposed Representative

Experience

5. During my consulting career, both as a Partner with (what was then) Price Waterhouse and as a Managing Partner with PA Consulting Group, I regularly led assignments with complex groups of stakeholders and involving very significant consulting fees and client budgets of £100 million or more. I also led, at PA Consulting, a group of approximately 600 staff. I will give below just a few examples to illustrate this experience in running large, complex projects, including projects directly related to the pensions sector (being one of the sectors adversely affected by the cartels).

a. I led a team (averaging 20 consultants) that worked with the Office of the e-Envoy over several years to devise and implement the e-government strategy for the UK. Again, this was not just about technical issues but about ensuring stakeholder support.

b. My team worked with UK Visas, part of the Foreign & Commonwealth Office, to deliver new IT arrangements, to be rolled out globally, for processing visas for the UK. The programme was delivered on time, under budget and to full scope.

c. I led a range of IT outsourcing projects for government departments, including managing the complex commercial negotiations with preferred bidders.

d. I led a team that ran consecutive projects to develop and operationalise an information strategy for community care. This involved working over a period of two years with all 108 local authorities in England that had social service responsibilities to establish their information and IT needs, including running frequent regional seminars, and speaking and networking at conferences of the Association of Directors of Social Services. The objective was not simply to devise the 'correct' technical solution, but one that had support and 'buy-in' from those 108 organisations.

e. Since finishing full-time employment in 2006 (further details below) I have continued to lead complex stakeholder management exercises. For example, I chaired The Pensions Regulator ("**TPR**") during the early stages of auto-enrolment. As the TPR annual report for 2012-13 notes: "*We commenced writing to large and medium employers periodically from 18 months prior to their staging date. In 2012-2013 we sent out more than 44,000 letters and we will build on this activity in 2013-2014. We also attended meetings, hosted speaker events, and developed and presented webinars*". All these activities were cleared and monitored by the TPR Board and I took part in visits to employer groups and advisers to assess how they experienced these activities and to get feedback on how we could do things better.

f. Most recently, during my six years chairing the Local Pensions Partnership, I led the process whereby initially two, then three, local government pensions funds combined the management of their assets (now valued at £20 billion). It remains, so far, the only local government pensions pool where 100% of the assets are managed by the pool. This involved establishing significant degrees of trust with stakeholders, such that pension funds were willing to transfer the management of their assets.

6. My roles at TPR and the Local Pensions Partnership have given me an excellent understanding of the pensions industry and the vital importance of well-managed pension schemes. Accordingly, the impact of the FX Cartels on pension funds is of particular

importance to me and contributed to my desire to seek to represent the Proposed Class, as explained in greater detail at paragraphs 30 – 33 of my First Statement.

7. As to the question of whether I have the time and resources available for the Class Representative role, I have had a 'portfolio' career since 2006, acting as chair or non-executive director of a range of public, private and voluntary bodies, as well as carrying out some consultancy work. I control my own diary and make sure I am able to devote the necessary time to each responsibility that I have undertaken.

Advisory Committee

8. I have continued to meet, both individually and collectively, with members of my Advisory Committee to inform my decisions as to the running of this case. Without waiving privilege in the matters discussed or the materials produced for the Advisory Committee discussions, I confirm that we have met regularly (meetings after the start of the Covid-19 pandemic have been held remotely) and that they have been briefed on developments in the litigation. They have provided valuable input, and I intend to continue to consult with them throughout the course of the litigation.

9. Mr Damian Mitchell of D-Square, who is a member of the Advisory Committee and has over 30 years' experience trading FX, had particularly helpful insights into the Proposed Defendants' arguments that the case should be brought as an opt-in rather than an opt-out case. Mr Mitchell is now contributing a witness statement on these issues.

Hourly rate

10. For full disclosure, I note that, since my First and Second Statements, my hourly rate was subject to review in January 2020 and subsequently increased to £420 (an increase of £20). This is in the mid-range of fees for my other consultancy commitments and the cap regarding the average amount I may receive in any 12-month period (being £65,000) has not changed.

