IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN: **Case Number: 1336/7/7/19**

MR PHILLIP EVANS

Applicant / Proposed Class Representative

- and -

BARCLAYS BANK PLC AND OTHERS

Respondents / Proposed Defendants

AND BETWEEN: **Case Number: 1329/7/719**

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

Applicant / Proposed Class Representative

- and -

BARCLAYS BANK PLC AND OTHERS

Respondents / Proposed Defendants

- and -

MITSUBISHI UFJ FINANCIAL GROUP, INC. AND ANOTHER

Proposed Objectors

APPLICATION FOR PERMISSION TO APPEAL ON BEHALF OF MR EVANS

Introduction and summary

1. This application seeks permission to appeal from the judgment of the Tribunal delivered on 31 March 2022 ([2022] CAT 16). It adopts the same abbreviations and terminology as in the judgment. All statutory references are to the 1998 Act and all references to rules are to the Tribunal Rules **[AUTH/82]**.

2. By the judgment, the Tribunal decided:

   a. By a majority (the President and Professor Neuberger), the claims as currently pleaded in the Applications are so weak that they are liable to be struck out: [375].[1]

   b. The Evans Application and the O'Higgins Application could and should be certified as collective proceedings: [364].

   c. By a majority (the President and Professor Neuberger) neither application should be certified on an opt-out basis: [383]. Both applications should be stayed and each Applicant be permitted (if so advised) to submit a revised application for certification on an opt-in basis: [411]. Mr Lomas (dissenting) held that the CPO should proceed on an opt-out basis: [462].

   d. Unanimously, if (contrary to the majority's conclusion on the Opt-in v. Opt-out Issue) the proceedings were to be certified on an opt-out basis, the carriage of the collective proceedings should be granted to Mr Evans: [389], [463].

3. Pursuant to rule 107, Mr Evans applies to the Tribunal for permission to appeal against the judgment on six grounds:

   a. **Ground 1**: The Tribunal erred in law in considering the Opt-in v. Opt-out Issue when there is no application to it for certification on an opt-in basis.

   b. **Ground 2**: The majority of the Tribunal erred in law in deciding that collective proceedings that meet the certification standard and which could only be brought on an opt-out basis are not entitled to go forward on that basis.

   c. **Ground 3**: The majority of the Tribunal erred in law in respect of the practicability criterion under rule 79(3)(b).

   d. **Ground 4**: The majority of the Tribunal erred in law in respect of the *"strength of claim"* criterion under rule 79(3)(a).

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[1] Mr Lomas addresses this issue in [414]. He shares "*the concerns of the majority as to the lack of definition in pleading in relation to the theory of harm*", but recognises that *"it is also important that there is some tolerance given to claimants articulating and pleading a theory of harm for market wide price changes"*. As it is unclear whether Mr Lomas concurred with the majority's view, this application proceeds on the basis that the strike-out finding was made only by the majority.

e. **Ground 5**: The majority of the Tribunal erred in law in relation to the factors that are relevant to the assessment of the Opt-in v. Opt-out Issue.

f. **Ground 6**: The majority of the Tribunal erred in law in holding the claims, as currently pleaded, are liable to be struck out under rule 41(1)(b).

4. Permission to appeal to the Court of Appeal (in a case where, as here, the Tribunal sat as a tribunal in England and Wales) may be sought "*on a point of law arising*" from a decision of the Tribunal of the type referred to in section 49(1A). The Tribunal's judgment on the Opt-in v. Opt-out Issue and Strike-Out Question constitute decisions as to the amount of damages within the meaning of section 49(1A)(a), in the same way as the decision on the eligibility of the claims for inclusion in collective proceedings was held to be in *Merricks v Mastercard Inc* [2018] EWCA Civ 2527, at [24]–[27]. In particular, the decision that the collective proceedings may only proceed on an opt-in basis is "*the end of the road*"[2] for them. Indeed, the majority expressly recognised that this is its effect, as *per* Ground 2 below. The decision that the proceedings are liable to be struck out unless the claim is re-pleaded (i) infects and is part of the Opt-in v. Opt-out issue; (ii) in any event is effectively "*the end of the road*" for the claims as currently pleaded before the Tribunal; and (iii) falls within the *Enron* approach to strike-out,[3] which means that it is enough that the issue of strike-out is potentially dispositive of the claim (as *per* §41 *PACCAR*, cited in fn. 2).

