Made on behalf of:	**Applicant/Proposed Class Representative**
Name of witness:	**Adrian Mark Chopin**
Number of statement:	**3**
Date:	**23 April 2021**

IN THE COMPETITION APPEAL TRIBUNAL **Case Number: 1336/7/7/19**

BETWEEN:

PHILLIP EVANS **Applicant/Proposed Class Representative**

and

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS PLC
(4) BARCLAYS EXECUTION SERVICES LIMITED
(5) CITIBANK, N.A.
(6) CITIGROUP INC.
(7) MUFG BANK, LTD
(8) MITSUBISHI UFJ FINANCIAL GROUP, INC.
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) JPMORGAN CHASE BANK, N.A.
(12) JPMORGAN CHASE & CO
(13) NATWEST MARKETS PLC
(14) THE ROYAL BANK OF SCOTLAND GROUP PLC
(15) UBS AG **Proposed Defendants**

THIRD WITNESS STATEMENT OF ADRIAN MARK CHOPIN

I, **ADRIAN MARK CHOPIN,** of Bench Walk Advisors LLC, 5 Cheapside, London EC2V 6AA, **WILL SAY AS FOLLOWS:**

1. As explained in my first witness statement, dated 10 June 2020, I am a Managing Director of Bench Walk Advisors LLC (**Bench Walk**), the asset manager of Bench Walk Capital LLC, which, in turn, wholly owns Donnybrook Guernsey Limited (the **Funder**), through which Bench Walk is funding Mr Evans's proposed collective proceedings. I am authorised to make this statement on behalf of the Funder.

2. This is my third witness statement in these proceedings. I make it in response to the Proposed Defendants' Joint CPO Response dated 26 February 2021 (the **Joint Response**) and specifically to explain the impact on Mr Evans's funding arrangements if the claim were to be certified as

opt-in collective proceedings.

3. I confirm that, unless otherwise stated, the contents of this witness statement are within my own knowledge, and are true to the best of my knowledge, information and belief. Where the facts are not within my own knowledge, I have indicated my sources of information or belief.

4. I also confirm that, for the avoidance of doubt, in giving this statement I do not disclose any information that is subject to legal professional privilege, nor is any waiver of such privilege intended by this statement**.**

5. I have maintained the definitions adopted in my first witness statement below.

Funding of opt-out collective proceedings

6. An important feature of the opt-out collective proceedings regime is the use of undistributed damages (i.e., the remainder of any damages award not claimed by class members after the distribution process is complete) to pay funding costs and fees. Under Rule 93(4), the Tribunal "*may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings*."

7. This is advantageous for class members because, unlike funding structures for other types of legal proceedings in England and Wales, they do not have to pay a share of any proceeds they recover towards funding costs and fees. Instead, the funder is paid only if there are sufficient proceeds remaining after distribution of damages to class members.

8. From a funder's perspective it means that, in addition to the usual risks of funding litigation, funders face the risk that such a large proportion of damages is distributed that there remains insufficient funds to pay the funder its fee. This risk is material and an important part of our risk analysis where we are funding any opt-out claim.

9. There are no UK precedents for assessing take-up rates by class members in UK collective actions, because no collective proceedings have been certified yet. But Bench Walk has sought to quantify this risk by obtaining data from two claims administrators, a continental European funder, an Australian law firm and a US law firm on the historical level of unclaimed damages in class actions in various other jurisdictions. These data show a wide variation in take-up rates across claim types and jurisdictions. By way of example, one of the sources Bench Walk has considered is a July 2017 report by Option Consommateurs, a Canadian consumer association,

entitled '*Class Actions: How can take-up rates be improved*?'.[1] This paper analysed 16 Canadian consumer class actions between 2001 and 2016, with take-up rates ranging from 18.2% to 100% (although the study stipulates that the 100% take up rates are in respect of claims where group members were compensated automatically). The average take up rate was about 60%.

10. The risk of insufficient undistributed damages and the paucity of available data in this jurisdiction are of real concern to funders when evaluating whether to fund UK "opt out" claims. By way of example, I have recently been considering funding another, entirely separate, opt-out claim in the Tribunal and have been discussing co-funding that claim with a second funder. That other funder recently informed me that, although the case is strong on the merits and would otherwise be attractive for funding, the co-funder was not inclined to invest because it is not comfortable with the risk that, on successful conclusion, the undistributed portion of the damages may be insufficient to cover the joint funders' fee.

