Neutral citation [2022] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1329/7/7/19
1336/7/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 March 2022

Before:

SIR MARCUS SMITH
President
PAUL LOMAS
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

Applicant / Proposed Class Representative

- and -

BARCLAYS BANK PLC AND OTHERS

Respondents / Proposed Defendants

- and -

MUFG BANK, LTD AND ANOTHER

Proposed Objectors

AND BETWEEN:

MR PHILLIP EVANS

Applicant / Proposed Class Representative

- and -

BARCLAYS BANK PLC AND OTHERS

Respondents / Proposed Defendants

Heard remotely on 12, 13, 14, 15 and 16 July 2021 with subsequent written submissions received on 24 September 2021 and on various dates in October and November 2021

JUDGMENT (CERTIFICATION, BASIS OF CERTIFICATION AND CARRIAGE DISPUTE)

APPEARANCES

Mr Daniel Jowell QC, Mr Gerard Rothschild, Ms Charlotte Thomas and Mr Shail Patel (instructed by Scott + Scott UK LLP) appeared on behalf of Michael O'Higgins FX Class Representative Limited.

Mr Aidan Robertson QC, Ms Victoria Wakefield QC, Mr Benjamin Williams QC, Mr Jamie Carpenter QC, Mr David Bailey and Mr Aaron Khan (instructed by Hausfeld & Co. LLP) appeared on behalf of Mr Phillip Evans.

Mr Mark Hoskins QC (instructed by Baker & McKenzie LLP) appeared on behalf of the Barclays Respondents in Cases 1329 and 1336.

Mr Tony Singla QC (instructed by Allen & Overy LLP) appeared on behalf of the Citibank Respondents in Cases 1329 and 1336.

Ms Sarah Ford QC and Ms Daisy Mackersie (instructed by Slaughter and May) appeared on behalf of the JPMorgan Respondents in Cases 1329 and 1336.

Mr Josh Holmes QC and Mr Tom Pascoe (instructed by Macfarlanes LLP) appeared on behalf of the NatWest/RBS Respondents in Cases 1329 and 1336.

Mr Brian Kennelly QC, Mr Paul Luckhurst and Ms Hollie Higgins (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the UBS Respondent in Cases 1329 and 1336.

Ms Ronit Kreisberger QC and Mr Thomas Sebastian (instructed by Herbert Smith Freehills LLP) appeared on behalf of the MUFG Respondents in Case 1336 and Proposed Objectors in Case 1329.

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Part I: INTRODUCTION

1. Two applications for an opt-out collective proceedings order (**CPO**[1]) pursuant to section 47B of the Competition Act 1998 (the **1998 Act**) have been filed at the Tribunal seeking to combine follow-on claims for damages arising from two separate infringement decisions of the European Commission (the **Commission**), both adopted on 16 May 2019. These infringement decisions are respectively Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express). We shall refer to each as a **Decision**, respectively the **Three Way Banana Split Decision** and the **Essex Express Decision**, and together, the **Decisions**.[2]

2. The first application was filed on 29 July 2019 and is brought, as proposed class representative (**PCR**), by Michael O'Higgins FX Class Representative Limited (respectively, the **O'Higgins Application** and the **O'Higgins PCR**). The O'Higgins PCR is a special purpose vehicle incorporated specifically for the purpose of bringing the proposed collective proceedings. Its sole director and member is Mr Michael O'Higgins, whose most recent professional position was Chairman of the Channel Islands Competition and Regulatory Authorities.

3. The second application was filed on 11 December 2019 and is brought by Mr Phillip Evans as PCR (respectively, the **Evans Application** and the **Evans PCR**). Mr Evans is a former Panel Member and Inquiry Chair at the Competition and Markets Authority.

4. In the Decisions, both of which were adopted pursuant to the settlement procedure, the Commission found that various major banking groups had infringed Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) and Article 53 of the Agreement on the European Economic Area (**EEA**) by participating in a single and

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[1] A list of the terms and abbreviations used in this Judgment, together with the paragraph in which that term/abbreviation is first used, is at Annex 1 hereto.

[2] Since the hearing, there has been a further decision of the Commission on 2 December 2021 in Case 40135 – FOREX Sterling Lads, along similar lines to these Decisions. Although, clearly, this latest decision might result in applications similar to the present, our Judgment is limited to the Decisions.

continuous infringement covering the whole EEA in foreign exchange (**FX**) spot trading of **G10**[3] currencies. Where necessary, those banking groups are referred to in this Judgment by the following shorthand names: Barclays, Citibank, JPMorgan, MUFG, NatWest/RBS and UBS, collectively the **Respondents**. Each Decision concerns a separate, not the same, single and continuous infringement.

5. The Three Way Banana Split Decision was addressed to entities in the Barclays, Citibank, JPMorgan, NatWest/RBS and UBS groups and the infringement the subject of the Decision was found to last from 18 December 2007 to 31 January 2013. The Essex Express Decision was addressed to entities in the Barclays, MUFG, NatWest/RBS and UBS groups and the infringement the subject of the Decision was found to last from 14 December 2009 to 31 July 2012.

6. The Respondents to the O'Higgins Application and the Evans Application are addressees of one or both of the Decisions and are the same, save that the O'Higgins Application has not been brought against any MUFG entities.

7. We shall, where appropriate, refer to both applications as the **Applications**, and to both the O'Higgins PCR and the Evans PCR as the **Applicants** or **PCRs**.

8. As we have described, the O'Higgins Application was filed on 29 July 2019 and the Evans Application on 11 December 2019. The intention, on the part of the Evans PCR, to file an application was foreshadowed before the application was actually filed. That was, we infer, because of a case management conference which took place on 6 November 2019, at which various directions in the O'Higgins Application were made. In order to ensure that directions were made in light of the intention on the part of the Evans PCR to make an application, the representatives of the Evans PCR made their intention clear shortly before that case management conference.

9. After the Evans Application was filed, the two Applications were case managed together, and various case management hearings took place in order to ensure the proper

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[3] The G10 FX currencies concerned by the Decisions comprise USD, CAD, JPY, AUD, NZD, GBP, EUR, CHF, SEK, NOK and DKK i.e. 11 currencies altogether, which corresponds to the market convention for currencies covered by the G10 designation.

hearing of the Applications. It is unnecessary to describe these in any detail, save to refer to an application made by both PCRs for a preliminary issue. Specifically, both PCRs contended that the question of carriage (i.e. which PCR should be permitted to take the collective proceedings forward, assuming that those proceedings were permitted to go forward) should be determined before the question of certification (i.e. whether the Tribunal should permit the collective proceedings the subject of either Application to proceed at all).

10. We shall refer to these two separate questions as the **Certification Issue** and the **Carriage Issue**. There is, as we shall come to describe, an inter-relationship between these two issues, in the sense that the Carriage Issue does not arise unless the Tribunal were minded to certify at least two applications for CPOs that cannot stand together (because, e.g. of overlapping class members).

11. The Tribunal refused to order the preliminary issue sought by both PCRs, for reasons set out in a decision cited as [2020] CAT 9, and which we will refer to as the **Timing of Carriage Dispute Decision**. As a result of our refusal to hear the Carriage Issue in advance of the Certification Issue, both the Certification Issue and the Carriage Issue were before us at the substantive hearing of the Applications in July 2021.

12. In addition to the Certification Issue and the Carriage Issue, we should mention one other issue, which is what we shall term the **Opt-in v. Opt-out Issue**. This issue concerns the question of whether – assuming the proceedings are certified to proceed – they should proceed on an "opt-in" or an "opt-out" basis. We shall explain the meaning and significance of these terms of art in the course of this Judgment.

13. The Applications were heard rather later than we would have liked. This was because it was necessary to await the decision of the Supreme Court in *MasterCard Inc v. Merricks*, [2020] UKSC 51 (***Merricks***), to which we will be making reference in this Judgment.

Part II: AN OVERVIEW OF THE LEGAL FRAMEWORK

A. INTRODUCTION

14. The statutory regime governing CPOs was introduced by the Consumer Rights Act 2015 (the **CRA 2015**), which inserted various provisions into the 1998 Act, with effect from 1 October 2015.

15. The relevant provisions can be characterised under the heads of: *(i)* provisions going to the Certification Issue; *(ii)* provisions going to the Opt-in v. Opt-out Issue; and *(iii)* provisions going to the Carriage Issue.

B. THE CERTIFICATION ISSUE

16. Section 47B of the 1998 Act now provides, so far as material:

> "(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").
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> (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
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> …
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> (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
>
> (5) The Tribunal may make a collective proceedings order only –
>
> (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings.
>
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
>
> …
>
> (8) The Tribunal may authorise a person to act as the representative in collective proceedings—

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

…

(11) "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except—

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

17. Accordingly, two conditions must be satisfied before the Tribunal may make a CPO:

(1) The claims must be considered by the Tribunal to raise the same, similar or related issues of fact or law and to be suitable to be brought in collective proceedings (section 47B(6) of the 1998 Act) (the **Eligibility Condition**); and

(2) The PCR must be authorised by the Tribunal on the basis that it is just and reasonable for that person to act as a representative in the collective proceedings (section 47B(8)(b) of the 1998 Act) (the **Authorisation Condition**).

18. The Eligibility Condition relates to the claims that may appropriately be certified as eligible for inclusion in collective proceedings, whereas the Authorisation Condition relates to the person who may appropriately be authorised to bring a collective action.

19. The provisions of section 47B and the distinction between the Eligibility Condition and the Authorisation Condition are clearly reflected in rule 77(1) of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**) which provides that:

"The Tribunal may make a collective proceedings order, after hearing the parties, only –

(a) if it considers that the proposed class representative is a person who, if the order were made, the Tribunal could authorise to act as the class representative in those proceedings in accordance with rule 78; and

(b) in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with rule 79."

20. As is clear from rule 77(1), rule 78 deals with the Authorisation Condition (see rule 77(1)(a)) and rule 79 deals with the Eligibility Condition (see rule 77(1)(b)). We will come to the specific provisions in these rules in due course.

C. THE OPT-IN V. OPT-OUT ISSUE

21. Section 47B(7) of the 1998 Act provides that:

"A collective proceedings order must include the following matters –

(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,

(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and

(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings …"

22. Opt-in and opt-out collective proceedings are further defined in sections 47B(10) and (11):

"(10) "Opt-in collective proceedings" are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.

(11) "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except –

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who –

(i) is not domiciled in the United Kingdom at the time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

23. A CPO must state:

(1) The outcome of the Tribunal's determination of the Authorisation Condition (section 47B(7)(a)).

(2) The outcome of the Tribunal's determination of the Eligibility Condition (section 47B(7)(b)).

(3) The nature of the collective proceedings – that is, whether they are "opt-in" or "opt-out" (section 47B(7)(c)).

24. The matter identified in paragraph 23(3) above makes clear that a CPO must state the outcome of the Tribunal's consideration of the Opt-in v. Opt-out Issue. Section 47B says nothing as to how the Opt-in v. Opt-out Issue is to be determined. More is said in the Tribunal Rules, to which we will come.

D. THE CARRIAGE ISSUE

25. The Carriage Issue is not separately addressed in the provisions that we have described so far. We will describe the relevant Tribunal Rules in due course.

Part III: MATERIALS AND EVIDENCE BEFORE THE TRIBUNAL

26. We heard the Applications over five days in July 2021. There was, prior to this, a "teach-in" regarding the economics which underlie both Applications, which took place on 21 June 2021. After the substantive hearing, there were significant further written submissions, which are described more fully later on in this Judgment.

27. The claims that the Applicants seek to advance are complex and substantial, and that was reflected in the material before us. Matters were not helped by the unavoidable fact that this is a relatively new jurisdiction. All of the parties – including in particular the Applicants – were concerned to ensure that the Tribunal did not want for material on points that might be considered relevant. Nor did the Tribunal consider it appropriate – for the same reason – to give robust direction as to what material might and might not assist in determining the Applications. With time the process will become more streamlined.

28. It is thus unsurprising – given the novelty of the jurisdiction, the nature of the claims and the matters in issue – that the material adduced before the Tribunal was vast. It

comprised a combination of pleadings/applications,[4] written submissions, and evidence. The material is listed in Annex 2 below, together with a brief description of the material and the abbreviations we use to refer to it in this Judgment, where such reference is necessary.

29. Over the course of these five days, we heard first from the Applicants – Mr O'Higgins for the O'Higgins PCR and Mr Evans as the Evans PCR. It seemed to us appropriate – given their status as Applicants – that we hear from them and have the opportunity ask them questions. We did not consider it appropriate to swear them – for they were not giving evidence. We are very grateful to them for appearing before us.

30. We then heard opening submissions from the Applicants' various counsel, followed by evidence from the Applicants' experts. These experts were sworn (or, rather, they affirmed) and gave evidence thereafter. This evidence – as with all parts of the process – was the subject of strict timetabled limits. Thus:

    (1) The experts called by the O'Higgins PCR were cross-examined by the representatives of the Evans PCR (first) and the Respondents (thereafter) and then re-examined by counsel for the O'Higgins PCR. The O'Higgins PCR's experts were:

        (i) Professor Francis Breedon, a Professor of Economics and Finance at Queen Mary University of London.

        (ii) Dr B. Douglas Bernheim, the Edward Ames Edmonds Professor of Economics and Trione Chair of the Department of Economics at Stanford University.

[4] We consider "pleadings" to be the correct term to use. As is clear from Annex 2, the Tribunal received a substantial number of documents – commencing with the Claim Forms of the PCRs – which are properly to be described as "pleadings". Those pleadings of course relate to the application for certification. However, rule 75(3)(g) of the Tribunal Rules provides that the "collective proceedings claim form shall contain … a concise statement of the relevant facts, identifying, where applicable, any relevant findings in an infringement decision", which is precisely the same wording as is used for the manner in which individual claims commenced in the Tribunal are to be articulated: see rule 30(3)(c) of the Tribunal Rules.

(2) The experts called by the Evans PCR were cross-examined by the representatives of the O'Higgins PCR (first) and the Respondents (thereafter) and then re-examined by counsel for the Evans PCR. The Evans PCR's experts were:

(i) Professor Dagfinn Rime, a Professor of Finance at the BI Norwegian Business School in Oslo, Norway.

(ii) Mr Richard Knight, an expert in FX markets and FX trading with more than 25 years' experience who, from 1988 to 2013, held a variety of roles in FX sales for major global banks.

(iii) Mr John Ramirez, a Managing Director of Econ One Research Inc., an economic consulting firm headquartered in Los Angeles, California with offices throughout the United States, who has worked for 18 years on competition matters in the United States, Europe and Asia and whose area of specialisation include economics and statistics, the analysis of economic, financial and other business issues that arise in litigation, especially the measurement of economic damages using economic and statistical methods.

31. We found that all of the experts were seeking to do their best to assist the Tribunal to resolve the Applications, and were, in all cases, extremely competent to do so. We are very grateful to them. Given that these were Applications for certification, the experts were inevitably *parti pris* in terms of their support for "their" respective Application, to which they had contributed, and which had their support. Normally – in a trial – this would be a matter for criticism. But in the case of the Applications, the experts were assisting us in resolving issues regarding claims they had themselves framed. Given the nature of the issues before us – in particular, the Carriage Issue – all experts were appropriately partisan, in a manner that would not (we consider) otherwise be appropriate at any substantive trial. We want to place expressly on the record that we consider that all of the experts gave evidence before us to the highest standards in this (for the United Kingdom, at least) unusual environment.

32. There was provision in the timetable for questioning by the Tribunal, and it is fair to say that this provision was fully utilised by the Tribunal. We wish to express our appreciation to all – Applicants, their legal teams and their experts – for the co-operative manner in which the case was presented, all the more so because the hearing was remote and not in person.

Part IV: STRUCTURE OF THIS JUDGMENT AND OUR APPROACH TO THE QUESTIONS BEFORE US

A. INTRODUCTION

33. Although perhaps not formally conceded in these terms, the Respondents' position at the hearing (at least at the outset) appeared to be that both the O'Higgins Application and the Evans Application met the hurdles that needed to be satisfied in order for each of the Applications to be certified. At the very least, the Respondents were not contending that the Applications should not be certified.

34. In other words, we were not presented with very much of an argument in relation to what we call the Certification Issue. The real battle, when the hearing began, turned on the basis of certification, or what we call the Opt-in v. Opt-out Issue. The Respondents contended that the Opt-in v. Opt-out Issue (which automatically arises where the Certification Issue is answered in the affirmative) should be resolved in favour of opt-in proceedings and against opt-out proceedings.

35. Both Applicants contended that this was, in effect, an argument against certification "by the back door". That was because neither the O'Higgins PCR nor the Evans PCR were seeking an opt-in CPO. The Applicants contended that not only was an opt-in CPO undesirable and impracticable, but also:

    (1) Declining to certify on an opt-out basis was something that would have the effect of "stifling" a perfectly proper claim that could otherwise be advanced against the Respondents. The Opt-in v. Opt-out Issue thus raised a question of access to justice under this new, collective proceedings, regime.

    (2) The Tribunal had no power to certify the proceedings on an opt-in basis, given how both Applications were framed. The Applicants' contention was, in effect,

that unless the "opt-in" option was before the Tribunal in the Applications, which it was not, this was an outcome that could not be ordered by the Tribunal.

36. We do not consider that the fact that the Certification Issue appeared to be relatively uncontentious as between the parties absolves us of the responsibility of ensuring that both Applications are appropriate to be certified. In our judgment, it is incumbent upon us to reach our own conclusion on the Certification Issue (on the basis of the material before us) ourselves. That is for the following reasons:

(1) First, section 47B(4) of the 1998 Act provides that "[c]ollective proceedings may be continued only if the Tribunal makes a collective proceedings order". Clearly, this is a matter on which the Tribunal must satisfy itself, whatever the position of the Respondents.

(2) Secondly, it is not possible to consider in any meaningful way the Carriage Issue and/or the Opt-in v. Opt-out Issue without also at least considering the factors involved in determining the Certification Issue.[5] For reasons that we shall come to, seeking to determine as self-standing questions the Carriage Issue and/or the Opt-in v. Opt-out Issue in isolation from the Certification Issue is either not going to be possible or (perhaps worse) is liable to lead us into error in failing to take account of material factors.[6]

(3) Thirdly, the Applicants' position was that the dispute regarding the resolution of the Opt-in v. Opt-out Issue was very much a proxy for a contention that the Applications should not be granted at all. Given that stance, it would be unwise – even apart from the other reasons we have articulated – to leave the Certification Issue unconsidered.

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[5] That consideration may lead to the conclusion that such factors are not, in fact, material at all.

[6] We stress that we are not saying that each and every factor relevant to the Certification Issue is inevitably also relevant to the other issues. It is perfectly possible for the factors relevant to each Issue to be different or of different weight. However, given *(i)* the inter-connectedness of the Carriage Issue, the Opt-in v. Opt-out Issue and the Certification Issue; *(ii)* the very obvious similarities between the Applications; and *(iii)* the fact that this is a relatively new jurisdiction and the first carriage dispute in the United Kingdom, we have taken care to list the factors in relation to each issue, even if we have ultimately concluded that they are immaterial. Again, in future applications, this is a process that we would hope can be streamlined.

B. IMPLICATIONS OF *MERRICKS*

(1) The general approach

37. In *Merricks*, Lord Briggs (with whom Lord Thomas agreed) gave the judgment of the majority.[7] Lord Briggs set out the history and background to the present rules and described the statutory framework at [19] to [29], and we do not repeat that analysis here. It will be necessary to consider, from time to time during the course of this Judgment, certain parts of *Merricks*. It is, however, worth quoting now from [45] of Lord Briggs' speech, as this provides a clear statement of what the collective proceedings regime is intended to achieve:

> "…Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose. The claims which are enabled to be pursued collectively could all, at least in theory, be individually pursued by ordinary claim, in England and Wales under the CPR, under the protection of the Overriding Objective. It follows that it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

38. In short, the collective proceedings regime is intended to be facilitative, to enable the vindication of claims that could (in theory) be brought individually but which (for practical reasons) are not.

(2) Requirements that must be met for certification

39. We touched upon the pre-conditions to certification in this Judgment at paragraphs 16 to 20 above. Two conditions are laid down in the 1998 Act:

(1) What we have called the Eligibility Condition;[8] and

(2) What we have called the Authorisation Condition.[9]

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[7] Lord Sales and Lord Leggatt gave a judgment disagreeing with the reasoning of the majority. Lord Kerr died shortly before judgment in *Merricks* was handed down, but had expressed his agreement with Lord Briggs' judgment: *Merricks* at [82] and [83].

[8] See paragraph 17(1) above.

[9] See paragraph 17(2) above.

40. It will be necessary to consider these two conditions in due course. The question we now address is the extent to which the "merits" – by which, in this instance, we mean the prospects of success at trial – feature in the questions we must resolve. In particular, the question arises as to whether there is a third condition, in addition to the Eligibility Condition and the Authorisation Condition: what might be called a "Merits Condition". The answer to this question is provided in *Merricks* itself:

> "59. Moving away from the general background of the law and procedure for civil claims, the following points need emphasis about the statutory structure itself. First, the Act and Rules make it clear that, subject to two exceptions, the certification process is not about, and does not involve, a merits test. This is because the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment is dealt with separately from certification. The Rules make separate provision for strike-out and summary judgment in rules 41 and 43 respectively, which applies to collective proceedings as to other proceedings before the CAT. There is no requirement at the certification stage for the CAT to assess whether the collective claim form, or the underlying claims, would pass any other merits test, or survive a strike out or summary judgment application, save that the CAT may, as a matter of discretion, hear such an application at the same time as it hears the application for a CPO: see rule 89(4). This is the first exception, but inapplicable in the present case because no such application was made.
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> 60. The second exception is that rule 79(3)(a) makes express reference to the strength of the claims, but only in the context of the choice between opt-in and opt-out proceedings. It does so in terms which, by the use of the words "the following matters additional to the matters set out in paragraph (2)", confirm that the factors relevant to whether the claims are suitable to be brought in collective proceedings do not include a review of the merits. By contrast with the conditions for certification in British Columbia, which do require that the pleadings disclose a cause of action, not even this basic merits threshold is prescribed in the UK by the Act or the Rules.
>
> 61. Secondly, the listing of a number of factors potentially relevant to the question whether the claims are suitable to be brought in collective proceedings in rule 79(2), within the general rubric "all matters it thinks fit" shows that the CAT is expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance. The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount. The hurdles (i.e., preconditions to eligibility under section 47B(5)(b) and (6)) are only that the claims are brought on behalf of an identifiable class, that they raise common issues and that they are suitable to be brought in collective proceedings: see also rule 79(1). In particular it is not a condition that the claims are suitable for an award of aggregate damages. That is only one of many relevant factors in the suitability assessment under rule 79(2).
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> 62. Thirdly, although the existence of common issues is a hurdle under section 47B(6) and rule 79(1)(b), in the sense that if none is raised the CAT may not make a CPO, it is also a factor relevant to suitability under rule 79(2). There the question is not whether there are common issues but whether collective

> proceedings are an appropriate means for the fair and efficient resolution of such common issues as are identified. At first sight this second inclusion of the common issues question under rule 79(2)(a) seems a little odd. It may contemplate a situation where a common issue may more fairly and economically be resolved by a procedure other than collective proceedings, perhaps by an individual test case. But it may also be a potential plus factor in the balance, where a common issue is ideal for determination in collective proceedings, or where all the big issues in a particular dispute are common issues. However that may be, it must certainly require the CAT first to determine, as it tried to do, what are the main issues in a particular case, and whether or not they are common issues. Unfortunately, the CAT got the common issue question wrong in relation to one of the two main issues in the present dispute, namely the merchant pass-on issue, finding that it was not a common issue at all. That was the very issue about which the forensic difficulties identified by the CAT led it to refuse certification. Thus, both the two main issues in the present dispute are common issues, whereas the CAT considered that only one of them was."

41. There is, in short, no "Merits Condition" independent of the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment. Merits may be relevant when determining whether proceedings, capable of certification, should be certified on an opt-in or opt-out basis, by reason of the express reference to the "strength of the claims" in rule 79(3)(a) of the Tribunal Rules. We will come to consider the meaning of this phrase in due course. The important point to note is that basis of certification – i.e. the Opt-in v. Opt-out Issue – was not a matter that was directly before the Supreme Court in *Merricks*, but is a matter which we will have to consider in the course of this Judgment.

C. OUR APPROACH

42. As we have noted, the *Merricks* judgment considered the Certification Issue without having to consider the Opt-in v. Opt-out Issue. That was because of the nature of the issue on appeal: at first instance, the Tribunal had declined to certify the proceedings as collective proceedings, and it was this refusal to certify that was before the Court of Appeal and thereafter the Supreme Court. The question of basis of certification, still less any question of carriage, did not arise.

43. However, when they do arise, as they do here, these questions are inseparably linked. Whilst it is possible to refuse to certify without considering the Opt-in v. Opt-out Issue (which, logically, does not arise in such a case), it is simply not possible to certify proceedings without doing so on either an opt-in or an opt-out basis. Certification – if it

is to be ordered – involves not merely the resolution of the Certification Issue but also, and inevitably, determination of the Opt-in v. Opt-out Issue.[10]

44. Lord Briggs stated that "I regard the question of certification as involving a single, albeit multi-factorial, balancing exercise in which too much compartmentalisation may obscure the true task."[11] That, if we may respectfully say so, is clearly right. The point is, we would suggest, as true of the questions related to the Certification Issue, namely the Opt-in v. Opt-out Issue and the Carriage Issue.

45. Whilst there may be cases where the questions of certification, nature of certification (i.e. opt-in versus opt-out) and carriage (where there is more than one CPO application, only one of which can go forward) can rigorously be separated and determined individually and in sequence, we are satisfied that this is not such a case.[12] More particularly, at least as regards these Applications:

(1) We regard the Opt-in v. Opt-out Issue and the Carriage Issue as intertwined. If certification is on an opt-in basis, then the question of carriage does not arise: both applications can result (if appropriate) in a CPO, even if there is an overlap between classes. It would simply be necessary in such a case to ensure that eligible persons could opt into only one and not both classes. But where, as here, both Applicants seek to be certified in respect of overlapping classes on an opt-out basis, a carriage dispute is inevitable.

(2) These questions of basis of certification and carriage, in our judgment, tend to be informed by criteria that are also relevant to the Certification Issue. Whilst we appreciate that the Respondents did not particularly seek to contend that certification in the abstract should be denied, they did contend that this was a case where (if there was to be certification) it should be on an opt-in basis. It seems to us that the factors that go towards determining whether the Eligibility

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[10] See paragraphs 23(3) and 24 above.

[11] *Merricks* at [64].

[12] Clearly, how cases and applications for CPOs are managed will turn on the facts of each particular case or application. Nothing in this Judgment is intended to fetter the approach that might be taken in different cases.

Condition and the Authorisation Condition are met, are likely also to be relevant – at least in the case of these Applications which, as we have noted, are very similar in nature – to the Opt-in v. Opt-out Issue and the Carriage Issue.

(3) Those factors are, however, likely to be relevant in providing a "comparative" or "relative" element, enabling rival applications to be assessed as against each other, and not merely according to some "absolute" criteria. The extent to which such a comparative element arises is a matter we will come to, but it is important to identify it now. Take, hypothetically, two applicants for a CPO, *A* and *B*, where *A* and *B*'s respective applications give rise to a carriage dispute. Each must separately meet the Authorisation Condition and in that sense the Authorisation Condition is absolute. It is not the case that the "least worst" applicant is regarded as satisfying the Authorisation Condition: it is perfectly possible for both applicants to fail this condition. There are thus three possible outcomes:

(i) Neither applicant meets the Authorisation Condition. Neither application can succeed. Self-evidently, no carriage dispute arises.

(ii) If, alternatively, only one applicant fails to meet the standard, which the other applicant meets, then the carriage dispute resolves itself.

(iii) If, in the further alternative, both *A* and *B* meet the Authorisation Condition, then there is a carriage dispute. It may be that, in seeking to resolve the Carriage Issue, the Tribunal should assess and have regard to which of *A* or *B* best satisfies the Authorisation Condition. It is in the case of this alternative that what we refer to as a comparative or relative element may arise.

(4) The resolution of the Opt-in v. Opt-out Issue will inform the Carriage Issue. If – and we stress that we have not lost sight of the Applicants' forceful objections to such a course – we were minded to certify on an opt-in basis, we would be able to make a CPO in relation to both applications (if it was appropriate to do so). On the other hand, if – contrary to the Respondents' submissions but as both Applicants contended – certification should be on an opt-out basis, then it was

common ground that only one of the Applications could succeed. That was because, whilst the classes framed by each Applicant differ to an extent, they clearly overlap, and overlap to a considerable degree. It is impermissible – for reasons that are obvious – to certify opt-out collective proceedings with overlapping classes, and so, if certification were to be on an opt-out basis:

(i) The carriage dispute between the Applicants would have to be resolved; and

(ii) The loser of that dispute could not be certified under the provisions of the 1998 Act.

46. Accordingly, in this Judgment, our approach will be first to identify and describe the nature and role of the various factors that may go to resolving the Certification Issue, the Opt-in v. Opt-out Issue and the Carriage Issue. This is done in Part V below. More specifically, in this Part:

(1) Section A considers the nature of the Authorisation Condition, and in particular the way in which it operates both as an absolute pre-condition to the certification of a PCR and – at least where there is a carriage dispute – as a relative test as to which of two or more PCRs should be certified as the class representative. In other words, we consider:

(i) The factors potentially relevant to a determination of the Authorisation Condition;[13] and

(ii) To which question(s) the Authorisation Condition is relevant, in particular whether it applies to the Certification Issue alone and/or also to the Carriage Issue.

[13] Throughout this Judgment, when we list factors as "relevant", what we mean is that they are factors that we ought to consider in relation to the various discretions that we are obliged to exercise to see if they matter. In short, for the reasons set out in footnote 6 above, we are striving not to miss potentially relevant factors rather than hold – *ex ante* – that they inevitably must be relevant or of material weight. As will be seen, in a number of cases, we consider factors only to conclude that they are of no or limited weight.

(2) The Eligibility Condition, like the Authorisation Condition, involves consideration of multiple factors going to the appropriateness of the proceedings being certified as collective proceedings. Section B considers the extent to which the Eligibility Condition, like the Authorisation Condition, has a relative as well as an absolute character. Clearly, claims may fail to be eligible for inclusion in collective proceedings simply because (by way of example) they are only suitable to be brought as individual claims. If so, then no CPO can be made at all – whether there is another rival application for a CPO or not. The question that is more difficult is whether – where there is more than one application for certification – the factors going to the Eligibility Condition can be taken into account as a means of differentiating between rival applications, so as to prefer one over the other(s). This question was considered – but not decided – in the Timing of Carriage Dispute Decision. At that hearing, the Applicants contended that the Tribunal should determine the Carriage Issue as a preliminary issue in advance of the Certification Issue, so as to save the costs of at least one Applicant (of the Respondents, Barclays, Citibank and MUFG supported this course of action whilst JPMorgan, NatWest/RBS and UBS took a neutral stance). We declined to do so because, as it seemed to us, it was an open question whether the Carriage Issue could be determined by reference to the Authorisation Condition alone. The Timing of Carriage Dispute Decision simply noted that the issue was a difficult one and left the matter open for later determination. As it was at least arguable that the Carriage Issues could only be determined by reference to both the Authorisation Condition and the Eligibility Condition, the Tribunal in the Timing of Carriage Dispute Decision declined to determine carriage as a preliminary issue solely by reference to the Eligibility Condition.[14] The Carriage Issue therefore falls for determination in this Judgment, and we will have to resolve the question left unresolved in the Timing of Carriage Dispute Decision, namely the factors that are relevant to the determination of the Carriage Issue.

[14] At [67] to [69] of the Timing of Carriage Dispute Decision.

(3) Section C considers the Opt-in v. Opt-out Issue and the factors potentially relevant to this issue. Section C considers:

(i) The extent to which the Eligibility Condition and the Authorisation Condition are relevant to the assessment and determination of the Opt-in v. Opt-out Issue. Whilst the Eligibility Condition and the Authorisation Condition are clearly relevant to both the Certification Issue and the Carriage Issue, it is an open question as to the extent to which they are also potentially relevant to the Opt-in v. Opt-out Issue.

(ii) The extent to which other factors – over-and-above those considered in Sections A and B – are potentially relevant to the assessment and determination of the Opt-in v. Opt-out Issue.

(iii) A jurisdictional question which arises directly out of these proceedings. That question is whether the Tribunal has jurisdiction to make a CPO on an opt-in basis, even though an applicant is seeking a CPO on an opt-out basis only. It is necessary to consider this purely jurisdictional question because (as we have described) the Applicants contended in terms that – because they were seeking certification on an opt-out basis only – this was the only type of CPO which we, as a Tribunal, could make.

47. Part V thus identifies and describes, in general terms, the factors arising for consideration according to the 1998 Act and the Tribunal Rules. Part VI considers a matter which – since the decision in *Merricks* – does not feature front-and-centre in the articulation of these factors. As we have described in paragraphs 40 and 41 above, there is no separate "Merits Condition" in the certification process. Collective proceedings, like individual proceedings, should be permitted to proceed (if they are otherwise capable of proceeding) provided there are "reasonable grounds for making the claim".[15] It is only where there are no reasonable grounds for making the claim that collective proceedings, like individual proceedings, can and should be struck out (the **Strike-out**

[15] See rule 41(1)(b) of the Tribunal Rules.

Question). Part VI considers the Strike-out Question, which involves, amongst other things, a consideration of the process by which this question came to arise before us, the pleadings, and their deficiencies. It is appropriate to consider the Strike-out Question before considering in detail the relevant factors going to certification. This is because the answer to the Strike-out Question has a potentially significant bearing on *(i)* the Certification Issue, *(ii)* the Carriage Issue, and *(iii)* the Opt-in v. Opt-out Issue. The Strike-out Question is considered in Part VI for the following reasons:

(1) If either or both of the Applications is struck out, then the struck-out Application cannot (self-evidently) succeed. The Certification Issue will not have to be resolved against that Application.

(2) If one of the Applications were struck out but the other not, that would have the incidental effect of resolving the Carriage Issue in this case.

(3) As Lord Briggs recognised, the Strike-out Question may be relevant to the Opt-in v. Opt-out Issue. At [60] of *Merricks*, quoted in paragraph 40 above, Lord Briggs noted that "rule 79(3)(a) makes express reference to the strength of the claims, but only in the context of the choice between opt-in and opt-out proceedings".

48. Part VII resumes where Part V left off, and considers the various factors described and identified in general terms in Part V in the particular circumstances of these Applications. In Part VII, we state our findings in relation to these factors.

49. Thereafter, in Part VIII, we consider the relevance of, and (if relevant) weigh, the factors described in Part V and specifically considered in Part VII so as to reach a conclusion in relation to the three issues that arise for our determination: the Certification Issue; the Carriage Issue; and the Opt-in v. Opt-out Issue. Part VIII, in short, draws together the threads of the analysis contained in Part VII, and contains our reasoned determination

in relation to all three of these questions, adopting the multi-factorial approach described by Lord Briggs.[16]

Part V: THE RELEVANT CRITERIA IN GENERAL TERMS

A. THE AUTHORISATION CONDITION

(1) The relevant statutory provisions

50. The nature of what we have termed the Authorisation Condition is stated in paragraph 17(2) above, and is more fully set out in rule 78 of the Tribunal Rules. Rule 78 provides:

> "(1) The Tribunal may authorise an applicant to act as the class representative –
>
> (a) whether or not the applicant is a class member, but
>
> (b) only if the Tribunal considers that it is just and reasonable for the applicant to act as the class representative in the collective proceedings.
>
> (2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person –
>
> (a) would fairly and adequately act in the interests of the class members;
>
> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> (c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
>
> (e) where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including –
>
> (a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;
>
> (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;

[16] See paragraph 44 above.

(c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes –

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.

(4) If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class."

(2) Factors arising for consideration

51. Clearly, a variety of factors arise for consideration. Equally clearly, the relevant factors are in themselves quite open-textured, in that their boundaries and ambit are not delimited with absolute "brightline" clarity.

52. Since neither the O'Higgins PCR nor the Evans PCR is a member of the class or classes they propose to act for,[17] the real question is whether (as specified in section 47B(8)(b) of the 1998 Act and rule 78(1)(b) of the Tribunal Rules) it would be "just and reasonable" for the O'Higgins PCR and/or the Evans PCR to act as the class representative.

53. The "just and reasonable" criterion is further specified or broken down in rule 78 of the Tribunal Rules. The list of criteria contained in rule 78 is not a closed list, but it includes (certainly given the facts of the present case):

(1) Whether the PCR would fairly and adequately act in the interests of the class members. This criterion is stated in rule 78(2)(a) of the Tribunal Rules.

[17] See the O'Higgins Claim Form at paragraph 38(2); O'Higgins 1 at paragraph 28; the Evans Claim Form at paragraph 122(a); and Evans 1 at paragraph 66.

(2) The qualifications of each PCR so to act. Both Applicants made much of their respective qualifications (and in doing so suggested that the other PCR was less qualified). Whilst it may be that this question falls within the rule 78(2)(a) criterion, whether it does or not we consider it to be relevant for consideration and consider it accordingly.

(3) The fact that both PCRs are not "pre-existing bodies" within the meaning of rule 78(3)(b). Rule 78(3)(b) is itself a part of the "fair and adequate" test stated in rule 78(2)(a), but we propose to consider it separately. We also consider, under this head, the extent to which it matters that the O'Higgins PCR is a corporation, whereas the Evans PCR is not.

(4) Whether either PCR has a conflict of interest. This criterion is stated in rule 78(2)(b).

(5) The extent to which each PCR is able to pay the Respondents' costs, if ordered to do so. This criterion is stated in rule 78(2)(d).

(6) The plans for the collective proceedings prepared by each PCR. This criterion is stated in rule 78(3)(c). We include, under this head, a consideration of the legal teams and experts that each Applicant has retained.

Whilst, no doubt, other cases may raise other factors, these are the factors that were articulated before us and fall for consideration in the case of the present Applications.

(3) Absolute and relative criteria

54. We consider that the Authorisation Condition has both absolute and relative aspects:

(1) The condition is absolute in the sense that if it is not satisfied then, even if there is no other PCR, a CPO should not be made. The fact is that the suitability of the proposed representative is a necessary and important part of the collective proceedings regime and – if the Authorisation Condition is not met – then it is better for the class action not to proceed at all than for it to be progressed by an inappropriate representative.

(2) The Authorisation Condition also has a relative aspect:

(i) Where there is a carriage dispute, as here, the Authorisation Condition operates as a relative criterion, so as to enable a consideration of the relative suitability of each PCR. In this case, as we have described, only one of the Applications before us can succeed if the CPO is to be made on an opt-out basis (which, as we have said, is the order both Applicants invite us to make). It follows that even if both Applicants meet the Authorisation Condition, only one can be authorised if the Tribunal proceeds on an opt-out basis. It is, therefore, necessary to consider – using the criteria we have articulated – which Applicant is more "suitable". That involves, we consider, assessing the relative qualities of each Applicant in respect of each of the criteria going to the Authorisation Condition.

(ii) This relative aspect of the Authorisation Condition is articulated in rule 78(2)(c) of the Tribunal Rules, which provides that where there is more than one applicant seeking approval to act as the class representative in respect of the same claims, the Tribunal must consider which applicant "would be the most suitable".

B. THE ELIGIBILITY CONDITION

(1) The relevant statutory provisions

55. The nature of this condition is more fully set out in rule 79 of the Tribunal Rules. Rule 79 provides:

> "(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings –
>
> (a) are brought on behalf of an identifiable class of persons;
>
> (b) raise common issues; and
>
> (c) are suitable to be brought in collective proceedings.
>
> (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including –

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

(b) the costs and benefits of continuing the collective proceedings;

(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(d) the size and nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2) –

(a) the strength of the claims; and

(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

(4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant –

(a) under rule 41(1), to strike out in whole or in part any or all of the claims sought to be included in the collective proceedings; or

(b) under rule 43(1), for summary judgment.