5. The test for the grant of permission is whether the Tribunal considers that the proposed ground has a real prospect of success or that there is some other compelling reason why the appeal should be heard: see para. 8.28 of the Guide **[AUTH/83/133]**.

6. Mr Evans submits that each of his proposed grounds has a real prospect of success, for the reasons developed below. Further, in circumstances where there is, it is respectfully submitted, a strong dissenting judgment, as in this case, a higher court may well come to

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2 This is the language of *Merricks* [37], adopted and applied by the Court of Appeal in *Paccar Inc v RHA and UKTC* [2021] EWCA Civ 299, [58]-[59].

3 In *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2009] EWCA Civ 647, at [23]-[24] Patten LJ (with whom Jacob LJ and Carnwath LJ agreed) held that s.49(1) applied to a decision to strike out a claim, and so should also apply to a decision not to strike out a claim. *"Once one accepts that the wording of s.49(1) is wide enough to cover a Rule 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of decision to the opposite effect. In my view, the language of the subsection covers both."*: ibid, [24].

a different conclusion to the majority. In these circumstances, Mr Evans submits that the proposed grounds have (at least) a real prospect of success, and permission should be granted. This has been the Tribunal's approach in previous cases when it has determined an appeal by a majority.[4]

7. Furthermore and in any event, there is a compelling reason why Mr Evans' proposed appeal should be heard. It is of evident importance to the outcome of this case and to future collective actions that the correct approach in law to the Opt-out v. Opt-in Issue is clarified, and similarly that the Strike-Out Issue be clarified. There is a general public interest in having guidance from the Court of Appeal on these issues. The importance and novelty of Mr Evans' proposed grounds of appeal are eminently suitable for the Court of Appeal to consider, even if the Tribunal were to consider for its own part that there was no reasonable prospect of success for the competing interpretation of the relevant statutory provisions.[5]

8. Each of the proposed grounds of appeal is developed in turn below.

<u>Ground 1</u>: the Tribunal erred in law in finding that it had the discretion to consider whether to make a CPO on an opt-in or opt-out basis where neither Applicant sought certification on an opt-in basis.

9. Firstly, there is no basis for the alleged discretion under the 1998 Act. The sole conditions for certification of collective proceedings are those set out in section 47B(5) **[AUTH/2/3]**. Whilst section 47B(7(b)) provides that any CPO must include *"specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings"*, this refers to the <u>content</u> of a CPO. It does not provide the Tribunal with a free-standing power to make a CPO on an opt-in basis in circumstances where there is no application for opt-in collective proceedings. Mr Evans respectfully submits that the Tribunal misinterpreted the statutory provisions at [82].

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4 See, e.g., Case 1230 *Federation of Independent Practitioner Organisations v Competition and Markets Authority* [2015] CAT 11, at [2]; Case 1154 *Telefónica O2 UK Ltd v Ofcom*, reasoned order of Vos J (as he then was) of 19 October 2010.

5 See, similarly, Case 1085 *Hutchison 3G (UK) Limited v Ofcom* [2009] CAT 17, at [6]; Case 1182 *Hutchison 3G (UK) Limited v Ofcom*, reasoned order of Marcus Smith J of 6 June 2012.

10. The Tribunal errs, secondly, in finding at [84] that rule 79(3) *"expressly articulates a discretion in the Tribunal as to whether a CPO that it is minded to grant is opt-in or opt-out"*. Mr Evans submits that rule 79(3) does not have this effect. While that rule states the factors that the Tribunal may take into account in determining whether collective proceedings should be opt-in or opt-out, it only applies where one (or more) applications have been made to bring opt-in or opt-out proceedings.[6]

11. Thirdly, the Tribunal's reasoning from principle at [86]–[89] is, with respect, flawed. The "*points of principle*" neither necessitate nor justify the Tribunal's statutory construction. In particular:

    a. Contrary to the Tribunal's statement at [87], there are circumstances in which an applicant would prefer an opt-in CPO to an opt-out CPO (see para. 36 of Maton 4 **[D/9/14-15]**, which provided the concrete example of the *Marine Hose* cartel as an example of a case where claims could have been brought on an opt-in basis).