Funding arrangements in these proceedings

11. As explained in paragraph 75 of Mr Evans' first witness statement, the Funder has agreed to fund these proceedings in return for a fee which is to be paid, subject to the Tribunal's permission, out of any undistributed damages

12. The Funder's risk assessment of this claim included taking the estimated aggregate damages that might be awarded in favour of the members of the proposed classes at the conclusion of the proceedings and applying a discount to account for the portion of the class members who would claim their entitlement to a share of those damages. Using the data sources I have identified in paragraph 9 above and the estimated take-up rate by claim volume in the US FX class action (32-35%) the Funder's assumption is that the take up rate in these proceedings would be in the range of 35-50%.

13. The estimates of the total aggregate damages are set out in paragraph 274 of the Amended Collective Proceedings Claim Form and are derived from the preliminary estimates provided in the first expert report of John Ramirez. These estimates did not include non-UK transactions because, as Mr. Ramirez explains in paragraph 90 of his report, he limited his preliminary estimates of the volume of commerce to transactions occurring in the UK. Accordingly, the Funder's analysis of the potential aggregate damages did not include any damages relating to any non-UK class members, i.e. the opt-in class members.

[1] This report is publicly available here as of the date of this witness statement.

14. The Funder does not expect the participation of non-UK domiciled class members to have an appreciable impact on the total undistributed damages that are available for payment of costs and fees if the proceedings are successful. This is because any class members that have taken specific steps to opt into the proceedings are, by definition, active and motivated and, in my opinion, are highly likely to participate in the distribution process at the conclusion of the proceedings, even if their individual entitlement is relatively small. Put another way, I think it would defy common sense for a claimant to opt into a claim only to decline to come forward to claim damages when that claim is ultimately successful. Therefore, I have assumed that the undistributed damages in respect of the non-UK domiciled class members' claims would likely be zero in almost all instances.

Funding structure for opt in collective actions

15. As I have noted above, the LFA is drafted on the basis that, as an opt-out claim, the Funder can be paid only from undistributed damages. If the claim were to be certified instead as an opt-in claim, my view is that, for the reasons given above, the undistributed damages on successful conclusion would be zero, or as close to zero as to make no difference. In those circumstances, I consider it virtually certain that the current investment terms that the Funder has provided to Mr Evans would no longer be economically viable for the Funder and, unless the Funder could fund the claim in a different way (as I discuss below), it would seek to exercise its right to terminate the current LFA under clause 23.3, which becomes exercisable where the claim is no longer commercially viable.

16. First, to fund this claim on an opt-in basis the funding structure would need to change: the Funder would no longer provide a single LFA to Mr Evans and take a share of undistributed damages but would, instead, need every "opting-in" class member to sign up to new funding terms under which that class member would agree to pay a portion of its damages to the Funder (and similar arrangements would be required in respect of the ATE insurers' premiums and the lawyers' fees). I understand this is the structure, for example, that is being used in the CPO application for collective proceedings which has been brought by the Road Haulage Association in the Tribunal regarding the Trucks cartel.[2]

17. Since the Funder is contractually entitled to receive from each class member a portion of its proceeds upon success, the opt-in funding structure eliminates the uncertainty as to the level of undistributed damages on successful conclusion under the opt-out structure. However, the

[2] Case 1289/7/7/18, *Road Haulage Association Limited v Man SE and Others*.

opt-in structure entails its own risks as it depends on "bookbuilding" i.e., ensuring that enough class members join the claim and sign up to the funding terms to ensure that the damages, in aggregate, and the funder's fee entitlement from those aggregate damages, are large enough to make the funder's investment economically viable if the claim is successful.

18. A bookbuilding process in a large claim of this sort typically involves significant upfront and ongoing expenditure on professional third party bookbuilders to approach potential class members and claims administrators to assist with on-boarding logistics, which is not required in opt out-proceedings (at least not until the conclusion of the case when the risk has been substantially reduced). In addition, each class member's claim data must be reviewed by the experts and the legal team. These additional costs can be very significant. By way of example, I am currently assessing another potential collective action, which would be brought in the UK either as an opt-in or as an opt-out claim (or possibly both claims may be brought for slightly different types of class members). The budget for the opt-in claim is more than 50% higher than the budget for the substantially similar opt-out claim.

19. In addition, in my experience class members with the largest individual claims often request a discount to the funding terms offered by the funder in order to join an opt-in claim. Also, an "opt in" class will always be smaller than the equivalent "opt out" class unless 100% of members opt in, which is extremely unlikely in a case such as this claim where the class size is likely to number in the tens of thousands.