…"

(2) Factors arising for consideration

56. Three factors are identified (on a non-exclusive basis) as regards the Eligibility Condition:[18]

(1) That the claims are brought on behalf of an identifiable class.

[18] Set out in rule 79(1) of the Tribunal Rules.

(2) That they raise common issues.

(3) That they are suitable to be brought in collective proceedings. This, third, factor is expanded by rule 79(2). The Tribunal shall take into account all matters it thinks fit, including the seven matters set out in rule 79(2).[19]

57. We will expand upon the nature of these factors when we come to consider the specific facts of this case.

(3) Absolute and relative criteria

58. In the Timing of Carriage Dispute Decision, the Tribunal posed the following question:[20]

> "The question is whether the Authorisation Condition and the Eligibility Condition can be determined entirely on their own terms and without reference to each other. To date that question has not arisen before the courts, for the very good reason that this is the first carriage dispute under this regime, and it is when there are rival proposed class representatives that the issue of the interplay between the two Conditions arises most acutely."

59. Clearly, if the Authorisation Condition and the Eligibility Condition are linked, they should not be considered and determined separately without careful consideration. Equally, if and to the extent that the Eligibility Condition contains what we call a relative aspect, it will be relevant to questions of carriage.

60. In the Timing of Carriage Dispute Decision, the Tribunal concluded, having considered the relevant provisions:[21]

> "In these circumstances, it simply cannot be said that the carriage dispute is, as a matter of law, a discrete matter capable of being determined as a preliminary issue. That may be the case, but it is certainly not necessarily the case. In these circumstances, ordering that the carriage dispute be heard as a preliminary issue is inappropriate."

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[19] Quoted in paragraph 55 above.

[20] At [61].

[21] At [69].

61. Clearly, and for the reasons we have given, the Authorisation Condition explicitly contains a relative element.[22] That is not so in the case of the Eligibility Condition, which contains no explicit reference to "more than one applicant seeking approval to act as the class representative in respect of the same claims".[23]

62. That said, whilst the requirements that the class be identifiable and that the issues raised be common can quite plausibly be seen as absolute "yes/no" requirements that would not permit of a relativistic analysis, the third requirement – suitability – is certainly one that contains sufficient shades of grey as to permit a relative (as well as an absolute) approach. That becomes even clearer when the individual elements of "suitability" – set out in rule 79(2) – are considered. These are criteria that turn on how the proposed collective proceedings are framed, and they lend themselves to an approach that allows one application to be evaluated as against another, which is the essence of how a carriage dispute is determined. Furthermore, as we have seen, one of the factors relevant to the Authorisation Condition is whether the PCR has a "plan". It is difficult to see how a plan for the collective proceedings can be detached from the manner in which those proceedings are framed.

63. This, we stress, is nothing to do with the merits of the proposed claims. It is perfectly possible for one proposed claim – hypothetical Claim *A* to be vaguer in terms of its class definition than hypothetical Claim *B*. If so, then that is relevant to the Eligibility Condition (rule 79(2)(e): "whether it is possible to determine in respect of any person whether that person is or is not a member of the class"). But the ability to identify who is and who is not a member of the class also affects the plan framed by the PCR, which is a relevant factor in considering the Authorisation Condition.

64. Accordingly, we conclude that when determining the Carriage Issue, the relative merits (using that term not to refer to substantive merits) of the rival applications fall to be considered on the following bases:

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[22] See paragraph 54, particularly paragraph 54(2)(ii), above.

[23] Quoting from rule 78(2)(c) of the Tribunal Rules.

(1) The Eligibility Condition and the Authorisation Condition should not, without consideration and justification, be considered in isolation. They are, as we have described, related; and

(2) Like the Authorisation Condition, the Eligibility Condition involves both absolute and relative elements.

(4) "Suitability" and the question of merits (again)

65. We described the non-existent role of a "Merits Condition" after the decision in *Merricks* in paragraphs 40 and 41 above. We will come, in due course, to the provisions concerning the Opt-in v. Opt-out Issue, where the "strength of the claims" can be taken into account.[24]

66. It is quite clear that, following *Merricks*, the question of merits is equated to the Strike-out Question and so presents a low hurdle for an application for certification to pass. This is plainly the right approach: certification and the determination of carriage disputes occur at a very early stage in the collective proceedings, when it is very difficult (to put it no higher than that) to reach a view as to the substantive outcome.[25] If there were an easy and reliable way to predict the outcomes of trials before the trials themselves took place, then trials would very quickly become redundant. Our point is that there is a reason we have trials; and that a party's or a class' right to a trial should only be abrogated in the clearest of cases.

67. We have already quoted from the judgment of Lord Briggs in paragraph 40 above. Lord Briggs clearly regarded the merits (i.e. the Strike-out Question) to be distinct from "suitability". The reason we raise this point again now is because the minority in *Merricks* – Lord Sales and Lord Leggatt – appeared to regard the merits as part of the suitability requirement:

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[24] See rule 79(3)(a) of the Tribunal Rules.

[25] The real issue is whether a claim can be determined in a reasoned, justified and objectively defensible way. Generally speaking, that can only be done at a trial, where the merits are in play, and the court sees and hears all the evidence that the parties wish to adduce. It is possible, in limited cases, to dismiss a claim sooner than trial in a reasoned, justified and defensible way: but these are exceptional cases. Strike-out is one such instance.

> "113. Clearly, if the CAT thinks it relevant when deciding on suitability to have regard in any way to the strength of the claims, it has to bear in mind that it would be wholly inappropriate at the preliminary stage of deciding whether claims may proceed by way of collective proceedings to hold a mini-trial. Furthermore, since the object of the collective proceedings regime is to facilitate access to justice for those with small but potentially meritorious claims, it would also be wrong in principle to make any consideration of the merits of the claims at the CPO stage excessively demanding, thereby preventing claimants from having enhanced access to the judicial process under the collective proceedings regime without a sufficiently good reason.
>
> 114. This point is further underlined by rule 79(4), which provides that a strike out application under rule 41 or a summary judgment application under rule 43 may be heard at the hearing of an application for a CPO. The CAT has the usual powers to strike out a claim, including if it considers that there are no reasonable grounds for making it (rule 41), and to give summary judgment for a claimant or a defendant if it considers that either of them has no real prospect of success (rule 43). Given these powers, the suitability requirement should not be interpreted as involving a test of the substantive merits of the claims which is comparable to but higher than the test that would be applicable under these rules."

68. We cite this passage because it illustrates the differences between the majority and minority approach. It is important, given those differences, for us to be clear what we understand by the phrase "suitable to be brought in collective proceedings". It seems to us that – at least for present purposes – the differences between the majority and the minority in *Merricks* are twofold:

    (1) First, Lord Sales and Lord Leggatt regarded merits as an intrinsic part of suitability. Lord Briggs did not. We are bound by Lord Briggs' approach. In any event, keeping the merits rigorously separate from other questions arising out of the Eligibility Condition and the Authorisation Condition ensures that no excessively high merits standard is applied, even inadvertently.

    (2) Secondly, and relatedly, it is not completely clear in *Merricks* whether Lord Sales and Lord Leggatt were holding that the merits standard could, in an appropriate case, involve the application of a standard <u>higher</u> than the test for striking out a case. If that was their conclusion, it is inconsistent with that of the majority judgment, and it is the majority's approach we are bound to follow.

69. Although we set out our view as to the significance of the merits in paragraphs 40 to 41 above, we have re-visited the point to make clear our understanding of the "suitable" criterion: it is one that does <u>not</u> embrace consideration of the merits.

C. THE OPT-IN V. OPT-OUT ISSUE

(1) Introduction

70. Whether a CPO should be made on an opt-in or on an opt-out basis (the Opt-in v. Opt-out Issue, as we term it) is an issue that cannot be avoided if a CPO is to be made. If proceedings are to be certified then they must be certified on one or other basis.

71. This requires (re-)consideration of the factors that we have already articulated in the preceding paragraphs,[26] as well as two additional matters that are specifically referenced. Rule 79(3) of the Tribunal Rules provides:

> "In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2) –
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

72. At the outset, the following points are worth making:

(1) Rule 79(3) forms part of what we call the Eligibility Condition which is stated in rule 79. We treat rule 79(3) separately from the rest of rule 79 because, logically, it needs to be: the Opt-in v. Opt-out Issue only arises if certification is otherwise appropriate. If, for whatever reason, proceedings should not be certified, then the Opt-in v. Opt-out Issue does not arise.

(2) Whilst it is analytically helpful to consider rule 79(3) separately, Lord Briggs' multi-factorial approach (described above) nevertheless must be borne in mind:

(i) The wording of rule 79(3) ("including the following matters additional to those set out in paragraph (2)") makes clear that the factors listed in

[26] Again, we stress that we are not saying that these factors will inevitably be relevant and of weight. In reality, we have a power to consider them but – for the reasons given in footnote 6 above – we are cautious, in this case, about dismissing these factors without more.

rule 79(2) are material for consideration. The extent to which they have weight as factors will, of course, depend on the individual case.

(ii) We consider that the factors going to the Authorisation Condition (considered in Section A above) may also be relevant for consideration. Again, this is clear from the wording of rule 79(3) ("the Tribunal may take into account all matters it thinks fit") and it seems to us that given the linkage between the Authorisation Condition and the Eligibility Condition it would be wrong to disregard such factors without more. Again, the extent to which they have weight as factors will depend on the individual case.

(3) The factors going to the Authorisation Condition and the Eligibility Condition will already have been considered for the purposes of certification. We consider that they ought to be considered again as potentially relevant and potentially of weight to resolving the logically separate Opt-in v. Opt-out Issue. Essentially, having decided that a CPO should be made, these factors ought to be considered afresh, in order to see whether they point towards certification on an opt-in basis or on an opt-out basis. In short, these factors are potentially relevant in determining a different issue, and they may have different implications or weight for that reason. As we stress repeatedly throughout this Judgment, we are not saying that these factors will always be relevant and we are certainly not saying there is an obligation to take them into account. Even if they are considered, they may not have material weight. It may be that in many cases, they can be discounted after short consideration. But they are factors that can permissibly be taken into account. In this case, because of the similarity between and similar strength of the two Applications, and the fact that this is the first carriage dispute to be determined in this jurisdiction, we make more explicit reference to these factors than perhaps in future cases will be necessary.

(2) Why the additional factors?

73. It is quite clear that rule 79(3) of the Tribunal Rules requires consideration of two factors ("strength of the claims" and "practicable for the proceedings to be brought as opt-in collective proceedings") that go beyond, or are additional to, those articulated so far.

74. These additional factors are not further defined in the legislation, and we will consider their meaning and significance both in general terms and in the context of this case in due course. But it is clear from the wording of rule 79(3) that these are factors going specifically to the Opt-in v. Opt-out Issue that the Tribunal is expected to consider (even if, on consideration, they prove to be of limited weight).

75. Before we consider the general nature of these additional factors, we need to consider and determine the jurisdictional argument advanced by the Applicants. That argument has a direct bearing on the significance of these two factors, and it is appropriate that we resolve it before attempting to articulate what these additional factors entail.

(3) Jurisdiction to certify proceedings on a basis not applied for by an applicant

(a) Introduction

76. Here we consider whether the Tribunal has the jurisdiction to certify proceedings on an opt-in rather than on an opt-out basis in circumstances where neither Applicant seeks certification on an opt-in basis. The point arises because the Applicants contended that – given the manner in which they had framed their Applications – the Opt-in v. Opt-out Issue simply did not arise.

77. The Respondents contend that, whilst they have concerns about the merits of the Applications, they consider certification to be much more defensible on an opt-in basis than on an opt-out basis. It is important to appreciate that in taking this stance, the Respondents are seeking to impose (or, more accurately, seeking to persuade the Tribunal to impose) on the Applicants a form of certification that the Applicants are explicitly not seeking and which (as the Applicants contend) will, at least in effect, stifle the Applications, with the result that these proceedings will not continue in any form:

(1) The proceedings will not be able to continue on an opt-out collective basis because, *ex hypothesi*, the Tribunal will not be certifying on that basis if the Respondents' arguments are accepted.

(2) The proceedings cannot be re-framed as individual or opt-in collective proceedings because the circumstances are such that it is not going to be possible to get sufficient individual claimants to sign up to those proceedings to make them viable.

78. The Applicants' position is that – given that they are not seeking an opt-in CPO – it is not open to the Tribunal to order certification on that basis. This narrow, but important, question, is the jurisdictional question we now determine.

79. We stress that we are only considering the question of jurisdiction, i.e. whether, in the teeth of the Applicants' objections, we can nevertheless certify on an opt-in basis. No-one disputed that (if the Applicants were wrong on the question of jurisdiction) the Applicants' stance on the basis of certification was a relevant factor to take into account in determining the Opt-in v. Opt-out Issue itself.

(b) Construction of the rules

80. The Applicants' contention was that section 47B(7) of the 1998 Act was silent on whether certification was to be on an opt-in or opt-out basis, save to state that the CPO must specify whether the proceedings were opt-in or opt-out: see section 47B(7)(c), set out in paragraph 21 above. The statute did not, according to the Applicants, mandate the Tribunal to consider any possibility which was not before it. In short, if an Applicant applied only for an opt-out CPO, the Tribunal could either:

(1) Grant the CPO on those terms; or

(2) Refuse the CPO.

81. Of course, where the other requirements for making a CPO are met, the Tribunal would not even have this choice. The Tribunal cannot, properly, refuse to make a CPO on the sole ground that the CPO is an opt-out and not an opt-in CPO. In effect, the Applicants' construction seeks to remove any discretion in the Tribunal as to the nature of the CPO

granted. The basis for that construction is simply that the relevant section – section 47B – does not explicitly state that it is the Tribunal that determines the nature of the CPO that it is minded to grant.

82. Even reading section 47B on its own, we do not consider that such an implied limit on the Tribunal's discretion in section 47B(4) exists. We do not consider that the effect of the wording of section 47B(7)(c) is simply to oblige the Tribunal to record the nature of an applicant's application for a CPO, without exercising any form of control at all.

83. Accordingly, for this reason alone, we reject the Applicants' contention on jurisdiction.

84. The Applicants' submission is further undermined by rule 79(3) of the Tribunal Rules.[27] The opening words of rule 79(3) provide that "[i]n determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit…". This expressly articulates a discretion in the Tribunal as to whether a CPO that it is minded to grant is opt-in or opt-out. If the Applicants were right about the construction of section 47B of the 1998 Act, then such a discretion could not exist in the Tribunal Rules. Neither Applicant could explain how their contention could stand in light of the express discretion framed in rule 79(3).

85. We stress, of course, that the discretion must be exercised judicially, and that the manner in which an applicant's application for a CPO is framed (i.e. whether the application is opt-in and/or opt-out) is a factor to which the Tribunal must have regard. But there can be no doubt that the power, and so the discretion, exists to find opt-in collective proceedings more appropriate even where an applicant only seeks certification on an opt-out basis (or *vice versa*). We consider the Applicants' contentions to the contrary to fly in the face of the express wording of the rules.

(c) An approach from principle

86. Strictly speaking, given our conclusion as to the meaning of the relevant provisions, it is unnecessary to consider a purposive construction of those provisions. However,

[27] Set out in paragraph 55 above.

because the discretion in the Tribunal to select between opt-in and opt-out CPOs is significant, and because further consideration is likely to shed light on the additional factors we identified in paragraphs 70 to 75 above, it is appropriate to consider the reasons the discretion exists in greater detail.

87. During the course of argument, the Tribunal asked the Applicants whether – given free choice – there were any circumstances in which an applicant would prefer an opt-in CPO to an opt-out CPO.[28] No clear or persuasive answer to that question was provided. In most circumstances, an applicant, acting rationally, is likely to prefer an opt-out CPO to an opt-in CPO. Opt-out CPOs render the administration of the proceedings far more straightforward[29] and maximise the potential recovery of the class as a whole, which (of course) is the *raison d'etre* of the applicant. By definition, the applicant is someone who will "fairly and adequately act in the interests of the class members". It seems to us that an applicant having such characteristics will almost inevitably view the collective proceedings as a "good thing" for the class, and therefore will want the class to be as large as possible. In short, viewed from the standpoint of the CPO applicant only, the choice between "opt-in" and "opt-out" collective proceedings is straightforwardly in favour of "opt-out".

88. The discretion between opt-in and opt-out proceedings exists and vests in the Tribunal not because of the interests of the applicant for the CPO but because of: *(i)* the interests of the due administration of justice; *(ii)* the interests of the proposed class (which are not necessarily the same as those of the applicant, however much the applicant might think so); and *(iii)* the interests of the proposed defendants to the class action. We expand upon the nature of these interests below:

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[28] See, for example, Transcript Day 5, pages 73*ff*.

[29] At least at the outset, because it is unnecessary to "sign up" class members. Of course, such questions will arise if the proceedings are successful, because then it will be necessary to identify recipients in the class for the purposes of distribution. So it may be that an opt-out process only postpones these costs, but it certainly makes the early stages of disputed proceedings easier to manage.

(1) *Due administration of justice.* In their judgment in *Merricks*, Lord Sales and Lord Leggatt said this of opt-out collective proceedings:[30]

> "Generally, legal proceedings may only be brought with the authority of the persons whose rights are sought to be enforced. Proceedings brought without such authority may be struck out and the person responsible for commencing them held liable to the defendant in damages. A significant innovation of the collective proceedings regime is the provision in section 47B(11) of the Act for "opt-out collective proceedings". These are proceedings brought by a representative on behalf of all the members of a class except any member who opts out by notifying the representative, in a manner and by a time specified, that his or her claim should not be included in the collective proceedings. This means that a person may become a claimant in collective proceedings without taking any affirmative step and, potentially, without even knowing of the existence of the proceedings and the fact that he or she is a claimant in them. This arrangement (which applies only to class members domiciled in the UK) is designed to facilitate access to legal redress for those who lack the awareness, capability or resolve required to take the positive step of opting-in to legal proceedings."

Opt-out proceedings are unusual in the manner described by Lord Sales and Lord Leggatt. Their unusual nature is justified for the reasons given by Lord Sales and Lord Leggatt. But it is because they are unusual that the election between opt-in and opt-out proceedings needs to be a reasoned one, controlled by the Tribunal. By this, we do not say that there is a presumption either in favour of or against opt-out proceedings. We are simply saying that, if proceedings are to be certified, because the relevant tests have been passed, the decision as to their basis (i.e. the Opt-in v. Opt-out Issue) must be a conscious and clearly articulated one.

(2) *Class members and "victims".* The focus of collective proceedings should be on those who have a claim that ought to be vindicated. Clearly, the form of action – the manner in which a claim is vindicated, whether by individual claim, opt-in collective proceedings or opt-out collective proceedings – must be informed by the interests of the victims of the wrong alleged. These victims may not necessarily align with the class of claimant articulated by a PCR. Indeed, the "victims" may very well have their own views as to how their rights should (or

[30] At [92]. We accept, of course, that this is the minority judgment: but the point is not inconsistent with that of the majority and, if we may respectfully say so, clearly right.

should not) be vindicated. The collective proceedings process must be sensitive to this. Both forms of collective proceeding impose a burden – albeit not necessarily a great one – on the members of the proposed class. One such burden is that of notifying the class representative as to the putative member's willingness or otherwise to be a member of the class. Self-evidently, the burden falls differently according to whether the action is opt-in or opt-out. The interests of the class members need to be specifically considered.

(3) *Potential defendants.* The benefits of class action regimes have been clearly articulated, not least in *Merricks*. One consequence of class action regimes is that potential defendants become exposed to claims that might not otherwise be brought. That is a benefit, not a disbenefit. However, it is necessary to be aware of the risks presented by class actions. Lord Sales and Lord Leggatt put the point this way:[31]

> "Experience in other jurisdictions, however, has also shown that a class action regime presents risks. In particular, there is a risk that speculative actions may be brought claiming large amounts of damages even where there is no realistic prospect of recovering such damages, but where the size of the claims and the heavy costs of defending the action may be used as a threat to induce defendants to settle. In introducing the new regime in the UK, the Government was alert to this risk. Immediately after the passage quoted above, its response to the consultation on options for reform continued:
>
> > "Recognising the concerns raised that this could lead to frivolous or unmeritorious litigation, the Government is introducing a set of strong safeguards…"
>
> These strong safeguards were said to include "strict judicial certification of cases so that only meritorious cases are taken forward"."

This was said in the context of the Certification Issue, with which we are not presently concerned. The point we make is that the risks articulated by Lord Sales and Lord Leggatt are greater if the collective proceedings are opt-out rather than opt-in. This is, of course, a concomitant of the leverage offered to the class

[31] *Merricks*, at [86].

by opt-out collective proceedings.[32] It is worth considering this leverage in a little greater detail:

(i) It is an unavoidable characteristic of opt-out collective proceedings in this jurisdiction that if the proceedings proceed to judgment, damages are awarded in respect of the whole class (save for those who have opted out[33]).

(ii) It is well understood that even though damages may be awarded on a whole-class basis, and notwithstanding strenuous efforts to bring the award of damages to the notice of the class, by no means all class members claim their entitlement. Indeed, other jurisdictions suggest that claims to what is, after all, "free money" are surprisingly low: if 60% of the fund created after a successful action is claimed, that represents a high rate.[34]

(iii) In this jurisdiction, the unclaimed part of the fund does not go to the class members who have come forward. Section 47C of the 1998 Act materially provides:

> "(5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part

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[32] It might be said that in articulating this issue we are expressing a prejudice or presumption against opt-out collective actions generally. That we do not consider to be correct. What we are here doing is articulating an attribute of opt-out collective actions that a court needs to be aware of. How this attribute is taken into account is a matter for later consideration. As we make clear later on in this Judgment, this attribute is a matter that feeds into the "strength" criterion that is articuled in rule 79(3)(a) of the Tribunal Rules.

[33] The opt-out regime does not apply to proposed class members who are not domiciled in the United Kingdom at the relevant domicile date. Even if the proceedings are certified as opt-out, such persons can only opt-in: see rule 82(1)(b)(ii) of the Tribunal Rules. We shall not repeat this qualification to the opt-out regime but shall take it as read throughout the remainder of the Judgment.

[34] In their financial projections, the Applicants did not project a higher level than 60%.

> of the costs or expenses incurred by the representative in connection with the proceedings."

(iv) This represents a significant difference between opt-in and opt-out proceedings. Generally speaking, opt-in proceedings will be run on a "no-win, no fee" basis, with the costs of litigation being paid out of any damages recovered by the class. Since, by definition, in opt-in proceedings the members of the class will be known – having opted in – money that would otherwise have gone to the class will go in discharge of the litigation costs. The class members will get less.

(v) The increase in risk and leverage to which we referred above is not intended to refer to this difference between opt-in and opt-out proceedings, but to the difference between opt-out proceedings that run to judgment and opt-out proceedings that settle before judgment. In the former case, the defendants pay damages assessed by reference to the entire class (i.e. by reference to all those who have not opted out). Damages not claimed go, as we have described, to charity and/or towards the discharge of litigation costs.

(vi) In the case of a settlement of opt-out collective proceedings, it is to be anticipated that the class representative would seek to negotiate a satisfactory outcome for the class which would include provision for damages as well as provision for the costs of the litigation. It would be surprising if such a settlement made provision for payment of any unclaimed sums to charity. Much more likely would be a mechanism whereby the defendants would either not pay such unclaimed damages at all or else recover back any unclaimed sums in due course. This creates an incentive on defendants to settle rather than litigate to judgment, because the sums payable on settlement are likely to be far less (around half), because of the unclaimed sums. Whilst, of course, the courts look favourably on settlements, it must be recognised that this ability to

negotiate away and not pay the unclaimed sums to charity magnifies the risk articulated by Lord Sales and Lord Leggatt.[35]

(vii) The upshot is that there is a factor in play weighing in favour of the settlement of actions that is not directly related to the merits of the claim in issue. A rational defendant faced with a weak claim will have an incentive to settle rather than litigate through to judgment that is additional to the usual incentives in favour of settlement (avoiding cost, managing risk, etc). Because litigating to trial contains the risk that damages will be far higher than if there is a settlement, a defendant will, for that reason, be less inclined to run the risk of litigating to judgment and more inclined to settle even weak claims for more than simply "nuisance" value. That, we consider, creates an incentive to bring weak claims as opt-out claims.

We are doing no more than articulating matters to which we consider the Tribunal must be alive when considering the factors relevant to the Opt-in v. Opt-out Issue. We say nothing – at this stage – of how these factors should be weighed. As Lord Sales and Lord Leggatt put it:[36]

> "A class action procedure which has these features[37] provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit. As the Court of Appeal observed in the present case, "the power to bring collective proceedings…was obviously intended to facilitate a means of redress which could

[35] Settlements are, of course, subject to careful scrutiny of the Tribunal: see sections 49A and 49B of the 1998 Act. One of the factors that the Tribunal must consider is whether the terms of the settlement are "just and reasonable". However, the extent to which the Tribunal can assess what is a just and reasonable settlement needs to bear in mind that: *(i)* the claims in issue are likely to be complex; and *(ii)* both the class representative and the defendants will be urging in favour of settlement.

[36] *Merricks*, at [98].

[37] We should be clear that Lord Sales and Lord Leggatt were not referring specifically to the point we have just made, but more generally to the class action regime under the 1998 Act. Nevertheless, the point they make is valid in this context also.

> attract and be facilitated by litigation funding": [2019] EWCA Civ 674 at [60]. Those who fund litigation are, for the most part, commercial investors whose dominant interest is naturally to make money on their investment from the fruits of the litigation."

89. For these additional reasons, the decision as to whether a CPO is made on an opt-in or an opt-out basis is not a matter that should rest absolutely with the applicant for a CPO. We consider that only very clear wording giving that decision to the applicant could compel such a conclusion. As we have noted, the legislative wording clearly places the responsibility of making this decision away from the applicant, and on the Tribunal. The matters we have just considered only serve to reinforce this conclusion.

(d) The appropriate order if an opt-out certification is inappropriate

90. During the course of argument, and in support of their contention that the Tribunal, if minded to make a CPO, must do so on an opt-out basis, the Applicants made the forensic point that the Tribunal could not order a CPO on an opt-in basis, given that neither Applicant was prepared (at least as their applications were then framed) to carry on the proceedings on that basis.

91. Although we consider the contention in support of which this argument was deployed to be without merit, for the reasons we have given, we should briefly explain why this point also is without substance.

92. If we were satisfied that a CPO should be made, but on an opt-in and not an opt-out basis, we consider that the appropriate course would be to stay the Applications for a three or four month period to give each Applicant the opportunity to consider, with their legal advisers and funders, whether they wish to make an application for an "opt-in" CPO, on the basis that (without fettering the Tribunal's ultimate decision-making ability) such an application could *prima facie* be expected to be successful. We consider that such a course would (in this hypothetical case) be more appropriate than:

(1) Refusing the Applications altogether.

(2) Making a CPO on an opt-in basis without more.

(3) Making a CPO on an opt-out basis.

(4) The nature of the additional factors to be taken into account when considering the Opt-in v. Opt-out Issue

(a) Context

93. We now return to the question posed, but not answered, in paragraph 74 above. To what end are the two additional factors ("strength of the claims" and "practicable for the proceedings to be brought as opt-in collective proceedings") relevant for consideration in relation to the Opt-in v. Opt-out Issue directed?

94. As Lord Sales and Lord Leggatt noted in *Merricks*,[38] opt-out collective proceedings are unusual in that they are brought without the authority of the persons whose rights are sought to be enforced. Normally, that would be an abuse of process: a person cannot vindicate rights he or she does not have. Opt-out collective proceedings cannot be stigmatised as abusive in this way, because they have been expressly authorised by statute. They are *ex hypothesi* proper, and to be ordered in the appropriate case.

95. The problem is, what constitutes an appropriate case? In particular, given that the Opt-in v. Opt-out Issue will only arise where certification is appropriate, what is to inform the Tribunal's discretion when determining whether proceedings that are appropriate to be certified are to be certified as "opt-in" or "opt-out"? Whilst, clearly, there are a whole range of factors that should at least be considered when determining this issue (which have been described in general terms in the foregoing paragraphs), the two additional factors set out in rule 79(3) of the Tribunal Rules are identified specifically in the context of the Opt-in v. Opt-out Issue and so ought to be regarded as intrinsically likely to be significant in determining how the discretion is to be exercised. Before we consider these additional factors specifically, it is appropriate to consider what *Merricks* says about collective proceedings generally:

    (1) In *Merricks*, Lord Briggs stated that collective proceedings are a "special form of civil procedure for the vindication of private rights, designed to provide

[38] See paragraph 88(1) above. This was, of course, the judgment of the minority, but *(i)* it is a point not addressed in the majority judgment and *(ii)* it is not inconsistent with that judgment.

access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose".[39] No doubt there were other policy considerations underlying the relevant legislation, but the parties did not take us to these considerations, and we are not independently going to speculate as to their nature. On the other hand, the Supreme Court has articulated, clearly and authoritatively, this purpose of the collective proceedings regime.

(2) Clearly, there will be many cases where a class of claimants will choose not to litigate in individual proceedings because the value at risk – the amount of the claim – is insufficiently great to justify the bringing of an individual claim. Judge Posner put the point clearly in *Carnegie v. Household International Inc* ***(Carnegie)***,[40] when he said "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for $30."

(3) Opt-in collective proceedings deal with this problem by altering the incentives to bring a claim in two important respects:

(i) First of all, claims can be pooled, and the otherwise often disabling requirement that individual loss must be proved is relaxed. In this way, the amount or value of the claim is increased, whereas the costs of the class (whilst they will doubtless be higher than in a single individual claim) are shared and become less of a disabling factor to the bringing of a claim. In short, to follow through on Judge Posner's example, a class of 17 million persons, suing for US$30 each, becomes a collective claim of substance (value at risk, hypothetically, above US$500,000,000[41]), where costs are no longer a disabling factor.

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[39] See the quotation from *Merricks* at paragraph 37 above, emphasis added here.

[40] (2004) 376 F 3d 656, 661, quoted in *Merricks* at [84].

[41] This assumes 100% opt-in, but that is of course unrealistic. But even with 10% opt-in, the claim is worth a not-to-be-sniffed at US$50 million – in contrast to the individual value at risk of US$30.

(ii) Secondly, and relatedly, the risk of costs playing unduly on the minds of individual class members is obviated. As we have noted, the costs of bringing the claim will be incurred by the class representative and his or her funders, acting on a no-win, no-fee basis.[42] Concerns about adverse costs orders are obviated by the rule that a costs order cannot be made against such a class member.

(4) Thus, opt-in collective proceedings go a long way to providing access to justice in cases where individual claims would be a non-starter. Opt-in collective proceedings achieve this without sacrificing the normal rule that a claimant must be associated with – i.e. must bring – the claim, whether that claim is individual or collective. Whilst opt-in collective proceedings are "unusual" in contra-distinction to individual claims in the respects identified in sub-paragraph (3) above, this is one unusual feature that they do not have when compared with individual claims.

(5) Opt-out collective proceedings share the unusual and class/claimant-friendly features of opt-in collective proceedings, but, additionally, opt-out proceedings:

(i) Involve the vindication of a claim without necessarily[43] having the commitment of the represented class or, often, without being known to the members of the represented class. The represented class participates through the will of another, the PCR.

(ii) Involve, as an inevitable concomitant, the additional pressure towards settlement on the defendants to the opt-out collective proceedings that we articulated in paragraph 88(3) above.

96. At the risk of stating the obvious, both opt-in and opt-out collective proceedings are concerned with access to justice, the difference between the two bases of certification

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[42] See paragraph 88(3)(iv) above.

[43] There is no reason in principle why opt-out proceedings cannot have explicit class support: the point is, however, that the claim can be pursued by the PCR without such involvement or support.

being that the former type (opt-in) has "buy-in" from the class, whereas the latter type (opt-out) does not need to have this. Of course, this has the not insignificant consequence that the damages payable if the proceedings are successful will be two or three times higher in the case of opt-out collective proceedings than in the case of opt-in collective proceedings. The two additional factors set out in rule 79(3) of the Tribunal Rules must, we consider, be important in determining whether certification of collective proceedings without buy-in of the relevant class members can be justified. As we see it, the choice between opt-in and opt-out proceedings turns on this difference. The difference may well be relevant to multiple factors – including the two being considered now. But it is this difference that must be justified when resolving the Opt-in v. Opt-out Issue.

(b) General points

97. In light of the foregoing, we turn to the additional factors set out in rule 79(3). Before considering these factors individually, we make the following more general points, which apply to both:

(1) We consider that it would be unwise to seek to elucidate the nature of these additional factors in too much detail. The drafter of the legislation has chosen to use the phrases "strength of the claims" and "practicable for the proceedings to be brought as opt-in collective proceedings" without further expansion. It is not for us, when seeking to make general points regarding these factors, to tighten, narrow or structure the statutory wording[44] save where the wording itself, read in context, provides a basis for this.

(2) We consider that, as a general proposition, the two phrases that comprise the additional factors informing the choice between opt-in and opt-out proceedings are phrases of ordinary English and need to be read in that light.

[44] We appreciate, of course, that the Tribunal Rules are a statutory instrument and not a statute, and the word "statutory" is used with that point in mind.

(c) "Strength of the claims"

98. As a matter of ordinary English, this would appear to require a "merits" assessment, where the likelihood of success at trial is gauged. However, we do not consider that "strength" can or should be read in this way, for the reasons articulated in paragraphs 65 to 69 above. We do not consider – save in extreme cases where a claim is clearly unarguable – that the outcome at trial can safely or confidently be predicted at the certification stage.

99. In reaching this conclusion, we draw support from the early case-law concerning the striking out of claims. In *Dyson v. Attorney-General*,[45] Fletcher-Moulton LJ said this:

> "To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

Although the determination of the Opt-in v. Opt-out Issue does not (unlike the striking out of a case) necessarily drive the class away from the judgment seat, in some cases (and these Applications constitute an example) the outcome of this issue may very well spell the end of the litigation. Collective proceedings may be certified, but if certified on an opt-in basis, the case may never proceed.

100. Lawyers are trained to assess the strength and weakness of cases at an early stage of the proceedings. That is typically an essential part of the service they provide to their clients. Whilst we are sure that clients will demand rational advice from their lawyers, a lawyer's advice on the merits will often contain instinctive predictions as to how a claim will be regarded by the tribunal that will ultimately hear it. Indeed, lawyers will often be predicting the likely future response of that tribunal to a particular point or issue. We consider that it would be invidious for the Tribunal to seek to emulate or be drawn into any such assessment. Whilst we could, no doubt, state our views as to the likely success or failure of the claims as articulated by each Applicant, such a statement would not, we think, be consistent with our judicial function. Our role is not to advise clients, but to

[45] [1911] 1 KB 410 at 419.

properly determine the issues and matters that come before us. We consider that claims should not be driven from the judgment seat unless the reason for doing so can be articulated in a reasoned, justified and objectively defensible way.

101. That is why the "strike out" jurisdiction works. It serves to prevent a claim from proceeding in circumstances where the cause of action is "obviously and almost incontestably bad". The Strike-out Question is an issue which can be articulated and resolved in a reasoned, justified and objectively defensible way.

102. However, it seems to us clear that "strength", within the meaning of rule 79(3)(a) of the Tribunal Rules, cannot simply be equated to the test for strike out:

(1) In the first place, "strength" is not the language of strike out. The Strike-out Question is framed in terms of there being "no reasonable grounds for making the claim", which is very different language as to whether claims are strong/weak.

(2) In the second place, the "strength" factor must be referring to a standard other than the standard for surviving strike out. Although it is possible for a claim that discloses no reasonable grounds for its being made to proceed (whether as individual or collective proceedings), that is (hopefully) the exceptional case, and not the norm. Cases that can be struck out, should be, to save the time and resources of all. That ought particularly to be the case where the claim in question (as here) is going to be expensive of both money and time (including that of the Tribunal). To equate "strength" with the test that applies in relation to the Strike-out Question would in practical terms deprive this factor of significance, making it close to redundant.

For these reasons, we do not consider that the "strength" factor can be equated with a claim that passes the strike-out test.

103. The Tribunal's *Guide to Proceedings 2015* (the **Guide**) says this at paragraph 6.39:

> "Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment

> of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. 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."

104. As a broad-brush articulation of matters that the Tribunal ought to bear in mind, the Guide is unexceptionable. In the appropriate case, the fact that class members have "signed up" to the collective proceedings may well be an indicator of "strength" of the claims and – where there is no class support – that 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.

105. The Guide is only guidance: we are bound by the 1998 Act and the Rules. To the extent that it was suggested, by the Respondents, that the Guide was articulating some sort of presumption in favour of opt-in proceedings, to be displaced only where the strength of the claims allowed, would be to place far too much weight on what is intended to be and can only be guidance. Strength of claims is only one factor – admittedly, likely to be a significant one – that needs to be taken into account. We do not consider that the words in the Guide articulate any kind of presumption against opt-out proceedings; and if they did, then we consider that the Guide would in this regard be wrong.

106. Rather, what the Guide is suggesting, rightly, is that when assessing the significance of the "strength" factor, the stronger the claim, the easier it is to justify certifying on an opt-out basis.[46] Of course, each case will turn on its own facts, and it must be borne in mind, as we have noted, that the "strength" factor of rule 79(3)(a) is only one factor amongst several to be taken into account. It is quite possible – if the other factors point in this direction – for even a weak claim to be certified on an opt-out basis.

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[46] We do note that, unlike the second factor in rule 79(3) ("practicable for the proceedings to be brought as opt-in collective proceedings"), the first factor ("strength of the claims") does not expressly correlate strength with any particular outcome. A general rule might have been articulated in the Tribunal Rules that the weaker the claim, the less inclined a Tribunal ought to be to certify on an opt-out basis, and that is not what the legislation says. Nevertheless, it does seem to us to be counter-intuitive, as a general rule, for the weakness of a claim to tell in favour of certification on an opt-out basis.

107. The Guide also states that where the infringement is already the subject of an infringement decision (as in this case), the proceedings will generally be of sufficient strength. Again, as guidance this is unexceptionable: but in this case, not especially pertinent. As we will come to describe, our issues with the strength of the claims articulated by both Applicants arise in relation to causation of harm, a matter not considered in the Decisions, which are concerned with infringement alone. Causation of loss, and certainly of the losses sought to be recovered by the Applicants, simply does not feature in the Decisions.

108. The Guide does not, however, provide any clear assistance as to what the term "strength" in rule 79(3)(a) actually means. We conclude, for the reasons we have given, that it involves a consideration of the strength of the claims that is not a conclusion on the merits (for that is properly the function and outcome of a trial), but which goes beyond the test for striking out a case (otherwise the "strength" criterion is rendered nugatory).

109. We have considered whether there are analogous cases elsewhere in the United Kingdom's procedural law that can assist in clothing "strength" with better meaning.

110. Interlocutory proceedings can require a court to do more than consider whether a claim is merely "arguable". Although Lord Diplock, in *American Cyanamid Co v. Ethicon Ltd*, [1975] 1 AC 396 (***American Cyanamid)***, sought to minimise the importance of a consideration of the merits, preferring to focus on a cost/benefit analysis of *(i)* the grant/non-grant of an interlocutory injunction and *(ii)* the efficacy or otherwise of damages/the cross-undertaking in damages as a remedy, even he accepted that in the finely balanced case "it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should only be done where it is apparent upon the facts disclosed by the evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The

court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case".[47]

111. Since *American Cyanamid*, English courts have embraced with greater or lesser enthusiasm the occasional need to consider the merits in this sense when granting or not granting interlocutory injunctions. Thus, where the interlocutory injunction will, in effect, dispose of the action finally, the court ought to give "full weight to all the practical realities of the situation to which the injunction will apply", including the "degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial".[48]

112. A greater than strike-out test also plays a role when the court is considering whether a claim falls within one or other of the "gateways" for service out of the jurisdiction. Thus, in *Four Seasons Holdings Inc v. Brownlie*,[49] Lord Sumption said this about the "good arguable case" test:

> "In my opinion [the test set out in *Canada Trust Company v. Stoltenberg (No 2)*] is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in [*Vitkovice Horni a Hutni v. Korner*]. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

113. Bearing in mind that this is a test framed in a very different context, and that the phrases "good arguable case", "plausible" and "strength of the claims" are very different, we nevertheless consider this to be a helpful guide to understanding what the "strength" factor means. "Plausible", in relation to a statement or argument means something

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[47] *American Cyanamid*, at 409.