    b. The Tribunal was wrong to direct itself, at [88(1)], that the "*unusual"* nature of opt-out proceedings means that "*the election between opt-in and opt-out proceedings needs to be a reasoned one, controlled by the Tribunal*". This mis-identifies the task for the Tribunal, erecting a gatekeeper function which is contrary to the Supreme Court's judgment in *Merricks.*

    c. The Tribunal was wrong to rely, at [88(3)], on the dissenting judgment of Lord Sales and Lord Leggatt in *Merricks.* The alleged risks identified therein were not endorsed by the majority, and to the contrary form a key part of the dissent.

    d. In general, the Tribunal's observations at [88] reveal an unwarranted preference for opt-in and a concomitant leaning or bias against opt-out proceedings (notwithstanding the disclaimer in footnote 32). The majority fails to recognise the fact that the process for bringing claims without "buy in" from class members is a deliberate policy choice to achieve the objectives of the collective actions regime: see Mr Lomas' dissent at [415(3)].

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[6] This would be the case, for example, where an applicant applies to bring collective proceedings on an opt-out, alternatively opt-in basis; UK Trucks Claim Limited made such an application in Case 1282.

12. Fourthly, the Tribunal's conclusions at [82] and [89] that it may certify proceedings on a basis not applied for by an applicant will render the regime unworkable in many cases. Specifically, the Tribunal would either have to speculate about the viability, form and scale of putative opt-in proceedings or, as in this case, certify the proceedings on the basis of an opt-out application (including funding and ATE arrangements), but certify the proceedings on an opt-in basis only (even though Mr Evans' evidence was that those arrangements would not apply to any opt-in case: see para. 23(c)-(d) of Maton 4 **[D/9/11]** and paras. 15-23 of Chopin 3 **[D/10/4-6]**). This approach would impermissibly require the Tribunal to assess the factors in rule 79(3) in the context of hypothetical scenarios. It would make it impossible to assess the "practicability" criterion in an objective manner (as set out in Ground 3 below).

<u>Ground 2</u>: the majority of the Tribunal erred in law in deciding that proceedings that should be certified and which can only be brought on an opt-out basis, are not entitled to be certified as opt-out proceedings.

13. The Tribunal unanimously found that both Applications met the test for certification (see [364] in the majority judgment; and e.g. [462] in Mr Lomas' dissent). Having made that finding:

    a. The majority accepted expressly that "*the litigation will, as the Applicants contend and which we accept, end if we do not (as the Applicants seek) certify on an opt-out basis*" [372(2)(ii)].

    b. The majority repeated this point: "*the choice is between opt-out collective proceedings and <u>no proceedings at all</u>*" (emphasis in original) [385] and again "*[w]e accept that not certifying on an opt-out basis means that, based on the evidence put forward in the Applications, the claims articulated by the Applicants will not proceed."* [385(1)].

    c. Mr Lomas therefore rightly notes that "*the majority proceed on the basis that an opt-in CPO will not, in fact, happen*" [415(1)]. His view is that whilst the evidence "*does not formally establish that an opt-in CPO is formally impracticable (impossible), it does establish (on a basis unchallenged by other evidence and*

certainly unrebutted) that, at the least, it is very unlikely that an opt-in CPO would proceed at all" [449].

14. Despite the majority's very clear findings, the majority reached the incongruous conclusion that the proceedings should be certified on an opt-in basis only: [411].

15. Mr Evans respectfully submits this is a misdirection in law because:

    a. the claims Mr Evans proposes to combine raise a triable issue that the members of Classes A and B have suffered some loss from the Respondents' breach of statutory duty (for the reasons most recently set out in his Theory of Harm Submissions **[CAU/4]**);

    b. the members of Classes A and B should therefore be entitled to have their claims heard "*almost ex debito justitiae*": *Merricks*, at [47];

    c. far from recognising this entitlement, the majority's conclusion at [372(2)(ii)] and at [385] achieves the opposite result;

    d. the majority's conclusion at [411] therefore runs counter to the purpose of the collective proceedings regime which is to *"provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose"*: *Merricks* at [45]; and

    e. the conclusion is, as Mr Lomas recognises at [415(1)], also inconsistent with the principle of effectiveness and the Court of Appeal's approach in *Stellantis.*[7]

16. As Mr Lomas pointed out at [449], the Tribunal cannot *"respect the interests of the PCMs and the administration of justice by adopting a process that we can only conclude is very likely not viable at all and where, even if it were to occur, many PCMs would never opt in, and, in many cases, would never have the opportunity to opt in"* (see also [415(1)–(2)]). This is because *"the satisfaction of access to justice concerns must be real not notional and present a viable pathway for PCMs to have their claims adjudicated"*: [451]. The majority were wrong to hold that "*Opt-out certification is not a certification basis of last resort,*[8] *in the sense that if opt-in proceedings do not work, there is effectively*

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7 *NTN Corporation v. Stellantis NV* [2022] EWCA Civ 16 at [26] and [29].