Communication with the Proposed Class

11. As envisaged in the Litigation Plan exhibited as Exhibit MOH4 to my First Statement, I have continued to communicate with the members of the Proposed Class that I seek to

represent. This communication is to ensure that members of the Proposed Class are kept informed of any and all updates in the proposed proceedings.

12. In October 2019 I visited Dublin with a member of the legal team. During this trip we met with a number of Ireland's largest potential opt-in class members. We also met with lawyers active in the funds industry to inform them of the anticompetitive conduct and alert them to the litigation. Given Dublin's prominence as a leading funds centre in Europe, this trip will have increased the potential opt-in engagement (as is discussed further below).

13. I also attended the Institutional Investors conference in Berlin in early February 2020, and spoke about the case to senior executives from the Fonds de Réserve pour les Retraites (The French Pension Reserve Fund — €36.6bn assets under management ("**AUM**"), HypoVereinsbank (€3.2bn AUM), European Patent Office Reserve Funds for Pensions and Social Security (€8.1bn AUM), APK Pensionkasse AG Vienna (€2.8bn AUM), WTO Pension Plan (CHF 4.1bn AUM) and Bank of Ireland Pensions Fund (€6.1bn AUM).

14. While the Covid-19 pandemic has prevented me from attending further in-person conferences, I have used other means of engaging with members of the Proposed Class, namely:

    a. **Website updates**: the Claim website, www.ukfxcartelclaim.com (the "**Claim Website**"), has been kept updated with each significant development in the litigation. The Claim Website allows members of the Proposed Class to view various documents, each of which is a companied by a short explanation of the content and effect of the relevant document. Available documents include:

        i. case documents, including the O'Higgins Application Collective Proceedings Claim Form (the "**Claim Form**"), my First and Second Statements, Ms Hollway's first and second witness statements (with relevant exhibits) and the budget;

        ii. a summary of the funding and insurance arrangements, explaining the key provisions of the litigation funding agreement and extent of the adverse costs cover;

iii. the non-confidential European Commission decisions, and the Commission's press release dated May 2019;

iv. the Tribunal's summary of the Claim Form; and

v. transcripts, judgments and orders made in the Claim to date.

b. **Emails to Claim Website registrants**: after any significant development in the litigation, an email has been sent explaining those developments and next steps to the registrants. By way of example, I attach a copy of the email sent on 21 January 2021, following the last case management conference, at Exhibit MOH8.

c. **Email enquiries**: as well as the general enquiries address info@ukfxcartelclaim.com, I have a personal email address with the same domain name (moh@ukfxcartelclaim.com). Both email addresses periodically receive enquiries from potential class members, which a member of the case team will respond to, answering any questions, and directing them to the Claim Website for additional information (including to the relevant FAQ, if appropriate).

d. **Webinars**: I held two interactive webinars at which I and members of the legal team explained the O'Higgins Application to potential class members, held on 10 March 2020 and on 17 March 2021. Attendees submitted live questions during the course of the webinar, and we answered at the end of the session. Everyone who had registered on the Claim Website was sent an invitation email in advance of the webinars, and a further email on the morning of the webinars, reminding them it was going ahead. The webinars were advertised on the website and the Claim's LinkedIn page. The slides from the second webinar are provided at Exhibit MOH9. I propose to continue holding such webinars throughout the course of the proceedings as they are a useful and cost-effective way of engaging with the Proposed Class.

e. **Communications with industry associations**: I have sent information about the case to the Chairman of the Pensions and Lifetime Savings Association (representing UK pension funds) and held email discussions with him about it.

f. **Discussions with contacts**: I have been in touch with various professional contacts to provide them with information about the case, including:

i. PTL Trustees, a provider of independent trustee and monitoring services; and

ii. the chairs of the Brunel Pensions Partnership, The London Collective Investment Vehicle (London CIV), LGPS Central and Border to Coast Pensions Partnership, representing over 60 local government pension funds, with assets of over £150bn.