[48] *NWL Ltd v. Woods*, [1979] 1 WLR 1294 at 1306. Of course, in such a case there will not be a trial, because the injunction will in effect be dispositive. That is not the case with many interim injunctions, and certainly is not the case where what is being considered is the Opt-in v. Opt-out Issue.

[49] [2017] UKSC 80 at [7].

seeming reasonable or probable, and we consider this to be useful (and no more than that) when considering the phrase "strength of the claims".

114. Clearly, when doing so, the Tribunal must have primary regard to the material actually before it, and must consider whether – in light of that material – the claim is "plausible" or "strong". That does not mean that the Tribunal should put out of its mind the potentiality for evidence supporting or contradicting the claims to emerge at a later stage. The Tribunal must be wary of anticipating that which – by definition – it cannot safely predict, and of condemning as "weak" that which in time may grow "strong".

115. However, it is probably a valuable exercise for the Tribunal to consider the sort of evidence that would have to be adduced by the PCR in order for a claim to succeed, so as to enable the "strength" or "plausibility" of the case as presently articulated to be gauged.

116. This approach means that considerable weight will have to be attached to the manner in which the claims are framed in the application for certification. We will come to consider the importance of pleadings in due course and will describe what the Tribunal Rules require in relation to pleadings.

117. A key purpose of the pleadings in this context is that – without pleading the evidence relied upon (which is not the function of pleadings) – they enable the Tribunal to understand what evidence will (in due course) have to be adduced in order for the claim to be successful. The probability of that evidence being adduced and what it will show will be material in assessing the "strength" of the claim or claims being advanced.

118. We make one final point in relation to how a Tribunal ought to approach the "strength" criterion. When certifying collective proceedings, it may be that the Tribunal has an effective choice between opt-in collective proceedings and opt-out collective proceedings, in the sense that both types of proceeding can viably go forward. In such a case, a finding that the strength of the claims precludes opt-out collective proceedings will <u>not</u> mean that the proceedings cease altogether. But where opt-in proceedings are theoretical only, in the sense that the reality is that the litigation will come to an end unless certification is on the opt-out basis, the "strength" factor can prevent a claim from proceeding at all, and so needs to be applied with particular care and caution.

(d) "Practicable for the proceedings to be brought as opt-in collective proceedings"

119. We turn to the second of the two additional factors.

120. "Practicable", as an ordinary English word, means, when an act, "something that can be done" or "something that is possible in practice".

121. The natural reading of the phrase "practicable for the proceedings to be brought as opt-in collective proceedings" suggests that where it is practicable for proceedings to be brought as opt-in proceedings, the Opt-in v. Opt-out Issue ought to be resolved in that way (i.e., in favour of opt-in). But, as we have also said in the context of the "strength" criterion, that is only as one factor (amongst multiple) whose weight will vary according to circumstances. We do not consider that these words oblige the Tribunal, whenever opt-in proceedings are "practicable", to resolve the Opt-in v. Opt-out Issue in this way. That is for two related reasons.

(1) First, the wording of rule 79(3) of the Tribunal Rules only provides for this factor to be taken into account as the Tribunal thinks fit. That is a discretion, and not a requirement.

(2) Secondly, opt-in proceedings may be "practicable" but nevertheless extremely onerous when compared to the opt-out alternative.

122. What of the converse case, where it is not practicable for the proceedings to be brought as opt-in proceedings, i.e. where opt-in collective proceedings are not possible in practice? As to this:

(1) The rule is silent as to the standpoint from which practicability is to be assessed. Whilst it is perfectly possible to treat practicability in the abstract and to divorce it from any particular standpoint, such an approach ceases to focus on what is possible in practice and the test becomes much more a question of what is theoretically possible. We have little doubt that any collective proceedings capable of certification are theoretically capable of being brought as opt-in collective proceedings. We do not consider that the test of "practicability" can

or should be reduced to a test of what is theoretically possible. That is not what the word "practicable" means.

(2) It is, accordingly, necessary to ask: "Practicable for whom?" In our judgment, "practicability" refers to that which is practicable from the standpoint of the members of the class concerned. This is consistent with the overall purpose of the collective action regime, and gives due weight to the fact that the reason why members of the class are not opting in needs to be taken into account.

(3) As we have described, opt-out proceedings are unusual and differ from opt-in proceedings because they can proceed with no class "buy-in". We certainly are not saying that opt-out proceedings should be refused because there is no "buy-in": that would be tantamount to denying the opt-out regime's purpose and would impermissibly thwart Parliament's intent. But we do consider that "practicable" requires an assessment of why the putative members of the class are not willing to step forward and opt in. That assessment requires consideration of the practical bars to opting-in – lack of knowledge of the infringements, ignorance of the proposed action, cost of participation versus the likely benefits of such participation.

(4) There has been a suggestion that "practicability" refers to that which is practicable from the standpoint of the applicant seeking the CPO, in this case the O'Higgins and the Evans PCRs. We do not consider that the criterion of practicability can or should be assessed through the prism of what is practicable for the PCR. That is because the collective action process is one that exists not for the benefit of the proposed representative of the class, but for the class itself. The point can be tested in the following way. Suppose an entire class were consciously and informedly to decide not to participate in opt-in collective proceedings. It would be perverse to permit this to constitute a reason or justification on the part of the PCR to contend for the proceedings to be certified on an "opt-out" basis. The proposition only has to be stated to be rejected: if the class, genuinely and informedly, does not want the proceedings to proceed, then they should not proceed. Collective proceedings are not concerned with unwilling claimants.

(5) We accept that framing matters by reference to the point of view of members of the putative class brings with it issues:

(i) The subjective intentions and thinking of the putative class members are likely to be unknown to the Tribunal. In most cases, and certainly in the case of these Applications, there will be silence from the class. That means that assessment of practicability is generally going to consist of an assessment of the practical bars to opting in. But it is important that the standpoint from which these practical bars are evaluated is clearly articulated.[50]

(ii) We do not consider that assessing practicability from the standpoint of the putative class member should require either specific evidence from or the consideration of the subjective intentions or thinking of the putative class members themselves.[51] Rather, the Tribunal is obliged to consider – from the totality of the evidence before it, however produced – whether opt-in proceedings are practicable from the standpoint of the putative or "reasonable" class member – the "class member on the Clapham omnibus".[52] In short, practicability is an objective standard, assessed by the Tribunal taking the perspective or standpoint of the putative class member.

(iii) In resolving this question, the Tribunal will obviously have regard to all of the material before it, including the evidence of the applicant – the PCR. The PCR will certainly be able to explain which class members, if any, have expressed an interest in participating and may be able to

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[50] Conversely, it will be relatively straightforward to obtain evidence of "practicability" from the PCR's standpoint. It is simply that this is the "wrong" standpoint: as we have described, a PCR will generally favour opt-out over opt-in proceedings, and the PCR is not the person on whose behalf the proceedings are being brought. So, despite the potential difficulties, we are satisfied that the standpoint of the putative class is the correct one to take into account.

[51] Although, of course, if provided, such evidence is likely to be important, and certainly should be taken into account.

[52] If we might be permitted to add to the passengers on the Clapham omnibus, listed by Lord Reed in *Healthcare at Home Limited v. The Common Services Agency*, [2014] UKSC 49. As Lord Reed said, all one is doing is defining a legal standard – or, here, framing a question in relation to a class – by reference to a hypothetical person.

explain why putative class members are, or are not, interested. (In this case, for instance, there was a suggestion that class members might not want to opt in out of fear of the reaction of the Respondents.)

(6) Moreover, in some claims the class may be diverse, with claims of very different sizes, or members with varying degrees of knowledge and experience, so that for some members the practical bar to opting in may be much higher than it is for others. The question arises in these cases as to how the test of practicability is to be applied. It seems to us that it is incumbent on the Tribunal, when considering practicability, to have regard to differences in class composition, and not to allow the fact that there are some members who are clearly able to decide for themselves about opting in to override the interests of other members for whom opting-in is not practicable. This is, we consider, a very fact sensitive question, and we would only say that the weight attaching to practicability as a factor will depend on the composition of the class and the likely size of claims of those members of the class for whom opting-in is not practicable.

123. There is, we consider, one other aspect of "practicability" that needs to be borne in mind. Paragraph 6.39 of the Guide – which we quoted in paragraph 103 above – notes that in opt-in cases, class members who have opted in "may be presumed to have conducted their own assessment of the strength of their claim". That is true. More to the point, such class members may also be able to contribute data, documents and materials that facilitate the pleading and making good of the claim: an applicant for opt-out collective proceedings may not have such material available.[53] This ability to contribute to the articulation of a claim may, in the appropriate case, render opt-in proceedings more practicable than opt-out proceedings.[54]

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[53] There are processes by way of which the Tribunal can order disclosure from any represented person (see rule 89(1)(c) of the Tribunal Rules). So a deficiency in documentation from the class can be made good through the order of the Tribunal.

[54] This is a very fact dependent matter: it is perfectly possible to have opt-out proceedings which are informed by the involvement of class members. But, whilst opt-in proceedings will inevitably require some form of concrete arrangement between the PCR and the opting-in class members, opt-out proceedings do not.

Part VI: STRIKE OUT UNDER RULE 41(1) OF THE TRIBUNAL RULES

A. INTRODUCTION

124. The Tribunal Rules make provision for the Strike-out Question. Rule 41(1) of the Tribunal Rules provides:

> "The Tribunal may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, strike out in whole or in part a claim at any stage of the proceedings if –
>
> …
>
> (b) it considers that there are no reasonable grounds for making the claim;
>
> …"

We stress that this is a very low hurdle for a claim to pass, akin to striking out under the rule 3.4(2)(a) of the Civil Procedure Rules.

125. This Part considers the following points:

(1) First, whether it is open to us to consider the question of strike out at all. We consider this question in Section B below.

(2) Secondly, if we have jurisdiction to consider strike out the Applications in this way, whether we should – of our own initiative – consider the question or whether we should refrain from doing so. This point is considered in Section C below.

(3) Thirdly, if we consider that the Strike-out Question should be considered of our own initiative – and, to anticipate, our conclusion is that we should do so – it is necessary both to understand the nature of the pleaded cases advanced by the Applicants and to be clear as to what is required of the pleadings. Ordinarily, it would not be necessary to set out the pleading requirement in any detail, for this

would be well understood. But these are novel claims,[55] and it is necessary that we be particularly careful in identifying the facts and matters that have to be pleaded. Thus, Section D below sets out the case articulated in the Applications, whilst Section E sets out the pleading requirements.

(4) Finally, in Section F, we consider and determine the Strike-out Question itself.

B. IS THE QUESTION OPEN FOR CONSIDERATION BY THE TRIBUNAL AT ALL?

126. The Evans PCR quite properly emphasised [59] of Lord Briggs' judgment in *Merricks*. Although we have quoted that paragraph in paragraph 40 above, we repeat it below with the emphases added by the Evans PCR:

> "Moving away from the general background of the law and procedure for civil claims, the following points need emphasis about the statutory structure itself. First, the Act and Rules make it clear that, subject to two exceptions, the certification process is not about, and does not involve, a merits test. **This is because the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment is dealt with separately from certification.** The Rules make separate provision for strike-out and summary judgment in rules 41 and 43 respectively, which applies to collective proceedings as to other proceedings before the CAT. **There is no requirement at the certification stage for the CAT to assess whether the collective claim form, or the underlying claims, would pass any other merits test, or survive a strike out or summary judgment application**, save that the CAT may, as a matter of discretion, hear such an application at the same time as it hears the application for a CPO: see rule 79(4). This is the first exception, but **inapplicable in the present case because no such application was made**."

127. We accept – and are obviously bound by – this statement of the law. The point Lord Briggs was making was that satisfying the test for strike out is not a pre-requisite to certification, but rather a general standard (and a low standard, at that) which all actions before this Tribunal ought to meet.

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[55] In *NTN Corporation v. Stellantis NV*, [2022] EWCA Civ 16 (***Stellantis***) at [9], Lord Justice Green observed that this was the "first occasion upon which the implications of the Judgment of the Supreme Court in *Sainsbury's Supermarkets Limited v. Visa Europe Services LLC*, [2020] UKSC 24…on mitigation by off-setting have been considered at the appellate level". As will be seen, the pleadings in this case raise very different, and yet related, questions, and we will cite from the decision in *Sainsbury's* in some detail for this reason.

128. There is, as we have noted, no application by the Respondents to strike out either of the putative claims in this case. That is – as we consider further below – a telling point, but it does not go to the question of our jurisdiction. It seems to us clear that, provided the parties have had an opportunity to be heard, the Tribunal may, of its own initiative, strike out a claim. That much is clear from the express wording of rule 41(1), the material parts of which are set out in paragraph 124 above.

129. Rule 79(4) of the Tribunal Rules goes on to provide:

> "At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant –
>
> (a) under rule 41(1), to strike out in whole or in part any or all of the claims sought to be included in the collective proceedings..."

130. We do not consider that the purpose of rule 79(4) is to preclude the Tribunal, on the hearing of an application for a CPO, from acting on its own initiative. Rather, the purpose of rule 79(4) is to make clear that an application to strike out can be entertained at the same time as application for certification.

131. Accordingly, we hold that we have jurisdiction to consider striking out the Applications under rule 41(1)(b) of the Tribunal Rules.

C. SHOULD THE TRIBUNAL CONSIDER THE QUESTION OF STRIKE OUT?

(1) The Tribunal's concerns regarding the cases articulated by the Applicants as raised during the course of the oral hearing

132. The next question is whether we should, of our own initiative, consider the Strike-out Question. That, we stress, is a question anterior to whether or not the criteria of rule 41(1)(b) are met so as to permit the striking out of a claim or application. The question is whether the Tribunal should act of its own initiative in this case or let the matter drop.

133. It was made very clear to the parties during the course of the proceedings that the question of causation (which, as all appreciated, is a necessary element of the cause of action relied upon by both Applicants) was a matter that was troubling the Tribunal.

Thus, in an exchange with the representatives of the O'Higgins PCR, the Chairman said:[56]

"The Chairman	Mr Jowell, I do not want to make too much of the merits point, because in one sense all this talk about theory of harm may not matter because it is a characteristic that is shared by both Applicants and so, in a sense, is not really going to go to assist us on the carriage dispute; and, as you have said very clearly, the certification question is articulated by *Merricks* and is, we all agree, a very low standard. So it may be that our probing in this area is going down the wrong rabbit hole. But that said, I think it is really very important, at least for my satisfaction, if nothing else, that we understand as clearly as possible how this is intended to work, because it seems to me that when one is articulating the purpose of these proceedings, it is to remedy a wrong, and that is what informs the very low standard of *Merricks*. But it seems to me to require a neat encapsulation of what that wrong is, or what that loss is, as a starting point. Now it may be that the fact that you have both brought out a series of extremely eminent professors to say "This can be done, and we will do it, but it is very difficult", maybe that is enough, and that is fine. But I think I would be assisted if the parties could provide a short reading list of the sort of financial papers that Mr Hoskins, QC has been plaguing himself with…
Mr Jowell, QC	By all means, of course…
The Chairman	…that is unrelated to the participants in this case. In other words, I would like to have some understanding of the theory that gives rise to the very clear statements in the expert report of Mr Ljungqvist[57] that you have taken us to. Because, speaking for myself, I have great difficulty in understanding how you can have independently set spreads which are out of line with the market in a market that is not dominated by large undertakings, but is actually very close to an economist's conception of perfect competition…
Mr Jowell, QC	Ah well, I think, just pausing there, I think that may be…
The Chairman	…That may be a mistake…
Mr Jowell, QC	I think that is a mistake. This is actually a rather concentrated market, surprisingly so, because the – as you can see, I think, from Professor Breedon's report, he talks about the fact that these five participants constitute about 45% of the market. Then you have got Deutsche Bank, I think that is about another 19%, so you are up to 65%, then there are a few others. So, this is actually – this is not a perfectly competitive market, this is an oligopolistic market. It is very surprising to everyone, but these are the only banks that, you know, deal in this – currencies at this kind of scale. It is a relatively small market of the really big players and that is – and

[56] Transcript Day 4, pages 118 to 120.

[57] Who was an expert in the earlier FX proceedings in the United States. Mr Ljungqvist's report in those proceedings was referred to in submissions, but he was not an expert before us, and his report was in the papers adduced by the parties.

	that is how these dealers were able to make money out of this at the expense of many others.
The Chairman	All right.
Mr Jowell, QC	I think that is a rather fundamental misconception, and the mechanism of raising rival's costs, the effect of that is that you do not have one set of dealers charging one lot of spreads and others charging others, what you have is a rising tide lifting the boats."

134. Again, in an exchange with the representatives of the Evans PCR, the point was continued:[58]

"The Chairman	Well, I suppose, the short point is this. These paragraphs, they could not be right in a world of perfect competition. I know we are not in a world of perfect competition, but as a basic proposition, would you, would the economists, agree with that?
Ms Wakefield, QC	I cannot answer on behalf of the economists, sir.
The Chairman	No, I understand. Which is why it goes back to the pleaded case. You see, I am not treating this as a pleading, but it is a very good instance of the issues we are having to grapple with.[59] It seems to me necessarily implicit in these paragraphs that you do not have something coming close to perfect competition, but that you are at the other end of the spectrum, in that you have got a configuration within the market that enables a non-competitive price to be imposed on the market. So, the issue that I think needs to be unpacked, is that kind of influence. Let me be clear: I am not sure it is completely answered by a market concentration point. A market concentration point is, no doubt, a necessary step. But let us go back to the filling station example that I articulated with Ms Kreisberger, QC.[60] You can have an oligopolistic market, three/four players holding the vast share, but it is quite possible – because of the elasticity of demand, which is not necessarily related to concentration – that if Esso put their price up by half a penny or a penny, they lose so much custom if BP or Shell do not do so, that it is not worth their while. And that is why these prices move together, as if in collusion, but not. Now, clearly, they can collude, and if they do it is very naughty and it is distortive. But that is the thing which is troubling me, that one obviously must look at concentration, but what we are looking at here is, if I am a minor bank in this market, where we are effectively talking about fungible trades and where the only metric is actually the rate and the spread, if one of the cartelists widens the bid-ask spread by three bips[61]…, why on earth do they not lose their market? Even if they have 80% of the market and the 20% minority share of the market is held by other banks. That is what concerns me.

[58] Transcript Day 5, pages 112 to 114.

[59] The Tribunal was being referred to statements made in Rime 1.

[60] One of the Respondents' counsel.

[61] I.e., basis points, one basis point being the equivalent of 1/100th of a percent.

> To be clear, just to answer in advance, but rather late in the day, Mr Jowell's point,[62] this is not a question of evidence, this is a Tribunal that is trained to deal with economic questions, and I am afraid this sort of road testing of a case is something which I think comes with an application.
> So it is not a question of there not being any evidence from the [Respondents] in response, this is us, I think, in order to be satisfied that there is something that meets the *Merricks* test, we need, I think, to be able to articulate what it is you are saying, in half a page.
> The question, after that, is is it so unarguable that it should be struck out. But I do not think we are there yet. I think we are at the stage where we have not quite unpacked what it is you are asserting must be the case in order for your claim to have legs."

135. These exchanges occurred towards the end of the oral hearing. They resulted in a letter written by the Tribunal to the parties in the immediate aftermath of the oral hearing, on 20 July 2021, to which we now turn.

(2) The Tribunal's letter of 20 July 2021

136. By the end of the oral hearing of these Applications on 16 July 2021, it was clear to the Tribunal that – in different ways – neither the O'Higgins nor the Evans Claim Form enabled the Tribunal sufficiently to understand the basis for the collective proceedings against the Respondents. Accordingly, the Tribunal wrote to the parties in the following terms on 20 July 2021 (emphasis in the original):

> "The Tribunal has been giving careful thought to the helpful and interesting exchanges between the Tribunal and the parties during the hearing and, particularly, the course of closing submissions on Friday 16 July 2021.
>
> We welcome the parties' confirmation that they will supply further material to clarify the "theory of harm" that the O'Higgins and Evans Applicants are asserting. However, it may assist the parties if the Tribunal set out its understanding as to what such further material should seek to resolve.
>
> (1) It is trite that, a party may not issue a Claim Form if that party is not in a position to articulate, with proper particularity, the nature of the claim to be advanced in a Statement of Case (e.g. *Nomura International plc v. Granada Group Limited* [2007] EWHC 642 (Comm)). Although, of course, there are exceptions, the general rule is that the framing of a case through particulars precedes disclosure, and that if a case cannot properly be framed, it must be struck out as an abuse of process.

[62] A reference to the exchange set out above.

(2) It is also trite that the claims in this case sound in tort, as a breach of statutory duty. The Applicants must, therefore, plead in a manner not susceptible of strike out, the following essential elements:

(a) Breach of duty.

(b) Actionable damage.

(c) A causative link between (a) and (b).

(3) Both Applicants reply upon the Settlement Decisions of the EU Commission as establishing a breach of statutory duty on the part of the Respondents for the purpose of 2(a). As set out in *BritNed Development Limited v. ABB* [2018] EWHC 2616 (Ch) at [427], actionable harm in cases such as this is the relatively low threshold of an unlawful restriction in, or reduction to, consumer benefit. Actual monetary loss, even *de minimis* monetary loss, does not need to be pleaded by the claimants. But the causal link to damage must be clear.

(4) The Tribunal does not consider that the causative link between 2(a) and 2(b) can be established by reference to the Settlement Decisions. The Commission – entirely unsurprisingly – did not articulate this "effect" in what were "by object" Settlement Decisions; nor did it consider the position of the putative class members (both Applicants having confirmed that they rest their case entirely on the impact on spreads across the market and not on the losses caused to the counterparties to the specific transactions that were found by the Commission to be within the infringements).

(5) Although the Collective Proceedings Claim Forms in these Applications are, naturally, very much fuller than a Claim Form in the ordinary case, they do not contain a fully pleaded Statement of Case.[63] That is not, in any sense, a criticism of the Applicants: but the importance of some kind of pleaded "theory of harm" has – in the Tribunal's present view – become clear over the course of the hearing last week as this topic was debated and as the Applicants expanded on their positions.

(6) In the Collective Proceedings Claim Forms:

(a) The O'Higgins Applicant deals with causation of loss essentially by cross-reference to expert reports (para 75);

(b) The Evans Applicant sets out a theory of harm based on spreads being widened (paras 249 to 253).

(7) The present Applications raise some specific issues:

[63] For reasons that we will come to, we consider this statement, and others like it made during the course of the hearing, to be inaccurate and wrong. We also consider the implications of the fact these statements were made by the Tribunal in the course of the proceedings.

(a) This is the first "carriage" dispute to come before the Tribunal and does so in circumstances where one issue that has to be considered (albeit at a high level) is the relative merits of the theories of harm of the Applicants;

(b) From the approach of both Applicants to date, although no doubt the parties would, at trial, produce evidence going beyond the econometric, the essence of the evidence in support of the Applications is economic/econometric/statistical. However, statistical correlation, of itself (and however useful and important for damages calculation), is not a substitute for a clearly articulated and proven theory of harm; and

(c) This is a very early example of an opt-out claim. Such claims raise particular issues as regards fairness between the putative parties; it is important that there is proper control of the procedure. Moreover, in this opt-out claim, the theory of harm is less evident than in a more classic cartel.

(8) During the hearing, the Tribunal raised various questions regarding the significance or otherwise of market concentration and the market power of the infringing banks, the impact of the individuals participating in the infringements on the behaviours of the banks that employed them (as regards moving spreads), and elasticity of demand in the market. These were to seek to understand fully the mechanism by which the Applicants allege that the infringements would have increased, rather than reduced, spreads and thereby caused loss. The Applicants' representatives gave differing answers on this point, and it seems to the Tribunal to be important that the concluded positions of the parties, and any differences in approach, be clearly stated, and properly considered, both for certification and in determining carriage.

(9) The Tribunal would, therefore, welcome the further material from the Applicants crystallising their current positions on the theory of harm in a brief but clearly articulated pleading-style manner, but with the support of their respective experts. Obliging an Applicant to set out its case clearly is, in the Tribunal's view, consistent with *Merricks* and, indeed, necessary for the *Merricks* test to be properly applied.

The parties are, of course, entirely free to point out that the Tribunal has not properly considered their existing case as articulated in the materials presently before the Tribunal and to rely on that position."

137. In response to the Tribunal's letter, each PCR submitted documents further articulating their respective cases on causation – namely, the O'Higgins Theory of Harm Submissions and the Evans Theory of Harm Submissions. The Respondents provided a joint response (the Joint Theory of Harm Response), to which each PCR then replied (respectively, the O'Higgins Theory of Harm Reply and the Evans Theory of Harm Reply). These documents were produced sequentially, but they were filed with the Tribunal in one tranche, on 24 September 2021.

138. With that introduction as to how the articulation of the Applicants' substantive claims came to the Tribunal's concern and attention, we turn to the nature of the claims articulated by each Applicant.

(3) The general nature of the claims articulated by each Applicant

139. The claims articulated by each Applicant are not straightforward. In different ways, each Applicant advances – on behalf of the respective classes that the Applicant seeks to represent – a claim for what might be called (and what we will refer to as) "market-wide" damage (or harm) resulting from or arising out of a series of infringements found to have occurred in the Decisions. We appreciate that this is not a precise label. It seeks to encapsulate forms of loss – sustained by claimants both directly and indirectly – which are diffused across a market. A textbook example of this, but which is not this case, would be where the operation of a cartel causes, through an "umbrella" effect, the prices in an entire market to rise. In such a case, identifying the manner in which the loss is transmitted through the market is likely to be challenging. It is inherent in the vagueness of the label "market wide" damage that it is liable to embrace a wide number of cases.

140. The claims as they have been articulated before us are founded on economic theory. That theory is not articulated in the pleadings, but can be derived from a careful consideration of the expert reports referenced in those pleadings (which we have listed and described in Annex 2 hereto) by a person well-versed in the relevant economics. The Tribunal is fortunate that it has the expertise to consider the implications of the Annex 2 materials.

141. These Applications concern the operation of "two-way" financial markets. In such markets, the same product (currency) is being bought and sold by dealers to the same consumers. If, in such a market, a large number of the dealers are handicapped in competing, then *(i)* that handicap may result in some form of inefficiency, which *(ii)* may result in increased or additional cost to those dealers; if so, then *(iii)* those inefficiencies/costs may cause some increase in the prices charged by the dealers to consumers generally in the form of wider "spreads". Essentially the "spread" is the

difference between the bid and offer prices quoted by a dealer. We will describe this, and other terms, in greater detail below.

142. To move from the specific to the more general, inefficiencies (whether they are anti-competitive or not) will tend to generate increased costs to users of the market.

143. An important aspect of the study of markets and competition is how undertakings deal with changes in costs. This is central to economics, where these aspects are analysed using models, simplifying assumptions and the hypothetical case. In the real world, how (and if) such costs are recovered by an undertaking is extraordinarily complex.

144. The issue, as we have come to see it in this case, is that economic theory does not, in and of itself, constitute an arguable legal claim. Moreover, economic theory does not automatically or even easily translate into a legal claim. The essential problem underlying both the O'Higgins Application and the Evans Application lies in translating a possible or theoretical phenomenon (whatever its theoretical plausibility[64]) into a series of averments capable of being tried in a court. This problem is what informed our concerns as set out in our letter of 20 July 2021, and those concerns were not assuaged by the responses we received to that letter.

145. It will, of course, be necessary to consider in detail how instances of market-wide harm can and should be pleaded. It will also be necessary to consider why the responses we received did not assuage our concerns. But, for the present, this broad-brush description of the claims in the Applications and of our concerns will suffice, for we are at this stage merely considering whether the Tribunal should consider the Strike-out Question.

(4) Should the Tribunal consider the Strike-out Question of its own initiative?

146. In these circumstances, it is necessary to consider whether we should act on our own initiative under rule 41(1)(b) the Tribunal Rules. We stress, again, that we are not

[64] As will be seen, we are perfectly prepared to ascribe a degree of plausibility to the general economic theory. It is in the translation of that theory into an arguable claim that is the problem.

determining that the claims should be struck out; the question we are debating is the anterior one of whether we should even consider this question.

147. Our short answer is that, in this case, we consider it appropriate to consider the Strike-out Question:

(1) Although the Tribunal should always keep in mind its power to act, under rule 41, of its own initiative, actually invoking that power and considering strike out of the Tribunal's own initiative[65] ought to be exceptional. That is because, generally speaking, the parties that come before the Tribunal are commercially astute and well-represented. If a commercially astute and well-represented party takes the view that it is not worth applying to strike out a claim, then that is (to our minds) a good indicator that (whilst a claim may very well fail at trial) the summary disposal of the case is not something that ought to be raised by the Tribunal of its own initiative.

(2) The Respondents in this case are exceptionally well represented (as, indeed, are the Applicants) and the fact that the Respondents have not made an application to strike out is telling and weighs heavily on us.

(3) We are also very conscious that we have not, in terms, told the Applicants that they stand in the "last chance saloon". That is very much a reflection of the complexity of the issues and the bulk of the material before us, but the wording of our 20 July 2021 letter is a consideration that also weighs heavily on us:

(i) Our letter of 20 July 2021 was clear in expressing the Tribunal's concerns regarding the claims put forward by both Applicants.[66] The

[65] We stress again that actually striking out an application or a pleading is an altogether separate step.

[66] The letter is set out at paragraph 136 above.

responses invited by our letter gave the Applicants every opportunity to be heard.[67]

(ii) However, paragraph (5) of the letter suggested that the Applications did not have to set out a fully pleaded statement of case:

> "Although the Collective Proceedings Claim Forms in these Applications are, naturally, very much fuller than a Claim Form in the ordinary case, they do not contain a fully pleaded Statement of Case. That is not, in any sense, a criticism of the Applicants: but the importance of some kind of pleaded "theory of harm" has – in the Tribunal's present view – become clear over the course of the hearing last week as this topic was debated and as the Applicants expanded on their positions."

This paragraph erroneously suggested that a fully pleaded statement of case was not a pre-requisite for a properly framed application for a CPO. Rule 75(3)(g) of the Tribunal Rules requires that a collective proceedings claim form shall contain "a concise statement of the relevant facts, identifying, where applicable, any relevant findings in an infringement decision". That requirement is exactly the same as the requirement for a pleaded case in individual claims, where rule 30(3)(c) is worded in exactly the same way. Both rule 75(3)(g) and rule 30(3)(c) draw on the similarly worded provision in the Civil Procedure Rules, CPR 16.4(1)(a).[68]

(iii) We recognise that our request, in our letter, for a further articulation of the Applicants' cases in a "brief but clearly articulated pleading-style manner, but with the support of their respective experts"[69] does not state that unless the deficiency in the pleading of causation is made good, the

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[67] It was suggested in the O'Higgins Theory of Harm Reply and in the Evans Theory of Harm Reply that the Respondents were acting opportunistically in supporting strike out in their Joint Theory of Harm Response. To be clear, we attach no weight to the Respondents' belated contention that strike out is appropriate. To the contrary, we attach considerable weight to the fact that no such application was made by the Respondents. However, all this is nothing to the point when the question is whether the Tribunal can and should act of its own initiative.

[68] CPR 16.4(1)(a) provides that "[p]articulars of claim must include…a concise statement of the facts on which the claimant relies…".

[69] Paragraph (9) of the letter.

Applications will be struck out. Of course, the reference to *Nomura* makes clear the Tribunal's direction of thought,[70] but it is entirely fair to say that the Tribunal was – at this time – more focussed on trying to understand the Applicants' respective cases than on the technical question of strike out under rule 41(1) of the Tribunal Rules. It is also entirely fair to say that the kind of discussion of the difficulties of pleading a market-wide harm case set out in the foregoing paragraphs never took place during the course of the oral hearings. Our concerns – although articulated during the oral hearing and thereafter – were altogether less focussed.

(4) Nevertheless, this is, we consider, a sufficiently exceptional case to warrant our raising and considering the question of strike out of our own initiative. It is important to appreciate how and why we have come to this conclusion:

(i) The fact is that this is not a case which has involved a brief articulation of each Applicant's case. No doubt because of the carriage dispute and the delay in hearing this application occasioned by the appeal in *Merricks* to the Supreme Court, the material that has accumulated for our consideration is vast, and includes a considerable amount of expert economic evidence seeking to justify and explain the aggregate award of damages each Applicant will seek on behalf of the classes they seek to represent. That material is listed in Annex 2, as we have described.

(ii) Obviously, it has been necessary to digest and understand the claims advanced by each Applicant. Initially, that was necessary for the purpose of determining the Carriage Dispute, for each Applicant contended (for reasons we will come to consider) that its claim was better for the classes they sought to represent. As we explored the Applicants' contentions, both in preparing for the hearing, and during the hearing itself, it became clear to us that there were substantial issues of concern in relation to both

[70] Paragraph (1) of the letter.

Applications. These issues of concern culminated in our letter of 20 July 2021.

(iii) The Applicants responded to our request for a theory of harm. We have, unsurprisingly, considered these responses with great care. If these had dispelled our concerns, without the requirement for much further consideration, then of course we would not be pursing the question of summary disposal of our own initiative. Rather, we would have ended our consideration here. But the Applicants' responses have not done so.

148. Accordingly, it seems to us that we are obliged to consider of our own initiative whether the Applicants have reasonable grounds for making the claims that they do. As we have stated, those concerns relate entirely to the question of causation. The litigation of these issues of causation is going to involve all parties in enormous expenditure of cost and time, and considerable court time. It would be irresponsible, in these circumstances, not to at least consider the Strike-out Question, and accordingly we propose to do so.

D. THE CASES ADVANCED BY THE APPLICANTS

(1) Introduction

149. The following points are considered in this Section:

(1) The "follow-on" nature of the claims articulated by the Applicants: Section D(2) below.

(2) The infringements found by the Decisions, which form the basis for the claims articulated by the Applicants: Section D(3) below.

(3) The elements of the tort alleged by the Applicants: Section D(4) below.

(4) The particular issues that arise, in relation to causation, in market-wide harm cases such as the present: Section D(5) below.

(5) The articulation of the O'Higgins class claim: Section D(6) below.

(6) The articulation of the Evans class claim: Section D(7) below.

We deal with these points in turn in the paragraphs which follow.

(2) The nature of these claims: follow-on actions

150. The claims that the Applicants seek permission to bring against the Respondents are, in each case, exclusively follow-on claims, and not (in any respect) stand-alone actions. The reasons for this are unnecessary to explore in any detail but have to do with the fact that a stand-alone cause of action would, very likely, be time-barred, whereas the follow-on claims that the Applicants seek to bring are not (or appear not to be[71]) time-barred.

151. Although the law regarding the claims that may be brought before the Competition Appeal Tribunal has developed considerably since the decision of the Tribunal in *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* (*"2 Travel"*),[72] *2 Travel* continues to be a good articulation of the constraints under which a claimant bringing a follow-on claim labours. In particular, any follow-on claim is limited to and must not stray beyond the findings of infringement made in an anterior decision of a regulator, here the Decisions of the Commission that we have described.

152. Whilst it is, of course, permissible to elucidate such findings of infringement in order to plead and prove the loss and damage flowing from these findings of infringement, and whilst the question of the loss and damage sustained is, in itself, entirely at large in the follow-on action, what is <u>not</u> permissible in a (pure) follow-on action is the articulation of any self-standing competition law infringement.

153. As we have described, the Applicants disavowed any such self-standing claim. It follows that the scope of the infringements found by the Commission in the Decisions assumes a particular importance in these Applications.

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[71] We are conscious that the Respondents have yet to articulate any defence, and nothing in this Judgment is to be taken as determining, one way or the other, any point that the Respondents might elect to take, if either application for certification were to prove to be successful.

[72] [2012] CAT 19, in particular at [30]. See also *Merricks* at [13].

(3) The infringements found by the Decisions

154. We have no intention of determining the exact scope of the infringements found by the Commission in the Decisions. That is a matter for consideration and determination later on in these proceedings, should they proceed. It is, however, necessary to understand the broad nature of the infringements found by the Commission, because these frame and inform the nature and scope of the follow-on claims articulated by the Applicants. We propose to set out the nature of these infringements by reference to the Commission's Three Way Banana Split Decision. The nature of the Essex Express Decision is materially the same.

155. The Three Way Banana Split Decision concerned infringements arising in FX spot trading in G10 currencies.[73] The Decision defines an FX spot transaction as "an agreement between two parties to exchange two currencies, that is to buy a certain amount (the "notional amount") of one currency against selling the equivalent notional amount of another currency at the current value at the moment of the agreement (the "exchange rate"), for settlement on the spot date (which is usually T (transaction's day) plus 2 days)".[74]

156. It is, in the main, banks that do business in the FX markets. Such trading can be for the bank's own account or as a market maker. Quoting from the Decision:[75]

> "The FX spot trading activity encompasses both:
>
> (a) market making: the execution of customer's orders to exchange a currency amount by its equivalent in another currency; and
>
> (b) trading on own account: the execution of other currency exchanges in order to manage the exposure resulting from the market making transactions."

157. We doubt very much whether this description of trading on own account embraces the totality of trading undertaken by FX market participants. Whilst it may very well be that such trading is sometimes, perhaps often, done in response to market making

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[73] Three Way Banana Split Decision at recital (4).

[74] Three Way Banana Split Decision at recital (4).

[75] Three Way Banana Split Decision at recital (5).

transactions, we would be surprised if such market making transactions were the sole trigger for trading on own account.[76]

158. When a FX market participant trades on own account, it is not reflective of the true nature of the transaction to refer to "bid prices" and "ask prices", which are the prices that such a market participant will quote to its customers when market making. As to this:[77]

> "In their capacity as market makers, traders stand ready to trade on behalf of customers at the quoted prices. Customers include asset managers, hedge funds, corporations and other banks. In industry terms, a market maker quotes two-way prices in a certain currency pair: the "bid price" which is the price at which the trader is ready to buy a currency against another, and the "ask price" which is the price at which the trader is ready to sell a currency against another currency. The difference between the bid and ask prices is the "bid-ask spread". A market maker would: (i) set bid prices and ask prices for a certain currency pair; (ii) commit to accepting spot transactions at these prices; and (iii) subsequently take the resulting exposure onto his/her own book. As such, a market maker is a counterparty in a Forex transaction, who, - unlike brokers, – bears the resulting exposure of the transactions he or she enters into."
>
> (Footnotes omitted).

159. In other words, the market maker trades as principal and not as agent for another. When trading on their own account:[78]

> "… traders may, after having taken a certain currency exposure into their books, choose to subsequently (i) hold it, (ii) close it by entering into an equivalent reverse transaction or (iii) increase the exposure further. Both the magnitude of currency exposure market makers are willing or able to keep in their books and the pace at which they modify currency exposure depends on their market expectations, their risk appetite and regulatory limits. This activity is called trading on own account, because it takes place on behalf of a trader's own undertaking." (Footnotes omitted).

160. The Three Way Banana Split Decision identified three types of (spot) transaction relevant for the purpose of the infringement considered in the Decisions:[79]

> "The following three types of orders characterising the customer-driven trading activity (market making) of the participating traders are pertinent in the present infringement:

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[76] Indeed, the description at recital (7) of the Three Way Banana Split Decision – quoted in this Judgment at paragraph 159 below – itself suggests a wider meaning to trading on own account.

[77] Three Way Banana Split Decision at recital (6).

[78] Three Way Banana Split Decision at recital (7).

[79] Three Way Banana Split Decision at recital (9).