8 Of course, the majority were also wrong to treat opt-out as less preferable than opt-in.

an entitlement to certification on an opt-out basis.": [372(2)(ii)]. Where proposed collective proceedings pass the test for certification, there is such an entitlement.

<u>Ground 3</u>: the majority of the Tribunal erred in law in its interpretation and application of the phrase "*practicable for the proceedings to be brought as opt-in collective proceedings*" under rule 79(3)(b).

17. Mr Evans' case is that the Tribunal misinterpreted and misapplied the practicability criterion in rule 79(3)(b) for the following reasons:

18. First, the majority was wrong to find at [122(2)] and [122(4)] that the practicability of opt-in proceedings is to be assessed from the standpoint of the PCMs as opposed to the PCR. This is a false dichotomy. Plainly the collective proceedings regime exists in order to vindicate the rights of PCMs, rather than to serve the interests of a PCR. However, there will be factors which are relevant to the practicability of opt-in proceedings which relate to, and are in the knowledge of, the PCR and his or her team. Accordingly, as Mr Lomas says at [415(8)], whilst clearly it is the interests of the PCMs that need to be considered, practicability requires an objective assessment of the probability that opt-in proceedings would occur, and their nature and scope if so (and the consequences for the PCMs, the Respondents and the administration of justice). The focus on the viewpoint of the PCMs, and attempting to assess what their decision processes may be, is not helpful to that objective assessment.

19. Secondly, the majority was wrong in law to adopt at [122(5)] and [376] a purely theoretical benchmark for the assessment of practicability, namely whether opt-in proceedings might be practicable from the standpoint of a *"class member on the Clapham omnibus"*. The danger of assessing the "practical bars" to opting-in solely from the point of view of fictional class members is that it is an entirely speculative approach which disregards or downplays the 'real world' evidence on the impracticability of bringing opt-in proceedings. The danger is illustrated by the majority's findings at [376]–[382]: the practicability factor becomes no more than whether, in the Tribunal's opinion, opt-in proceedings are theoretically possible (c.f. [415(6)]). This is not what rule 79(3) requires which, rather, relates to an objective assessment of practicability in the 'real world'.

20. Thirdly, even if the majority were correct in assessing practicability from the standpoint of PCMs only, its conclusion has been arrived at on the basis of no evidence at all. In

fact, quite the contrary, it has disregarded or at least distorted the evidence placed before it of the real, practical barriers to opt-in from the point of view of the PCMs.

21. By way of non-exhaustive examples of the real, practical barriers to opt-in from the point of view of the PCMs:

    a. [381(6)] draws attention to the average class member having a potential claim with compound interest for £63,953. Viewed in isolation and without reference to the evidence underlying that figure, that average is apt to mislead. As explained in Ramirez 3, the average does not represent the potential value of the claim for many of the PCMs.[9] Mr Lomas noted the considerable variation in the size of claims across the class at [419].[10]

    b. The majority of the Tribunal recognises at [381(10)] that it would be impracticable for a sub-class of the PCMs to opt-in, and that these are precisely the sort of persons for whom "*the Merricks factors apply with great force*", given their low individual claim value. However, the majority directs themselves that this should not cause *"what is a clear-cut conclusion on practicability to change."* With respect, this approach does not make sense: if it would be impracticable for a significant proportion of PCMs to opt-in (and who, on the evidence, may comprise the majority of PCMs[11]), this is precisely the type of factor which the Tribunal <u>should</u> take into account in deciding whether opt-in proceedings are practicable. Mr Evans shares Mr Lomas' concerns about this approach: see [415(7)].

    c. The majority of the Tribunal ignore the unchallenged evidence in Maton 4 and Ramirez 2 as to why PCMs would be unlikely to opt in.[12]

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9 For example, Mr Ramirez's (uncontested) evidence is that 18,274 PCMs, comprising 77% of non-financial PCMs and 43.5% of all PCMs, have claims below £3,500. See Ramirez 3 at §9(a)(ii) **[C/10/5]** and §§27-29 **[C/10/13-15]**.