I have also authorised and encouraged others involved in the case, including the legal team, experts and members of the Advisory Committee, to similarly discuss the case with their contacts who they believe may be interested in it.

g. **Mainstream and financial press**: I have engaged a public relations agency, Questor Consulting, to manage press and keep in regular contact with an extensive list of national and international journalists from the mainstream, financial and legal press (including the FT, Bloomberg and Investment Week), to provide them with periodic briefings on the Claim. The full list of publications and broadcasters is provided at Exhibit MOH10. The Claim has received wide press coverage with articles published in Bloomberg, City AM, CNBC, Deutsche Welle, Financial News, The Financial Times, FT Adviser, FX Markets, FX Week, iExpats, Investments and Pensions Europe (IPE), LearnBonds, Le Figaro, Money Age, Pensions Age, Pensions Expert, Reuters, The Economist, The Guardian, The Scotsman, The Times, The Trade and This Is Money (as well as the legal press). To attempt to raise awareness of the Claim beyond those who have already registered on the Claim Website, I have spoken to a number of journalists to encourage them to publish articles explaining this and (as at the date of this statement) have given interviews to Bloomberg, City AM, Deutsche Welle, Financial News, FT Pensions Expert, FX Markets, FX Markets and Risk.net, IBA Global, IPE Real Assets, Press Association, Reuters, Sky News, The Daily Telegraph, The Economist, The Guardian and The Wall Street Journal.

h. **LinkedIn page**: the Claim LinkedIn page is kept up to date with developments in the case including notifying potential class members of upcoming hearings. As well as links to Claim Website and press articles, the LinkedIn page is regularly

updated with articles which may be of interest to potential class members, to help them understand the Claim and the collective action regime. As at the date of the statement, the website includes links to articles on the following subjects:

i. the Supreme Court hearing and judgment (separate articles) in *Merricks v Mastercard*, explaining possible implications of the judgment on the Claim;

ii. litigation funding and after the event insurance, explaining what they are, how they work and why they are important in collective actions;

iii. the duties of class representatives, explaining the legal framework and factors relevant to suitability; and

iv. follow-on claims, explaining what a follow-on claim is, and what this means in terms of a claimant's requirement to prove wrongful conduct in a cartel damages claim.

i. **Website video**: I have recorded a short video in which I explain the Claim and my reasons for bringing it, which is available on the Claim Website.

j. **Asset management associations**: Questor Consulting has been communicating with asset management organisations including the European Fund and Asset Management Association (EFAMA) and the Investment Association, to keep them apprised of progress in the Claim.

k. **Investor relations organisations**: similarly, Questor Consulting has been communicating with investor relations organisations which have significant asset management clients, including ISS, Glass Lewis, and Institutional Protection Services, to allow them to keep their own clients up to date.

l. **Conference*:*** I will be on a panel on class actions in competition law at the Bonavero Institute of Human Rights – Class Actions in England and Wales conference on 7 May 2021.

15. Following the Tribunal's approval of the Joint Publicity Notice ("**JP Notice**") on 4 February 2021, in accordance with the Litigation Plan, the O'Higgins Application took the following steps to publicise the JP Notice within 7 days of the approval:

a. **Website**: the JP Notice was published on the Claim Website on 6 February 2021, and a post went up on the claim's LinkedIn feed directing potential class members to the JP Notice on the Claim Website.

b. **Email**: the JP Notice was sent by email with the subject line "*Claim Update: Formal Legal Notice*" on 9 February 2021 to everyone who had registered on the Claim Website, included at Exhibit MOH11. The JP Notice was sent as a link rather than an attachment to maximise the effectiveness of the noticing. I understand that internet service providers will often flag bulk emails sent with attachments as potential spam, impacting deliverability of the notice and future emails from the ukfxcartelclaim.com email addresses. This method also avoided any problems with mailboxes having file size limitations or functions to block attachments.