(1) Customer immediate orders, to immediately enter trades for a certain amount of currency based on the prevailing market rate;

(2) Customer conditional orders, which are triggered when a given price level is reached and opens the traders' risk exposure. They only become executable when the market reaches a certain level (for example a stop-loss or take-profit order);

(3) Customer orders to execute a trade at a specific Forex benchmark rate or "fixing" for particular currency pairs, which in the current case only concerned the WM/Reuters Closing Spot Rates (hereinafter the "WMR fixes") and the European Central Bank foreign exchange reference rates (hereinafter the "ECB fixes")."

(Footnotes omitted).

161. FX trading involves considerable communication between market participants. Such communication is intrinsic to concluding trades. It will be necessary, in due course, to consider in a little greater detail the manner in which FX trades are concluded, but this is not a matter considered in detail in the Decisions. For present purposes, it is sufficient to note that whilst some trades (whether because of their size or importance in other respects) are concluded orally (over the telephone), most are concluded without direct human involvement by way of algorithmic trading on electronic trading platforms. Obviously, the amount of communication involved is greater where trades are concluded between persons. The infringements found by the Decisions relate to trades concluded between persons, but the claims articulated by the Applicants allege widened spreads in FX trades concluded both in person and by way of algorithmic trading on electronic trading platforms. It is, therefore, necessary to be conscious of the various ways in which trades can be concluded.

162. The Decisions find that in addition to legitimate communications between traders, there was a layer of illegitimate communication between certain traders employed by the Respondents over time.[80] The Commission identified four types of information that were exchanged:

"The following specific types of exchange of information occurred in the Three Way Banana Split chatrooms:

[80] The Three Way Banana Split Decision makes clear at recital (46) that "[t]his Decision does not concern the communications between the participating traders in the Three Way Banana Split chatrooms, in the ordinary course of their business, relating to matters such as the provision of information needed and intended to explore trading opportunities with each other as potential counterparties or as potential customers, or communications about market colour."

(a) Exchange of information on open risk positions of the participating traders

(53) The exchange of information on open risk positions consisted in the recurrent sharing of certain current or forward-looking commercially sensitive information on open risk positions with competitors (the direction of the position (either "short" or "long") and, at times, the size of the position or an indication of it pursuant to the underlying understanding. The exchange of such information could provide the traders with an insight into each other's potential hedging conduct. The recurrent knowledge update of such open risk positions of major competitors provided the participating traders with information which could be, for a window of minutes or until new information superseded it, relevant to their subsequent trading decisions and enable the participating traders to identify opportunities for coordination.

(b) Exchange of information on outstanding customers' orders

(54) The exchange of information on outstanding customers' orders concerned stop-loss orders, take-profit orders, orders for the fix and immediate orders.

(55) Pursuant to the underlying understanding, the participating traders of the addressees were expected to share and shared with each other confidential information related to their respective customers' outstanding orders. This applied to:

- **Customers Conditional orders** such as "stop-loss" and "take-profit" orders, which are triggered when a given price level is reached and opens the traders' risk exposure. In this case, the participating traders frequently revealed certain current or forward-looking commercially sensitive information on conditional orders such as the size or the direction of the orders or the type of customer to other participating traders on an extensive basis. This eased the identification of opportunities for coordination among the participating traders. The recurrent update of knowledge of customers' confidential conditional orders placed with participating traders increased the likelihood of the traders successfully coordinating their trading activities for their own benefit.

- **WMR or ECB fix positions**: traders usually engaged in these exchanges in the hour preceding the relevant fix. In contrast to instances of sharing their own fix positions (based on their own customers' orders executable at the fix or their own hedging needs) to explore trading opportunities as potential counterparties or as potential customers, these traders often shared certain commercially sensitive information on their fix positions (such as the size or direction of the orders) to identify occasions to coordinate trading at or around the fix. Shared current or forward-looking information on customers' orders executable at the fix remains relevant information until the relevant fix.

- **Commercially sensitive information on customers' immediate orders** (such as the size or the direction of the orders, the type of customer). pursuant to the underlying understanding. In this case, the exchange of information results in the same consequences as explained regarding the exchange of certain commercially sensitive information on current or planned trading activity (section (c)).

(c) Exchange of information on other details of current or planned trading activities

(56) Traders are constantly seeking to execute trades and to cover risks for those trades. This requires traders at competing undertakings to communicate with each other and request quotes directly from separate traders of given amounts and currencies. Nevertheless, traders should manage their operations independently from competitors and should not coordinate their trading activities with one another.

(57) The exchange of information on current or planned trading activities covered by this Decision concerns the recurrent disclosure to other traders in mostly multilateral private chatrooms of certain commercially sensitive information on their current and intended trading activity pursuant to the underlying understanding, which made it easier for participating traders to identify occasions to coordinate their trading activities. Such information can remain relevant for competing undertakings during a window of between a few minutes and a few hours, or until new information supersedes it.

(d) Exchange of information on bid-ask spreads

(58) The exchange of information on bid-ask spreads concerned the instances in which the participating traders occasionally discussed existing or intended bid-ask spreads quotes of specific currency pairs for certain trade sizes. The knowledge of existing or intended bid-ask spreads quotes of specific currency pairs for certain trade sizes, where there is a specific live trade, may remain useful for the other traders for a window of up to a few hours depending on the market's volatility at the time, and could enable coordination of spreads to that client.

(59) Bid-ask spreads quoted by traders refer to specific currency pairs for certain trade sizes. They are an essential competition parameter in FX spot trading activity. Spreads affect the overall price paid by customers for trading currencies). The potential revenue earned by a trader is also affected by the spread. When quoting both bid and ask price to a client, the traders would generally apply a spread to a given market mid-point (whether in even amounts from that mid-point or otherwise) as part of this calculation." (Footnotes omitted).

163. The Decision goes on to describe instances of coordination facilitated by the exchange of information.

164. The number of individual traders involved – it is unnecessary to name them – was around ten or fewer as regards the infringements identified in both Decisions,[81] but (at least for present purposes) we proceed on the basis that these persons were significant in the FX trading departments of the Respondents, and so could (in ways that we will

[81] Recitals (37) to (44) of the Three Way Banana Split Decision name four traders – albeit that they moved between different Respondents over time. The Essex Express Decision is similarly limited in number.

not seek to specify) have been influential within the Respondents. As regards these illegitimate communications:[82]

> "… the participating traders however agreed to exchange – in private, mostly multilateral chatrooms and on an extensive and recurrent basis – certain current or forward-looking commercially sensitive information about their trading activities. This information exchange took place in accordance with a tacit understanding that: (i) such information could be used to the traders' respective benefit and in order to identify occasions to coordinate their trading; (ii) such information would be shared within the private chatrooms; (iii) the traders would not disclose such shared information received from other chatroom participants to Parties[83] outside of the private chatrooms; and (iv) such shared information would not be used against the traders who shared it (hereinafter referred to as the "underlying understanding")…"
>
> (Footnotes omitted).

165. The extent to which communications between traders – whether these were legitimate or illegitimate – could have affected trades on electronic trading platforms is a matter not explored in the Decisions, but is (as we have noted in paragraph 161 above) something that we must be conscious of when considering the Applications.

166. The Commission found that this conduct constituted a single and continuous infringement of Article 101 TFEU.[84] The Respondents substituted practical co-operation – collusion – between themselves for the risks of competition.[85] Article 1 of the Decision provides:

> "The following undertakings infringed Article 101 [TFEU]…by participating, during the periods indicated, in a single and continuous infringement covering the whole EEA in G10 FX spot trading:
>
> (a) UBS AG, from 10 October 2011 until 31 January 2013.
>
> (b) The Royal Bank of Scotland Group plc and NatWest Markets plc, from 18 December 2007 until 19 April 2010.
>
> (c) Barclays plc, Barclays Services Limited and Barclays Bank plc, from 18 December 2007 until 8 July 2011 and from 19 December 2011 until 1 August 2012.
>
> (d) Citibank, N.A. and Citigroup Inc., from 18 December 2007 until 31 January 2013.

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[82] Three Way Banana Split Decision at recital (47).
[83] The Three Way Banana Split Decision defines "Parties" at recital (26) as "the addressees of this Decision".
[84] Three Way Banana Split Decision at recitals (1) and (146) to (148) and Article 1.
[85] Three Way Banana Split Decision at recital (80)-(81).

(e) JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Europe Limited and J.P. Morgan Limited, from 26 July 2010 until 31 January 2013."

167. Although the infringements are described as "single and continuous" in the Decisions, the Commission recognised that they comprised a series of discrete acts. For the purposes of competition law infringement, it is probably right to say that "[i]t would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement".[86] However, the fact that the infringements, in the case of the Decisions, comprised a series of acts may be relevant for the purposes of establishing the loss caused by the infringements.

(4) The elements of the tort alleged by the Applicants

168. Competition law infringements are vindicated as statutory torts under English law. That is as true of class actions as it is of individual claims although – as will be seen – there are some differences between collective proceedings and proceedings brought by an individual claimant or claimants.

169. To establish a claim, *(i)* an infringement of competition law must be shown, which *(ii)* has resulted in actionable harm or damage suffered by the claimant or class,[87] *(iii)* caused by that infringement.[88] Proving actionable damage involves demonstrating a causal link between the infringement and the damage, generally using the "but for" test of causation.[89]

170. In this case – as we have described – an infringement of competition law has been found by the Commission. That finding cannot be (and, for the avoidance of doubt, is not) challenged before us. However, the Decisions say nothing about the loss and damage caused by the infringements found, and these matters will be live (and, we anticipate, hotly contested) if either of the Applications before us were to be granted. It is

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[86] Three Way Banana Split Decision at recital (76).

[87] This formulation embeds the requirement of causation, which is nevertheless separately articulated at *(iii)*.

[88] *BritNed Development Ltd v ABB AB* [2018] EWHC 2616 (Ch) ("*BritNed*") at [10], substantially affirmed in the Court of Appeal, [2019] EWCA Civ 1840.

[89] *BritNed* at [10].

necessary, therefore, to be quite clear as to the actionable damage that must be alleged (and, ultimately, proved) if a claim based on the infringements found by the Commission is to succeed.

171. In *BritNed*, actionable damage was defined as follows at [427]:

> "When seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty imposed. In this case, the object and scope of the provision is the preservation and protection of competition from collusive efforts to undermine it. This purpose must inform the "gist" or actual damage that a claimant must show when bringing a private action for damages. More specifically:
>
> (1) Cartel cases do not, by definition, involve a single actor. Cartel cases involve two or more actors, by agreement or concerted practice, acting with the object or effect of preventing, restricting or distorting competition. It is not possible, in cartel cases, to identify the act of a single person that can be tested as being the cause of a claimant's harm. It is the collective failure to compete that is the wrong at which Article 101 TFEU is aimed.
>
> (2) In this, Article 101 TFEU is different even from abuse of a dominant position under Article 102 TFEU, which is directed towards the unilateral conduct of dominant firms which act in an abusive manner. In such a case, assuming the abuse has been identified and proved, it is possible - applying the approach of Stuart-Smith LJ in *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 1 WLR 1602 at 1609-1610 - to ascertain what loss the abuse has caused.
>
> (3) What the collusive misconduct of cartelists does is prevent, restrict or distort competition. To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the "gist" damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers <u>properly</u> participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it." (emphasis in the original) (Footnotes omitted).

172. It is important to stress that the averment of "gist" damages constitutes a necessary element of the cause of action. Unless "gist" damage or actionable damage can properly be pleaded, the claim must fail. Actionable loss has nothing to do with the quantification of damages. If the necessary elements of the tort are made out, the claimant or claimants have a <u>right</u> to damages, no matter how difficult or recondite the assessment process. As Lord Briggs stated in *Merricks* at [46] to [47]:

> "46. … In this follow-on claim Mr Merricks and the class he seeks to represent already have a finding of breach of statutory duty in their favour. All they would need as individual claimants to establish a cause of action would be to prove that the breach caused them some more than purely nominal loss. In order to be entitled to a trial of that claim they would (again individually) need only to be able to pass the strike-out and (if necessary) summary judgment test: ie to show that the claim as pleaded raises a triable issue that they have suffered some loss from the breach of duty.
>
> 47. Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the claimant of a trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost ex debito justitiae. There are cases where the court has to do the best it can upon the basis of exiguous evidence. There are cases, such as general damages for pain and suffering in personal injury claims, where quantification defies scientific analysis…"

173. In competition cases, quantification is a complex process, usually involving difficult economic, econometric and statistical evidence.

174. These rules of causation and quantification are as applicable (and not more strictly applicable) in collective proceedings as they are in individual claims. There is one important qualification to this that we should highlight now. Whereas, in an individual claim, the individual claimant must allege and at trial prove the loss he or she has suffered, that is not a requirement in a collective action:[90]

> "… in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable."

175. It is unnecessary to consider quantification of loss in this Judgment, only the causative link between infringement and actionable damage. We should make clear that when considering the question of actionable damage, we approach that question by reference to classes as a whole, without particular consideration of the position of individual claimants within that class. Although speaking for the minority, we consider that Lord

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[90] *Merricks* at [58]; *Lloyd v. Google LLC*, [2021] UKSC 50 (***Lloyd***) at [32].

Sales' and Lord Leggatt's statement at [94] and [95] of *Merricks* provides a clear statement of the law in this regard:

> "94. As pointed out by Professor Rachel Mulheron in an illuminating discussion of the present proceedings, there are two functions which a provision allowing damages to be awarded on an aggregate basis may in principle fulfil: see R Mulheron, "Revisiting the Class Action Certification Matrix in Merricks v Mastercard Inc" (2019) 30 King's LJ 396, 412-417. The first concerns the quantification of loss. Where the liability of the defendant to the members of a class has been established, such a provision enables damages to be assessed by quantifying the loss suffered by the class as a whole, without the need to determine what loss each individual member of the class has suffered. This involves a departure from the normal "compensatory principle", whereby the object of an award of damages for a civil wrong is to put the claimant (as an individual) in the same financial position as if the wrong had not occurred. It is clear that section 47C(2) is intended to serve this purpose.
>
> 95. A provision for aggregate damages may, however, go further and serve an additional purpose. It may also permit liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim. As Professor Mulheron notes, the nature of a claim for a breach of competition law is that it constitutes a claim in tort for a breach of statutory duty. Under the general law such a claim is not actionable without proof of loss. In other words, a defendant commits no wrong and incurs no liability towards a claimant unless its anti-competitive behaviour causes that claimant to suffer financial harm. An aggregate damages provision may dispense with this requirement by permitting liability towards all the members of a class to be established by proof that the class as a whole has suffered loss without the need to show that any individual member of the class has done so." (emphasis in the original)

(5) Causation of actionable damage in "market-wide harm" cases

176. Generally speaking, in order to plead an arguable cause of action, the hurdle – so far as causation is concerned – represents a relatively low bar, at least in the case of the individual transaction. But it is, nevertheless, an important control in ensuring that meretricious claims – even against found infringers of competition law – are not brought.

177. The reason causation represents a relatively low barrier in the case of an individual transaction is because, where (say) *A*, *B* and *C* unlawfully collude in relation to a particular transaction (whether by "fixing" a tender price or by unlawfully exchanging information), the innocent counterparty to that transaction (*X*) will be dealing with *A*, *B* or *C* (it matters not which of the cartelists *X* deals with) in circumstances not amounting

to a properly competitive environment. That is *X*'s actionable harm. To repeat [427](3) of *BritNed*:[91]

> "What the collusive misconduct of cartelists does is prevent, restrict or distort competition. To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the "gist" damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it."

178. If a counterparty to one of the Respondents identified an FX transaction concluded with one of those Respondents that was the subject of one of the unlawful information exchanges identified in the Decisions, and alleged that this specific transaction took place in a distorted competitive environment, such that (absent the infringement) the transaction would have been on different terms more advantageous to the claimant, then it would be very difficult to say that a claim so pleaded was demurrable. There might very well be hard arguments about quantum: but that is not the province of the Strike-out Question.

179. We observe that claims of this sort have already been articulated by various FX counterparties in *Allianz Global Investors GmbH v. Barclays Bank plc*, a claim originally brought in the Commercial Court under Claim No CL-2018-000840 (***Allianz***).[92]

180. The *Allianz* Amended Particulars of Claim assert:

> "5. Over the Claims Period the Defendants were involved in manipulation of the FX market ("FX Manipulation"). By these proceedings the Claimants pursue claims in relation to two forms of FX Manipulation, as follows:

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[91] Quoted in paragraph 171 above.

[92] Now transferred to the Tribunal by order of Butcher J dated 15 December 2021. We were not taken to very much material regarding *Allianz*, and have only referred to and considered material in the public domain. We indicated to the parties (Transcript Day 1, page 71) that we had had sight of the *Allianz* pleadings.

(i) Manipulation of certain benchmark FX rates ("Benchmark Manipulation"); and

(ii) Manipulation (*i.e.* fixing) of bid/ask spreads (that is to say, the difference or 'spread' between the rate at which the Defendants would buy currency and the rate at which they would sell it) ("Bid/ask Manipulation")."

(Footnotes omitted).

181. The FX Manipulation was arranged, at least in part, through "chat rooms", as in the case of the Decisions.[93] The loss and damage alleged arose:

(1) In the case of Benchmark Manipulation, by way of manipulation of the FX rates away from what would otherwise have been the market rate;[94] and

(2) In the case of Bid/ask Manipulation:[95]

> "So far as concerns Bid/ask Manipulation, by reason of such manipulation, the bid/ask spread was wider than it would otherwise have been, with the effect that when entering into FX transactions over the Claims Period, the Claimants received less by way of consideration in terms of the currency purchased than they would otherwise have done (or paid more of the currency paid than they would have done for such purchased currency)."

182. It is not absolutely clear whether this allegation of Bid/ask Manipulation is limited to specific transactions (and so is no more than an allegation of direct harm arising in relation to a limited number of transactions concluded between the claimants and defendants in those proceedings) or whether the allegation is altogether wider and alleges what we describe as a form of market-wide harm. By this we mean a loss sustained as a result of competition law infringements that is not linked to specific transactions (which we will describe as a form of direct harm) but which affects a market generally (which can be described as a form of indirect harm or, perhaps better, a loss resulting from "umbrella" effects, where other dealers innocent of any infringement nevertheless increase prices to the wider market because of someone else's infringement). Whilst it is easy to see how the sort of collusive practice alleged by the claimants in *Allianz* might give rise to a non-market FX rate to the claimants'

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[93] *Allianz* Amended Particulars of Claim at paragraph 7.

[94] *Allianz* Amended Particulars of Claim at paragraphs 11 to 16.

[95] *Allianz* Amended Particulars of Claim at paragraph 17.

disadvantage in concluded specific transactions (i.e. direct harm), it is less clear how that collusive practice could cause a widening in the spreads of exchange rates generally (i.e. indirect harm or harm caused by an "umbrella" effect). The allegation of Bid/ask Manipulation, whilst it is capable of being read narrowly as a form of direct harm limited to specific transactions, can equally be construed as an allegation of market-wide harm.

183. It is appropriate to describe in a little greater detail the parties to the *Allianz* proceedings. These comprise:

(1) A number of defendants who are at least related to the Respondents in the present proceedings – notably Barclays, Citibank, JPMorgan, RBS and UBS.

(2) Around 100 claimants, listed in Schedule 1 to the *Allianz* Claim Form. Given that the class members in the case of these Applications are not specifically known, the precise overlap between claimants cannot be articulated further.

184. In whatever way the Bid/ask Manipulation allegation in the *Allianz* case is read, there is a potential for overlap between claims falling within the *Allianz* proceedings and claims falling within the Applications put forward by the PCRs, if only in relation to the damages claimed.

185. What is equivocal in *Allianz* is clear in the case of both Applications. Both Applications allege a widening of the spread in the FX market generally and allege a form of market-wide harm. Neither Applicant seeks to advance a collective action based upon manipulation of the rates paid by clients in respect of certain specific FX trades. That is unsurprising, because it is difficult to see how such claims could be framed as collective proceedings, given that the losses (being referable to individual transactions) would be individual and not collective. The same cannot be said for a widening in the FX spreads, which will affect all participants in the affected market, whatever G10 currency they are buying or selling, whomever they are transacting with, and whether they are buying or selling. The problem, however, lies in the articulation of the causal link between the infringements in the Decisions and the market-wide harm alleged to have been caused to the affected class or classes.

186. Although the Applications differ in a number of respects, they have a number of important aspects in common. While the class definitions differ, they are both brought on behalf of the generality of customers using the FX markets, including not only those who traded with the Respondents, but also those who traded with other dealers (**Non-Respondent Dealers**). The proposed claims embrace trades in all G10 currency pairs, and include trades conducted electronically as well as voice trades. Both Applications assert that the Respondents, through the unlawful actions found in the Decisions, caused customers' loss through the widening of spreads. That is to say, customers in general bought currency at a higher price and sold it at a lower price than they would in the absence of the anti-competitive behaviour found.

187. The Applicants' approaches to measuring the loss of the classes they wish to represent also contain broad similarities. However, the theories of harm articulated differ in important respects. The following Sections consider first the articulation of the class claim in the O'Higgins Application and then that articulated by the Evans PCR.

(6) Articulation of the O'Higgins class claim

188. The O'Higgins Claim Form provides as follows:[96]

> "5. As noted above, these Proposed Collective Proceedings seek to combine claims for damages as a result of the anticompetitive conduct of the Proposed Defendants in the foreign exchange (or "FX") market as determined in the Settlement Decisions.
>
> 6. The expert report of Professor Breedon (the "Breedon Report"), which accompanies this Re-Amended Collective Proceeding Claim Form, provides an overview of the FX market including: the nature of FX trading; the different types of FX transactions; how FX prices are set; and FX benchmark rates. The Proposed Representative does not propose to repeat the entirety of what is said by Professor Breedon here but the following key points bear noting (paragraph references are to the Breedon Report):
>
> (1) The FX market is the market in which currencies are bought and sold. It is a global market: paragraph 2.2.
>
> (2) The vast majority of FX trading happens "over-the-counter" ("OTC"): paragraph 2.4.

[96] We omit the red-linings that identify amendments.

(3) Currencies are bought and sold in currency pairs. In a currency pair, each currency is valued relative to the other. The ratio that expresses that value is the exchange rate: paragraph 2.23.

(4) Spot rates consist of a "bid" and an "ask". The bid is the price or rate at which an FX dealer is willing to buy a given number of units of the base currency. The ask (also referred to as the "offer") is the price or rate at which an FX dealer is willing to sell a given number of units of the base currency (the first named currency in the currency pair): paragraphs 2.24 to 2.26.

(5) An FX dealer or "market maker" (a term explained further at paragraph 33(1) below[97]) will earn a profit if the average price at which he/she buys a volume of a particular currency pair is lower than the average price at which he/she sells that currency pair. Dealers therefore seek to maintain a "spread" between their bid and ask prices. This is commonly referred to as the "bid-ask spread": paragraph 2.7.

(6) A "fix" is a published exchange rate reflecting the price of a currency pair at a moment in time, or calculated over a short interval of time, which is often used as a benchmark. Dealers may price transactions with their customers by reference to "fixes" or "benchmarks". Widely used fixes include those published by WM/Reuters and the Euro FX reference rates published by the European Central Bank (the "ECB"): paragraph 4.16.

7. The anticompetitive conduct that the Proposed Defendants were engaged in and which is the subject matter of the Settlement Decisions comprised the extensive and recurrent exchange of commercially sensitive information and trading plans in relation to ongoing FX trades, as well as the coordination of trading strategies with respect to FX spot trading (see the Three Way Banana Split Settlement Decision, recitals 46 and 101, and the Essex Express Settlement Decision, recitals 46 and 101). By the Proposed Defendants' own admission (these being Settlement Decisions), the commercially sensitive information exchanged related to outstanding customers' orders, bid-ask spreads, open risk positions, and other details of current or planned trading activities (see recitals 53-59 of both Settlement Decisions).

8. Participating traders, employed by each of the Proposed Defendants, were thereby enabled to exploit information received pursuant to the anticompetitive exchanges to make informed market decisions on whether to sell or buy the currencies they had in their portfolio, when and at what price. It also allowed traders to identify opportunities for coordination, for example through a practice called "standing down", whereby some traders would temporarily refrain from trading activity to avoid interfering with the business of another trader within the chatroom (see recitals 62 and 63 of both Settlement Decisions).

9. This anticompetitive conduct was coordinated through interbank chatrooms. The Settlement Decisions refer to various Bloomberg chatrooms, via which the two

[97] In fact, there is no such definition: but the meaning of the term is clear.

separate infringements the Commission has identified were implemented: namely the *Three Way Banana Split* chatrooms and *The Essex Express* chatrooms.

10. The Proposed Representative seeks, by way of these Proposed Collective Proceedings, to recover damages on behalf of the victims of this sustained and systematic anticompetitive conduct. The global FX market is a vast one: Professor Breedon states in section 2 of his report that in April 2013, trading in the FX spot and OTC derivatives markets averaged USD 5.3 trillion per day, of which spot and outright forwards transactions accounted for USD 2.7 trillion per day (Breedon Report at paragraph 2.2). Professor Breedon has also undertaken preliminary loss calculations, for illustrative purposes only to assist the Tribunal with an approximate scope of the possible range of loss. These calculations indicate that the class which the Proposed Representative seeks to represent may have suffered losses ranging between USD 643.66 million and USD 2.574 billion (or between USD 811.55 million and USD 3.246 billion, when applying compound interest): see section 7 of the Breedon Report and specifically paragraphs 7.51 to 7.54 and Table 11.

11. As the Commission's Press Release and the Settlement Decisions themselves indicate (see recital 6 of each Decision), the Proposed Defendants' FX customers comprise a wide variety of persons, including asset managers, pension funds, hedge funds and major companies, as well as central banks.

12. It is on behalf of such customers of the Proposed Defendants, and the customers of other market-maker banks operating at the same time and in the same market as the Proposed Defendants, that these Proposed Collective Proceedings are brought."

189. The O'Higgins Claim Form further provides as follows:

"75. As a foreseeable consequence of the Proposed Defendants' breach of statutory duty, the Proposed Class Members have, for the reasons explained in the Breedon Report, suffered loss and damage.

76. Pursuant to section 47C(2) of the 1998 Act, the Proposed Representative seeks an aggregate award of damages in these Proposed Collective Proceedings, to compensate for that loss. The Proposed Representative's proposed methodology for calculating that aggregate award is as set out in the Breedon and Bernheim Reports. The following points bear noting here:

(1) As a consequence of the infringements found by the Commission, the prices paid for Relevant Foreign Exchange Transactions by members of the Proposed Class were affected, regardless of who the counterparty was. This is because the infringement committed by the Proposed Defendants had the effect of moving the benchmark price for FX at any given point in time away from where it would have been absent the infringements. The Proposed Class Members are entitled to recover in respect of such "umbrella pricing".

…"

190. The O'Higgins Claim Form relies on a report ("Breedon 1" appended to the Claim Form and listed in Annex 2 hereto) from Professor Breedon which asserts that the class that the PCR seeks to represent suffered damage as a result of the infringements found in the

Decisions. The reasoning referred to in paragraph 75 of the Claim Form quoted above is summarised by Professor Breedon in paragraphs 8.3 to 8.9 of Breedon 1:

> "8.3 Academic literature supports the view that the type of conduct set out in the EC Decisions would have affected FX pricing and caused loss. In particular, a key feature of most academic FX Market Microstructure analysis is the role of asymmetric information in determining price movements and spreads.
>
> 8.4 Potentially market moving information includes both fundamental information (news releases, events etc.) and knowledge of what is termed "Order Flow", which is the stream of trades arriving (or recently arrived) at the market. Knowledge of the Order Flow is a key source of information and competitive advantage.
>
> 8.5 According to the EC Decisions, the individual traders involved in the FX Cartels exchanged "commercially sensitive information" relating to customer orders, Bid-Ask Spreads, their open risk positions and other details of current and planned trading activities. Knowledge of prospective Order Flow could potentially allow them to collusively 'front run' customer orders (i.e. trade before the order arrives so that the market price is temporally moved in a way that is disadvantageous to the customer) or make excess revenue on trades by collusively widening their Bid-Ask Spreads as a result of the information advantage.
>
> 8.6 Further, the information advantage arising from the Proposed Defendants' coordinated exploitation of shared sensitive competitive information would increase what economists call Adverse Selection Risk, which would have the effect of widening Bid-Ask Spreads across the FX market.
>
> 8.7 As a result, Dealers / Market Makers not involved in the Anticompetitive Conduct would have found themselves at an information disadvantage and so tended to lose money on trades with the collusive group and on a greater proportion of customer trades than usual (because the information advantage of the collusive group would effectively allow them to cherry pick customer trades that would benefit them more).
>
> 8.8 Thus, in this situation a competitive Dealer / Market Maker (i.e. who was not involved in collusive behaviour) would have to widen its spreads in order to make up for the losses it was making due to Adverse Selection thereby disadvantaging its customers relative to a world where there was no collusion.
>
> 8.9 Additionally, due to their knowledge of one another's Order Flow, the revenue that they will have generated from participating in the collusion, and the consequent incentive to remain a member of the conspiracy (i.e. to not be excluded from it), the Proposed Defendants were not incentivised to offer tighter Bid-Ask Spreads, even for trades which were not directly discussed with other Cartelists."

191. The O'Higgins Application seeks to recover from the Respondents damages in respect of FX transactions concluded by members of the class with FX market participants other than the Respondents themselves. The definition of the O'Higgins PCR's proposed class

does not differentiate between those members of the class who contracted with the Respondents and those members of the class who contracted with market participants other than the Respondents, i.e. with Non-Respondent Dealers. Related to the term Non-Respondent Dealer defined in paragraph 186 above, we shall refer to FX trades in the former category as **Respondent Trades** and FX trades in the latter category as **Non-Respondent Trades**, always bearing in mind that the O'Higgins Application seeks to hold the Respondents liable in damages to the proposed class in respect of Respondent and Non-Respondent Trades alike.

192. We now turn to consider the manner in which the Evans Application is pleaded.

(7) Articulation of the Evans class claim

193. The Evans Claim Form materially provides as follows:

> "3. The Proposed Collective Proceedings are brought on an opt-out basis, on behalf of two classes ("the Proposed Classes") and seek an aggregate award of damages for each class. The Proposed Classes are described in detail at paragraphs 71 – 112 below. In overview, one class concerns those who transacted directly with the Proposed Defendants during their participation in the infringements identified in the Decisions (collectively, "the Infringements") and the other class concerns those who transacted with certain entities that did not participate in the Infringements.
>
> …
>
> 17. As further particularised in Part III below, the Proposed Class Representative will say that the overall effect of the Infringements was that members of the Proposed Classes entered into FX Spot Transactions and FX Outright Forward Transactions on terms that were less advantageous to them than would otherwise have been the case had the Proposed Defendants not committed the Infringements.
>
> 18. Specifically, as a result of the Infringements, the Proposed Defendants were able to unlawfully widen the bid-ask spreads that they applied to FX Spot Transactions involving G10 Currency Pairs beyond that which would have prevailed in the absence of the Infringements. The effect of an unlawfully widened bid-ask spread is two-fold:
>
> a. The price offered to members of the Proposed Classes to sell currency (i.e. the bid price) was lower than would otherwise have been the case absent the Infringements; and
>
> b. The price charged to members of the Proposed Classes to buy currency (i.e. the ask price) was higher than would otherwise would have been the case absent the Infringements.
>
> 19. The Proposed Class Representative will also say that the Infringements produced additional effects, as follows:

a. The Infringements also caused the unlawful widening of bid-ask spreads applicable to FX Outright Forward Transactions involving G10 Currency Pairs. This is because the price of an FX Outright Forward Transaction is partially based on the prevailing price of the equivalent FX Spot Transaction. Accordingly, the unlawful widening of bid-ask spreads applicable to FX Spot Transactions would, in turn, cause the unlawful widening of the bid-ask spreads applicable to FX Outright Forward Transactions;

b. The Infringements also caused bid-ask spreads to widen on FX Spot Transactions and/or FX Outright Forward Transactions entered into with persons who were not parties to the Infringements and/or did not implement the same; and

c. Although the Decisions themselves do not make any findings relating to FX e-commerce trading activities, but instead address "voice" trading only, it is the Proposed Class Representative's case than an infringement affecting voice trading would affect all other forms of trading." (Footnotes omitted).

194. Paragraph 75 of the Evans Claim Form expands upon the loss suffered by the two proposed classes identified (referred to as **Class A** and **Class B**):

"i. The harm suffered by members of Class A results from the direct effects of the Infringements, which are suffered in transactions entered into with the Proposed Defendants during their Relevant Class A periods; whereas

ii. The harm suffered by members of Class B is caused in two ways:

1. The impact of the Infringements, as further particularised in paragraph 252 below, was to enable the Proposed Defendants to unlawfully widen the bid-ask spreads charged to their customers. This, in turn, reduced the competitive pressures on the Relevant Financial Institutions and the Proposed Defendants (during their Relevant Class B Periods), enabling them, in turn, to charge widened spreads to their customers.

2. The Infringements created increased "adverse selection" risks in the inter-dealer market, which increased the costs of buying and selling currency in that market. These costs were borne by Relevant Financial Institutions and the Proposed Defendants (during their Relevant Class B Periods) which, in turn, were passed on to members of Class B." (Footnotes omitted).

195. Causation is specifically pleaded in paragraphs 249*ff* of the Evans Claim Form:

"249. The effect of the Infringements was, at all material times, to enable the Proposed Defendants to unlawfully widen the bid-ask spreads applied to FX Spot Transactions involving G10 Currency Pairs beyond the bid-ask spreads that would have prevailed in the absence [of] the Infringements. In particular, as explained further in section 5 of the Rime Report, the exchange of current and forward-looking commercially sensitive information on bid-ask spreads applicable to certain currency pairs and for certain trade sizes facilitated explicit and/or tacit coordination on the bid-ask spreads charged to members of Class A. This caused or materially contributed to bid-ask spreads being wider than would have been the case if the Proposed Defendants had competed to offer the

best bid-ask spreads to their customers, as would have been the case absent the Infringements.

250. The effect of a widened bid-ask spread is twofold:

a. The bid price decreases, meaning that an FX Dealer pays less to purchase, and a customer receives less when selling, a particular currency; and

b. The ask price increases, meaning that an FX Dealer receives more when selling, and the customer pays more when buying, a particular currency.

251. A further effect of the Infringements was, at all material times, to unlawfully widen the bid-ask spreads that the Proposed Defendants applied to FX Outright Forward Transactions involving G10 Currency Pairs beyond the bid-ask spreads that would have prevailed in the absence of the Infringements. As explained in section 4.3.2 of the Knight Report, and further in paragraph 58 of the Rime Report, the price of a given FX Outright Forward Transaction is partially based on the prevailing price of an equivalent FX Spot Transaction. Accordingly, the unlawful widening of the bid-ask spreads applicable to FX Spot Transactions pleaded to in paragraph 249 above would, in turn, have caused or materially contributed to the unlawful widening of bid-ask spreads applicable to FX Outright Forward Transactions.

252. Members of Class B entered into FX Spot Transactions and FX Outright Forward Transactions with persons who, so far as the Proposed Class Representative is aware, were not parties to the Infringements and/or did not implement the same. The effect of the Infringements was, at all material times, to cause or materially contribute to the unlawful widening of the bid-ask spreads applicable to those same transactions beyond the bid-ask spreads that would have prevailed in the absence of the Infringements. This effect shall be referred to hereafter as the "Umbrella Effect". In particular, and as explained further in section 5.2 of the Rime Report, the Umbrella Effect arose in two ways:

a. The Infringements significantly distorted, reduced or eliminated the competition between the Proposed Defendants and other FX Dealers that were not party to the Infringements and/or did not implement the same, in relation to bid-ask spreads applicable to FX Spot Transactions and/or FX Outright Forward Transactions. This, in turn, enabled those FX Dealers to charge wider bid-ask spreads than would have been the case absent the Infringements; and/or

b. The overall effect of the Infringements was to increase the adverse selection risks prevailing in the inter-dealer market. This, in turn, resulted in FX Dealers:

i. Increasing the price at which they would offer to sell G10 Currencies; and

ii. Reducing the price at which they would offer to buy G10 Currencies.

Consequently, this affected the prices that other FX Dealers would pay to acquire and sell currency in the inter-dealer market, meaning that they: (i) would pay more to acquire currency; and (ii) receive less when selling

currency. Those costs were passed on to members of Class B in the form of wider bid-ask spreads." (Footnotes omitted).

196. The two Applications contain broad similarities, as well as a number of differences:

(1) In terms of their similarities, they both claim that the infringements led to a widening in bid-ask spreads across the whole of the FX market. In both cases the claim is based on an analysis by expert economists of the likely economic consequences of the infringements as set out in the Decisions. The analysis makes inferences about how the information exchanged through the chatrooms would have been used, and how other parties would have reacted to the actions of the Respondents. In neither application is it made clear whether the Applicants are intending to rely solely on the plausibility of their economic theories to make good their claims, or whether they intend to prove that what their experts regard as plausible actually occurred. In both applications, the quantification of loss is to be based on a regression analysis of trading records. In neither case is it stated whether this statistical analysis is also to be used to demonstrate that the damage actually occurred.

(2) There are many differences between the two claims, and some of them (the detailed definition of the classes, and of the trades that are covered by the claims) will be further discussed below. Other differences in the details of the economic reasoning and of the design of the statistical methodology they propose to adopt are not of great significance at this stage of the proceedings. But there are two differences that are worth mentioning.

(3) First, while both Applications contend that the infringements found in the Decisions would have enabled the Respondents to make trades in the inter-dealer market at the expense of non-Respondent Dealers (and this would lead to wider spreads on the customer market), only the Evans PCR contends that the infringements would have allowed the Respondents to widen their spreads to customers through a process of tacit collusion.

(4) The O'Higgins claim identifies a single class of claimant, comprising customers of both the Respondent Banks and the Non-Respondent Banks. The Evans Claim distinguishes two classes. We consider this further below.

E. PLEADING CASES OF MARKET-WIDE HARM

(1) General points regarding pleadings

197. Pleadings are important in modern civil litigation. They frame each side's case, allowing a "cards on table" approach, and enabling the court to case manage the litigation going forward. The point of pleadings is not to encourage pettifogging technical points, but the reverse: pleadings enable all parties, and the court, to know exactly where they stand so as to prepare for a fair trial efficiently.

198. That is true as much in competition as in other cases.[98] In this case, the question we are focussing on is that of causation, and it is trite that a claimant must identify the way in which the infringement is said to have resulted in the loss or damage claimed.[99] This is as true for collective proceedings as it is for individual claims, subject of course to the very important qualification that an individual loss does not have to be pleaded: it is enough for a loss affecting the class as a whole to be articulated.

199. Of course, we recognise that competition cases typically may involve information imbalances, where a claimant is disadvantaged as against a defendant. That is particularly so where the claimant is seeking to establish a (secret) cartel, where (almost by definition) the nature and operation of the cartel will be unknown to the claimant. The courts will be astute to ensure that proper claims are not stifled by reason of an informational deficit on the part of the claimant.[100]

200. Although the Evans PCR referred to such informational imbalances in the Evans Theory of Harm Submissions,[101] it was not clear to us how far the Evans PCR was contending that informational imbalances were material in this case or to these Applications. True it is that both PCRs made clear that they reserved the right, and indeed expected, to expand and improve their cases if their claims proceeded to disclosure. Both expected to obtain significant information from the Respondents and from third parties. But that

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[98] *Sel-Imperial Ltd v. British Standards Institution*, [2010] EWHC 854 (Ch) at [16] to [18].

[99] *Forrest Fresh Foods Ltd v. Coca-Cola*, [2021] CAT 29 at [30].

[100] *Media-Saturn Holding GmbH v. Toshiba*, [2019] EWHC 1095 (Ch) at [77] to [78].