10 The prospect of class members with smaller claims is also borne out by the US class action, where, in 2019, the court approved an initial distribution of the settlement fund to class members: 11,609 class members received compensation of $15; 8,128 received $150; and the mean amount paid to other class members was $7,307.35 (which may increase to $11,242.08). See Maton 4 at §50-53 **[D/9/18-20]**.

11 As the Tribunal notes at [381(10)], including these class members could increase the preliminary class size estimate from 42,015 to over 100,000.

12 See, for example, Maton 4 at §36 **[D/9/14-15]**; Ramirez 2 at §27 **[C/7/13]**. See also Ramirez 3 at §17-18 **[C/10/9-10]**, Chopin 4 at §18-20 **[D/13/5-6]** and Evans 2 at §7-45 **[D/8/3-14]**.

d. The majority wrongly infer from the evidence that PCMs are not interested in collective proceedings [381(9)]. This ignores the well-known influence of a default position and the human tendency to do nothing when faced with a choice which requires positive action.[13] Further, as Mr Lomas pointed out at [415(20)], *"there are many good commercial reasons why organisations could have decided not to become parties to the proposed claim but that does not mean they would not want compensation if it were shown that they had been overcharged for their FX activities."*

e. These errors also demonstrate that the majority's approach of trying to assess practicability from the standpoint of a *"class member on the Clapham omnibus"* is unsuitable in this case where it is common ground that the class is heterogeneous (see e.g. Knight 2 paras. 9-16 **[C/5/5-7]**; Ramirez 2 paras. 12-27 **[C/7/6-13]**). See also Mr Lomas' dissent at [415(6)].

22. Fourthly, and in any event, the majority's approach leads to the following 'Catch-22'. As Mr Lomas recognises at [415(12)], if a PCR adduces no evidence on interest in an opt-in case, they may be refused certification on an opt-out basis (as they have not shown that opt-in proceedings are impracticable). But if the PCR shows that they have been unsuccessful in obtaining "buy-in", then the majority's approach take that as evidence that the claim is not strong enough to proceed on an opt-out basis. To put it colloquially, the PCR is damned if he does and damned if he doesn't. This is further evidence that the approach of the majority was wrong in law.

<u>Ground 4</u>: the majority of the Tribunal erred in law in respect of the "strength of claim" factor under rule 79(3)(a).

23. The Tribunal held at [375] that the claims pleaded in the Applications are so weak that they are liable to be struck out for lack of necessary particularity and are "without substance" in terms of pleaded causes of action.

24. Mr Evans submits that this is a misdirection in law for the following reasons.

25. First, the majority did not form a high level view of the strength of the claims based on the collective proceedings claim form (c.f. Guide, para. 6.39 **[AUTH/83/86]**), even

[13] Recognised by the Supreme Court in *Lloyd v Google* [2021] UKSC 50, at §27.

though this approach was common ground (see Joint CPO Rejoinder, para. 69 **[A/6/33-34]**). Rather, their conclusion was seemingly based on an impermissibly close (but unduly selective) review of parts of the Evans Claim Form **[EV/1]** and Theory of Harm Submissions **[CAU/4]**: see [237] and [239]. For the reasons set out under Ground 6, the Tribunal should have found that the Evans Claim Form is adequately pleaded and, accordingly, not placed much, if any, weight on the strength of the claim criterion (c.f. *Justin Gutmann v First MTR South Western Trains Limited* [2021] CAT 31 at [51] **[AUTH/87/21]**).

26. Secondly, the majority of the Tribunal failed to attach proper weight to the fact that these are follow-on claims (c.f. Guide, para. 6.39 and *Gibson v Pride* [2017] CAT 9 at [12] **[AUTH/22/7-8]**). Para 6.39 of the Guide provides that "*For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion"* **[AUTH/83/86].** The Tribunal held at [107] that this is "*not especially pertinent*", since the Tribunal's issues were with causation. That reveals a misreading of the Guide. The sentence is directed squarely at follow-on proceedings, in which liability is by definition resolved and the only issues are causation and loss. It is therefore entirely pertinent to this case, since it indicates that where liability has been resolved the claims are normally of sufficient strength. That is the case here. Further and in any event, as explained at paras. 249–285 of Mr Evans' Reply Submissions **[A/3/70-81]**, in the present case the Decisions do make findings that are relevant to, and consistent with, his theories of harm.