16. In addition, the O'Higgins Application subsequently took the following additional steps to publicise the JP Notice:

a. **Solicitor contacts**: I am informed by the legal team that a number of organisations who have been in contact with Scott+Scott UK LLP in the past about the FX cartels have been provided with information about the O'Higgins Application. Many of these have registered on the Claim Website already, but over 20 who had not registered were emailed individually and sent the JP Notice.

b. **Asset management organisations**: Questor Consulting sent the JP Notice to both EFAMA and The Investment Association to ensure that they were fully aware of the certification hearing and potential class members' and interested parties' rights to object or to apply to make submissions, to allow them to communicate with their members and answer any questions should they be approached.

c. **Investor relations organisations**: Questor Consulting sent the JP Notice to ISS, Glass Lewis and Institutional Protection Services. I understand that further to that, at least ISS sent an information email to its own clients in relation to the JP Notice.

d. **Informing the press**: Questor Consulting sent the JP Notice to journalists at over 50 publications.

17. I intend to continue to communicate regularly with members of the Proposed Class, using the methods outlined above.

Opt-out

18. In my First Statement, I explained at paragraph 27 the reasons why I am applying to bring the O'Higgins Application on an opt-out basis. Among other reasons, I highlighted: the size of the class; the expense and difficulty of attempting to contact all potential members of the Proposed Class to explain the Proposed Collective Proceedings to them; the low value of damages to which many class members will be entitled; and reluctance of class members to sue the banks with whom they deal.

19. I have reviewed the CPO Response, and I understand that the Proposed Defendants take the position that the Claim should be brought as an opt-in, rather than opt-out, action, although I note they have filed no evidence to support their submissions. In this section I further elaborate the reasons why, based on my own previous experience, I do not believe an opt-in approach is as effective or appropriate as an opt-out approach.

Opt-in vs opt-out regimes

20. As I described at paragraph 34(c) of my First Statement, during my tenure as Chairman of TPR, I was involved in the introduction of the auto-enrolment pension regime in 2012 and the subsequent amendment of TPR's objectives to include a new aim of maximising employers' compliance with their duty to enrol staff automatically into a qualifying pension scheme with a minimum contribution rate.

21. Auto-enrolment to pensions is in essence a form of opt-out enrolment. Prior to the introduction of auto-enrolment, many workers missed out on valuable pension benefits, because the worker did not apply to join their company's pension scheme even where such a scheme was available. Auto-enrolment made it obligatory for companies to enrol their employees in pensions for the first time. This was a significant pension reform which resulted in several millions of workers starting to save into a pension scheme for the first time. Despite some employers' arguments that auto-enrolment was not necessary, it is clear that the number of employees who now have some form of pension provision is much greater due to auto-enrolment.

22. My involvement with the introduction of the pensions auto-enrolment regime made it clear to me that people will often not be aware of steps that they could or should take, and even when aware, many may not take pro-active steps even when there is an important financial benefit at stake. This can be for a variety of reasons, such as being unaware of benefits, or taking a view that the effort involved is not worth the reward, or simply not making it a priority and finding the time to do it.

23. Although this should be less of a problem for a business than for individuals, nevertheless I believe the same issues would arise for many businesses adversely affected by the FX cartels. A very substantial number may be unaware of the FX cartels and/or that they are entitled to compensation. I understand from Mr Mitchell that he was unaware of his business's right to compensation even though FX trading is his business's sole activity. For some, particularly those with comparatively small trading volumes, even if they were made aware, they will not have the time or inclination to make a decision about whether or not to get involved, let alone provide data at a time when any ultimate entitlement to compensation is some way off. They may also be very hesitant to become involved in litigation adverse to banks with whom they have an ongoing relationship. I address below the distinction between opting in to litigation at an early stage and coming forward to claim money from a damages pot that has already been established.

Why class members prefer opt-out

24. In my First Statement at paragraph 27(d), I referred to the reticence of commercial parties to become involved in disputes with key suppliers, such as the banks with whom they deal. As part of my communication with the Proposed Class, I have been in touch with a number of potential opt-in and opt-out class members (and bodies which represent them) who have displayed this reticence. In some instances, people have said that their organisation's previous experience of litigation predisposed them against becoming involved. Others made a point of asking, including in our most recent webinar, whether if they registered on the Claim Website, this information would be kept confidential, particularly from the Proposed Defendants. This further confirms to me that many organisations and individuals are reluctant to take any positive step adverse to the banks, particularly by becoming involved in litigation which they see as speculative or uncertain.