[101] See paragraph 8(b).

sort of expansion and articulation is commonplace in civil litigation: almost every claim of any complexity is altered to reflect what emerges on disclosure. That fact does not justify the conclusion that there is an informational imbalance that may stifle a claim; nor does it justify advancing a case that is not pleaded with sufficient specificity.[102]

201. In this case, we do not consider that an informational imbalance in the sense described in paragraph 199 above exists, and certainly do not consider that any such argument was advanced with any force. These are follow-on claims, where the infringements have been established and where the Applicants will not be able to supplement those infringements by additional (new) infringements.

202. Equally, the Applicants have purported to articulate the classes' claim to damages, including in relation to the question of causation, by reference to the Decisions and to the economic evidence they have adduced. Neither PCR has suggested that they need something more to make their applications good. Had it been asserted that some disclosure from the Respondents was necessary in order even to make a certification application, that is an assertion that we would have taken seriously. What the answer would have been is not something we propose to address, because it does not presently arise.

203. Both Applications turn on the evidence of the expert economists, who based themselves (in the first instance) on the Decisions. There is in essence no factual evidence on the question of causation apart from that expert evidence.[103]

204. It is, in our judgment, not appropriate for a party in individual proceedings asserting a causative link to do so without articulating that causative link in a pleading. Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove[104]) all the material facts on which a party relies for his or her claim or defence.

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[102] There are reasons why the courts have the ability to order pre-action or early disclosure. In this case, the Respondents would be unlikely to have all of the information necessary, and the class of proposed claimants (as opposed to the PCRs themselves) would certainly have some of this information.

[103] We should also say that Evans adduced evidence from a market expert, Mr Knight: see Knight 1, Knight 2 and Knight 3.

[104] Pleadings plead the material facts, not evidence and not law. They state an arguable case, but do not prove it.

Of course, pleadings are no more than an articulation of a party's case, and "proof" of the case is absolutely not required: that is the function of the trial. The term "cause of action" is not defined by statute, but a good definition in the case law is that a cause of action comprises every fact which it would be necessary for the claimant to prove in order to support his or her right to the judgment of the court.[105] Those facts must be asserted – but not proved – in a pleading.

205. A good test – although it derives from the pre-Civil Procedure Rules regime – for what must be pleaded is to say that a party will not be entitled to lead evidence at trial of any facts which he or she has not pleaded. In *Phillips v. Phillips*,[106] Brett LJ stated:

> "If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial…any fact which is not stated in the pleadings. Therefore…in their pleadings they ought to state every fact upon which they must rely to make out their right or claim."

206. A more recent, authoritative, articulation of the dual objectives of *(i)* concision and pleading facts not evidence and *(ii)* stating the case fully so that its nature is understood by the court and the other side was made in *Building Design Partnership Ltd v. Standard Life Assurance Ltd*,[107] where (under the heading "The Basic Ingredients of a Pleading") Coulson LJ said this:

> "39. On this topic, Mr Moran referred to a decision of mine at first instance in the TCC, *Pantelli Associates Ltd v. Corporate City Developments No 2 Ltd*, [2010] EWHC 3189 (TCC). In that case, I had regard to CPR 16.4(1)(a) and the meaning of the phrase "a concise statement of the facts on which the claimant relies". At [11] I said:
>
> > "11. CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in support of the allegation, and are required in order that proper witness statements (and

[105] See, for example, Lord Esher MR in *Coburn v. Colledge*, [1897] QB 702 at 706 to 707.

[106] (1878) 4 QBD 127 at 133.

[107] [2021] EWCA Civ 1793.

> if necessary an expert's report) can be obtained by both sides which address the specific allegations made."

40. I should stress that, although this summary was part of a judgment in a professional negligence claim, it is not to be read as if it were confined to such claims. These are the basic ingredients of any statement of case against any defendant.

41. The other side of the same coin is that pleadings should not be vague and unparticularised, and if they are, they are liable to be struck out: see the judgment of Teare J in *Towler v. Wills*, [2010] EWHC 1209 (Comm). In that case, Teare J said:

> "18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies; see Spencer v Barclays' Bank 30 October 2009 per Mr. Bompas QC at paragraph 35. The Amended Particulars of Claim are, perhaps, concise but they are not clear or coherent. The transactions which the Defendant is alleged to have conducted in the name of the company without disclosing his conflict of interest and which have caused loss have not been clearly identified. The Further Information could perhaps have cured these defects but it has not done so. The particular transactions cannot be identified with ease. Moreover, additional claims, not foreshadowed or pleaded in the Amended Particulars of Claim, appear to have been added. They have no place in the Further Information since they had not been pleaded in the Amended Particulars of Claim. Further, evidential material has been added in such a way as to make comprehension of the Further Information difficult.""

207. As we have noted, pleadings should not become a forensic battleground where technical points prevail to no practical purpose. Where, as here, a claim is one of market-wide harm and the claim is heavily reliant upon econometrics, the pleader will be entitled to significant and sympathetic latitude in how the case is put, because we recognise that the pleader will be pleading "material facts" of an unusual and particular type not usually deployed in civil litigation. Where the law is new or developing, the court must

be careful not to permit pleadings to become a device for stifling proper claims,[108] but the fundamental purpose of pleadings remains critical even, or perhaps especially, in cases where the law is new or developing.

208. A pleading will be deficient – and liable to be struck out – if it fails to articulate with proper particularity a necessary element of a claimant's cause of action or a defendant's defence. That is true as much of a claim framed in an application for a CPO as it is in a pleading in an individual claim. It is, at this point, worth setting out the principles for strike out articulated in *Easyair Ltd v. Opal Telecom* (***Easyair***),[109] as endorsed in many later cases:[110]

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v. Hillman*, [2001] 1 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v. Patel*, [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v. Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v. Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond (No 5)*, [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court

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[108] Thus, for instance, a claimant can plead a case based upon an extrapolation from samples taken from a pool, without pleading a detailed case on each of the allegations in the pool: *Building Design Partnership Ltd v. Standard Life Assurance Ltd*, [2021] EWCA Civ 1793. Such a sampling may or may not be statistically based. As Birss LJ noted at [104]: "Statistics may, in a proper case, add weight to a case based on extrapolation, just as the absence of statistical rigour may weaken it, but there is no general rule that the only extrapolation which can be permitted must be statistical in nature."

[109] [2009] EWHC 339 (Ch) at [15].

[110] E.g., Cockerill J in *King v. Stiefel*, [2021] EWHC 1045 (Comm) at [15].

should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd*, [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v. TTE Training Ltd*, [2007] EWCA Civ 725."

209. We have no hesitation in saying that, in those causes of action where actionable damage is a necessary element (as here), a failure properly to assert a causal link between breach and damage will result in a claim being defective and – if that defect is not cured – liable to be struck out. That is as true of Applications for CPOs as it is in other cases.

210. It is not enough for a claimant to commence proceedings unable properly to make the necessary factual averments sufficient to constitute a cause of action. In particular, a claimant may not commence proceedings in the hope that material will turn up later to enable him or her later to make the necessary factual averments in the pleadings.

211. This is why the Tribunal's letter to the parties made explicit reference to the decision in *Nomura*.[111] *Nomura* (and the cases discussed in that decision as well as those following it) holds that it is an abuse of process to advance a claim where it is not possible, at the time the claim is made, to plead out all of the necessary elements of the cause of action.

[111] *Nomura International plc v. Granada Group Limited* [2007] EWHC 642 (Comm), cited in paragraph (1) of our letter (see paragraph 136 above).

212. The basis upon which claims can be struck out has expanded with the advent of the Civil Procedure Rules, which the Tribunal Rules emulate. Under these rules, a claim may be struck out where the statement of case discloses no reasonable grounds for bringing or defending the claim. That is different to the old formulation – under Order 18 rule 19(1)(a) of the Rules of the Supreme Court – which permitted a claim to be struck out where it disclosed no reasonable cause of action or defence. The later formulation is doubtless wider, but what is clear under both dispensations is that a statement of case may be struck out where a necessary element of a cause of action (or defence) has not been pleaded with proper particularity. It is this element of the strike out jurisdiction that we are here concerned with. *Nomura* deals with that special case where a pleading is defective in this way, but where the argument is made that – if the party in default is only given disclosure from the other side – the deficiency can be made good and the pleading perfected. Although a party will generally be given an opportunity to amend to make good a deficiency in the pleadings,[112] *Nomura* makes clear that that opportunity must be taken before and not after disclosure.

213. In the case of these Applications, both PCRs say that this is not a *Nomura* case. They say that because they assert that their cases are properly pleaded. If that is right then of course *Nomura* does not arise, and rule 41(1)(b) will not apply to strike out the Applications. But that is begging the question. The materials that were before us when we wrote to the parties on 20 July 2021 gave rise to precisely this concern.

(2) Pleading cases of market-wide harm

(a) Introduction

214. What we term cases of market-wide harm are rarely articulated, even in this jurisdiction. We have no desire to be prescriptive in how such cases should be pleaded. Nevertheless, before considering the adequacy of the O'Higgins and Evans Claim Forms, it is both appropriate and necessary that we say something about how cases of this sort should be put, as a "benchmark" for assessing the pleadings.

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[112] *Soo Kim v. Youg*, [2011] EWHC 1781 (QB).

215. We are not – for present purposes at least – concerned with either the pleading of an alleged infringement nor with the quantification of the loss and damage alleged (to the extent that needs to be pleaded at all), but with the causal link between infringement and actionable loss. In this case the infringement actually found by the Decisions was wrongful information exchange (and worse: there are allegations of actual manipulation of trades) between members of a cartel, as a result of which the prices of specific FX trades were manipulated (at worst) or (at the very least) entered into by a member of the cartel with an illegitimate informational advantage, such that the counterparty to the trade suffered from a failure (on the part of the cartelist) to compete lawfully. As we have noted, the actionable loss sustained by the innocent counterparty does not (for pleading purposes) have to be quantified in monetary terms: the counterparty's actionable damage is simply that the unlawful conduct of the defendant cartelist has, in some way, restricted or reduced the level of the claimant's consumer benefit.

216. Causation, therefore, is the focus. We propose to consider the question of causation in a series of instances, beginning with the (relatively) straightforward, before moving to the harder cases.

(b) The causal link in the case of "direct" claims

217. As we have already described, the causal link between cartelist *A* and innocent counterparty *B*, where there is a transaction between *A* and *B* that is the subject of the cartelist's unlawful conduct is straightforward to plead, although likely to be difficult to quantify.[113]

218. Indeed, where the infringement is either established (as here) or sufficiently pleaded (as would have to be the case in a stand-alone action) causation might be said to fall into the category of *res ipsa loquitur*. The consequence of a cartel is that transactions between the cartelists and non-cartelists do not occur in a lawful way or (to put the same point differently) do not occur in a competitive market. Causation of loss is inherent in the very transaction entered into by innocent counterparty *B* with cartelist *A*.

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[113] See paragraphs 177 to 178 above.

219. In such cases, it is easy to see why Directive 2014/14 (the **Damages Directive**[114]) articulates a presumption of loss. Paragraph 13 of Schedule 8A to the 1998 Act provides:

> "For the purposes of competition proceedings, it is to be presumed, unless the contrary is proved, that a cartel causes loss or damage."

(c) The causal link in the case of "indirect" claims

(i) "Pass on"

220. Causation becomes more complex where the loss or damage is suffered at one or more remove. The paradigm case of this is "passing on". It is clear law that where an overcharge is passed on (e.g. where innocent counterparty *B* passes his or her loss on to his or her own counterparty *C*):

(1) Where *B* claims for that loss from *A*, then *A* has a passing on defence.

(2) But *C* may, him- or herself claim that loss from *A*.

There is, thus, an inevitable relationship between *A*'s defence to *B*'s claim, and *C*'s claim against *A*.

221. There is obvious risk in pass on cases of over – or under – compensation, in that *A* may advance a passing on defence in circumstances where *C* makes no claim; or *B* and *C* may each successfully claim for the same loss from *A*. The courts are alive to this risk. The answer is to be clear as to what constitutes pass on, and to require the party asserting pass on to plead it clearly, so that the different cases that come before the court may be decided consistently. Thus, in *Sainsbury's Supermarkets Ltd v. Mastercard Inc* (***Sainsbury's* (First Instance)**),[115] Mastercard's defence that Sainsbury's would have

[114] Implemented into English law by the Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017. These rules materially survive the United Kingdom's withdrawal from the European Union, but they only apply to loss or damage suffered on or after 9 March 2017. The Damages Directive accordingly would not apply to the present case: see the dates of the infringements described in paragraph 5 above.

[115] At [479] to [485].

passed on the unlawful interchange fee which the Tribunal had found was charged was rejected in the following terms:

> "479. The so-called "pass-on" defence was recognised by the Court of Justice in *Courage v. Crehan*, and this recognition of the defence has been reiterated in a number of subsequent cases.
>
> 480. It is plain that the ambit of the defence – like the illegality defence – is one for the national laws of the Member States, subject always to the principles of effectiveness and equivalence and any other requirements of EU law. Before considering the defence as a matter of English law, the following points emerge:
>
> (1) The basis for the defence is said to be the principle of "unjust enrichment". This is probably because many of the cases in the Court of Justice involving pass-on issues have been claims for the recovery of sums levied on the claimant in breach of EU law, rather than claims for damages. In the context of such cases, the Court has stipulated that the scope of the defence must be interpreted restrictively as "that exception is a restriction on a subjective right of recovery of the tax levied contrary to EU law derived from the Community legal order…" (See Case C-147/01 *Weber's Wine World Handels-GmbH and others v Abgabenberufungskommission Wien*, [2003] ECR I- 11385). In another such case, Case C-398/09, *Lady & Kid A/S and others v. Skattenministeriet*, [2012] All ER (EC 410), the Court of Justice stated:
>
> "20. None the less, since such a refusal of reimbursement of a tax levied on the sale of goods is a limitation of a subjective right derived from the legal order of the European Union, it must be interpreted narrowly. Accordingly, the direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of European Union law"
>
> Thus, in that context Community law limits the pass-on defence to instances where the tax unlawfully levied has been directly passed on to the claimant's purchaser. However, "unjust enrichment" is an inapt label in the present case, for it is obvious that claims based upon anti-competitive wrongs are tortious or delictual and not restitutionary. The victim of a defendant's anti-competitive conduct does not seek the restitution of a benefit conferred, but compensation for an injury suffered.
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> (2) The real thrust of the defence is, at least in this case, to do with compensation:
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> (i) It is to prevent the over-compensation of a claimant; and
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> (ii) It is to ensure that the defendant does not pay damages for the same wrong twice over.
>
> (3) These two points are linked. Where a claimant has (for example, by reason of a breach of Article 101 TFEU) overpaid for a good or service, that claimant (a "direct" purchaser) would be over-compensated where the overpayment has been passed-on to a party "downstream" of the claimant (an "indirect" purchaser). EU law recognises that a claim for damages for

breach of competition law may be brought not only by those who have directly suffered harm as a result of anti-competitive conduct, but also those who have been indirectly affected by the same conduct. Where there can be both direct and indirect purchasers – or multiple classes of indirect purchasers – it is important to ensure both that these classes are properly compensated and that the defendant pays only compensatory and not what are in effect multiple damages.

(4) These difficulties emerge very clearly in [the Damages Directive]. Although the Damages Directive is to be transposed into the national laws of the Member States by (at the latest) 27 December 2016 (Article 21(1)), it is nevertheless a document worth referring to:

(i) Article 13 requires that Member States "ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden on proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties."

(ii) Article 14 provides:

"1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

(a) the defendant has committed an infringement of competition law;

(b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them…"

(iii) Article 15 provides:

"1. To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the

application of Articles 13 and 14 is satisfied, national courts seized of an action for damages are able, by means available under Union or national law, to take due account of any of the following:

(a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;

(b) judgments resulting from actions for damages as referred to in point (a);

(c) relevant information in the public domain resulting from the public enforcement of competition law…"

481. The fact that the Damages Directive spends two full Articles dealing with the burden of proof and the need to avoid over- or under-compensation between rival claimant levels or groups and potential defendants is a clear demonstration of the difficulties inherent in the pass-on defence.

482. These difficulties were articulated by White J in the decision of the US Supreme Court in Hanover Shoe Inc v United Shoe Machinery Corporation. In that case, the US Supreme Court denied the pass-on defence in its entirety and so barred the potential for overcharge claims by indirect purchasers. As we go on to describe, that is not the position under English law: but the difficulties identified by White J remain pertinent:

"United seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of section 4 to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price because the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequence decline in sales.

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed, a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world, rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or

maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would only have a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no-one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

483. As yet, there has been no case under English law substantively dealing with the pass-on defence, although the existence of the defence has been recognised on a number of occasions. The scope and nature of that defence remains unascertained.

484. We consider the following points to represent the position under English law:

(1) English law recognises overcharge claims by indirect purchasers. Indeed, it is worth bearing in mind that Sainsbury's claim is itself an indirect claim. It is simply that the passing-on, by Acquiring Banks, of the UK MIF via the Merchant Service Charge to Merchants such as Sainsbury's has so formed part of the "background" facts of this case – and has at no point been challenged by MasterCard – that the indirectness of Sainsbury's claim can easily be overlooked. Nevertheless, this is a case where the overcharge that we have identified has been 100% passed on by Acquiring Banks to Sainsbury's.

(2) From this, it follows that there must be a pass-on "defence". Absent such a "defence", a defendant guilty of overcharge would be liable to compensate directly and indirectly overcharged purchasers many times over, which would be entirely contrary to the principle of compensatory damages. In this case, it would lead to the perverse outcome that MasterCard would have no defence to a claim brought by the Acquiring Banks.

(3) We agree with the submissions of MasterCard, that the pass-on "defence" is no more than an aspect of the process of the assessment of damage. The pass-on "defence" is in reality not a defence at all: it simply reflects the need to ensure that a claimant is sufficiently compensated, and not over-compensated, by a defendant. The corollary is that the defendant is not forced to pay more than compensatory damages, when considering all of the potential claimants.

(4) We have already noted that whilst the notion of passing-on a cost is a very familiar one to an economist, an economist is concerned with how an

> enterprise recovers its costs, whereas a lawyer is concerned with whether a specific claim is or is not well-founded. We consider that the legal definition of a passed-on cost differs from that of the economist in two respects:
>
> (i) First, whereas an economist might well define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers.
>
> (ii) Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so.
>
> There is danger in presuming pass-on of costs to indirect purchasers (*pace* Article 14 of the Damages Directive)), because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end-result is that the defendant retains the overcharge in default of a successful claimant or group of claimants. This risk of under-compensation, we consider, to be as great as the risk of over-compensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation "impossible or excessively difficult".
>
> (5) Given these factors, we consider that the pass-on "defence" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground.
>
> 485. It follows that MasterCard's pass-on defence must fail. No identifiable increase in retail price has been established, still less one that is causally connected with the UK MIF. Nor can MasterCard identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge has been passed who would be in a position to claim damages." (Footnotes omitted).

222. These paragraphs were concerned less with the pleading of a pass-on defence (this was the trial of the claim, not a strike-out application), and more with the reasons why that defence failed in the instance case. But there is a link between that which must be proved for a claim or defence[116] to succeed at trial and that which must be pleaded. Since – as we shall come to describe further – transmission (albeit perhaps not "pass on" *stricto*

[116] It is obvious that the criteria for establishing a pass-on defence must be the same as those which pertain where a claimant makes an indirect claim because the loss has been passed on. The two comprise different sides of the same coin.

sensu) of costs/losses caused by anti-competitive conduct forms an aspect of both Applications, it is as well to have in mind that which must be established if a claim is to succeed, and hence what must be alleged if a claim is to proceed.

223. All of the interchange fee cases, including *Sainsbury's* (First Instance), were overturned on appeal to a greater or lesser extent. But the finding of liability in *Sainsbury's* (First Instance) was upheld in the Supreme Court, which (on remitting all of the cases back to the Tribunal) provided a helpful statement of the law regarding damages and burden of proof in the pass-on context: *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC* (***Sainsbury's* (SC)**).[117] Because these passages show very clearly the sort of facts that will have to be grappled with – and so the sort of points that need to be addressed in pleadings – we make no apology for setting them out at length. We are also very conscious that the law in this area is complex and developing. We have no desire to make any statement ourselves as to what the law is, or to anticipate how future claims might be framed. We only seek to shed light on the sort of averments one would need to see in a pleading to enable a case to proceed. Accordingly, it is best simply to quote (even if it is at length) from this authoritative decision:

> "192. The merchants' claims are for the added costs which they have incurred as a result of the [Merchant Service Charge or "MSC"], which the acquiring banks have charged them, being larger than it would have been if there had been no breach of competition law. Sainsbury's claims damages measured by the difference between the sums which it paid the acquirers through the MSC and the sums which it would have paid if the acquirers' market had not been distorted by the MIF. Similarly, AAM's principal pleaded case is that they are entitled to recover the basic amounts by which they have been unlawfully overcharged with an alternative case that in so far as the unlawful overcharges have been passed on in their selling prices to their customers, they have suffered a loss of profit on the sales of the goods concerned through a reduced volume of sales.
>
> 193. In each case the merchants' primary claim of damages is for the pecuniary loss which has resulted directly from the breach of competition law by the operators of the schemes. That direct loss is prima facie measured by the extent of the overcharge in the MSC.
>
> 194. It is trite law that, as a general principle, the damages to be awarded for loss caused by tort are compensatory. The claimant is entitled to be placed in the position it would have been in if the tort had not been committed. A classic

[117] [2020] UKSC 24.

statement of this principle is that of Lord Blackburn in *Livingstone v. Rawyards Coal Co*, (1880) 5 App Case 25, 39; (1880) 7 R (HL) 1, 7:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

See also *Watson, Laidlaw & Co Ltd v. Pott, Cassels & Williamson*, 1914 SC (HL) 18, 29 *per* Lord Shaw of Dunfermline, who spoke of the principle of "restoration"; *One Step (Support) Ltd. V. Morris-Garner*, [2018] UKSC 20; [2019] AC 649, [25] to [27] *per* Lord Reed.

195. In the United States, concerns about the complexity, uncertainty and cost of calculating the existence and effects of pass-on in federal anti-trust litigation have caused the US Supreme Court to exclude a defence of pass-on under federal law and to allow the claimant to use the amount of the overcharge as the basis of its claim in a treble-damage suit: *Hanover Shoe Inc v. United Shoe Machinery Corpn*, 392 US 481 (1968), 491 to 494 *per* White J.

196. By contrast, in the United Kingdom there is, as is well known, no entitlement to treble damages. Nor is there any exclusion of pass-on as an element in the calculation of damages and the normal rule of compensatory damages applies to claims for damages for breach of statutory duty: *Devenish Nutrition Ltd v. Sanofi-Aventis SA*, [2008] EWCA Civ 1086; [2009] Ch 390, 477, [147] *per* Longmore LJ, 478-479, [151] *per* Tuckey LJ; *Emerald Supplies Ltd v. British Airways plc*, [2009] EWHC 741 (Ch), [2010] Ch 48, [36] and [37] *per* Sir Andrew Morritt C; *WH Newson Holding Ltd v. IMI plc*, [2013] EWCA Civ 1377; [2014] Bus LR 156, [40] *per* Arden LJ. In this respect, English law and Scots law are consistent with EU law which now requires member states to ensure that there is a pass-on "defence": Articles 12(2) and 13 and recital 39 of the Damages Directive. In the legal systems of the United Kingdom pass-on is an element in the quantification of damages rather than a defence in a strict sense. But so long as the UK's competition rules remain aligned to those of the EU, the pass-on of an overcharge remains a relevant factor in the assessment of damages.

197. There are sound reasons for taking account of pass-on in the calculation of damages for breach of competition law. Not only is it required by the compensatory principle but also there are cases where there is a need to avoid double recovery through claims in respect of the same overcharge by a direct purchaser and by subsequent purchasers in a chain, to whom an overcharge has been passed on in whole or in part.

198. The question then arises as to whether the merchants are entitled to claim as the *prima facie* measure of their loss the overcharge in the MSC which results from the MIF. The merchants say that they are so entitled because they have had to pay out more than they would have but for the anti-competitive practices of the schemes and so have suffered pecuniary loss. On the other hand, Visa in its supplementary written submissions submits that their claims are for pure

economic loss and must be claims for the loss of the profit which they would have enjoyed but for the alleged wrongful act of the defendants.

199. We are satisfied that the merchants are correct in their submissions that they are entitled to plead as the *prima facie* measure of their loss the pecuniary loss measured by the overcharge in the MSC and that they do not have to plead and prove a consequential loss of profit. There are many circumstances, which are not confined to damage to property, in which the law allows the recovery of damages without regard to the claimant's profitability.

200. If a claimant suffers damage to property, such as a vehicle or a ship, as a result of the tortious actions of a defendant, it can claim as damages the diminution in value of the damaged property, usually measured by the cost of repairing the property, and consequential loss, such as the loss of use of the property while it was being repaired, without having to show that that expenditure diminished its overall profitability. See, for example, *Coles v. Hetherton*, [2013] EWCA Civ 1704; [2014] 1 WLR 160; *The London Corpn,* [1935] P 70; *The World Beauty*, [1970] P 144.

201. In a claim for contractual damages resulting from the failure of a supplier to deliver goods to a purchaser, the *prima facie* measure of damages is the difference between the market value of those goods and the contract price which the purchaser would have had to pay: *Garnac Grain Co Inc v. HMF Faure & Kairclough Ltd*, [1968] AC 1130, 1140 *per* Lord Pearson.

202. Where charterers of a vessel redelivered the vessel two years before the contractual date on which the charterparty ended, the court accepted the owner's claim for loss of profits from that charterparty during the remaining two years of the charterparty without having regard to the overall profitability of the claimant: *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU (formerly Travelplan SAU) of Spain*, [2017] UKSC 43, [2017] 1 WLR 2581.

203. The effect of the breach on the overall profitability of the claimant in each case was not the relevant measure of damages.

204. Similarly, if a claimant incurs expenditure in replacing items which a supplier had failed to deliver, it is entitled to damages without having to show that the breach of contract adversely affected its overall profitability. An illustration of this is the judgment of Leggatt J in *Thai Airways International Public Co Ltd v. KI Holdings Co Ltd*, [2015] EWHC (Comm); [2016] 1 All ER (Comm) 675. The case concerned a claim for damages resulting from the defendant's (Koito's) breach of contract through the late delivery and failure to deliver aircraft seats to Thai Airways for use in new aircraft which they had purchased. Thai Airways, facing a shortage of aircraft to perform its planned services, leased three aircraft on short-term operating leases to cover the gap in capacity and ordered replacement seats for its new aircraft from another supplier. It claimed as damages the costs which it incurred in mitigating its loss and its principal claim was for the cost of leasing the replacement aircraft. Leggatt J held that Thai Airways was entitled to recover among other things, the costs of leasing the replacement aircraft for two years. Thai Airways did not attempt to base its claim on an estimate of a net loss of profits measured by the differential between what its overall profits would have been if Koito had performed its contractual obligations and the profits which Thai Airways actually made during the period of the leases of the replacement aircraft. Having regard to the

complexity of the arrangements by which the airline sought to maximise the efficiency of the use of its aircraft, that calculation would have been extremely complex.

205. In the present appeals, the merchants by paying the overcharge in the MSC to the acquirers have lost funds which they could have used for several purposes. As sophisticated retailers, which obtain their supplies from many suppliers and sell a wide range of goods to many customers, they can respond to the imposition of a cost in a number of ways, as the CAT pointed out in [434] and [455] of its judgment. There are four principal options: (i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers. Which option or combination of options a merchant will adopt will depend on the markets in which it operates and its response may be influenced by whether the cost was one to which it alone was subjected or was one which was shared by its competitors. If the merchant were to adopt only option (i) or (ii) or a combination of them, its loss would be measured by the funds which it paid out on the overcharge because it would have been deprived of those funds for use in its business. Option (iii) might reduce the merchant's loss. Option (iv) also would reduce the merchant's loss except to the extent that it had a "volume effect", if higher prices were to reduce the volume of its sales and thereby have an effect on the merchant's profits.

206. In our view the merchants are entitled to claim the overcharge on the MSC as the *prima facie* measure of their loss. But if there is evidence that they have adopted either option (iii) or (iv) or a combination of both to any extent, the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss, to which we now turn.

Mitigation and the burden of proof

207. Visa and Mastercard submit that the burden is on a claimant to prove its loss taking account of any pass-on. Visa presents the merchants' claims as claims for loss of profits. On this presentation, the claim for the overcharge incorporated in the MSC is a poor surrogate for loss of profits and must be reduced by any pass-on if it is to comply with the compensatory principle. Sainsbury's and AAM on the other hand submit that, as they have stated a *prima facie* case of their loss, it falls to the defendants to assert and prove that the merchants have mitigated their loss by passing on the relevant costs in the prices which they charged their customers.

208. There are two reasons why the merchants are correct in their submission that they do not have the legal burden of proving their loss of overall profits caused by the overcharge.

209. First, if the law were to require a claimant, which is a complex trading entity, to prove the effect on its overall profits of a particular overcharge, the claimant might face an insurmountable burden in establishing its claim. Were there to be such a domestic rule, it would very probably offend the principle of effectiveness. It is the duty of the court to give full effect to the provisions of

Article 101 by enabling the claimant to obtain damages for the loss which has been caused by anti-competitive conduct.

210. Secondly, an exclusive focus on the claimant's profits would result in it being undercompensated if the overcharge had caused it to forgo discretionary expenditure to develop its business which did not promptly enhance its profits (ie option (ii) in paragraph 205 above).

211. We are also satisfied that the merchants are correct in their assertion that there is a legal burden on the defendants to plead and prove that the merchants have mitigated their loss. See for example, *"The World Beauty"*, 154 *per* Lord Denning MR; *OMV Petrom SA v. Glencore International AG*, [2016] EWCA Civ 778, [2016] 2 Lloyd's Rep 432, [47] per Christopher Clarke LJ. The statement of the Court of Appeal in [324] of its judgment in the present case is an accurate statement of English law:

> "Whether or not the unlawful charge has been passed on is a question of fact, the burden of proving which lies on the defendant…who asserts it."

But in the context of these appeals, as we discuss below, the significance of the legal burden should not be overstated.

212. In some cases of mitigation, the court is concerned with additional benefits which a claimant has gained from the mitigation action which it has taken. In such a case, it is for the defendant to show that the benefits should be set off against the prima facie claim of loss. For example, in *Thai Airways* (above) it fell to Koito to prove that the net benefits that the airline received as a result of leasing the replacement aircraft during the relevant period offset the losses which it suffered from the delayed entry into service of the aircraft for which Koito failed to supply the seats. Such cases raise delicate questions as to whether a benefit is sufficiently causally connected with the breach of contract or (in tort) the wrong or whether the benefit was the result of an independent commercial decision by the claimant.

213. In *Fulton Shipping* at [30], Lord Clarke of Stone-cum-Ebony explained that there must be a sufficiently close link between the benefit and the loss caused by the wrongdoer: "The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation". In that case, by selling the vessel after the charterparty had been prematurely terminated the owners avoided a substantial capital loss occasioned by the collapse in the market for such vessels following the financial crisis in 2008. While the premature termination of the charterparty in *Fulton Shipping* was the occasion for the owners' decision to sell the vessel, the court held that that decision was not necessitated by the termination but was a commercial decision of the owners at their own risk.

214. In other cases, the court may be concerned with a failure of a claimant to act reasonably in its response to its loss. As Leggatt J stated in *Thai Airways* at [33], quoting from an article by A Dyson and A Kramer, "There is No 'Breach Date Rule': Mitigation, Difference in Value and Date of Assessment", (2014) 130 LQR 259, 263: "damages are assessed as if the claimant acted reasonably, if in fact it did not act reasonably". Thus, for example in *Golden Stait Corpn v,*

Nippon Yusen Kubishika Kaisha ("The Golden Victory"), [2007] UKHL 12, [2007] 2 AC 353, Lord Bingham of Cornhill stated (at [10]):

> "An injured party such as the owners may not, generally speaking, recover damages against a repudiator such as the charterers for loss which he could reasonably have avoided by taking reasonable commercial steps to mitigate his loss. Thus where, as here, there is an available market for the chartering of vessels, the injured party's loss will be calculated on the assumption that he has, on or within a reasonable time of accepting the repudiation, taken reasonable commercial steps to obtain alternative employment for the vessel for the best consideration reasonably obtainable."

215. We are not concerned in these appeals with additional benefits resulting from a victim's response to a wrong which was an independent commercial decision or with any allegation of a failure to take reasonable commercial steps in response to a loss. The issue of mitigation which arises is whether in fact the merchants have avoided all or part of their losses. In the classic case of *British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London*, [1912] AC 673, at 689 Viscount Haldane described the principle that the claimant cannot recover for avoided loss in these terms:

> "[W]hen in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account…" (Emphasis added)

Here also a question of legal or proximate causation arises as the underlined words show. But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein? The merchants, having acted reasonably, are entitled to recover their factual loss. If the court were to conclude on the evidence that the merchant had by reducing the cost of its supplies or by the pass-on of the cost to its customers (options (iii) and (iv) in para 205 above) transferred all or part of its loss to others, its true loss would not be the prima facie measure of the overcharge but a lesser sum.

216. The legal burden lies on the operators of the schemes to establish that the merchants have recovered the costs incurred in the MSC. But once the defendants have raised the issue of mitigation, in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business. Most of the relevant information about what a merchant actually has done to cover its costs, including the cost of the MSC, will be exclusively in the hands of the merchant itself. The merchant must therefore produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle.

The degree of precision required in establishing the extent of pass-on of an overcharge

217. The court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss. But in applying the principle the court must also have regard to another principle, enshrined in the overriding objective of the Civil Procedure Rules, that legal disputes should be dealt with at a proportionate cost. The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates. The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved: *Devenish Nutrition Ltd v. Sanofi-Aventis SA*, [2007] EWHC 2394 (Ch); [2009] Ch 390, 408, [30] *per* Lewison J.

218. In *Livingstone v. Rawyards Coal Co* (above), Lord Blackburn in speaking of getting "as nearly as possible" to the sum which would restore the claimant, recognised that the court's task in achieving reparation is not always precise. Similarly, Lord Shaw in *Watson Laidlaw & Co Ltd* (above, at 29 to 30) spoke of restoration by way of compensation being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe" and of the attempt of justice "to get back to the *status quo ante* in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed". When the court deals with claims for personal injury, loss of life or loss of reputation, it has to put a monetary value on things that cannot be valued precisely. But the task of valuing claims for purely monetary losses may also lack precision if the compensatory principle is to be honoured, particularly when one is dealing with complex trading entities such as the merchants in these appeals. We see this for example in AAM's alternative case which seeks to assess the loss of profit caused by the volume effect where the overcharge was passed on to their customers in the form of higher prices. Such a claim is likely to depend in considerable measure on economic opinion evidence and involve imprecise estimates.

219. We see no reason in principle why, in assessing compensatory damages, there should be a requirement of greater precision in the quantification of the amount of an overcharge which has been passed on to suppliers or customers because there is a legal burden on the defendants in relation to mitigation of loss. The contrary view appears to have been based on an application of (a) the CJEU jurisprudence relating to a defence to claims for restitution, that there should be an identifiable increase in a retail price directly attributable to the unlawful charge and (b) the requirement, discussed in Fulton Shipping , of a close causative link between a wrong and a benefit which the victim obtains as a consequence of the wrong: see the judgment of the Court of Appeal at [327] to [330], [337] to [340].

220. As we have said, the relevant requirement of EU law is the principle of effectiveness. The assessment of damages based on the compensatory principle does not offend the principle of effectiveness provided that the court does not require unreasonable precision from the claimant. On the contrary, the Damages Directive is based on the compensatory principle. The European Commission has issued "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" (2019/C 267/07) ("the 2019 Guidelines") in accordance with a power conferred by Article 16 of the Damages Directive. The 2019 Guidelines make clear (para 12) that the compensatory principle "underlies the entire Damages Directive and must be understood as requiring that a person entitled to claim compensation

for the harm suffered must be placed in the position in which that person would have been had the infringement not been committed". It goes on to state that pass-on may be invoked by an infringer as a shield against a claim for damages and by an indirect purchaser as a sword to support the argument that it has suffered harm (paras 18-19).

221. Article 12.1 of the Damages Directive requires member states to ensure not only that both direct and indirect purchasers who have suffered harm should be able to claim full compensation but also that compensation exceeding the harm caused by the infringement of competition law is avoided. Article 12.5 states:

> "Member states shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on."

222. Similarly, in Article 17 the Damages Directive states:

> "Member states shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member states shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."

223. In discussing those articles of the Damages Directive, the 2019 Guidelines (Section 2.3, paras 30-35) recognise that the national courts in addressing the issue of pass-on will have to resort to estimates. In para 33, the 2019 Guidelines state that the principles of equivalence and effectiveness mean, as regards the power to estimate, that "national courts cannot reject submissions on passing-on merely because a party is unable to precisely quantify the passing-on effects". The power to estimate "requires national courts to, firstly, base their assessment on the information reasonably available and, secondly, strive for an approximation of the amount or share of passing-on which is plausible" (para 34). The 2019 Guidelines note that several member states already have rules which correspond to the power to estimate which the Damages Directive envisages and (in footnote 39) refer to Lord Shaw's statement in *Watson, Laidlaw & Co Ltd* (above) that harm may be quantified "by the exercise of a sound imagination and the practice of the broad axe", and to the application of that statement by the Court of Appeal in Devenish Nutrition Ltd (above), [110].

224. As the regime is based in the compensatory principle and envisages claims by direct and indirect purchasers in a chain of supply it is logical that the power to estimate the effects of passing-on applies equally when pass-on is used as a sword by a claimant or as a shield by a defendant.

225. The loss caused by the overcharge included in the MSC was an increased cost which the merchants would in all probability not address as an individual cost but would take into account along with a multiplicity of other costs when developing their annual budgets. The extent to which a merchant utilised each of the four options, which the CAT identified and we described in para 205 above, can only be a matter of estimation. In accordance with the compensatory principle and the principle of proportionality, the law does not require

unreasonable precision in the proof of the amount of the prima facie loss which the merchants have passed on to suppliers and customers.

Conclusion on the broad axe issue

226. In conclusion, we do not interpret the Court of Appeal as having held that the defendants had to prove the exact amount of the loss mitigated. But in so far as the Court of Appeal has required a greater degree of precision in the quantification of pass-on from the defendant than from a claimant, the Court erred. For these reasons, the appeal succeeds on issue (iv)."

(ii) Complexity in articulating an "indirect" claim

224. Even in a case where the unlawful overcharge – in *Sainsbury's*, the interchange fee which unlawfully caused the MSC paid by merchants to increase – is established and is relatively straightforward to compute, difficult questions of fact and law regarding the incidence of loss arise. It is not necessary part of this judgment to articulate or resolve any of these difficult questions, which is why we have chosen to set out, without attempting any synthesis, the articulation of the law by the Supreme Court in *Sainsbury's* (SC). That articulation is an appropriate reminder to all, including ourselves, of the difficulties these cases give rise to; and, relatedly, of the importance that the issues that the court will have to grapple with at trial are properly set out (in a pleading) at the outset.

225. *Sainsbury's* concerned a pass on defence (where the defendants were contending that the losses being claimed by the claimants had not, in fact, been sustained by them), but precisely similar (and similarly difficult) questions of fact and law arise where an indirect claim is being made, where the essence of the claim is the passed on cost.

226. *Merricks* is such a case. We bear in mind that *Merricks* sits at the relatively easy end of the spectrum of this sort of case. That is, first, because the unlawful overcharge that was allegedly passed on to the claimant class in this case is itself reasonably easy to identify and compute: that, as we shall come to consider further, is not the case in these Applications. But, secondly, *Merricks* is an "easy" case because of the very collective action regime we are considering:

(1) In the case of an individual claimant – assuming, for the sake of argument, a claimant willing to incur the enormous cost of litigating for a trifling sum – establishing even the actionable damage necessary to found a cause of action

would be very difficult for the individual. That is because complex trading organisations will seek to recover their costs from their customers: otherwise they will go out of business. However, the manner in which they seek to recover their costs will be informed by their competitive environment. In essence, recovering the costs of a business enterprise is another way of describing the profit-maximising efforts of the entrepreneur, and is a matter closely informed by the nature of the business, and the market environment in which that business operates.