27. Thirdly, the Tribunal erred in law at [201] in failing to take account of Mr Evans' written submissions that informational imbalances exist and are material in this case. Those submissions were set out, for example, at paras. 241 **[A/3/68]**, 243 **[A/3/69]**, 245 **[A/3/70]**, 254 **[A/3/72]**, 289 **[A/3/82-83]**, 314 **[A/3/92]** of the Evans Reply and para. 44 of the Evans Surrejoinder **[A/8/14]**. As Mr Lomas noted at [428] and again at [453] and [454], any strength issues essentially relate to the quality of factual and expert evidence that will be obtained in the future.

28. Fourthly, the majority of the Tribunal wrongly concluded at [375] that Mr Evans' proposed claims (as they are currently pleaded) lack the necessary particularity and/or are intrinsically weak for the reasons set out under Ground 6 below. To the extent that

the majority applied an independent merits test in reaching this conclusion, this was wrong in law: *Merricks* at [59].

29. Fifthly, and in any event, the majority unreasonably placed decisive or undue weight on the strength criterion in its overall assessment under rule 79(3). As Mr Lomas has cogently explained, there are limitations as to the weight that can properly be given to the strength criterion at this stage (prior to disclosure and service of evidence): [428]. Moreover, strength is just one factor that must be weighed up with all other relevant considerations (see [432] and [434]), which, taken together point towards opt-out. Indeed, as Mr Lomas points out, it is not necessarily the case that stronger claims are better brought as opt-out and weaker claims as opt-in; and instead the contrary could be the case: [433].

30. Sixthly, the majority erred in creating a presumption that opt-out claims require greater strength. First, it found that where class members have not opted-in to proceedings, it may suggest that the claims are "weak" and that the additional benefits of opt-out proceedings over and above opt-in proceedings ought not to be conferred for that reason [103]. Second, it found that "*as a general rule… the weaker a case, the less justification there is for certifying on an opt-out basis*" [374(3)]. As Mr Lomas points out at [430], there is nothing in the Act or the Rules to support this approach, and if there were to be such an intention, it might have been expected to have been clearly specified. Further, this approach would have the "*slightly perverse consequence that a weak case could only be opt-in when that is precisely the kind of case where it would be more difficult both to persuade parties to opt in and to obtain funding*" [429].

<u>Ground 5</u>: the majority of the Tribunal erred in law in relation to the factors that are relevant to the assessment of the Opt-in v. Opt-out Issue.

31. First, the majority of the Tribunal is wrong at [96] to approach the Opt-in v. Opt-out Issue as turning on whether certification of collective proceedings without "buy-in" of the relevant class members can be justified. This approach reveals an impermissible preference for certifying opt-in proceedings for the reasons set out by Mr Lomas at [415(5)] of his dissent.

32. Secondly, the majority incorrectly considered at [370(3)] and [383] that the absence of a pre-existing body, such as a trade association, pointed against certifying on an opt-out

basis. In fact, as Mr Lomas points out, this factor might favour opt-in proceedings,[14] but is either irrelevant to the Opt-in v. Opt-out Issue in this case or, at most, is a neutral factor where (as here) no obvious trade associations or other structures exist to enable the PCMs to be more easily organised or contacted. The majority's observation that the fact the PCRs had come forward *"at the behest of the lawyers they now instruct"* was an indicator against certifying on an opt-out basis also sits uneasily with its recognition at [269] that this type of relationship is *"likely to be a hallmark of collective proceedings in this jurisdiction"*.

33. Thirdly, at [370(5)(iii)] and [383], the majority states that the lack of a sufficiently large "fighting fund" on the part of both PCRs inclines it slightly against opt-out proceedings. As identified in Mr Lomas' dissent at [415(16)], if anything, this factor should point *towards* opt-out proceedings, as these are more likely to be attractive to funders, and so can put the PCR in a better position to advance the PCMs' case.