25. By contrast, I believe the position is likely to be different when there is a damages pool to be distributed as a result of either a favourable judgment or a settlement. At that stage, members of the Proposed Class can be informed that they are entitled to a share of the damages, so any investment of time and effort of needed to lodge their claim is not speculative but done in the knowledge that they will receive a return. The risk of harming relationships with their banks should also be perceived as less if the damages pot has already been ordered or agreed. I believe this will particularly be the case if the UK follows the US model where (I am informed by Scott+Scott) distribution is handled by the claims administrator and the identities of class members who come forward to participate in the damages distribution are not made known to the banks, let alone made public.

Nature of class members

26. In the CPO Response, the Proposed Defendants refer selectively to passages from my First Statement to claim that I have contradicted myself regarding the nature of the proposed class members. I reject this misleading allegation, which mischaracterises what I said. The detail of this mischaracterisation by the Proposed Defendants is as follows:

    a. At paragraph 24 of my First Statement I stated: "*I believe that, generally, most entities which traded FX will have done so repeatedly, either as a fundamental part of their operations (e.g. investment funds) or as an ongoing ancillary task to a businesses' main operations (e.g. multinational corporations repatriating money to the UK from other jurisdictions), and will be well aware that they have done so*."

    b. At paragraph 27(a) of my First Statement I stated: "*Whilst some of those entities will no doubt frequently engage in FX transactions and therefore have an extensive knowledge of the FX market, the Proposed Class is also likely to include members for whom FX transactions do not form <u>a central</u> part of their business and who therefore may not be aware of the existence of the FX Cartels and the implications of the FX Cartels for them. In the absence of the Proposed Collective Proceedings, these potential claimants may not even be aware that they have been harmed, let alone that they have a claim arising from the FX Cartels*." [emphasis added]

    c. In paragraph 33(c)(ii) of the CPO Response the Proposed Defendants refer to "*Mr O'Higgins' assertion that the proposed class is "likely to include members for*

whom FX transactions do not form part of their business'"" and refer to paragraph 24 of my First Statement. I note that the Proposed Defendants have omitted the words "*a central*" in their quoting of my First Statement. I trust that this was an unintentional mis-transcription, but this error changes the meaning of the sentence significantly.

d. In paragraph 37(a) of the CPO Response, the Proposed Defendants state that paragraph 27(a) contains a "*bare assertion*" and contradicts paragraph 24. These allegations are presumably as a result of their misreading of the quote as omitting the words "*a central*" from "*a central part of their business*".

27. In paragraph 27(a), I was referring to the two types of potential class members identified again in paragraph 24:

a. those who trade FX as part of their core business, e.g. investment funds who trade FX as an investment strategy (i.e. the "*most entities which traded FX will have done so repeatedly"*); and

b. those who trade FX on an ancillary basis to their central business (i.e. the entities "*for whom FX transactions do not form a central part of their business*"), e.g. corporates who occasionally purchase FX to manage their currency exposure.

I therefore consider that my statements were entirely consistent.

28. As to the allegation that paragraph 27(a) is "*unevidenced*" and a "*a bare assertion*", I confirm that paragraph 27(a) is based on my knowledge and experience. Nor would I regard it as at all controversial that entities in both categories exist and are part of the class, and I understand Mr Mitchell will also address this in his statement. I therefore maintain that the members of the Proposed Class will include both types of customer as I identified in paragraphs 24 and 27.

29. In paragraph 40 of the CPO Response, the Proposed Defendants refer to both proposed class representatives providing for non-UK domiciled class members to opt in to the proceedings. That is correct, but that does not contradict the core position that the application is on an opt-out basis for UK-domiciled class members.