(2) By way of example, take the individual supermarket shopper paying for his or her purchases by credit card. It would be difficult – perhaps impossible – for that individual shopper to articulate (even in the broadest terms, using the soundest of imaginations and the broadest of axes) his or her loss.[118] The unlawful overcharge – in the form of the inflated MIF – obviously exists and the supermarket will (as a profit maximiser) attempt to recover that cost through the prices it charges. But whether it can do (supermarkets exist in a very competitive environment) and how it does so (i.e. which prices are increased) is very hard, perhaps impossible, to know.

(3) In *Merricks* at first instance,[119] the Tribunal was not concerned with individual claims, but with an application for a CPO. Nevertheless, it considered that the individual nature of the loss that was (allegedly) passed on precluded certification.[120] Pass on is considered at [39]*ff* of the Tribunal's judgment in that case. The Tribunal was troubled by a concern that "there is no methodology which can produce a fair distribution of an aggregate award of damages, and therefore proper compensation".[121] It concluded that this question of individual

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[118] See [484](5) of *Sainsbury's* (First Instance), quoted at paragraph 221 above.

[119] *Merricks v. Mastercard Inc*, [2017] CAT 16.

[120] The issue runs through the judgment of the Tribunal. Thus, at [25] and [26], the Tribunal noted that the pass-on would not be limited to those who purchased goods by credit card, but would probably extend to any purchaser of goods from a merchant accepting payment by credit card.

[121] At [46]

compensation could not be regarded as a "common issue" and so could not be certified for the purposes of collective proceedings.[122]

(4) The Tribunal's decision was overturned. The decision in the Supreme Court makes clear – as we have described[123] – that in the case of both opt-in and opt-out collective proceedings damages can be assessed on a class-wide basis, without any need to articulate individual loss. That meant that the Tribunal was wrong in failing to certify the collective action in *Merricks*.[124] That correction of the Tribunal is immaterial for present purposes. What is material is that the Supreme Court's decision demonstrates that collective proceedings may succeed where individual claims or group litigation claims under CPR 19.6[125] might very well fail. The point is that whilst it may be extraordinarily difficult (and certainly not practically viable) to plead and prove actionable loss in an individual claim – because precisely how an overcharge is passed on may be unknowable – the point can more straightforwardly be averred in collective proceedings, because an undertaking that has sustained an overcharge will generally seek to recover that overcharge in the prices it charges to its customers, who will comprise the class in the collective proceedings.[126]

(iii) Identifying the "passed on" loss

227. We have, on a number of occasions, suggested that the nature of the passed on cost or loss or claim (depending on context, one or more of these terms will be apposite) is more straightforward in the interchange fee cases than in other cases. That is because in the interchange fee cases there is an identifiable charge to the merchants – the MSC –

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[122] At [66].

[123] See paragraphs 174 to 175 above.

[124] The proceedings have now been certified: [2021] CAT 28.

[125] See *Lloyd v. Google LLC*, [2021] UKSC 50.

[126] Of course, even this will not be straightforward, because the overcharge need not necessarily be passed on at all: see [205] of the Supreme Court's decision in *Sainsbury's* (SC), quoted at paragraph 223 above. But the exercise is a good deal more straightforward where the claim is a collective one than where it is an individual action.

which contains 100% of the unlawful interchange fee overcharge.[127] In other cases – in particular in the cases here under consideration – the cost may be much more elusive and less susceptible of identification.

228. Only once the initial cost or loss to the market has been identified can the question of the extent to which (if at all) that cost or loss has been passed on to others by the party initially bearing it be addressed. On this point, both this Tribunal and the Supreme Court have noted:[128]

> "There are four principal options: (i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers. Which option or combination of options a merchant will adopt will depend on the markets in which it operates and its response may be influenced by whether the cost was one to which it alone was subjected or was one which was shared by its competitors."

It is, however, important to note that there are two distinct issues: the "initial" loss or cost (which could be the subject of a "direct" claim) and the extent to which that "initial" loss has been passed on (which could be the subject of an "indirect" claim).

(d) Market-wide harm

229. We shall not repeat the general description of the market-wide harm here in issue contained in paragraph 141 above.

230. An important aspect of markets and competition is how undertakings in a market respond to an increase in the costs of doing business.[129] The legal analysis to date has focused on the recovery of unlawfully caused costs. The four principal options are set out at paragraph 228 above, but these options are likely to operate not singly, but in

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[127] That is common ground in the interchange fee cases. See, for example, the explanation in the Tribunal's decision in *Merricks*, [2017] CAT 16 at [25]. Of course, precisely what that overcharge is will be the subject of dispute, and there may be defence. But, assuming no competition law defence, the cost is identifiable.

[128] See [205] of the Supreme Court's decision in *Sainsbury's* (SC), quoted at paragraph 223 above.

[129] See the exchanges recorded in the Tribunal's decision in *Sainsbury's* (First Instance) at [432] to [435].

parallel, and we would be surprised if these were the only options open to the undertaking: there will at least be variants on these themes. It must also be noted that the picture becomes even more complex when it is borne in mind that an undertaking is unlikely to react to an unavoidable increase in costs immediately. In the short term, an undertaking may well bear an unavoidable increase in costs by making less profit (or incurring a loss or a greater loss), but that is most unlikely to be the undertaking's response in the medium or the long term. In the medium or long term, the undertaking will seek to maximise its profit and to cover its costs one way or the other.[130]

231. There is, thus, to the economist, a broad similarity between a cost that is passed from undertaking to undertaking (like the unlawfully excessive MIF) and a cost that represents an increase in the cost of doing business (like the cost of doing business in a market rendered less efficient by unlawful information exchanges). The way in which these costs arise is self-evidently different: but the way they are recovered by the undertaking may in essence be the same. We have no difficulty in economic theory postulating that an increase in costs may – one way or the other – result in an increase in prices. From this, it follows that we have no difficulty in economic theory postulating that a specific and unlawful cost (whether that be an excessive MIF or an unlawful information exchange) may be passed on[131] or transmitted to the market in the form of increased prices. To be even more specific, we have no difficulty (as a matter of theory) in postulating or accepting that information asymmetries in the FX markets (including, but not limited to, unlawful information asymmetries) might generate increased costs to large numbers of participants in those markets, resulting in increased spreads charged to market counterparties.

232. But economic theory does not, in and of itself, constitute an arguable legal claim. Put as we have put it, to the lawyer it amounts to no more than assertion, bereft of the particularity that is required in order to render the claim triable. Economic theory does

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[130] *Sainsbury's* (First Instance) at [435].

[131] As was noted in the Tribunal's decision in *Sainsbury's* (First Instance) at [484](4) the notion of a passed-on cost is very familiar to the economist and – more recently – to the lawyer. But the term is used in very different ways by each. Economists tend to use the phrase as simply meaning the transfer of costs, in some way, to other participants in the market. Lawyers – as the cases we have cited show – see the concept very differently.

not automatically or easily translate into a legal claim. A civil action requires, amongst other things:

(1) Identified or identifiable claimants.

(2) Identified or identifiable defendants.

(3) Some kind of actionable and identifiable harm, caused by the defendants to the claimants.

233. The economic theory of passed on or transmitted costs provides the answer to none of these questions. An essential problem in articulating market-wide claims of harm, which both the O'Higgins Application and the Evans Application need to have grappled with, lies in translating this possible or theoretical phenomenon into a series of averments capable of being tried in a court.

(e) Overcoming the difficulties

234. Before we turn to the specific issues that arise out of the O'Higgins and Evans Applications, it is important that we make clear that these courts are open to claims of market-wide harm, and have a number of tools to deploy in order to enable such a claim to be framed. As to this:

(1) The courts in this jurisdiction are very much alive to the concept of "effectiveness".[132] Claimants cannot have imposed upon them insurmountable burdens in establishing their claims. If there are insurmountable burdens, then they should arise not from the rules of pleading, but from the inherent (de)merits of the case itself. The courts in this jurisdiction have shown remarkable flexibility in terms of what constitutes a properly pleaded case in order to ensure that proper cases are not denied access to the seat of judgment. Thus:

(i) Articulation of the burden of proof on particular issues is of considerable importance, as the consideration in the Supreme Court in *Sainsbury's*

[132] *Sainsbury's* (SC) at [209], quoted in paragraph 223 above.

shows.[133] Pleadings play an important role in articulating which party, on a given issue, bears the burden of proof. In cases where proof of fact may be elusive, this is important.

(ii) So far as the quantification of loss and damage is concerned, the courts can and do take a "pragmatic view"[134] and Lord Blackburn's dictum about compensation being accomplished "to a large extent by the exercise of a sound imagination and the practice of the broad axe"[135] is rightly claimant friendly, particularly when read in light of the low hurdle of actionable loss.

(iii) More generally, the courts are well able to take account of inferences pleaded out of anterior factual averments,[136] and such inferences are valuable in demarcating the areas where disclosure and factual evidence will be required (from one side or the other) in due course. As we have noted, the pleadings are the critical source for identifying areas of disputed fact, so that the parties and the court can marshal the evidence that will be required to resolve them. Particularly in competition and markets cases – but more generally also – the courts are receptive to expert statistical evidence in support of a pleaded case provided it is not too abstract, theoretical, unrepresentative or uncertain.[137] Furthermore, extrapolation based upon sampling that is not underpinned by statistical analysis may be a perfectly acceptable way of pleading a claim.[138]

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[133] See the quoted extracts in paragraph 223, in particular at [211] and [216].

[134] *Sainsbury's* (SC) at [217], quoted in paragraph 223 above.

[135] *Sainsbury's* (SC) at [218], quoted in paragraph 223 above.

[136] See *Building Design Partnership Ltd v. Standard Life Assurance Ltd*, [2021] EWCA Civ 1793 at [26], quoting from the careful observations of the judge below.

[137] See, for example, *Amey LG Ltd v. Cumbria County Council*, [2016] EWHC 2856 (TCC), where a number of patching and surfacing claims were pleaded on the basis of a sample, the claim extrapolating from that sample. The judge had no difficulty in principle with such a pleading, but rejected the statistical approach as insufficiently strong to support even the pleaded averments. See the discussion in *Building Design Partnership Ltd v. Standard Life Assurance Ltd*, [2021] EWCA Civ 1793 at [45] and [46].

[138] *Building Design Partnership Ltd v. Standard Life Assurance Ltd*, [2021] EWCA Civ 1793 at [54] and [104].

(iv) It may be that in cases involving multiple transactions or claimants, a sample of transactions or claimants needs to be taken and set out in detail, so as to enable a properly extrapolated case to be articulated at the pleadings stage. As we have described, collective proceedings before this Tribunal have the very significant advantage of not obliging the claimant class to plead or prove individual loss. The loss can be articulated by reference to a class or classes of person.

(2) We do not consider that market-wide harm cases can be pleaded at the level of economic theory only. The facts and matters set out in paragraph 232 are unlikely to be provided with the specificity required to try a claim by theory alone. But we should stress that we are very much alive to the difficulties of pleading a market-wide harm case, and would be open to novel ways of articulating such claims provided they were sufficiently specific to enable the trial processes properly to go ahead.

(3) We hesitate to be too specific as to how such a pleading might be framed, because this is a matter for the parties, and not the court. But it does seem to us that there are at least two ways in which a case of this sort could be pleaded. As to the two ways that we have identified:

(i) First, a statistical correlation between infringement and effect on market spreads could be averred. The essence of such a plea would be that whilst the transmission mechanism of an additional and unlawful cost (i.e. the information imbalance) through the market would not be set out or averred, the statistical relation between the infringements found in the Decisions and the effects on the market was such as to amount to an arguable claim[139] that the explanation for this correlation was that the widened spreads were caused by the infringements. In short, such a plea would involve looking at the start point and end point of a causal chain and, without necessarily articulating all of the detailed links in that chain,

[139] For pleading purposes, no more is required.

inferring those links out of the correlation between the data relating to the start and end points of the chain (the start point being the infringement and the end point being the spreads in the market).

(ii) Secondly, 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, which the first method side-steps. In such a case, the sort of statistical correlation described in sub-paragraph (3)(i) above would be unnecessary to plead,[140] but there would have to be: *(i)* some particularisation of how the cost of the illegitimate information imbalance found in the Decisions manifested itself in the market; and *(ii)* how that additional cost was transmitted or passed on, so as to manifest itself in wider spreads. Again, we are under no illusions that this is a difficult case to make out. It might well involve extrapolation from specific examples. It would also likely require some sort of consideration of how price increases can be passed on in what is a competitive market.

(4) We are, for obvious reasons, both reluctant and unable to spell out in any further detail how a market-wide harm case might be pleaded. There are, no doubt, other ways of articulating an arguable case. We turn, now, to the pleadings in the two Applications.

F. THE STRIKE-OUT QUESTION

(1) Introduction

235. Often questions of strike out can be considered by reference to the pleadings alone. That is not appropriate in the case of the present Applications, because of the considerable additional material adduced by the Applicants, which material is in some cases specifically referenced by the Applicants in their pleadings.

[140] Although it might very well constitute evidence that could, later on, be deployed in support of such a case.

236. We have therefore reviewed the cases articulated by the Applicants in the widest sense, so as to understand the cases they are making. Earlier drafts of this Judgment went to some length in considering all of the pleadings, including those submitted in response to our letter of 20 July 2021, as well as the expert evidence submitted by each Applicant. It is, however, unnecessary to set out the content of these materials in any greater detail than we have done. On the basis of all the materials we have considered, including in particular the expert evidence, we are prepared to proceed on the basis that the claims are theoretically plausible.

237. However, we are satisfied that the facts and matters necessary to support a proper pleading have not been articulated in the pleadings as they stand in either the O'Higgins Application or the Evans Application. We are satisfied that this is not because of a failure to translate specific details that are contained in the expert reports into a legally framed document. Although the expert reports are detailed, these details amount to no more than a detailed expansion of a theoretical position. Our conclusion is that they do not contain material sufficient to support a proper plea of causation, loss and damage. We will consider the O'Higgins and Evans pleadings in turn.

(2) The O'Higgins Claim Form

238. As regards the O'Higgins Claim Form and the O'Higgins Application:

(1) As we noted in paragraph 189 above, it is paragraph 12 of the O'Higgins Claim Form that is the critical paragraph in terms of averring loss and damage. The point is expanded in the O'Higgins Theory of Harm Submissions. As to these:

(2) Paragraph 3(3) of these submissions does no more than re-state the economic theory in play:

> "An increase in cost – actual and anticipated – to rival (non-cartelist) dealers trading in the inter-dealer segment is likely to have led to higher prices charged by the rival dealers in the dealer-to-customer segment. This increase in price would have taken the form of wider bid-ask effective spreads charged to their customers."

Paragraphs 13 and 14 then seek, respectively, to deal with the two distinct questions set out in paragraphs 227 and 228 above. Paragraph 13 pleads the "initial" cost to the market, in the form of the direct cost to the market arising

out of the unlawful information asymmetry found in the Decisions. Paragraphs 14*ff* then plead how that loss or cost was passed on in the form of widened spreads. Thus:

(i) Paragraph 13 provides:

> "As a result of the increased information asymmetry, non-cartellists trading in the inter-dealer segment faced elevated risk of "adverse selection" – i.e. trading with a better informed dealer (either a cartelist dealer or potentially a dealer following the lead of a cartelist). The corresponding increase in adverse selection costs would have been experienced by non-cartelist dealers during the cartel period in the form of higher rate and/or extent of loss-making trades suffered by such non-cartelist dealers in the inter-dealer segment. Put simply, as a result of the cartels, a non-cartelist ran a greater risk of making a bad bargain. In particular:
>
> (1) A trader is likely to be unaware of the specific occasions when they trade with a better informed counterparty but will experience greater average trading losses than would otherwise be the case. A trader in such a position (i.e. one who cannot tell how well informed their counterparty is for any particular transaction in a given series) must assume that <u>every</u> transaction in that series carries the *risk* that the counterparty is unusually well informed and hence that the particular transaction may be loss making. For that reason, even if it were the case that only a fraction of the trades were actually affected, the impact of adverse selection would remain relevant for every such trade.
>
> (2) Such elevated adverse selection risk thereby increased the transaction cost for the non-cartelist of using the inter-dealer segment to lay off inventories acquired from customer trades. For the avoidance of doubt, this elevated adverse selection risk arose because of the presence of increased informed trading in the market owing to the existence of the cartels and did not depend on the level of market power possessed by the members of the cartel.
>
> (3) This cartel mechanism of operation is an example of a strategy known as "raising rivals' costs." (Footnotes omitted).

(ii) Paragraphs 14*ff* then aver that these additional costs resulted in wider spreads charged to the market by those Non-Respondent Dealers who incurred them. In particular, paragraph 16 pleads:

> "In light of the rising costs for the non-cartelist dealers on the inter-dealer segment as described in paragraph 13 above, the non-cartelists had to recover such costs to remain profitably in business and/or to

maintain their profitability. In consequence, the likely effect of the increased variable transaction cost to non-cartel dealers in the inter-dealer segment (as described in paragraph 13 above) would have been for the non-cartel dealers to have in turn widened the spreads to their own customers in the dealer-to-customer segment."

(Footnotes omitted).

(iii) It is then alleged that the cartelists (i.e. the Respondents) would (instead of undercutting their rivals) have increased their own prices by widening their own spreads. Thus, paragraph 20 provides:

> "There are two theoretical possibilities – the cartelist dealers could either have: (a) reduced their own prices (viz spreads) or maintained their own prices at the same level as they would have been in the absence of the cartels (and thereby enjoying gains by expanding their share of the relevant market solely by undercutting their rivals); or (b) increasing their own prices (viz spreads) in order to enjoy higher profits. For the following reasons, the first possibility is far less probable than the second:
>
> (1) The prices of distinct firms operate typically as *strategic complements* – i.e. an increase in price by one firm tends to elicit price increases by its competitors.
>
> (2) The cartel activity is unlikely to have materially *reduced* the cartel dealers' own variable costs of laying off inventories acquired through trading with their own customers when the cartel dealers were not better informed – i.e. the increase in costs to the non-cartelist dealers was probably not mirrored by a reduction in costs to cartelist dealers. On the contrary, the wider spreads in the inter-dealer segment may well have caused cartel dealers to have incurred greater costs (paid under wider spreads) when they were themselves sourcing liquidity on many trades.
>
> (3) The Commission Decisions record that there were exchanges between the cartelists of information relating to bid-ask spreads. The Commission Decisions also acknowledge that these exchanges "may have facilitated occasional tacit coordination of those traders' spreads behaviour". Although the Commission Decisions note that this might have resulted in "tightening or widening the spread quote in that specific situation" it is inherently more likely to have more often led to spread widening, since this would tend to increase the price (and hence maximise profit to the dealers in question). In the present context, raising prices means in particular widening the (effective and/or realised) spread. Further, the Commission Decisions explain that cartel members exchanged information in part to monitor and enforce compliance with the cartel strategy, thereby potentially deterring cartel members from tightening spreads. Regulatory filings from the US FX

litigation report evidence of such information exchange from cartel chatrooms." (Footnotes omitted).

(3) So far as this pleading is concerned:

(i) The averment of collusion in the setting of the spreads contained in paragraph 20(3) of the O'Higgins Theory of Harm Submissions is in our judgment new to the O'Higgins Application, and reflects a point pleaded in the Evans Application.[141] We take no issue with the insertion of an apparently new point by the O'Higgins PCR, but would only observe that this is a form of "direct" loss that will have been sustained by those counterparties to the Respondents who dealt with the Respondents in circumstances where the rate was not the market rate. In short, this is not a consequence of an unlawful information asymmetry case, but is a different loss caused to participants in the market who dealt on the basis of non-market-rate spreads. It seems to us that this type of loss needs to be distinctly articulated, and we consider it further in relation to the Evans Application (where it has always been pleaded).

(ii) Turning, then, to the articulation of the theory of market-wide harm originally alleged by the O'Higgins PCR articulated in these paragraphs, it seems clear that the pleading is seeking to articulate the links in the causal chain by which the costs arising out of an infringement are translated into a market-wide loss.[142] The chain alleged is as follows.

(iii) First, that Non-Respondent Traders sustained losses through information asymmetry.[143] It is to be noted that the allegation is not that the entire market sustained a loss or an additional cost. That is the economic theory that is being articulated – set out in paragraph 229 above – but the legal translation of that theory involves an assertion that a specific class of

[141] See paragraph 196(2) above.

[142] I.e. a plea along the lines described in paragraph 234(3)(ii) above.

[143] I.e. the plea in paragraph 13 of the O'Higgins Theory of Harm Submissions.

person (the Respondents) have, through their unlawful conduct (namely, the unlawful information sharing), caused loss to the Non-Respondent Traders. Whereas economic theory can plausibly assert that in general information asymmetry will result in an increase in the costs to the market, a legal claim must assert with some specificity that a given infringement, by a named defendant, caused a loss to the claimant class. The market will be redolent with information asymmetries, many of them entirely lawful, and the pleading must identify the losses caused by the illegitimate information asymmetries.

(iv) What needs to be pleaded is that the infringements caused some identifiable loss to the claimant class, in this case, via the Non-Respondent Dealers. Identifying the increased cost of the reduction in competition caused by the informational asymmetry arising from the unlawful conduct is not undertaken in the pleading. The O'Higgins Application does not involve the passing on of an illegal cost like an inflated MIF. Rather the claim is substantially based on the information asymmetry between the Respondents and the Non-Respondent Dealers, resulting in increased costs to the Non-Respondent Dealers. The essence of the claim put forward is that the actions of the Respondents reduced the efficiency of the inter-dealer FX market (by, in effect, increasing the costs of doing business) and that this weakening of competition/increase in cost led to passing on of this inefficiency/cost in the form of a widening of the spreads in the market. Prepared though we are to accept that there is the potential for an increased cost, it must be identified in some way. It is here that the difference between a cost that is passed from undertaking to undertaking (like an unlawfully excessive MIF) and a cost that represents an increase in the cost of doing business (like the cost of doing business in a market rendered less efficient by unlawful information exchanges) tells. How does the increased cost of doing business incurred by FX market participants by reason of the infringements manifest itself? How can that increased cost be separated from the many other costs (legitimate and illegitimate) that will be

incurred by FX market participants as the price of doing business? It is not enough to assert: "I have incurred some costs: you, the defendant, caused it". This, as we have stressed, is a difficulty that does not arise in the MIF pass-on cases we have been considering, where the unlawful cost can, at least, be specifically identified. But it does arise in the case of this Application: and it is not addressed in the pleading.

(v) We consider – to adopt the words of Lord Justice Green in *Stellantis*[144] – that the pleading "is theoretical. It assumes what has to be proven and a number of pivotal links in the logic chain represent assumptions which are evidential leaps in the dark and are certainly not inferences that can be drawn from such limited facts as can properly be pleaded…". We consider this to be the case as regards the first of these pivotal links, namely the very existence of a loss to Non-Respondent Dealers. We turn to the other stages in the chain.

(vi) The next, second, step in the chain is the "passing on" of these losses, in the form of widened spreads.[145] There is, of course, the initial difficulty that the frailties that inform the first stage of the chain inevitably affect the second stage: it is very difficult to plead with any specificity that an unidentified loss is passed on. But there is a further problem. Because what is pleaded is a cost that is specific to the Non-Respondent Dealers the question of *intra*-market competition arises, and is nowhere addressed. By *intra*-market competition we mean competition – in relation to what are fungible and very similar products – where the elasticity of demand might be expected to be very high.

(vii) Thus, assuming an identifiable and unlawful cost incurred by FX market participants, the question arises as to how that cost transferred on or passed on into the wider market? We accept that if such a cost can be

[144] [2022] EWCA Civ 16 at [61]

[145] See paragraphs 14*ff* of the O'Higgins Theory of Harm Submissions.

identified, then it may be passed on or transmitted in the form of increased spreads. But, again, this is a theoretical construct, for there are many other ways in which a cost may be absorbed by an FX market participant: e.g. reduced contribution to the profitability of the bank; reduced bonuses to traders for poor performance; cutting back on overheads. Even if the cost is passed on in the form of increased spreads – the question arises how the pass on occurred; in which currencies; and over what time duration? The point is, even assuming an identifiable and unlawful cost incurred by FX market participants, on what basis can it be said that this caused these market participants – the banks – to widen their spreads to customers? They could have absorbed the cost themselves. And even if they did seek to pass on the costs, would this have been achieved by a widening of FX spreads or by increasing the price of other products?[146]

(viii) These questions will be informed by the fact that Non-Respondent Dealers and the Respondents will be in direct competition. That, of course, is a factor specific to the legal articulation of these claims: economic theory draws no distinction between Non-Respondent Dealers and the Respondents.

(ix) Turning, then, to the third stage of the chain, paragraph 20 of the O'Higgins Theory of Harm Submissions asserts that the Respondents would follow the widened spreads adopted by the Non-Respondent Dealers. It will readily be appreciated that this question turns on the extent to which the Non-Respondent Dealers could increase their own spreads, and why they would do so. Again, the plea in the O'Higgins Theory of Harm Submissions is entirely theory-driven.

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[146] There are analogies with the "waterbed" argument that often occurs in cases of price control. The theory is that if – in the case of a multi-product firm – the price for one product is controlled, so that it cannot be raised, the prices of other products not subject to the control may be increased. Like a waterbed, if you push down one part, another part of it rises.

(4) It may also be that the O'Higgins PCR is relying upon the first manner in which a claim to market-wide harm can be articulated.[147] Paragraph 28 of the O'Higgins Theory of Harm Submissions provides:

> "The O'Higgins PCR intends to test the causative effect of the cartels via their effect on effective and realised spreads. This will be achieved by rigorous empirical testing using regression analysis and corroborative techniques based upon the disclosure…In particular, the possibility that the cartel conduct had a differential impact on the spreads of the cartelist dealers and non-cartelist dealers (or other variety of differential impact, such as volume of the trade, mode of the trade (voice/SBP/e-commerce) can be tested empirically by the application, in particular, of multiple dummy cartel variables and interaction terms combined with a close analysis of the underlying documents (in particular, the cartel chatroom records). It is expected that data will be available from the Respondents enabling this empirical analysis to be carried out."
>
> (Footnotes omitted).

(5) At best, this plea is one where there is the hope – framed as an expectation – that something will "come out in the wash", probably in the form of the regression analyses that can be conducted in relation to the data that would – if these actions were to proceed – be provided on disclosure, so as to enable a theoretical position to be fleshed out by some kind of freshly articulated case.

(6) Allowing actions to proceed on a "wing and a prayer" is precisely what *Nomura* enjoins. Defective claims cannot be allowed to proceed in the expectation – even the confident expectation – that the deficiency will be made good by disclosure. The answer to this sort of problem is pre-action disclosure – and no application along these lines has even been suggested by the O'Higgins PCR.

(7) Nor are we confident that the regression analysis would demonstrate the kind of correlation between the infringements found in the Decisions and the movements in the market (in particular, the widening and narrowing of spreads) so as, in and of itself, to make good the causative link between the infringements and the losses alleged. That is because of the multitude of other factors that may affect the level of spreads in the FX market, which will be hard to control for. We make this point about the utility of statistical analysis simply because it

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[147] As described in paragraph 234(3)(i) above.

underlines the importance, and essential correctness, of cases like *Nomura*. If there is an arguable statistical case on causation, it should be pleaded first, with disclosure following.

(3) The Evans Claim Form

239. We turn to the Evans Claim Form, which was described in paragraphs 193*ff* above. Much of what we have said in relation to the O'Higgins claim can be read across to the Evans claim, and here we focus on points that are specific to the Evans Application:

(1) It will be recalled that the Evans PCR seeks to act for two classes, Class A and Class B. Beginning with the first of the two classes articulated in the Evans Claim Form, at first sight Class A appears to be a straightforward claim by a counterparty to one of the Respondents whose trade was affected by the unlawful information exchange identified in the Decisions. That is what the wording in paragraph 75(a)(i) of the Evans Claim Form suggests:[148]

> "The harm suffered by members of Class A results from the direct effects of the Infringements, which are suffered in transactions entered into with the Proposed Defendants during their Relevant Class A periods…"

In short, what appears to be pleaded is a claim falling within paragraphs 177 to 178 above. In fact, on closer examination, that is not the claim articulated:

(i) Class A comprises all persons entering into FX transactions during the relevant period, which is the period when the Respondents' traders were engaged in their infringing conduct as found in the Decisions.

(ii) Class A is not confined to those persons whose trade(s) were actually subject of the unlawful information exchanges identified in the Decisions. Rather, Class A comprises anyone dealing with a Respondent during the relevant period. The linkage alleged between these trades and the unlawful information exchanges found in the Decisions is thus significantly attenuated and very unlike the sort of claim described in

[148] Emphasis added.

paragraphs 177 to 178 above. Class A embraces trades that may not have been close in time with trades actually the subject of the unlawful information exchanges.

How transactions not the subject of the unlawful information exchanges identified in the Decisions were affected by those information exchanges is not stated.[149] The basis of the plea appears to be the theory of tacit collusion articulated in paragraph 249 of the Evans Claim. But if there was collusion – tacit or otherwise – amongst traders of the Respondents that affected certain trades, then that would render the case one of "direct" harm: the transaction would not be on proper market terms, because of the collusion. In short, this would either be a case of "tacit collusion", where the trade is affected by the collusion – in which case this must be stated – or else a claim that is defective in its averments. The mere fact that a person *A* trades with a counterparty who – in other, unrelated trades, has behaved unlawfully – is of itself no basis for impugning *A*'s trades with that counterparty. The causal route by which *A* is harmed is unclear and not clearly stated in the Evans Claim Form.

(2) Turning to Class B, the whole point of Class B is to articulate a theory of class harm where the FX transactions in question are between two parties neither of whom is infringing competition law. As to this aspect of the Evans claim:

(i) Class B identifies a specific (albeit large) set of participants in the market. Like the O'Higgins claim, the claim is not one of market-wide harm, but one of harm to a specific (admittedly large) segment of that market.[150] However, as we have noted, the moment a case ceases to be a case of market-wide harm, and the prospect of *intra*-market competition is introduced, the constraints of competition need to be factored in. In

[149] There is a bare averment of causation at paragraph 249 of the Evans Claim Form: "The effect of the Infringements was, at all material times, to enable the Proposed Defendants to unlawfully widen the bid-ask spreads applied to FX Spot Transactions involving G10 Currency Pairs beyond the bid-ask spreads that would have prevailed in the absence [of] the Infringements."

[150] Compare the analysis of the O'Higgins Application in paragraph 238(3) above.

the case of the Evans Application, trade with or the potential to trade with Non-Respondent Dealers (resulting in what we term Non-Respondent Trades) ought, in a competitive market, to have acted as a competitive constraint on the Respondents. There is no suggestion that the products offered by the Respondents were any different to those offered by others in the market: currencies, and the contracts pursuant to which they are traded, are fungible and would appear to be readily substitutable. In short, absent a cost transferred to the market generally, which is not alleged and which would render the distinction between claimants and defendants difficult, the demand for FX products (at least those products traded on standard terms, as these were) ought – if ordinary economic theory prevails – to be elastic and price sensitive. As a matter of theory, *intra*-market elasticity ought to be very high in this market, and the constraint on price a real one. Of course, the real world position may be very different. It may be that what is in theory an elastic market is not – due to switching costs, relationship issues and the like. Or it may be that a cost caused by unlawful information exchanges is passed generally on to the market as an "umbrella effect". But if that is the case, the distinction drawn between Class A and Class B becomes much harder to understand.

(ii) In these circumstances, the assertion (in paragraph 249 of the Evans Claim Form) that one consequence or effect of the infringements found by the Decisions was "to enable the Proposed Defendants to unlawfully widen the bid-ask spreads" in the market generally[151] appears to be insufficiently justified on the face of the Evans Claim Form.

(iii) It is not clearly evident from the Evans PCR's case how a widening of the bid-ask spread in the face of the prevailing market rate could be sustained unless either the market in question was uncompetitive or

[151] Emphasis added.

otherwise inelastic or there was a market-wide cost affecting all spreads in the FX market.[152]

(3) In this regard, we note that – when pressed in our 21 July 2021 letter – the Evans PCR did attempt the beginnings of a pleading regarding elasticities of demand in the FX markets. This was a point – as noted by the Respondents[153] – that featured marginally, if at all, in the Evans PCR's pleadings prior to the Evans Theory of Harm Pleading. It was troubling to us that so significant a point should have gone unstated (or, at least, not clearly stated) for so long.[154] We do not intend this as a criticism, but merely as an indication that it is possible to make assertions in pleadings about the operation of markets. But we are satisfied that the difficulties we have identified remain.

(4) The claim in paragraph 252(a) of the Evans Claim Form – which avers that the Non-Respondent Dealers would follow the wider spreads charged by the Respondents – is also unexplained by the Evans PCR. Again, the question of constraints arising out of *intra*-market competition is not addressed.

(4) Conclusions

240. The question is whether the level of generality or abstraction contained in the O'Higgins and Evans pleadings is sufficient to amount to "reasonable grounds for making the claim" within the meaning of rule 41(1)(b) of the Tribunal Rules. The short answer to this question is that we have no doubt that this test is not met and that both Applications could be struck out under this rule. We are acutely conscious that translating a phenomenon that may well commend itself to economic theory into an arguable claim is likely to be extraordinarily difficult. We are also well aware of the competing values of *(i)* the need for clarity and certainty in regard to a case being put forward and *(ii)* the

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[152] We want to be very clear that we are not making any kind of determination on the merits. What we are articulating is a deficiency in how the case is pleaded. We are not saying that there is no causal link between infringement and loss. What we are saying is that we do not understand from the pleaded case how this link between infringement and causation arises. We could speculate as to how the case might be put. Or we could – using the economic expertise of the panel – try to "fill in the blanks". But that is not our function.

[153] See the Respondents' Theory of Harm Pleading at paragraph 30.

[154] The point is pleaded in the Evans Theory of Harm Pleading at paragraphs 44*ff*.

principle of effectiveness. As the Supreme Court has noted in *Sainsbury's* (SC),[155] "[i]t is the duty of the court to give full effect to the provisions of Article 101 by enabling the claimant to obtain damages for the loss which has been caused by anti-competitive conduct." However, we are satisfied that the averments in both Applications lack the specificity to enable them to be tried, and that is both unfair to the Respondents and an impossible burden on this Tribunal.

241. Equally, we are in no doubt that this is a jurisdiction that we should not – at this stage – exercise:

(1) The reason we are in no doubt that these Applications could be struck out is because, as presently framed, we simply do not understand how they could properly be tried. The pleadings give no idea as to how the losses claimed have been suffered, and we do not consider that this Tribunal can effectively manage these cases to trial or at trial; nor do we consider that the Respondents can properly defend themselves in circumstances where – although the nature of the claims are understood at a theoretical level – there is, in reality, no pleaded case on causation.

(2) However, as we have noted on a number of occasions, these Applications raise novel and difficult questions. In particular, "market harm" cases – where the class sought to be represented consists of participants in a market in which anti-competitive infringements took place – are novel. We accept that this is a new and (in pleading terms) untested area. It is right that the strike-out jurisdiction not be exercised in an area of law that is subject to some uncertainty and is in a state of on-going development,[156] and not without the Applicants having the opportunity to address the concerns we have articulated much more clearly in this Judgment than we did during the hearing. For what we hope are understandable reasons, our attempts to understand the claims advanced by the Applicants have caused developments in our thinking, and it is entirely fair to

[155] At [209], quoted at paragraph 223 above.
[156] See, for example, *Hughes v. Colin Richards & Co*, [2004] EWCA Civ 266.

say that there has not been an opportunity, on the part of the Applicants, to address our final thinking on the question of pleading.

(3) Accordingly, we consider that, at this juncture, it would be inappropriate to strike out either Application. Rather, both Applicants need to be (and now are) on notice that absent significant amendment and revision a future strike-out application may very well be on the cards.

Part VII: ASSESSMENT OF THE RELEVANT FACTORS IN THE CIRCUMSTANCES OF THESE APPLICATIONS

A. INTRODUCTION

242. We have concluded that – notwithstanding our articulated concerns – it would be inappropriate to strike out either Application. Accordingly, it is necessary for us to consider the exercise of our discretion in the context of the issues (i.e. the Certification Issue, the Carriage Issue and the Opt-in v. Opt-out Issue) that now arise.

243. We propose to consider, first, in Section B below, the factors relevant to the Authorisation Condition. We listed these factors in paragraph 53 above. Thereafter, we consider the factors relevant to the Eligibility Condition (in Section C below). Section D considers factors not specifically enumerated in the legislative *schema*, but on which the Applicants relied.

244. We do not, in this Part, specifically consider the additional factors identified by rule 79(3) of the Tribunal Rules. That is because these factors (the general nature of which we describe in Part V: Section C) need to be considered separately and specifically when determining the Opt-in v. Opt-out Issue, which we consider separately in Part VIII.

245. We stress that this Part of our Judgment is not intended as a weighing or balancing exercise: it does not seek to anticipate the issues that fall for consideration and determination in Part VIII below. Rather, we seek, in this Part, to ascertain the extent to which there is a material difference between the two Applications.

B. ASPECTS OF THE AUTHORISATION CONDITION

(1) Introduction: the "nature and qualifications" of each PCR and other relevant factors

246. We use the term "nature and qualifications" as a convenient way to group several, related, factors (considered in Section B(2) below). These comprise:

(1) The qualifications of each PCR to act as PCR for the classes they wish to represent.[157]

(2) The significance or otherwise of the fact that the O'Higgins PCR is a corporation, whereas the Evans PCR – Mr Evans – is a natural person. This is not a separately enumerated statutory factor, but arises because the O'Higgins PCR drew a distinction between the corporate nature of the O'Higgins PCR and the personal nature of the Evans PCR. It is, therefore, necessary that we deal with this point.

(3) The significance or otherwise of the fact that neither PCR is a "pre-existing body" with an interest in bringing these claims.[158]

(4) Whether either PCR has a conflict of interest.[159]

247. It will be observed that this list does not include two factors that go to the Authorisation Condition:

(1) The plans for the collective proceedings prepared by each PCR.[160] This factor, we consider, constitutes a sufficient separate factor from the foregoing as to warrant separate treatment (which is received in Section D(2) below).

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[157] See paragraph 53(2) above.
[158] See paragraph 53(3) above.
[159] See paragraph 53(4) above.
[160] See paragraph 53(6) above.

(2) The extent to which each PCR is liable to pay the Respondents' costs.[161] We consider this factor separately in Section D(3) below.

248. We leave the question of whether each PCR would fairly and adequately act in the interests of the class to the end.[162] This factor strikes us as something of a "catch-all", and it is appropriate to consider it last, in Section E below.

(2) The "nature and qualifications" of each PCR

(a) Qualifications of each PCR

(i) Mr O'Higgins

249. Paragraph 16 of the O'Higgins Claim Form provides:

> "The Proposed Representative is Michael O'Higgins FX Class Representative Limited, whose company number is 12100525 and whose registered office is Scott+Scott UK LLP, St Bartholomew House, 90-94 Fleet Street, London EC4Y 1DH. As explained further below, the company's sole director and member is Mr Michael O'Higgins."

250. Of course, what matters is less the nature of the O'Higgins PCR and much more the nature of the person behind the PCR, namely Mr O'Higgins. The O'Higgins PCR Claim Form says this about Mr O'Higgins at paragraph 38(1)(c):

> "Mr O'Higgins is well-suited to managing the Proposed Collective Proceedings, in particular due to his experience in competition law, his experience in the field of financial services, and the numerous and varied positions of public responsibility which he has held:
>
> (i) Mr O'Higgins spent almost a decade as a Partner at PA Consulting Group, during which time he was accustomed to running substantial projects, giving instructions and receiving and distilling large amounts of information.
>
> (ii) From July 2016 to the end of 2019, he has served as Chairman of the Channel Islands Competition and Regulatory Authorities and since 2015 he has served as Chairman of the Local Pensions Partnership. Between October 2006 and September 2012, he served as Chairman of the Audit Commission. Between January 2011 and March 2014, he served as Chairman of the Pensions Regulator. He was also a Non-Executive Director of HM Treasury from October 2008 to September 2014. This impressive range of roles, and breadth and depth of

[161] See paragraph 53(5) above.