34. Fourthly, at [372(3)], the majority states that the existence of the *Allianz* proceedings inclines it towards certifying on an opt-in basis. The majority should place limited if any weight on this factor in circumstances where, as it accepts at [182], the extent of any overlap between the claims is unclear.[15] This conclusion is also based on incorrect assumptions. First, the Tribunal's statement that there is a risk of overlapping claims is wrong: para. 103(e) of the Evans Claim Form **[EV/1/42]** expressly excludes transactions covered by other court proceedings. Moreover, the *Allianz* proceedings does not indicate a general appetite to bring a claim for market-wide harm. Rather they show that a large, well-resourced group of companies that traded substantial volumes of FX can bring a claim for damages. Here too, Mr Lomas is right to say at [415(19)] that the existence of the *Allianz* proceedings actually points in favour of certification on an opt-out basis – as there will not be other individual or collective proceedings.

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14 See [415(13)].

15 See also Lomas dissent at [415(19)].

<u>Ground 6</u>: the majority of the Tribunal erred in law in concluding that Mr Evans had not advanced a properly pleaded case on causation and that his proposed claims were liable to be struck out: see e.g. [237], [240], [241(1)] and [375].

35. Whilst the majority did not strike out the claims, its conclusion has material consequences for the future conduct of these proceedings. In particular:

    a. it is to be expected that – absent significant amendment – the claims will be struck out. Indeed, the majority held in terms that the test for strike out was met [240] and that they declined to strike out in the judgment only because of a concern that inadequate notice had been given [241].

    b. further, and critically, the majority's answer to the Strike-Out Question directly affected the majority's mistaken assessment of the Opt-in v. Opt-out Issue: [375]. Indeed, they effectively led to a strike-out. The majority held that: "*We accept that not certifying on an opt-out basis means that, based on the evidence put forward in the Applications, the claims articulated by the Applicants will not proceed. Ordinarily, that would be a significant factor. But in this case we have concluded that the claims, as presently framed, are so weak that they are deserving of strike out. Although we have not struck the claims out it seems perverse to permit a claim unsupported by "reasonable grounds" to proceed, which is what opt-out certification will achieve"* [385(1)].

36. Mr Evans submits that the majority of the Tribunal misdirected itself in respect of the legal test for a viable pleading of market-wide harm. In particular, the majority was wrong in law to conclude at [237] and [375] that a plausible evidentially-based economic theory cannot provide a valid basis for a claim. Mr Evans' theories of market-wide harm as to tacit coordination and increased adverse selection risks were clearly and adequately pleaded at paragraphs 249 to 253 of the Evans Claim Form **[EV/1/108-110]**. Both theories were, moreover, grounded in expert evidence on the FX industry markets and FX trading (from Mr Knight) and on FX market microstructure (from Professor Rime) – none of which was challenged by the Respondents for the purposes of certification. The majority's application of a different, and more demanding, test for pleading market-wide harm rather than the orthodox principles set by the case-law (cited at [197] and [199]) is wrong in law.

37. In formulating its erroneous test for pleading market-wide harm, the majority of the Tribunal erred in taking into account its view that the claims were "*novel*" ([125(3)] and [241(2)]). Mr Evans' theories of market-wide harm are well-established:

    a. As to direct harm to Class A, tacit coordination is recognised in the case-law (e.g. Case C-413/06 P *Bertelsmann and Sony v Impala* EU:C:2008:343, at [123]); the Decisions (e.g. Three Way Banana Split Decision, recital (89)) **[EV/2/21]** and its conditions were common ground (Evans Reply para. 293) **[A/3/83]**.

    b. As to indirect harm to Class B, the judgment in Case C-557/12 *Kone v OBB-Infrastruktur* EU:C:2014:1317, at [34] confirmed that national legal systems must permit umbrella claims where "*the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied*." Not only did Mr Evans' experts explain the specifics aspects of the relevant market that were conducive to umbrella pricing, but the majority (rightly) held at [231] that (in theory) information asymmetries in FX markets might generate increased costs to participants in those markets, resulting in increased bid-ask spreads.

38. By concluding that Evans Claim Form (along with his other submissions and expert evidence) is insufficient for a viable pleading at this stage, the majority's test additionally renders the exercise of EU rights to damages (including umbrella damages) impossible or at least excessively difficult. This is contrary to the principle of effectiveness.