30. While I wish to make the option of opting-in available to non UK-domiciled entities who have suffered loss, particularly as a result of trading FX in London, and, as I have explained, some of my engagement with members of the Proposed Class has been with entities in this category, the core class consists of UK-domiciled entities. Non-UK-domiciled class members may include entities who trade FX out of London but are domiciled elsewhere (e.g. the Cayman Islands, Ireland, Luxembourg, the Channel Islands, etc.). It may also include sophisticated class members of the nature identified by the Proposed Defendants who are based in and trade through Europe (e.g. Frankfurt, Paris, Amsterdam, etc.) and sophisticated class members who are based outside Europe (e.g. Middle East, Asia, etc.) but trade through Europe. Post-certification, we will embark on a publicity campaign, as explained in the publicity plan included in the Litigation Plan, to explain the Claim to such class members, but we recognise the challenges in this exercise, which reflect some of the challenges involved in relation to attracting opt-ins generally. Also, the cost of such a campaign can more readily be justified for a claim that has already been granted a Collective Proceedings Order and when being conducted in conjunction with the publicity informing class members of their right to opt out.

Lack of viability of opt-in claim

31. In paragraph 50 of the CPO Response, the Proposed Defendants state that I made a "*half-hearted suggestion*" in paragraph 27(e) of my First Statement that an opt-in claim would not be economically viable. It is not clear to me on what basis the Proposed Defendants characterise a succinct statement as "*half-hearted*". However, to the extent I can understand their statement, and by way of further detail, I note Mr Neil Purslow will elaborate on the very different analysis that needs to be conducted when considering an opt-in rather than an opt-out action in a second witness statement.

32. I also understand from Scott+Scott that many thousands of class members in the US Class Action have received comparatively small payouts (which Ms Belinda Hollway will address in her witness evidence). I regard class members who suffered comparatively small losses as just as entitled to compensation as class members who suffered large losses, but I recognise that the costs and difficulty of identifying and communicating with such class members and trying to persuade them to join a claim prior to there being settlement or judgment money 'on the table' are likely to be disproportionate. I also expect that potential class members who are entitled to comparatively small payouts

would be less likely to undertake any significant volume of work in order to participate in an opt-in claim, and I again, I understand from Scott+Scott that in the US Class Action most elected the 'Option 1' route which did not require them to produce data (again I understand this point will be address in Ms Hollway's witness evidence).

33. I therefore believe that an opt-in claim would not be as effective a means of providing compensation to as many of the victims of the FX cartels as the opt-out claim that I am seeking to bring, and would ultimately not be an economically viable means of proceeding on behalf of the Proposed Class. I have also been informed by Scott+Scott that, while in an opt-out claim the litigation funder is paid from undistributed damages, in an opt-in claim there would be no such undistributed damages and therefore the funder would have to be paid by taking a proportion of the class members' damages. This would lead to class members having to give up a portion of their recovery.

Timing of the O'Higgins Application

34. I understand that Mr Evans states in paragraphs 25 to 27 of his first witness statement that his delay in filing the Evans Application was due to his decision to wait for access to the Commission Decisions on which both the O'Higgins Application and the Evans Application are based.

35. I did not consider that it was necessary to await the publication of the Commission Decisions before filing the O'Higgins Application. To the contrary, I believed that more than enough information relating to the anticompetitive conduct in question was publicly available in advance of filing the O'Higgins Application. This included the clear and concise press release published by the European Commission on 16 May 2019 (the "**Press Release**") which gave significant information regarding the anticompetitive conduct of the Proposed Defendants. Various other regulatory decisions which were also public before the Press Release, and which are annexed to the O'Higgins Collective Proceedings Claim Form, provided further information.

36. My legal representatives also explained that, as the Commission Decisions were settlement decisions, they would be 'short form' decisions that would not be as detailed as they would if they were 'contested' decisions. Once the Commission Decisions were obtained from the Proposed Defendants through the litigation, I saw that nothing in them

changed our prior understanding of the fundamental nature or key aspects of the FX cartels.

37. I fully believe it was the right decision to file the O'Higgins Application as soon as it was possible, which (I was instructed by my legal representatives) was 29 July 2019, being immediately after the Commission Decisions became final (i.e. could no longer be appealed). I believed that the members of the Proposed Class had waited long enough given that it was already at that point nearly 12 years since the start of the Three Way Banana Split cartel, over 6 years since Bloomberg first published reports on the anticompetitive conduct, and over four years since the first settlement with one of the Proposed Defendants (JPMorgan) in the US litigation.