[162] See paragraph 53(1) above.

experience, means Mr O'Higgins is well equipped to understand the subject matter of these Proposed Collective Proceedings, and will be able to exercise appropriate oversight of the conduct of proceedings and give full consideration to any matters on which his instructions are sought.

(iii) Mr O'Higgins has also made arrangements for a small group of advisers to be appointed, who will assist him in his role as director of the Proposed Representative…This group is to be led by Sir Christopher Clarke, a former Lord Justice of Appeal of the Senior Courts of England and Wales and current President of the Court of Appeal of Bermuda. Other members are Damian Mitchell (the founder and managing partner of DSquare Trading Limited, which is a high frequency and high volume FX trading company, who has over 30 years' involvement in trading FX and other products) and Ian Pearson (a former member of Parliament, who was Economic Secretary to the Treasury from October 2008 to January 2010 and has extensive business interests and financial knowledge)."

251. Mr O'Higgins addressed us at the outset of the oral hearing, and (with Mr Evans) answered our questions. We found him an impressive PCR (we appreciate that there is a corporate intermediary, a point to which we will come) and have no doubt that he is appropriately qualified.

(ii) Mr Evans

252. In contrast to the O'Higgins PCR, the Evans PCR is a natural person: Mr Evans. He is described in paragraph 122(b) of the Evans Claim Form as "well-suited to manage the Proposed Collective Proceedings", and his motivation to act is set out in Evans 1. The Evans PCR Claim Form goes on to say:

> "… he has substantial professional experience in the field of competition law, and extensive experience in managing substantial inquiries as part of his role as an Inquiry Chair in a number of major cases for the Competition and Markets Authority. This, in combination with his advisory work in consumer affairs, as well as the numerous positions of responsibility he has held over the course of his career, clearly demonstrate his ability to manage an action such as this, and can leave no doubt that he would act fairly and adequately in the interests of members of the Proposed Classes."

253. Like the O'Higgins PCR, Mr Evans will benefit from advice from an Advisory Panel. Mr Evans' Advisory Panel comprises Lord Carlile of Berriew (a cross-bench member of the House of Lords, deputy High Court Judge and former member of the Competition Appeal Tribunal), Professor Joseph Stiglitz (a Nobel Prize-winning economist, public policy analyst and a professor at Columbia University), David Woolcock (a FX markets and trading expert with more than 30 years' experience in the FX market who has held the roles as Vice Chair of the Financial Markets Association FX Committee and a

member of the BIS Market Practitioners Group) and Professor Philip Marsden (a Professor of Law and Economics at the College of Europe).

254. Mr Evans addressed us immediately after Mr O'Higgins and, with Mr O'Higgins, answered various of our questions. Like Mr O'Higgins, we found him to be an impressive PCR and have no doubt that he is appropriately qualified.

(iii) A relative approach

255. We accept that a comparison of the qualifications of each PCR is open to us, as a factor to consider in relation to the Carriage Issue. (Qualification is, of course, a pre-condition to certification, but given our findings above, both Mr O'Higgins and Mr Evans would be appropriate to authorise as class representative.)

256. Given that relative qualification is a factor going to carriage, it is unsurprising that each PCR (through their legal teams) took shots at the other. We did not, however, find such points helpful in this case. The fact is that a person can be appropriately qualified as a PCR in a variety of ways. Where two appropriately qualified persons are putting themselves forward each as a PCR and as rivals, it is most unlikely that their qualifications will be capable of precise and exact comparison. A "like-for-like" comparison will generally either be impossible or else inappropriate.

257. That was the case here, and we decline to be drawn into a comparison process that is bound to be subjective, i.e. informed by our own particular preferences. We consider that we should have at the forefront of our minds the classes that each PCR wishes to represent and to consider whether, given the nature of those classes, one PCR presents "better" than the other. We also consider it appropriate to focus more on concerns rather than advantages as a means of objectively differentiating PCRs (whilst fully accepting that advantages are likely to represent the flip-side of concerns).

258. Accordingly, without in any way seeking to frame a test like a statute, we consider that the appropriate test to bear in mind, where there are two or more appropriately qualified PCRs, is the following:

Would an interested and well-informed member of the proposed class have a concern or concerns about the proposed PCR and – if so – what is the nature of that concern or

those concerns? To what extent do those concerns enable a differentiation between PCRs?

259. Applying this test, we see no such concerns. We consider that the PCRs rank equally.

(b) The significance of incorporation

260. The O'Higgins PCR sought to make much of the advantages of the fact that the O'Higgins PCR was incorporated, whereas the Evans PCR was not. We do not consider there to be advantages (nor, indeed, disadvantages) in whether the PCR is or is not incorporated, and our view is that this is a neutral factor.

261. The O'Higgins PCR identified two purported advantages:

(1) *Lack of personal exposure to costs.* The suggestion was that Mr O'Higgins was, in some way, insulated from costs exposure and so "is better protected and better able to progress the case fearlessly without concerns of crippling liabilities (and indeed, in contrast to Mr Evans, Mr O'Higgins is not personally liable at all)." We consider this suggestion on the part of the O'Higgins PCR to be both wrong and a distraction:

(i) The collective proceedings regime should not render proposed defendants less well protected – nor the PCR more or less exposed – simply because of the manner in which the PCR is structured.

(ii) We consider that, in general, provided that the PCR has in place proper provision for the payment of the proposed defendant(s)' costs, then the PCR should generally consider him-, her- or itself not to be at risk of personally having to satisfy an adverse costs order. The general risk of such an order – against a person acting for the benefit of others – would have an unduly chilling effect on the collective proceedings regime as a whole.

(iii) That said, there may well be cases where the conduct of the PCR is such that the PCR ought to be sanctioned in costs – even if that means a personal exposure. The directors behind corporate PCRs should be under

no illusions that if the corporate PCR is not good for the money in these circumstances, a third-party costs order will likely follow, so that incorporation as a liability shield does not work.

(2) *Ease of succession, if the person behind the corporate PCR were to become incapacitated or otherwise unable to continue to act.* Were it to be the case that either Mr O'Higgins or Mr Evans were to be unable or unwilling to continue as class representative, that is a matter that would necessitate an application to the Tribunal to ascertain the basis upon which the class action could continue to proceed. That should be the case, even if (as a matter of strict legal requirement) a corporate PCR could continue without such an application. At the end of the day, it is the personal qualities of the PCR that matter, whether those qualities are exercised through a corporation (as in the case of Mr O'Higgins) or directly and personally (as in the case of Mr Evans).

262. In short, this is an entirely neutral matter, for each applicant or potential applicant to consider. No doubt there are advantages for each course: but they do not sound in relation to the Authorisation Condition.

(c) Not a "pre-existing body"

263. This is a factor specifically mentioned in the Tribunal Rules. It will have been articulated for a reason.

264. If a PCR is a pre-existing body, then it must immediately be asked "Why does it exist?" and "What are its purposes?". If the reason for or purpose of the pre-existing body is to further the interests of the class concerned – for instance, if the pre-existing body is a trade association or a consumer protection organisation – then that, as it seems to us, is a material factor in favour of that particular PCR.

265. In this case, neither PCR is a pre-existing body in this sense. Both PCRs have come forward specifically for the purposes of these Applications and, indeed, at the invitation of the solicitors who they are now instructing.[163]

266. Thus, this factor is neutral as between the O'Higgins PCR and the Evans PCR; but it is not irrelevant. It is a factor to take into account against both PCRs equally.

(d) Conflict of interest

267. Neither PCR is a member of the class or classes they seek to represent. No question of conflict of interest, as such, therefore arises.

268. We do consider that it is necessary to bear in mind – as we have found in paragraph 265 above – that the PCRs in this case came "after the event". In other words, although the O'Higgins PCR and the Evans PCR are the formal Applicants, the only reason that they are Applicants is because they were approached by the lawyers that they now instruct.

269. That is an inversion of the usual process, whereby lawyers are instructed by clients, not *vice versa*. However, it is, we anticipate, likely to be a hallmark of collective proceedings in this jurisdiction. What we must consider is the extent to which the Applicants "call the shots" in terms of the conduct of this litigation, in particular in relation to questions of settlement and (where additional funding is required) pressing for further funding in the face of a settlement offer.

270. Whilst this might be characterised as a conflict of interest (between the class, on the one hand, and the lawyers and funders who have a distinct interest in the outcome of the proceedings, on the other), we do not consider that this is the appropriate label for this particular factor. Rather, we consider the question of the PCR's robustness, in the face of their own legal team's advice and funder's interests, to be a matter that should be considered under the broader rubric of whether the PCR can fairly and adequately represent the interests of the class members, which is the broad factor identified in

[163] Transcript Day 1, page 31 (O'Higgins PCR); Transcript Day 1, page 32 (Evans PCR).

paragraph 53(1) above. We consider this factor specifically in paragraphs 342 to 346 below.

271. Subject to this proviso, we find no conflict of interest to exist in relation to either the O'Higgins PCR or the Evans PCR.

C. THE ELIGIBILITY CONDITION

(1) Introduction

272. The Eligibility Condition comprises a number of factors, which have been enumerated in paragraph 56 above. Essentially, these factors fall under three heads. The Tribunal may certify claims as eligible for inclusion where they:

(1) Are brought on behalf of an identifiable class of persons.

(2) Raise common issues.

(3) Are suitable to be brought in collective proceedings.

273. We consider these three requirements in turn. Before we do so, however, we should articulate the class or classes that each PCR seeks to represent, because these are differently framed.

(2) The classes as framed by the PCRs

(a) Introduction

274. We do not propose to set out in full the class definition contained in either of the two Applications before us. There are – entirely unsurprisingly – a series of nuances and carve-outs in each of the draft orders framed by the PCRs which it is unnecessary to set out in this Judgment.

(b) The O'Higgins PCR

275. Focussing on the essentials, therefore, the O'Higgins PCR's class is:

All persons who during the period from 18 December 2007 to 31 January 2013 entered into one or more Relevant Foreign Exchange Transactions in the European Economic Area, other than as an Intermediary, where:

(1) "Relevant Foreign Exchange Transaction" means any foreign exchange Spot and/or Outright Forward transaction involving a Relevant Currency Pair and entered into with a Relevant Financial Institution or on an ECN.

(2) "Intermediary" means a broker and/or custodian engaged by another person to carry out a transaction.

(3) "Relevant Financial Institution" is a banking group listed in the schedule to the draft order.[164]

(4) "ECN" means an electronic communications network that matches buy and sell orders for financial products including currencies.

(5) "Relevant Currency Pair" involves buying and/or selling a G10 currency.

(6) A "Spot" transaction is a single outright transaction involving the exchange of two currencies at a rate agreed on the date of the contract for value or delivery (cash settlement) typically within two business days.

(7) An "Outright Forward" transaction means a transaction involving the exchange of two currencies at a rate agreed on the date of the contract for value or delivery (cash settlement) at some time in the future (more than two business days later).

276. A person "enters into" a Relevant Foreign Exchange Transaction where either:

(1) The person was the direct contractual counterparty to the Relevant Foreign Exchange Transaction; or

(2) The person instructed or engaged an Intermediary to enter into a Relevant Foreign Exchange Transaction on its behalf (regardless of whether the Intermediary, rather than that person, was the direct contractual counterparty).

(c) The Evans PCR

277. The Evans PCR's classes are defined as follows:

(1) Class A:

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[164] A full list is provided in the Claim Form, but it is unnecessary to set it out.

All persons who entered into one or more FX Spot Transaction(s) and/or FX Outright Forward Transaction(s) where each of those same transaction(s):

(a) Was entered into, directly or indirectly via an Intermediary, with a Defendant, during that Defendant's Relevant Class A Period and in the European Economic Area; and

(b) Involved a currency pair consisting of two G10 Currencies.

(2) Class B:

All persons who entered into one or more FX Spot Transaction(s) and/or FX Outright Forward Transaction(s) where each of those same transaction(s):

(a) Was entered into, directly or indirectly via an Intermediary, with a Relevant Financial Institution between 18 December 2007 and 31 January 2013 and/or a Defendant during that Defendants Relevant Class B Period and in the European Economic Area; and

(b) Involved a currency pair consisting of two G10 Currencies.

278. We shall not expand upon the defined terms in this class definition. They are – for present purposes – sufficiently similar to those of the O'Higgins class to call for no further elucidation, save to note that Class B is intended to comprise those persons trading with Relevant Financial Institutions innocent of an infringement of competition law as established by the Decisions, and the reference to a Defendant's "Class B" period is to a period when that Defendant was not involved in the anti-competitive practices identified in the Decisions. The O'Higgins class, as we have explained, does not differentiate between infringing and non-infringing parties in this way.

279. We turn to the three factors articulated in paragraph 272 above.

(3) Brought on behalf of an identifiable class of person

280. A person becomes a member of the class or classes here in issue by "entering into" a relevant FX transaction. It is that dealing that constitutes the person a member of the relevant class. There immediately arises a potentially important distinction between whether a given person is a member of the class in question (which is answered simply by reference to having entered into a single, relevant, transaction) and the number of relevant transactions to which that particular person was a counterparty.

281. Obviously, the second of these questions is relevant to quantum (although we are sure it is not the only relevant factor). But we do not consider that it is relevant to the identification of the class, which can be accomplished simply by reference to whether the putative class member has entered into a single relevant transaction.

282. For present purposes, it seems to us that this factor turns on whether the class can be identified. That, we consider, is the case so far as each of the formulations of each PCR are concerned. We see no basis for differentiating between them.

(4) Raise common issues

283. Almost by definition, common issues will be raised in both cases. The fact is that the very way in which loss is computed – by reference to widening spreads across the market, without particular reference to individual transactions – renders these Applications almost by definition cases raising common issues.

284. We have considered whether the different classes – Class A and Class B – articulated by the Evans PCR give rise to a potential conflict of interest, such as to preclude the Eligibility Condition from being met in the case of the Evans Application. We do not consider this to be a serious concern: whilst, as we have described, certain claims articulated on behalf of Class B are contingent on the claims of Class A succeeding, this is not a conflict of interest, but merely a divergence, where Class A may do better than Class B, but not at the expense of Class B.[165]

285. As we have noted, it is quite possible for the infringements found in the Decisions to give rise to arguable individual or individuated losses – as is demonstrated by the *Allianz* proceedings described in paragraphs 179*ff* above. Both Applicants have – quite deliberately and quite understandably – framed their actions by reference to the (alleged) market-wide effects of the Respondents' conduct and – as we say, almost by definition – these are claims raising common issues. We do not see how the contrary could sensibly be argued. If the Respondents were making any such contention, it has eluded us.

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[165] See *Lloyd v. Google*, [2021] UKSC 50 at [72].

(5) Suitable to be brought in collective proceedings

(a) The meaning of "suitable"

286. Because of the apparent divergence between the minority judgment and the majority judgment in *Merricks*, we have been careful to articulate what we understand by the term in the light of the decision in *Merricks*.[166] As we understand it, "suitable" is a term divorced from the merits of a claim. Rather, it refers in essence to the question of access to justice. If an individual claim or claims will not be brought, because (for instance) the individuated claims are too small to make such claims viable, but where a cumulation of such claims in collective proceedings does render proceedings viable, then the "suitable" requirement will likely be met.[167]

(b) "Suitable" as an absolute requirement

287. We have no doubt that the claims as framed pass the "suitability" requirement. Given that the issues in these claims are framed explicitly as collective issues, where these claims could not be vindicated on an individual basis because a market-wide effect on the spreads is alleged, it seems to us more-or-less inevitable that we conclude that this requirement is met.

288. However, it is important that we nevertheless go through the various factors listed in rule 79(2) of the Tribunal Rules:

(1) *Rule 79(2)(a) and (f): whether collective proceedings are appropriate and whether the claims are suitable for an aggregate award of damages.* For the reasons we have given, we consider that the nature of the claims render collective proceedings appropriate and that (given the way the claims are framed) an aggregate award of damages is not merely suitable, but inevitable.

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[166] See paragraphs 40 to 41 and 65 to 69 above.

[167] Of course, the consideration may be more nuanced than this. It may, for instance, require consideration of the viability of representative proceedings under CPR 19.6. However, such questions do not arise in the present case, and we do not consider them further for that reason.

(2) *Rule 79(2)(b): costs and benefits of continuing the proceedings.* It clearly would be inappropriate to override the commercial assessment of the funders and the lawyers retained by the PCRs in seeking to second-guess their willingness to take a financial stake in the success of these claims. It seems to us that these are commercial factors that are not for us to evaluate – and which rule 79(b) does not require us to evaluate in this way. To do so would be to require us to consider, gazing into a crystal ball, the benefits and disbenefits of the decision on the part of the PCRs to make these Applications on behalf of the class(es) they want to represent. Put that way, it is clear that it would be inappropriate to engage in any such analysis. Rather, we consider that rule 79(b) obliges us to consider the benefits and disbenefits of continuing the proceedings in an altogether more open-textured and broader framework. In short, we consider that, in a very broad-brush way, we must consider whether there are adverse effects ("costs") in allowing these proceedings to continue. In short, "costs" does not refer to the financial costs being incurred by the funders and by their contingently instructed lawyers. It refers to disbenefits in an altogether broader framework. We can, in this case, identify no such disbenefits.

(3) *Rule 79(2)(c): Any separate proceedings.* We disregard the fact that there are two Applications before us. It seems to us that the question of carriage is not a matter than can affect the question of absolute suitability here in issue. However, it does seem to us that the existence of the *Allianz* proceedings is an indicator that the Eligibility Condition is not met. Although not capable of being framed as collective proceedings, this is a form of group litigation where multiple claimants are advancing as one of their claims a claim that (even if differently framed)[168] may seek recovery of some of the same losses that are claimed in these Applications. We were given no information as to what proportion of transactions falling within the *Allianz* proceedings would also be covered by the

[168] As we noted in paragraph 182 above, the allegation in the pleading we have seen is not absolutely clear.

claims in these applications, and we can see considerable difficulties in working out the extent of any overlap.

(4) *Rule 79(2)(d): Nature and size of the class.* We consider the nature of the class in greater detail when we consider "practicability" in paragraph 381 below. In the case of both PCRs, the size of the class is considerable (about 40,000 persons). Those persons are going to be both sophisticated and (if Mr Evans' preliminary estimates of the claim value and class size are right) possessed of a reasonably substantial individual claim: an average of £50,000 or £60,000 per class member. We consider that given the enormous complexity of the claims articulated in the Applications, and the degree of resistance those claims are going to meet from the Respondents, that the nature and size of the class tells strongly in favour of these proceedings being suitable for certification as collective proceedings.

(5) *Rule 79(2)(e): Ability to determine class membership.* In a very real sense this factor duplicates the factor already considered in Section C(3) above, and we find its inclusion in rule 79(2)(e), as well as in rule 79(1)(a), duplicative, at least in this case. For the reasons we have given, we consider that it is possible to determine class membership.

(6) *Rule 79(2)(g): alternative dispute resolution.* We consider that these claims will only be resolved if they progress past certification. In our judgment, whilst settlement is clearly very much on the cards, and can be regarded as a form of dispute resolution alternative to trial, a collective settlement will only come about if these collective actions proceed.

289. Although there are indicators pointing against suitability, they are marginal given the indicators going the other way. We conclude that both Applications are suitable to proceed as collective actions.

(c) "Suitable" as a relative test

290. We have concluded that the Eligibility Condition operates both as an absolute and as a relative criterion.[169] However, that said, we do not consider that this relativity should be used – at least, not without explicit consideration – as a means of introducing a further merits test "through the back door".

291. One point that particularly illustrates this relates to the width of the classes defined by each PCR:

(1) The O'Higgins PCR says this in its skeleton argument about the relative widths of the classes defined by the two PCRs:

> "7. The signal distinction between the claims of the two PCRs is that the O'Higgins PCR's class definition is wider in scope. Unless the O'Higgins PCR is chosen as class representative, victims will forego claims which the Evans PCR is not prepared to advance. This is because the scope of the O'Higgins PCR's class definition covers all types of transactions and forms of anti-competitive conduct identified in the Commission's Settlement Decisions, whereas the Evans PCR's class definition does not.
>
> 8. In particular, the O'Higgins PCR's class definition encompasses:
>
> (1) all three types of trading identified by the Commission Decisions as having been affected by the infringements: (a) immediate orders; (b) conditional orders (e.g. "stop loss" and "take profit"), and (c) benchmark orders ("trading at the fix"); whereas (b) and (c) are excluded by the Evans PCR; and
>
> (2) harm stemming from the Respondents' anticompetitive coordinated trading (including collusive manipulation of conditional orders, and collusive manipulation of the fix), which the Evans PCR also excludes.
>
> 9. By contrast, the Evans PCR's approach creates classes which are arbitrarily narrow in scope and do not reflect the Settlement Decisions or the full scope of the harm caused to victims of the cartels, which is disapproved of by both Canadian law (*Hollick v. City of Toronto*, [2001] SCC 68, [2001] 3 SCR 158, at [19] – [21]) and the CAT Guide (at paragraph 6.37). It is neither necessary nor appropriate to cut down the size of the class and the scope of the damages claimed by excluding two of the three types of trading identified by the Commission (i.e., benchmark trades and conditional orders such as limit/resting orders) in the manner proposed by the Evans PCR. It is also unnecessary and inappropriate to exclude an entire category of wrongful conduct engaged in by the Respondents

[169] See paragraphs 58 to 64 above.

and identified by the Commission's Settlement Decisions – coordinated trading. In addition, it is likely that trades consisting of conditional orders cannot reliably be separately identified and thereby excluded from the Respondents' transactional data. Both the Respondents and the US court identify this limitation. It is, therefore, likely that the Evans PCR's methodology will prove to be unworkable. The exclusion of data in relation to such transactions and of whole categories of cartel conduct will limit the Evans PCR's experts' ability properly to analyse and understand the effect of the cartels." (Footnotes omitted).

(2) Of course, the Evans PCR in no way accepted this characterisation of the width (or, rather, narrowness) of the classes adopted in the Evans Application. In particular, the Evans PCR contended that the two classes that are defined by the Evans Application were rationally founded, and better, than the single class articulated by the O'Higgins PCR. This dispute is one that runs across multiple expert reports, and we propose only to quote from a section in the Evans PCR's skeleton argument headed "Mr Evans has the better claims":

"19. The second reason why Mr Evans is the more suitable person to act as class representative is that he has advanced the stronger claims. Mr Evans has already explained in detail … the reasons why the claims he proposes to bring are more sound and robustly based than those of the O'Higgins PCR. Below he focusses on five core superiorities of his approach.

20. **Proper distinction between direct and indirect harm:** both PCRs contend, *inter alia*, that the infringements caused harm on transactions with RFIs and/or the Proposed Defendants outside of their infringement periods (i.e., indirect or "umbrella" harm). As the Tribunal knows, in Mr Evans' case this is reflected in two separate classes (Class A having suffered direct harm, Class B having suffered indirect harm), whereas the O'Higgins PCR tries to wrap all of this up in a single class.

21. Whereas Professor Rime and Mr Ramirez identify differing theories of harm, methodologies and data sources for Class A and Class B, the O'Higgins PCR's experts' approach is more broad-brush, apparently taking the view that there is no requirement of any commonality at all across a class in collective proceedings.

22. By way of example of their lack of detail, the O'Higgins PCR's experts have not properly grappled with how they would calculated indirect harm, especially on transactions with FX dealers other than the Proposed Defendants ("Non-Defendant FX Dealers"):

(a) Breedon 1, Breedon 2 and Bernheim 1 do not identify any specific third-party data sources that could be used to calculate indirect harm on transactions with Non-Defendant FX Dealers. Breedon 1 merely refers in general terms to the possibility of third-party disclosure from FX dealers not involved in the cartels.

(b) In the absence of third-party data, Professor Breedon initially proposed to extrapolate from harm estimated using the Proposed Defendants' data to

represent damages for the whole O'Higgins class. That approach is flawed as it inappropriately assumes that any overcharge on transactions with the Proposed Defendants was the same as transactions with Non-Defendant FX Dealers (i.e., that direct and indirect harm was the same). That may not be the case as the ways in which the infringement caused direct and indirect harm are different. It is also not a viable methodology given that transactions entered into with Non-Defendant FX Dealers represent around 50-60% of the O'Higgins PCR's class of VoC. Such an approach would assume more class-wide harm than it actually measures.

(c) Latterly, and in response to criticisms made by Mr Evans' experts, O'Higgins PCR's experts have confirmed that, in the absence of third party data, they would proxy indirect harm using the Proposed Defendants' transaction data for their non-infringement periods. That is one of the approaches already identified in Ramirez 1, but only to compute harm on transactions with the Proposed Defendants outside of their infringement periods. … However, using that data to calculate all indirect harm suffers from two notable flaws:

(i) First, it means that as participation in the infringements increases, there is a corresponding decrease in the amount of data available to proxy indirect harm. In particular, there will be portions of two years of the infringement period (2010 and 2011) where no data at all is available, because all of the Proposed Defendants were part of at least one of the infringements.

(ii) Second, using the Proposed Defendants' data would still mean that the O'Higgins PCR's experts are assuming the harm suffered by up to 50-60% of the VoC covered by the O'Higgins class.

23. It follows that Mr Ramirez's proposed approach to calculating indirect harm … is far more comprehensive than that of the O'Higgins PCR experts, and will result in a materially more accurate calculation, to the direct benefit of the members of the proposed classes."

(Footnotes omitted).

We leave the Evans PCR's defence of its classes at this point, although we stress that that defence goes on for a number of paragraphs after this – and we mean no discourtesy in cutting short our quotation.

292. The question arises as to whether, and if so how, such differences in approach are to be factored into our assessment:

(1) We begin by re-stating our understanding of the implications of *Merricks*, namely that – absent demurrability (i.e. a claim not properly arguable) – the merits should not be used to prevent a collective claim from proceeding.

(2) We are considering – on a relative basis – the suitability of the claims articulated by each PCR and each PCR has expressed very clearly that their particular approach is the better. It may very well be that the PCRs would deprecate the precise rubric ("suitability") under which we are considering these points but that, as it seems to us, is nothing to the point. These points need to be considered, on a relative basis, and this is where this analysis (in our judgment in the multi-factorial approach) best fits.

(3) The more difficult question is the extent to which points such as this can properly be considered in applications such as these. We have already adverted to the extreme difficulty – and inadvisability – of seeking, at a very early stage, to make findings on the merits, and it seems to us that this inadvisability extends, at least in this case, given the points taken by each Applicant, to any "compare and contrast" approach between the Applicants.

293. In conclusion, we consider that – at least given the points articulated by the Applicants in this case – a relative evaluation of each approach will involve a consideration of the merits into which we cannot and should not be drawn.

D. OTHER ASPECTS OF THE AUTHORISATION CONDITION

(1) Introduction

294. As we described in paragraph 247 above, we have left for consideration now the two factors there set out. In themselves, these comprise a number of subsidiary factors, and we will go through them in turn.

295. However, before we do so, it is necessary to describe certain post-hearing events. After the conclusion of the hearing in this matter, and after we received the Theory of Harm Submissions that we have described, the Evans PCR submitted further material intended to improve the substance of his Application. In essence, and we will describe the detail in due course, the Evans PCR explained that he had obtained additional funding and obtained additional "after-the-event" (**ATE**) insurance, so as significantly to improve his offering.

296. The reaction of the O'Higgins PCR was – unsurprisingly – to suggest that this was opportunistic behaviour that this Tribunal should not sanction. The O'Higgins PCR took the view that this new material should be entirely disregarded.

297. Clearly, there is a question of admissibility that must be addressed. If the new material is admitted, then there is the further question of what difference that material makes. If it makes a difference, then a yet further question is the extent to which the O'Higgins PCR should be afforded an opportunity to improve its own Application.

298. These various questions obviously have to be addressed. However, we do not consider that it is helpful to consider these developments before we have expressed our conclusions in relation to how matters stood at the end of the oral hearing before us. We will, later on in this Judgment, address the questions we have articulated above as regards the new material.

(2) Each PCR's plans for the collective proceedings

(a) Funding

(i) Litigation funding obtained

299. We consider that it is appropriate to begin with an assessment of how each PCR plans to fund the collective proceedings that each PCR seeks permission to bring.

300. Both PCRs have obtained litigation funding: the O'Higgins PCR from Therium Litigation Finance Atlas AFP IC (**Therium**) and the Evans PCR from Donnybrook Guernsey Limited (**Donnybrook**). No-one made any adverse suggestion as to the financial robustness or lack of willingness to meet their funding obligations on the part of either Therium or Donnybrook; and we do not consider that there is any serious prospect of either funder failing to deliver on what they have promised.

301. The funding obtained by the O'Higgins PCR is £29,375,043 to fund all elements of the claim. This money is payable in tranches, and there is the right in Therium to terminate funding prospectively if certain conditions are met (e.g. if it ceases to be satisfied of the merits or commercial viability of the claim). The funding obtained by the Evans PCR was £18,654,088, but was increased (before the commencement of the oral hearings) to

£19,603,152. There is a further, very recent increase days before the commencement of the oral hearings, in the amount of £2,884,000, which brings the amount of funding to £22,487,152. Although this latest tranche of money was originally and provisionally earmarked in order to enable Mr Evans to purchase additional anti-avoidance endorsements for his ATE insurance policies, it became increasingly clear during course of the hearing that the Evans PCR was less minded to use the money for this purpose, and instead was minded to use the money for other legal expenditure – with the funder's knowledge and consent.

302. Accordingly, we proceed on the basis that the Evans PCR's funding is £22,487,152, and that the latest increase will not be used to enhance the anti-avoidance endorsements on the Evans PCR's ATE insurance. (We will, of course, evaluate the ATE policies purchased by the PCRs on this basis.) We were not specifically informed of any provisions regarding prospective termination of funding by Donnybrook, but we anticipate that similar provisions will exist, and we do not regard this as a point of difference between the two PCRs.

303. Thus, the funding obtained is:

(1) £29,375,043 in the case of the O'Higgins PCR; and

(2) £22,487,152 in the case of the Evans PCR.

304. The Evans PCR drew our attention to the possibility of further funding being obtained – and Donnybrook's willingness to provide such additional funding has already been evidenced by the two increases we have referred to. Although not specifically mentioned to us, we are in no doubt that – in an appropriate case – Therium would also augment its funding and we do not consider this to be a point of distinction between the PCRs.

(ii) Significance of the level of funding as a metric

305. These funding figures need to be treated with caution in assessing the monies available for the future conduct of these proceedings. That is for the following reasons:

(1) First, in the case of both PCRs, the funding is "stretched" by contingent or conditional fee arrangements between the PCR and their lawyers.

(2) Secondly, both PCRs have – entirely understandably – taken out ATE insurance. That, obviously, has to be paid for, and it is not cheap. However, it cannot be said that the purchasing of such insurance does anything to improve the strength of the claims being articulated by the PCRs. How the ATE insurance is paid – i.e. the extent to which it draws on the funding obtained – is therefore important to note.

(3) Thirdly, in the case of both PCRs, there has already been significant expenditure preceding these Applications, which expenditure we do not consider will (for a considerable part, at least) be in relation to work that will be useful if one or other of the Applications proceeds. We are not saying that the money has been wasted or badly spent: far from it. What we <u>are</u> saying is that a great deal of the work done and the costs incurred is related <u>directly</u> to the Certification Issue, Carriage Issue and Opt-in v. Opt-out Issue, all of which are incidental to the progression of these claims to trial, which will raise rather different issues. The incurring of these costs will not be of very much benefit when (or if) the substantive questions arising out of each claim will have to be addressed in contentious proceedings with the Respondents.

306. We expand upon these three points below.

(iii) <u>The use of contingent fees</u>

307. The O'Higgins PCR describes the position in its Funding Neutral Statement as follows:

> "Lawyers' fees:
>
> (1) Scott+Scott act for the O'Higgins PCR under a 50% reduced Conditional Fee Arrangement ("**CFA**"). This operates as follows: on a normal hourly rate of (e.g.) £500ph + VAT, Scott+Scott is entitled to 50% (£250ph + VAT) as the case progresses, from the funding made available by Therium. If the case fails, Scott+Scott will retain only those sums. If the case succeeds, Scott+Scott is entitled to: (a) its normal "Base Fees" (i.e., the balance of £250ph + VAT); and (b) in addition, Success Fee of 50% of Base Fees. The total payable would therefore be £750ph + VAT.

(2) The Success Fee is not recoverable as costs from the Proposed Defendants. Scott+Scott's entitlement to any fees beyond the reduced rate depends on the availability of undistributed damages (see further below).

(3) Mr O'Higgins was originally paid £400ph and is now paid £420ph. His remuneration is capped at £65,000 in any 12-month period.

(4) Counsel are retained on a normal hourly rates or brief fee basis and (along with expert fees and other disbursements) paid as the case progresses. These costs, along with Scott+Scott's reduced rate fees, can be described as "pay as you go" ("**PAYG**") costs." (Footnotes omitted).

308. The position is similar in the case of the Evans PCR, where Hausfeld and counsel operate on a partial contingency basis:

> "18. Mr Evans has retained Hausfeld & Co LLP ("**Hausfeld**") under a CFA, which provides for 50% of Hausfeld's base fees to be at risk and for a success fee of 100% of the fees at risk in the event of success. Hausfeld has subsequently agreed to defer until after certification seeking payment of the 50% of its fees which are payable in any event in respect of work done prior to certification. Hausfeld has also agreed not to seek payment of its fees for work prior to the determination of Mr Evans' CPO application from the Funder above the value of £661,966 plus VAT. These will be sought from the Proposed Defendants insofar as they are ordered to pay them and otherwise as part of the costs payable out of undistributed damages.
>
> 19. Hausfeld have in turn retained the Counsel team at Brick Court Chambers (but not Counsel instructed specifically to deal with issues of funding and costs) on discounted CFAs which provide for between 15-29% of their fees to be at risk and for a success fee of 100% of the fees at risk in the event of success."
> (Footnotes omitted).

309. The extent to which the funding provided is "stretched" by conditional fee arrangements is illustrated in the Evans PCR's Funding Neutral Statement:

> "The Costs Budget which was originally agreed with the Funder totalled £23,487,162 of which £18,654,088 was to be provided by the Funder. The difference between these two figures is accounted for by the base fees of Hausfeld and Counsel which are at risk under their CFAs and therefore not payable by the Funder. The Costs Budget was amended in April 2021 and in July 2021. The total budgeted recoverable costs are now £24,766,642. The deposit premiums payable for ATE insurance have been excluded from this figure, because they are not payable by the Proposed Defendants. The total amount of funding to be provided by the Funder is £22,487,152. The difference between the total estimated costs and the amount of funding to be provided is again accounted for by the contingent base fees payable to Hausfeld and Counsel at Brick Court."

310. We have drawn on the Evans PCR for this example: but the same is true of the O'Higgins PCR, save that its counsel are not working on a contingent basis at all.

(iv) <u>ATE insurance premia</u>

311. We do not propose to consider the terms of the ATE insurance obtained by the PCRs in this Section. This Section is simply concerned with the cost of the insurance. The premia for ATE insurance are classified either as "deposit premium" or "contingent premium". Deposit premia are payable on inception or at some specific point during the litigation – and so must be budgeted for.

312. On the other hand, contingent premia are contingent upon outcome, which can be variously defined. In the case of the O'Higgins PCR:

> "The Contingent Premium is payable if the case succeeds
>
> (i) For the primary layer and the first and second excess layers, the level of the Contingent Premium depend on the litigation stage at which the case succeeds. The Stage 1 premium is payable if the case succeeds before the date for disclosure. The Stage 2 premium is payable in the period to 61 days before trial, and the Stage 3 premium thereafter. The staged contingent premiums are alternative and not cumulative.
>
> (ii) For the other excess layers, the Contingent Premium is fixed."

313. The premia in the case of each PCR are as follows:

	Paid deposit premia	**Future deposit premia (payable if the relevant PCR's Application succeeds)**	**Deferred and contingent premia**
O'Higgins PCR	£4,987,500	£100,000	£18,675,000
Evans PCR	£1,050,000	£2,380,000	£11,570,000

Table 1: Schedule of Applicants' ATE premia

We stress that these figures should be treated with a degree of caution. For instance, insurance premium tax (of 12%) is left out of account, and the deferred and contingent premia represent the maximum payable in each case. Nevertheless, the exercise is helpful to identify the nature of the drain on the funds of both PCRs.

314. We consider that we should draw no distinction between paid deposit premia and future deposit premia, because the payment obligations will arise for payment out of the funding if the relevant PCR's Application succeeds. Thus, the deposit premia are:

(1) In the case of the O'Higgins PCR: £5,087,500.

(2) In the case of the Evans PCR: £3,430,000.

315. On the other hand, the deferred and contingent premia do not come out of the funds provided by the funders, but rather will be paid out of any undistributed damages (if the case proceeds to judgment) or will be dealt with as appropriate in any settlement.

(v) Other incurred expenditure

316. Having described the costs of funding the ATE insurance premia, we turn to the data that was provided by the PCRs regarding other costs. We stress that these are actual contra-entries to the funding: in other words, contingent elements of cost are disregarded.

(1) Payments to solicitors are £1,598,946 in the case of the O'Higgins PCR and £794,360 in the case of the Evans PCR. The Evans PCR costs have been deferred until after certification, but (for the same reason we gave in paragraphs 314 and 315 above regarding ATE deposit premia) we consider this deferral to be irrelevant for the purposes of our present evaluation.

(2) Disbursements – including to counsel, but also experts – are £6,058,277 in the case of the O'Higgins PCR and £4,097,430 in the case of the Evans PCR.

317. In terms of taking the proceedings forward, we consider that it is appropriate to proceed on the basis that a large part of these incurred costs will have been on work that will not assist in the very difficult process of bringing these claims to trial. In some cases, that is obvious: all of the work done in relation to explaining and responding to arguments on funding, carriage, etc will have no bearing on the claims made against the Respondents. Even a considerable part of the work of the experts is likely to be "wasted" (although we found it very helpful for the purposes of these Applications), because they have done no more than explain what the Applicants would do if "their" Application

were granted. Although not completely a standing start, we consider that we should regard these incurred costs as (for the purpose of funding the proceedings going forward) costs essentially "thrown away". We consider – given our views about the need for substantial re-pleading – that this is the appropriate way to treat such costs.

(vi) Funds actually available

318. Based upon our findings in the foregoing paragraphs, the position on funding is as follows:

	O'Higgins PCR	**Evans PCR**
Level of funding	£29,375,043	£22,487,152
Less ATE deposit premia	£5,087,500	£3,430,000
Less other costs to the funding	£1,598,946 (solicitors) £6,058,277 (disbursements)	£794,360 (solicitors) £4,097,430 (disbursements)
Funding left	£16,630,320	£14,165,362

Table 2: Funds actually available to the Applicants for the future conduct of the litigation

319. Recognising that this is only a broad metric, but nevertheless a helpful one, we consider that although there is some difference between the two PCRs in terms of the money actually available to them to fund the on-going litigation, that difference is by no means

as great as the O'Higgins PCR suggested in submissions. Recognising that this is a broad metric, the difference is about £2.5 million.[170]

320. We also note that this money will be "stretched" by the contingent element in the solicitor fee arrangements in the case of both the O'Higgins and Evans PCRs and by the contingent element in the counsel fee arrangements in the case of the Evans PCR (but not the O'Higgins PCR). On this basis, it seems to us likely that the Evans PCR's funding will be stretched further than the O'Higgins PCR's funding, because the contingent element is more broadly based across the professionals working on the action. That, of course, erodes the difference in funding, which we have put at £2.5 million.

321. On any view, both PCRs have put in place impressive funding arrangements. The O'Higgins PCR has more funds available than the Evans PCR – about £2.5 million – by our reckoning; but the Evans PCR stretches its funding a little further, through the more extensive contingent element.