39. The majority also erred in rejecting the informational imbalances that exist in this case [201]. This was wrong in law for the reasons set out at para. 27 above. The point made at [201] that these are follow-on claims is true, but it is irrelevant when considering the informational deficit on the part of the claimant on aspects of causation.

40. The majority's test for pleading market-wide harm requires a level of granularity in a pleading that is not only unrealistic but also unnecessary for a pleading to survive the strike-out threshold. In particular:

    a. The majority criticises the failure in the pleadings to identify with precision the increased costs caused by adverse selection risk, how those costs can be separated from other costs incurred by FX market participants, or on what basis it is said that those costs are passed on in the form of increased spreads: [238(3)(iv)-(vii)] and [239]. This is an unnecessary, undesirable and unrealistic level of particularity for

a pleading at this early stage of proceedings. These are matters that can and should properly be addressed in evidence at a future stage of the proceedings.

b. Many of the matters which the majority asserts should be addressed in the pleadings are responses to points which could be expected to be raised by way of defence. For example, the majority states at [239(2)] that it was not evident how a widening of the bid-ask spread could be sustained unless the market in question was uncompetitive or otherwise inelastic. Mr Evans submits that a pleader does not need (and should not be required) to plead that the FX market was relatively inelastic in order to contend the fact of increased costs through adverse selection risk, as the latter encompasses the former. If there are background conditions required to make the causation case good, which the Proposed Defendants want to show did not exist, that is for them to raise in their defences. It is not for the Tribunal to pre-empt those defences.

41. Paras. 247-256 of the Evans Claim Form **[EV/1/107-110]** provide a concise statement of the relevant facts on causation (in accordance with rule 75(3)(g)). The Evans pleadings fulfil the function of a particular of claim: they clearly allow the Proposed Defendants to know the case on causation that they will have to meet: see *Design Partnership Ltd v Standard Life Assurance Ltd*, at [39], cited at [206] of the judgment. Tellingly, none of the Proposed Defendants took the view that they did not understand the case which they have to meet in the event of certification.

42. Finally, and in any event, Mr Evans submits that his pleadings comfortably satisfy the majority's (incorrect) standard for pleading market-wide harm. The majority gives two examples of pleading market-wide harm at [234(3)]:

a. A statistical correlation between infringement and effect on market spreads could be averred. This example is misconceived. That is because it would plead evidence, which is not the function of a pleading (per fn. 104 of the judgment).

b. "*The additional cost to the market of the unlawful infringements could be articulated and its transmission through the market described. This would involve the articulation of the links in the causal chain".* The latter is precisely what the Evans Application did, and did on the basis of extensive expert evidence on the FX industry, FX market microstructure and economics.

43. Mr Evans does not repeat the detailed explanation of the causal mechanisms by which the Infringements caused loss: they are set out for example at paras. 23–67 of the Evans Theory of Harm Submissions **[CAU/4/7-23]**. In short, as envisaged by the majority at [232] of the judgment, the Evans Application pleads:

    a. identifiable claimants: members of Class A and Class B;

    b. identifiable defendants: the Proposed Defendants; and

    c. two plausible causal mechanisms by which the harm was alleged to have been caused to the PCMs (tacit coordination of wider bid-ask spreads and increased adverse selection risks in the inter-dealer market).[16] As already noted, both mechanisms were grounded in expert evidence.

44. In conclusion, Mr Evans submits that the majority erred in law in applying an unduly high standard for an adequate and properly particularised pleading on causation.

Conclusion

45. Mr Evans therefore respectfully applies for permission to appeal from the judgment on the grounds set out above. Mr Evans considers that there are no particular circumstances which render a hearing necessary or desirable in order for the Tribunal to determine his request for permission to appeal. Should the Tribunal consider that a hearing is required, however, Mr Evans would of course be willing to make brief oral submissions as necessary at the hearing on 5 May 2022.

AIDAN ROBERTSON QC

VICTORIA WAKEFIELD QC

DAVID BAILEY

SOPHIE BIRD

21 April 2022

Signed: 

Name: Phillip Evans

Date: 21 April 2022

[16] For completeness, Mr Evans' claim also includes harm from less competitive market conditions, but this is contingent upon the tacit coordination mechanism of harm.