38. Furthermore, I also note:

    a. While Mr Evans implies in his Proposed Decision Matrix sent to the Tribunal on 13 January 2021 that his delay in filing his application was because he was waiting for the Commission Decisions, that position is contradicted by a letter from his lawyers on 13 December 2019 which stated that the delay in filing the Evans Application, which they first informed the Tribunal of on 4 November 2019, was due to delays in obtaining funding. This is supported by a witness statement of Mr Maton from the Evans Application's legal representatives (paragraph 37 of Mr Maton's first witness statement).

    b. I understand that the O'Higgins Application, through commencing proceedings against the Proposed Defendants, obtained a copy of one of the Commission Decisions before the Evans Application and of the other Commission Decision only three days after the Evans Application. Accordingly, my legal team obtained the Commission Decisions just as quickly through the litigation as the Evans Application did by approaching the Commission.

Funding and insurance arrangements

39. I attended the (remote) case management conference in the proceedings held on 15 January 2021. At this hearing, Mr Lomas from the Tribunal panel noted the importance of the Tribunal understanding: "*precisely the way in which the funding package operates both for lawyers and for funders, the extent to which the assumptions have been made*

around the undistributed element of the damages and the extent to which that operates as a cap on the payments back to the lawyers and funders".[1]

40. I wish to note that I have taken an open approach to the funding arrangements from an early stage in the Proposed Collective Proceedings not only with the Tribunal, but also with the class that I seek to represent. Specifically, the O'Higgins Application website has contained the following:

    a. An explanation of the funding arrangements of the Claim in the FAQ section in response to the question "*What will it cost to join the claim?*". This has been on the website since it launched in July 2019.

    b. The budget, which states the total amount invested by Therium in support of the O'Higgins Application and specifies how the funding is broken down into the phases and elements of the proceedings. This has been on the website since July 2019.

    c. The First Witness Statement of Neil Andrew Purslow dated 28 July 2019, which contains an explanation of the funding arrangements including the total invested amount and the structure of the funder's return. This has been on the website since September 2020.

    d. A detailed summary of the funding arrangements in layman's terms for class members to read and understand. This has been on the website since September 2020.

41. The Litigation Funding Agreement dated 25 July 2019 (the "**LFA**") is not available on the website because the bespoke drafting of the LFA represents Therium's intellectual property. However, the information and documents included on the O'Higgins Application website are clear and transparent summaries of the funding arrangements, and arguably more accessible and intelligible to class members than the LFA itself.

42. However, in light of the comments of Mr Lomas at the 15 January 2021 case management conference, the LFA was removed from the Outer Confidentiality Ring on 19 February 2021 and is available to potential class members on request. To protect Therium's

[1] Transcript Page 26, line 24 to page 27, line 1.

intellectual property, we have reserved the right to not disclose the LFA in circumstances where I believe the person or company making the request is not an actual or potential class member.

Budget

43. At the case management conference on 15 January 2021, counsel for Barclays referred to how the Proposed Defendants can argue in the carriage dispute for the more "*cost efficient*" proposed class representative.

44. The O'Higgins Application has a budget of £29,375,043 million. However, it is not my (nor my solicitors') intention to use that entire budget unless it is required to successfully prosecute the Claim; the total budget should be seen as a cap not a goal.

45. I am in charge of the case budget and have scheduled quarterly reviews with my legal representatives, including the Deputy Finance Director of Scott+Scott, to ensure I understand how expenditure is tracking against the budget. As the examples from my consulting and other professional experience demonstrate, I have long experience in successfully managing professional service budgets, including amounts in excess of the those in this case.

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: .....

Michael O'Higgins

Date: 23 April 2021

Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: Third
Exhibits: MOH8-MOH11
Dated: 23 April 2021

Case no. 1329/7/7/19

IN THE COMPETITION APPEAL TRIBUNAL

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

THIRD WITNESS STATEMENT OF MICHAEL O'HIGGINS