20. The combination of an increased budget and a smaller overall claim will increase a funder's economic risk, all else being equal. An increased funder's fee may compensate for some of that risk although, as stated above, larger class members will often request a reduction to a funder's funding terms in order to join a group. As a result, a funder may not be able to compensate for this risk by increase its funding fee.

21. To mitigate some of the increased risk of an opt-in claim, I anticipate that the Funder would seek to include in the new funding agreement a right for the Funder to cease funding the claim if, by a given date or stage in the claim, the aggregate claim value in respect of the claims of all class members who have signed up to the funding terms is not at least equal to a stipulated threshold level. There may be multiple threshold levels applicable at different times or stages. These thresholds ensure that the Funder is not required to continue funding the opt-in claim even where the claim is not commercially viable because the overall value of the claim is too small to pay the Funder its fee upon success.

22. It is very difficult to state, without running a full risk assessment, where exactly those trigger

levels may be set. It depends on a number of factors, including the quality of data provided by the class members to support the quantum of their claim, the funding fee that the Funder anticipates can be charged (which involves, among other things, an assessment of whether there are actual or potential competing claims that may impede the bookbuild and/or offer lower funding terms and how well-resourced those competing claims are) and the discounts expected to be requested by larger claimants and the anticipated budget, including bookbuilding costs.

23. I note, also, that this model is necessarily economically worse in all circumstances for those class members who sign up to the funding terms than the opt-out model where, on success, those same class members could claim their share of damages without any deduction for the funder's fee, the ATE premiums or the lawyers' fees.

The LFA budget

24. As Mr Evans explains in Evans 2, the Funder has agreed to increase the LFA budget to cover additional pre-CPO costs that were not contemplated when the budget was originally prepared.

25. The Funder appreciates that in complex proceedings such as these, it is necessary to keep the litigation budget under review throughout the proceedings. I agree with Mr Evans' assessment that it is sensible to review the budget after certification. If Mr Evans and his legal team reasonably believe it is necessary to increase the budget at that stage, I will be entirely supportive of the request and have already obtained "in principle" approval for Bench Walk Capital to make further funds available if and when required.

26. One area where I expect it may be appropriate to vary the budget following certification is to increase the provisions for Mr Evans to acquire additional ATE insurance. The need for any such insurance is difficult to assess at this stage of the proceedings, given that the Proposed Defendants have not provided any information about their costs. However, I am highly confident that the Funder will provide any additional funding necessary following certification to ensure that sufficient ATE insurance remains in place throughout the remainder of the proceedings.

27. I have worked with closely with the ATE insurance market throughout my time working in litigation funding and I know the market and many of its main players very well. Based on this experience, I am confident that there will be no difficulties for Mr Evans to obtain additional ATE insurance following certification, should this be necessary. There are two main reasons for this. First, I expect that insurers will view the case as having a lower risk profile once it has

crossed the certification hurdle. Secondly, if the O'Higgins PCR's CPO application is not certified, then I would expect additional ATE insurance capacity (currently bound to the O'Higgins PCR) to be released back into the market. I have already had informal conversations with certain insurers and brokers to this effect.

Maximising the amount and distribution of damages

28. I have considered paragraphs 91 – 103 of Evans 2, in which Mr Evans discusses the steps he intends to take to maximise the amount and distribution of damages to the proposed classes, and confirm that I agree to the extent that these paragraphs relate to matters within my knowledge. As I stated in paragraph 17(d) of my first witness statement, it is important that Mr Evans' funding arrangements not interfere with his ability to act in the best interests of the proposed classes. I am fully supportive of any proposals that Mr Evans wishes to implement for the purpose of safeguarding the distribution process and ensuring that damages be distributed to members of the proposed classes to the fullest extent. More broadly, it is in the Funder's interest to promote the integrity of the settlement and distribution processes, because the Funder wishes to participate successfully in other collective proceedings in the Tribunal.

29. My general approach in all litigation in which I am involved as a funder is to leave day-to-day management of the proceedings to the client and the legal team, with the funder playing the role of silent partner. Accordingly, the Funder has not sought to take, and will continue not to take, an active role in the management or control of these proceedings, which I leave to be handled by Mr Evans and his legal team.

Undistributed damages scenarios

30. I have considered the spreadsheet exhibited to Maton 4 at Exhibit AJM16 regarding potential sums that might be sought by Mr Evans from undistributed damages in respect of his unrecovered costs under various scenarios, and confirm that I assisted with its preparation and agree with its contents.

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: 

Date: 23 April 2021