(b) How is the funding available going to be spent?

322. We were provided with a helpful table comparing how each PCR proposed to spend its funds going forward. The table refers to recoverable *inter partes* costs, and so excludes certain costs – notably contingent items and ATE premia – that will be incurred, but not be recoverable from the Respondents (assuming success). Recoverable costs are an excellent proxy for ascertaining how the available funding will be spent, because contingent fees are left out of account and we have already factored in the deposit premia payable on each PCR's ATE insurance.

323. The table we were provided with further broke down the figures in that they differentiated between solicitors' costs and disbursements. Given the inherent uncertainty of the planning process, we have disregarded this distinction, and set out

[170] When reviewing the draft of this judgment, the Evans PCR suggested that on a true analysis of the figures the difference was in fact much smaller. The O'Higgins PCR disputed this. We have retained the wording of our original draft, but recognise that assessments like this – as we have said – amount to something of a broad brush exercise.

only the totals in the table below, without differentiating between costs and disbursements:

	O'Higgins PCR	**Evans PCR**
Disclosure and notification, including "bookbuilding"	£3,735,200	£1,718,400
Witness statements	£1,418,100	£606,800
Experts	£2,382,600	£1,862,400
Settlement/ADR	£1,002,300	£709,650
Pre-trial	£3,801,900	£1,323,550
Trial	£2,316,000	£3,360,229
Post-trial, notice and administration	£3,423,000	£1,015,810
Contingency/other matters	£1,653,540	£2,289,316
Advisory committee	£132,000	-
TOTAL	£19,864,640	£12,886,155

Table 3: Proposed future expenditure

324. There are a number of points to be made here:

(1) We consider that no matter how much thought has gone into the planning of future litigation and the budgeting of costs, this is an exercise in speculation, and we should proceed with extreme caution in attaching too much weight to this material.

(2) Equally, it is very possible – in light of unknown or unanticipated future developments – that plans will change. The Respondents have yet to articulate a positive defence, but it is clear that – if there were to be certification – these proceedings would be vigorously resisted. The nature of that defence may very well inform differently how the collective proceedings are run. Moreover, as we have indicated, if the collective action is proceeding satisfactorily, but costing more than anticipated, we assume that it will be funded further.

(3) That is, in our view, an important point, given that the O'Higgins PCR's projected expenditure appears to be rather higher (at £19.8m) than the available funding (at £16.6m). We have no doubt that if and to the extent there is a shortfall (and, we repeat, a great deal of this is an exercise in speculation) it will be made good.

(4) Moreover, we consider that the risk of shortfall is present on both sides. That is because we consider the Evans PCR's budget to be likely to be too low. In relation to the anticipated costs for disclosure, experts and post-trial costs we consider that the Evans PCR has adopted too rosy a view and that the O'Higgins PCR's assessment is more likely to be right. Indeed, if we were to extrapolate pre-CPO recoverable costs of both sides, we anticipate that even £19 million will not be enough to fund these claims. The pre-CPO costs that are, in principle, recoverable are:

(i) In the case of the O'Higgins PCR, £9,256,169 (split £3,197,892 on solicitors and £6,058,277 on disbursements).

(ii) In the case of the Evans PCR, £11,880,487 (split £7,200,000 on solicitors and £4,680,487 on disbursements).

(5) This is – as we have described – a very complex and difficult claim. Given that the claim has barely even begun, and we are in the foothills of this litigation, we consider the Evans PCR's budget of £12.88 million in the light of recoverable costs to date of £11.88 million to be untenable.

325. We do not consider this question of how the funding is going to be spent to represent much – if anything – by way of a relative difference between the two PCRs. We do consider it significant that both PCRs have, in our judgment, underestimated the difficulties of bringing this claim successfully to trial and beyond. We consider that both parties should have budgeted for a spend (in terms of funds needing to be available for the future, without regard to how they are going to be recovered) of not less than £25,000,000 given their rate of expenditure to date. The essence of the concern is that both PCRs are likely to come under pressure to settle before trial.

326. Of course, all courts in this jurisdiction welcome and encourage settlement: but the best settlements arise between litigants of equal litigation "heft", and that (of course) includes the funding available for the litigation. Given that both PCRs are – by definition – seeking to act as representatives of a class, we consider this matter to be significant, albeit not a point of differentiation between the two Applicants.

(c) The legal teams and experts retained

327. This is a relevant factor, as both sides acknowledged, but it is one that is extremely difficult for the Tribunal to evaluate. We set out below the "core" members of the team of each PCR:

	O'Higgins PCR	**Evans PCR**
Solicitors instructed	Scott+Scott	Hausfeld
Counsel (excluding specialist costs and other counsel)	Daniel Jowell, QC Gerard Rothschild	Aidan Robertson, QC Victoria Wakefield, QC

	Charlotte Thomas	David Bailey Aaron Khan
Experts	Professor Francis Breedon Dr B Douglas Bernheim	Professor Dagfinn Rime Mr Richard Knight Mr John Ramirez
Advisory Panel	Sir Christopher Clarke Damian Mitchell Ian Pearson	Lord Carlile of Berriew Professor Joseph Stiglitz David Woolcock Professor Philip Marsden

Table 4: Teams retained by each Applicant

328. It is unnecessary to set out biographical details. It is evident from the table above, and from what we have seen at the hearing, that both PCRs have put in place teams well able to conduct this heavy litigation and properly represent the proposed class(es). Whilst we would not shy away from identifying objective differences in the calibre or quality of representation (for instance, if the solicitors firm instructed were simply too small to conduct the litigation effectively; or if, for no good reason, counsel specialising in an irrelevant practice area was selected to lead), we equally consider that it would be invidious to allow a subjective assessment of performance, at an early stage, or a subjective preference of one team's performance over another to have any weight.

329. Objectively viewed, there is no material difference between the Applicants' teams. The O'Higgins PCR sought to suggest that Scott+Scott's involvement in similar litigation in the United States was a real advantage. We lay on one side the fact that Hausfeld was also involved in that litigation – albeit in what appears to be a more junior role than Scott+Scott. We consider that involvement in "similar" litigation in another jurisdiction might involve as many pitfalls as advantages. This is a different jurisdiction, and there

is a danger in becoming a prisoner of thinking that worked or might have worked before another court in another jurisdiction.

330. On the other hand, it is important that the solicitors be well familiar with claimant actions in the form of class proceedings involving competition and financial markets law. That is a skill set that both firms possess. Equally, we are impressed by – but consider to be of similar standing – the Advisory Panels established by each PCR.

331. We consider that the test we should apply (analogous to the "concerns-based" test we framed earlier[171]) when considering the legal teams and experts retained is something along the following lines:

Would an interested and well-informed member of the proposed class have a concern or concerns about the proposed legal and expert representation and – if so – what is the nature of that concern or those concerns?

332. We consider that where concerns emerge on the basis of such a test, they should be taken into account. But none arise in the present case. To the contrary, we consider that both PCRs have retained extremely capable and well-organised teams.

(3) Costs recovery and the extent to which each PCR is able to pay the Respondents' costs

(a) Introduction

333. Where, as here, each PCR is not a member of the class or classes concerned, and is acting as proposed representative in order to protect the class concerned and not out of self-interest or to bring a claim in which the PCR is personally interested, the usual rule that costs follow the event requires a degree of additional articulation and modification.

[171] See paragraph 258 above.

334. We begin by summarising the regime that applies if there were to be a costs order in favour of the represented class, and then go on to consider the converse question, of the sort of costs orders that can be made in favour of the Respondents.

(b) Recovery of costs by or on behalf of the represented class

335. The position is as follows:

(1) Costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative, save in certain cases.[172]

(2) Where a collective action is successful, the class representative can expect to recover costs from the losing defendant(s). However, such recoverable costs will not include:

(i) Any "return" to the funder. To the extent that the funder has funded recoverable costs, then no doubt these will be payable to the funder, but no more than this.

(ii) Success fees pursuant to any conditional fee arrangements.

(iii) ATE insurance premia.

We shall refer to these as **irrecoverable costs**, by which we mean irrecoverable from the defendant(s). We stress that we are not using the term, as it is sometimes used, to refer to costs that are reduced on taxation or detailed assessment by a costs judge. Often, the gap between the costs incurred and the costs recovered on assessment are referred to as "irrecoverable", and so they are. Here, we will use the term **taxed/assessed costs** to reflect the incurred costs after taxation/assessment, and will reserve the term "irrecoverable costs" to those

[172] Rule 98 of the Tribunal Rules.

costs that cannot be recovered, in principle, no matter how reasonable their quantum might be.

(3) Irrecoverable costs – plus any shortfall between incurred costs and taxed costs – would normally be borne by the claimant. In an opt-in claim – where it may reasonably be expected that there will be no shortfall or undistributed damages – these sums will be deducted from any damages awarded. There is no rule to this effect, but in any opt-in case, class members opting in will be required to enter into some kind of litigation management agreement, which will make provision for such irrecoverable costs. Self-evidently, therefore, the class bears the burden (in the form of a deduction from the damages awarded) of the irrecoverable costs.

(4) The position is different in the case of an opt-out claim, where – as we have described[173] – provision can be made for the payment of such irrecoverable costs and costs taxed down out of the undistributed damages. This, of course, represents a significant advantage (for the class) in opt-out rather than opt-in proceedings.

336. The Applications in this case are, of course, both for opt-out certification, and both Applicants are explicit that irrecoverable costs will – with the Tribunal's consent – be paid out of the undistributed damages. Of course, if there is a settlement, the dynamic is different: see paragraphs 88(3) and 95(5)(ii) above.

(c) Recovery of costs by a successful defendant

337. As we have described, a costs order cannot be made against the represented class. An order can be made against the class representative, but for the reasons given in paragraph 261(1) above, we consider that such an order ought to be exceptional. Equally, whilst a third party may be made liable for costs, simply funding a claim does not entail such an exposure to the third party.

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[173] See paragraph 88(3)(vi) above.

338. It is thus clear that the collective action regime leaves a successful defendant significantly exposed when compared to an individual action. In an individual action, where costs follow the event and the claimant loses, the claimant is exposed. It is for this reason that the Tribunal Rules list, as a specific factor to be taken into account, the PCR's ability to pay the defendant's costs, were the Tribunal to make such an order. Equally clearly, it is for that reason both PCRs have taken out ATE insurance, and incurred significant liabilities in doing so.

339. We do not consider that it is profitable to undertake a detailed analysis of the ATE insurance acquired by each PCR, or in particular to seek to ascertain in great detail which package is "better". We consider that a more broad-brush approach commends itself, otherwise there is enormous danger in applications for certification becoming swamped by "mini-trials" in relation to collateral issues. In this case, we have taken great care in ensuring that the Respondents have had every opportunity to probe the ATE insurance arrangements of the PCRs and – to be clear – had the Respondents emerged with significant concerns we would have examined those concerns in detail. In the event, no such concerns have been articulated.

340. There are two points of differentiation between the ATE insurance purchased by the O'Higgins PCR and the ATE insurance purchased by the Evans PCR:

(1) *Anti-avoidance endorsements.* As is well-known, commercial insurance can be set aside and/or avoided for non-disclosure or misrepresentation by the proposed assured, even innocent non-disclosure or misrepresentation. That, of course, affects the security of the insurance from the Respondents' point of view. Both PCRs, recognising this, have sought to procure anti-avoidance endorsements. Both ATE insurances seem to us to be robust: to the extent the degree of robustness matters – it is not a material factor for us – we consider that the O'Higgins PCR's ATE insurance is marginally more robust than that taken out by the Evans PCR.

(2) *Extent of insurance.* Here there is a material difference between the extent of cover: the O'Higgins PCR's ATE insurance runs to £33.5 million, whereas that of the Evans PCR's ATE insurance has a limit of £23 million. This is a

significant difference in amount, although we would note that if the collective action proceeded to trial, we consider that the Respondents' costs would comfortably exceed even this higher amount. There are six defendant groups in the present Applications and whilst these Respondents have, quite apparently and very helpfully, saved our time and their costs by co-operating, inevitably each defendant group has its own interests to safeguard. Applying a broad-brush and conservative approach, we would be surprised if each defendant group did not incur taxed costs in excess of the ATE insurance acquired by either Applicant, meaning that – should the Respondents succeed in their defences – they will be faced with a shortfall in the recovery of their taxed/assessed costs.

(4) Other matters

341. We were referred by both Applicants to other factors, which the Applicants contended differentiated their respective offerings. Thus, for instance, we were provided with metrics for the Applicants' respective cost of funding and their respective readiness to proceed. Although we have looked at these matters, they are, in our judgment, immaterial in the broad scheme of things. Assessing these factors is fraught with a high degree of speculation, and for that reason we have focussed on the broad essentials (which are likely to be in the right region) rather than the specifics which are likely to amount to no more than crystal-ball gazing.

E. CAN THE PCR FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE CLASS MEMBERS?

342. As we have described, the question whether the PCR would fairly and adequately act in the interests of the class members is an element of the Authorisation Condition.[174] We consider it at this late stage in our analysis because of its open-textured nature. Clearly, whether the PCR can fairly and adequately represent the interests of the class members is a factor that must draw significantly on factors that we have already considered.

[174] See paragraph 53(1) above.

343. We have considered each PCR's nature and qualifications,[175] their plan for the collective proceedings,[176] and their ability to meet a costs order against them.[177] We repeat none of this, although we consider that all of these matters are relevant to this factor.

344. Rather, we consider the extent to which the PCRs are truly independent of the funders and the law firms that are an essential part of these Applications. We bear in mind that – as both PCRs acknowledged – both PCRs were approached by their lawyers as potential representatives, and not *vice versa*.[178] This, of course, is why the pre-existing nature of the PCR is significant.[179]

345. There are a number of points that we consider to be relevant to the PCRs' ability fairly and adequately to represent the interests of the class members, arising out of the fact that the PCRs were chosen by the lawyers, and not *vice versa*:

(1) *Both Applications are framed as opt-out and not opt-in proceedings.* In the case of opt-in proceedings, the class could have significant input into the conduct of the proceedings. Of course, opt-in proceedings will have to be managed by some representatives of the class, for it is difficult to imagine all class members having a say on every decision. But those representatives will at least include members of the class. We do not propose to consider the terms that typically would be found in a litigation management agreement, but the existence of such an agreement – which does not automatically exist in the case of opt-out proceedings – can act as a means whereby the interests of the class, and the information that specific class members might be able to provide, can be taken

[175] Part VII: Section B(2) above.
[176] Part VII: Section D(2) above.
[177] Part VII: Section D(3) above.
[178] See paragraphs 265, 268 and 269 and footnote 163 above.
[179] See paragraphs 264 and 266 above.

into account. This input is lacking in the present Applications.[180] It means that the role of the PCRs is central.

(2) *Control over the proceedings by the PCRs.* Both PCRs were at pains to explain that they were in control of the proceedings, including in relation to questions of tactics, settlement and so on.[181] We accept that both PCRs have, at the very least, nominal control over the proceedings, and that they will seek to exercise that control to the benefit of the class or classes they represent. But it would, we consider, be naïve not to recognise that there are (entirely proper) influences additional to the pure interests of the class or classes represented. The PCRs have to operate within the financial constraints imposed upon them by the funders, and funding is contingent upon the funders continuing to be satisfied that continuing with the proceedings is in their – the funders' – interests. Of course, the extent those interests feature is constrained by contract and by the desire to avoid exposure to third party costs. But, nevertheless, this is a dynamic that will, particularly, come into play as and when settlement proposals are discussed. There is, we consider, a built-in inclination in the way both PCRs have structured themselves that lays them open to agreeing a settlement that covers contingent fees and funders' profits at the possible expense of the class. We say this without in any way impugning the integrity or professionalism of either PCR or their lawyers.

(3) *Failure to find a common ground.* We asked each PCR why – at considerable cost – they had persisted in their own Applications, and engaged in what has been a very expensive carriage dispute.[182] The answer was that each PCR was of the view that their offering was better. Whilst that may be part of the answer,

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[180] Obviously, it is more difficult, in opt-out proceedings, to obtain such input, because litigation management agreements are not a prerequisite. However that does not mean to say that opt-out proceedings have to proceed on the basis of no input at all from the class members.

[181] See Transcript Day 1, page 32 (O'Higgins PCR); Transcript Day 1 pages 33 and 42 (Evans PCR).

[182] See Transcript Day 1, pages 39 and 40 (Evans PCR) and 41 (O'Higgins PCR).

the claims advanced by each Applicant are insufficiently distinct to render this a complete answer. This serves to reinforce the concerns we have articulated.

346. We conclude that within the limits of the regime within which they operate, each PCR does and can fairly and adequately represent the interests of the class members. However, we consider that the limits of the regime are circumstances that affect each PCR's ability to act unambiguously in the interests of the class(es) they seek to represent. We do not consider this to be a point of differentiation between the two Applicants, but to affect both Applicants to the same degree.

F. TIMING OF THE APPLICATIONS AND THE QUESTION OF RELATIVE PRIORITY

347. As we have described, the O'Higgins Application was filed on 29 July 2019,[183] whereas the Evans Application was filed some months later, on 11 December 2019.[184] The O'Higgins PCR contended that relative priority of commencement was a relevant factor in determining the Carriage Issue. The O'Higgins PCR put the point in its skeleton argument as follows:

> "The O'Higgins PCR respectfully submits that it is right for the Tribunal to place weight on the 'first-to-file' criterion as a significant factor at least where there is, as here, a significant gap between the commencement dates. It promotes the key goals of the collective proceedings regime, including efficiency, judicial economy, and access to justice, by ensuring that second and subsequent proposed class representatives only bring claims if they are confident that they offer a distinctly better proposition to proposed class members, and that, if they bring such claims, they do so promptly."

348. We do not consider timing to be a relevant factor in the present case, for the following reasons:

(1) First, there is nothing in the Tribunal Rules to point to this being a relevant factor. Of course, the Tribunal Rules are sufficiently flexible to permit relative priority to be taken into account, and it may be that in future cases, depending on the facts, it should be. But we consider that the Tribunal's approach should

[183] See paragraph 2 above.

[184] See paragraph 3 above.

be framed prospectively, and that it would be unfortunate if we held against the Evans PCR a point articulated – in relation to the present regime – after and not before the Evans PCR had made its Application.

(2) Secondly, although the Application of the Evans PCR might (subject to the third point, below) be characterised as late, that lateness caused no prejudice. It is an unfortunate truth that any new regime takes time to "bed in" and for its proper operation to be determined. The present regime is no exception, and all of the parties to these Applications were agreed that the proceedings needed to be stayed so as to enable the decision of the Supreme Court in *Merricks* to be factored into the parties' submissions and our Judgment. The anticipated timing of the *Merricks* decision affected when these Applications were first listed (which was for hearing in early 2021) and – when the decision was not handed down in the summer of 2020 – that hearing was itself adjourned to July 2021. In short, such prejudice to the conduct of these collective proceedings as might have been caused by the allegedly late application of the Evans PCR made absolutely no difference in the present case.

(3) Thirdly, and this was a point advanced with some force by the Evans PCR, it was suggested that the Evans Application was not late, but that the O'Higgins PCR had "jumped the gun" in making its Application before the Decisions had actually been published, and on the basis of Commission press releases only. As a result, significant amendments were made to the O'Higgins Claim Form, so as to bring the pleading into line with what the Decisions (as opposed to the press releases) said. We see the force of this contention.

349. In all the circumstances, we make no finding as to whether the O'Higgins Application was unduly early or the Evans Application unduly late: it seems to us, that there are points to be made on both sides, and that they effectively cancel each other out. Moreover, given that this is the first carriage dispute to reach a hearing in this jurisdiction, we (for these Applications only) consider that relative timing is an immaterial matter.

350. For the future, whilst of course this will be a matter for the specific consideration of the Tribunal concerned, the following general points can be made:

(1) An application for certification will be published on the Tribunal's website for all to see, and a hearing will be scheduled in order to consider and manage the process of certification. In the ordinary course, a case management hearing will be scheduled in short order.

(2) We consider that any other person considering making a related or duplicatory application for certification would be well advised to seek permission to attend any such CMC, even if their application for certification has not yet been issued. This will enable the Tribunal to manage the carriage dispute as part of the certification process.

(3) Whilst there will, no doubt, be cases and reasons why a putative applicant cannot or does not attend the first CMC in another certification application, that absence will have to be justified when and if their rival application is made. Generally speaking, where the opportunity to participate in a CMC has been foregone without good reason, a late applicant should be under no illusions that the applicant that is first in time will have a significant advantage in terms of any carriage dispute.

(4) That consideration, however, will very much be subject to the question of whether an applicant for certification has "jumped the gun" or issued the application for certification prematurely. This will generally be judged by reference to the articulation of the claim that the applicant seeks permission to bring. Where a claim is poorly formulated or unspecific, that will be an indicator of prematurity. On the other hand, where an applicant can frame his, her or its case specifically and clearly, that is an indicator that the timing of the application is appropriate, and that a later application may require its (later) timing to be justified. Certainly, an application that is so late that it potentially derails an application for certification already on foot will have to have its timing closely justified.

G. THE OPT-IN V. OPT-OUT ISSUE

351. The Opt-In v. Opt-Out Issue, as we term it, involves consideration of two additional matters, which we have described in paragraphs 70 to 75 and 98 to 123 above:

(1) The strength of the claims.

(2) The practicability of bringing the proceedings as opt-in as opposed to opt-out proceedings.

352. We have sought to articulate, in general terms, the nature of these additional matters in paragraphs 93 to 123 above. However, because the Opt-in v. Opt-out Issue requires consideration, not merely of these factors, but the totality of all relevant factors, we consider that these factors must be considered, in the round, with the other material factors, in Part VIII.

Part VIII: WEIGHING THE RELEVANT FACTORS AND DETERMINING THE ISSUES BEFORE US

A. INTRODUCTION

353. Three issues arise for our determination: the Certification Issue, the Opt-in v. Opt-out Issue and the Carriage Issue. As we have also noted, these issues are, to a considerable extent, interlinked[185] and a multi-factorial approach is called for in each case.[186] It would, however, be wrong to say that all factors are of equal relevance or of similar weight in relation to each of these issues.

354. As we noted in paragraphs 295 to 298 above, there have been potentially material developments post-hearing which might affect these factors. We deliberately did not describe this new material in our articulation of the various relevant factors in Part VII of this Judgment, and we propose to decide the Certification Issue, the Opt-in v. Opt-out Issue and the Carriage Issue without reference to this material in the first instance.

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[185] See paragraphs 43 and 45 above.

[186] See paragraph 44 above.

Having done so, we then consider what, if any, difference this new material can or should make.

355. This Part of our Judgment is therefore structured as follows. We consider the questions of certification (Section B), opt-in versus opt-out (Section C) and carriage (Section D) in the absence of the post-hearing material, and state our conclusions independently of this material. We then consider, in Section E, the admissibility of this new material, whether (if admitted) it makes a difference, and (if admitted) the extent to which the O'Higgins PCR should be permitted to respond.

B. THE CERTIFICATION ISSUE

(1) Introduction

356. The question of certification is an issue that is to be resolved by reference to the factors comprising the Eligibility Condition and those comprising the Authorisation Condition on, essentially, an absolute basis. A PCR is either certifiable to progress proposed collective proceedings or not. If two or more PCRs are certifiable to progress the proceedings they wish to progress, then a Carriage Issue may (but need not) arise.

357. We begin, therefore, with the Certification Issue, and lay to one side the Carriage Issue.

(2) The Authorisation Condition

358. We considered the general nature of the Authorisation Condition in Part V: Section A of this Judgment. Later sections (Part VII: Sections B and D) considered the various factors comprising the Authorisation Condition in the context of these Applications.

359. We have concluded as follows:

(1) *Qualification.* Both the O'Higgins PCR and the Evans PCR are appropriately qualified to act as PCR: see Part VII: Section B(2)(a) above.

(2) *Incorporation.* We do not consider that the incorporation of the O'Higgins PCR constitutes a material difference – one way or the other – between the two PCRs: see Part VII: Section B(2)(b) above. So far as certification is concerned, we

consider that PCRs are entitled to structure themselves as they are best advised. We see nothing to preclude certification.

(3) *Pre-existing body.* Neither the O'Higgins PCR nor the Evans PCR is a "pre-existing" body. In some circumstances, it may very well be an advantage to be a "pre-existing body", but that is a very fact dependent question: see Part VII: Section B(2)(c) above. So far as certification is concerned, self-evidently, not being a pre-existing body is not something that should preclude certification. It is much more a factor – if present, and depending on the circumstances – that points in favour of certification.

(4) *Conflict of interest.* In the case of neither PCR is there an issue about conflict of interest, as we have described in Part VII: Section B(2)(d).

(5) *Plans for the collective proceedings.* All aspects of this factor are considered in Part VII: Section D(2) above. More specifically:

(i) Both PCRs have put in place what we have found to be "impressive" funding arrangements.[187] At the moment a relative differentiation is not appropriate, but we should record our concern that, given the nature of these proceedings (highly complex in both data and economic terms) and given the Respondents ranged against them (numerous, well-funded, and likely to strenuously defend themselves), we do have a concern that neither PCR has a sufficient fighting fund to bring the collective proceedings that they want to bring successfully to trial and beyond.[188] We do not consider this is a factor to preclude certification, but it is a factor against certification. That said, it weighs relatively little in our consideration, first because these claims may well settle, and secondly because (if they do not) there is always the prospect of further funding being made available. Nevertheless, we can see a material risk in the PCRs effectively being forced into a settlement – notwithstanding the

[187] Paragraph 321 above.
[188] Paragraph 325 above.

need for Tribunal approval of such a settlement – because of a lack of a sufficiently large fighting fund.

(ii) We have no concerns about the legal teams and experts retained by either PCR: see Part VII: Section D(2)(c) above.

(6) *The extent to which each PCR is able to pay the Respondents' costs if ordered to do so.* We are obliged to consider the extent to which each PCR is able to pay the Respondents' costs, and this factor is considered in Part VII: Section D(3) above. As to this:

(i) The reason this is a factor requiring specific consideration is because a defendant to collective proceedings is placed in an unusual (and disadvantageous) position in contrast with "ordinary" litigation. In the ordinary case, a successful defendant will recover from the unsuccessful claimant his, her or its taxed costs. In the case of collective proceedings (whether certified as opt-in or opt-out) there is no recovery from the class being represented. Nor do we consider, for the reasons that we have given, that there should, in general at least, be a costs exposure to the representative of the class.

(ii) That means that the only recovery that the successful defendant can make will be out of such responsive ATE insurance as the class representative has put in place.

(iii) In this case, quite substantial amounts of ATE insurance have been acquired by both the PCRs.[189] Nevertheless, we would surprised if even the extensive cover of the O'Higgins PCR would serve to permit the Respondents to recover all of their taxed/assessed costs. We consider that – if the matter went to trial, and the Respondents won and were awarded their costs – there is likely to be a shortfall in the recovery of taxed/assessed costs. However, we also bear in mind that none of the

[189] Paragraph 340(2) above.

Respondents – who are well-advised and sophisticated litigants – challenged the current levels of cover as insufficient.

(iv) Again, we do not consider that this is a factor that ought to preclude certification, but it is an indicator against certification. We appreciate that all of the Respondents have "deep pockets" and can well afford such a cost which some might regard as simply the price of doing business as a financial institution in this day and age. We do not accept that point: due regard must be had to the rights of all litigants before these courts, even those with deep pockets. It is important to note that there are many cases where a claimant will – if the claim is lost – be unable to pay his, her or its costs obligations, yet the action is still (and rightly) permitted to proceed. Of course, the claimant in such a case will suffer the pain and stress of enforcement and perhaps insolvency, which are risks that do not arise here. Nevertheless, the general point holds good that litigation cannot and should not be stifled for want of funds, and shortfalls in costs recovery are relevant to consider, but no more than that.

(7) *Fairly and adequately represent the interests of the class.* We considered this factor in Part VII: Section E. We considered that the manner in which actions such as these are structured inevitably gives rise to a potential towards early settlement. The way to avoid that conflict is, in effect, to over-fund the litigation, and eliminate as many contingent fees as possible. That is not the reality of the litigation world as it stands and – whilst we consider that it is appropriate to have well in mind the realities of litigation funding – this is a proper and acceptable route to access to justice, which is, after all, the objective of the collective action regime.

360. Although the relevant factors do not all point in a single direction, in the case of both PCRs it is clear that the Authorisation Condition is met. We reach that conclusion with no real hesitation: the contra-indicators (specifically, funding levels and level of ATE insurance) do not come close to outweighing the factors pointing the other way.

(3) The Eligibility Condition

361. We considered the Eligibility Condition in general terms in Part V: Section B above, and in specific terms in Part VII: Section C.

362. For the reasons we have given in that Section, we conclude that:

(1) The claims that each Applicant seeking permission to combine are brought on behalf of an identifiable class of persons: see Part VII: Section C(3) above.

(2) The claims raise common issues: see Part VII: Section C(4) above.

(3) The claims are suitable to be brought in collective proceedings: see Part VII: Section C(5) above.

363. We conclude that the Eligibility Condition is clearly met.

(4) Conclusion

364. We conclude that each Application – if it were the only application in issue – could and should be certified as collective proceedings. In short, both Applicants succeed in relation to the Certification Issue.

365. That leaves the Opt-in v. Opt-out Issue and the Carriage Issue. We propose to consider the Opt-in v. Opt-out Issue first, and then the Carriage Issue. That is first because – as we have observed – determining whether collective proceedings are to be opt-in or opt-out arises inevitably if the Certification Issue is answered favourably to an applicant; and, secondly, the outcome of the Carriage Issue will be informed by the outcome of the Opt-in v. Opt-out Issue, whereas the converse does not apply.

C. THE OPT-IN V. OPT-OUT ISSUE

(1) Introduction

366. The question of whether proceedings should be certified on an opt-in basis or an opt-out basis is separate from the question of certification itself, but it inevitably and automatically arises if the conditions for certification are met, as is the case here.

367. We considered the Opt-in v. Opt-out Issue in general terms in Part V: Section C. In particular, we concluded that both the construction of the Tribunal Rules and approaching the question from first principles made clear that the Tribunal had a discretion in determining the outcome of the Opt-in v. Opt-out Issue, and could not properly simply "rubber stamp" the Applicants' choice in framing their Applications as opt-out only Applications.

368. The factors that we are obliged to consider (if only to dismiss them as of no or limited weight) in relation to the Opt-in v. Opt-out Issue are multiple. They comprise:

(1) All of the factors going to the Authorisation Condition.[190]

(2) All of the factors going to the Eligibility Condition.[191]

Pausing there, it is not, we consider, either appropriate or enough to simply read across our findings and conclusions in relation to these factors. Rather, they must be considered afresh: the Certification Issue and the Opt-in v. Opt-out Issue are very different, and these factors are likely to have different relevance and different weight according to the issue under consideration.

(3) The "additional factors", described by us in Part V: Sections C(2) and C(4) above.

369. We consider these sets of factors, in this order, in the Sections below.

(2) Factors going to the Authorisation Condition

370. We propose to go through the factors enumerated in Part VII: Section B(2):

(1) *Qualification.* Both the O'Higgins PCR and the Evans PCR are appropriately qualified to act as PCR: see Part VII: Section B(2)(a) above. But this does not

[190] See paragraphs 72(2)(ii) and 73 above.

[191] See paragraphs 72(2)(i) and 73 above.

point either away from or towards identifying a basis of certification. We consider it to be a neutral factor.

(2) *Incorporation.* We do not consider that the incorporation of the O'Higgins PCR (Part VII: Section B(2)(b) above) assists one way or the other on the basis of certification.

(3) *Pre-existing body.* Neither the O'Higgins PCR nor the Evans PCR is a "pre-existing" body: see Part VII: Section B(2)(c) above. We consider that this is a factor pointing away from certifying on an opt-out basis. If we had before us a trade association, whose established purpose it was to represent a specific class that had suffered alleged harm, but (for good reason) found it difficult to corral members of the class into opting in, that would be a factor in favour of certifying on an opt-out basis. It seems to us that the fact that both PCRs in this case have come forward, not at the behest of the class, but at the behest of the lawyers they now instruct (who have themselves failed to "build a book") is an indicator against certifying on an opt-out basis.

(4) *Conflict of interest.* In the case of neither PCR is there an issue about conflict of interest: see Part VII: Section B(2)(d). We do not consider this to be material to our decision as to the basis of certification.

(5) *Plans for the collective proceedings.* We have no concerns about the legal teams and experts retained by each PCR (Part VII: Section D(2)(c)), but do not consider that this assists in determining the Opt-in v. Opt-out Issue. We do have concerns, as we have described, about the level of funding: see Part VII: Section D(2)(a) and (b) and paragraphs 325 and 359(5) above. Our concern, as we described it above, is the risk in the PCRs effectively being forced into an early settlement because of a lack of a sufficiently large fighting fund. It is, perhaps, important to expand upon this:

    (i) Opt-in collective proceedings will have some – even if limited – involvement of the class, who might be expected to have views about any proposed settlement.

(ii) In the case of opt-out collective proceedings, the only safeguard is the scrutiny of the Tribunal. Of course, the Tribunal will discharge its obligations conscientiously and carefully, but the reality of this case is that quantum is hugely uncertain and – in any application for approval of the settlement – the Tribunal will be faced by both the class representative and the Respondents saying "this outcome is better than litigating to trial and judgment".

(iii) The level of funding does, therefore, slightly inclines us against opt-out collective proceedings for this reason, but the point is, we consider, a marginal but not immaterial one, of relatively little weight. We take it into account.

(6) *The extent to which each PCR is able to pay the Respondents' costs if ordered to do so.* We considered this factor in Part VII: Section D(3) above and, in paragraph 359(6) above, expressed the conclusion that if these claims did proceed, but were ultimately lost, the Respondents would not recover a substantial part of their taxed/assessed costs. We expressed the view that this is a pointer against certification, but not a factor that ought to bar certification. Indeed, we pointed out that there are many cases where a successful defendant will be left substantially out of pocket, often failing to recover both *(i)* all of his, her or its costs (which is usual), but *(ii)* worse, all of his, her or its taxed/assessed costs. In a very real sense, this is an aspect of litigation in this jurisdiction, and we repeat the view we expressed that "litigation cannot and should not be stifled for want of funds, and shortfalls in costs recovery are relevant to consider, but no more than that".[192] As we have indicated, although there is a real risk that the Respondents' taxed costs will not be paid in full if they succeed at trial and the Applicants are ordered to pay those costs, this is not a point which the Respondents have particularly advanced (although they could have done) and – had such a point been made – there would have been potential for either

[192] See paragraph 359(6)(iv) above.

Applicant to improve its ATE insurance position.[193] However, this likely shortfall in recovery will arise whether the proceedings are framed as opt-in or opt-out and so is irrelevant to our consideration as regards the Opt-in v. Opt-out Issue. We consider it no further.

(7) *Fairly and adequately represent the interests of the class.* We considered this factor in Part VII: Section E, and expressed our concerns that the manner in which actions such as these are structured inevitably gives rise to a potential towards early settlement. That remains our view, but this is, in essence, exactly the same concern that arises under the factor already considered in paragraph 370(5) above. We say no more about this factor, for that reason. "Double-counting" of the same concern is to be avoided.

(3) Factors going to the Eligibility Condition

371. We consider the Eligibility Condition in general terms in Part V: Section B above, and in specific terms in Part VII: Section C. We concluded, in paragraph 363 above, that for the purposes of the Certification Issue, the Eligibility Condition was met. We now consider the same factors in the context of the Opt-in v. Opt-out Issue. The focus is not on whether the Eligibility Condition is met (we have found it is), but on whether there are points which indicate the proper outcome of the Opt-in v. Opt-out Issue.

372. In paragraph 288 above, we considered the various factors enumerated in rule 79(2) of the Tribunal Rules. It is appropriate to use this as a framework for assessing the factors going to the Eligibility Condition in the context of the Opt-in v. Opt-out Issue:

(1) *Rule 79(2)(a) and (f): whether collective proceedings are appropriate and whether the claims are suitable for an aggregate award of damages.* We have concluded that collective proceedings are appropriate for the determination of these claims, but that in itself says nothing about the basis of certification, only that certification on some basis is appropriate. To the extent that this factor

[193] Indeed, as we will come to describe, that is exactly what the Evans PCR has done.

assists in determining the Opt-in v. Opt-out Issue, it is considered alongside the next factor in paragraph 372(2) below.

(2) *Rule 79(2)(b): costs and benefits of continuing the proceedings.* As to these:

(i) The costs are really being borne by the funders and the contingently paid members of the PCRs' legal teams. These costs are, as it seems to us, an immaterial factor. The risk of non-certification or certification but on an opt-in basis are risks that will have been apparent to sophisticated funders from the start, and it is more likely than not that Therium and Donnybrook understood exactly the risks they were running. Our decision cannot be influenced by their (we acknowledge) enormous outlay in terms of time and money.

(ii) In terms of benefits, the benefit we must look for is access to justice – the case that should be brought, but which (for whatever reason) can only be brought by opt-out collective proceedings. In one sense, that is this case: 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. But that is to take an altogether superficial view of what "access to justice" is. Access to justice does not, in our judgment, mean that every case that can only be brought on an opt-out basis must be permitted to proceed on that basis. Opt-out certification is not a certification basis of last resort, in the sense that if opt-in proceedings do not work, there is effectively an entitlement to certification on an opt-out basis. Rather, "access to justice" means considering – taking all of the material into account – whether certifying on an opt-out basis is appropriate. To an extent, that involves considerations which fall squarely within the additional factors of "strength" and "practicability" that we consider below. We do consider that the fact that a case can only be brought as an "opt-out" collective action has significant weight. However, it cannot be in and of itself a sufficient reason for resolving the Opt-in v. Opt-out Issue in favour of opt-out certification. It is a factor that, in this case, weighs strongly in favour of certification on an opt-out basis.

(iii) We have described the differences in cost payment between a successful opt-in collective proceedings and a successful opt-out collective proceedings. The difference, in essence, is that whereas the successful class in both opt-in and opt-out actions recover their taxed costs from the losing parties (here, it would be the Respondents), what we have termed the irrecoverable costs are: *(i)* in the case of an "opt-in" action borne by the class; and *(ii)* in the case of an "opt-out" action paid out of the undistributed damages, the residue, of those who are nominally in the class but who (for whatever reason) do not claim the damages to which they are entitled. As we have described, that will be in value and not in number 40% or more of the damages paid. This represents a clear advantage to the class of the proceedings being opt-out rather than opt-in. We can understand how the erosion of the gross sums recoverable by what we have termed the irrecoverable costs (the ATE insurance premia and the funders' advances) might deter class members from joining opt-in proceedings, whereas they might be interested if the certification was opt-out. It is a factor in favour of opt-out certification.

(3) *Rule 79(2)(c): Any separate proceedings.* We considered the existence of the *Allianz* proceedings to be an indicator that the Eligibility Condition was not met, although we did not consider that indicator to be remotely determinative. The risk of overlapping claims tells differently as between opt-in and opt-out collective actions. If there is a risk of overlap – and it is, in this case, very difficult to tell, which is part of the problem – then it is better to ensure that class members take the conscious decision to opt in, rather than being obliged to consider opting out. Furthermore, the *Allianz* proceedings are an indicator that there is an appetite to bring this sort of claim, albeit as an adjunct to instances where individuated or direct harm (through entering into a specific FX transaction at the wrong rate) has also been caused. This does, however, support (albeit marginally) the sense that the putative class members are choosing not to involve themselves in the proceedings the Applicants wish to bring on their behalf. We return to this point in the next sub-paragraph (but will avoid "double-counting").

(4) *Rule 79(2)(d): Nature and size of the class.* In paragraph 288(4) above, we considered the nature and size of the class in terms of whether this rendered the proceedings more or less appropriate for certification as a collective action. Clearly, the nature and size of the class points in favour of certification, for it is very difficult to see how an individual member of the class could be expected to bring an individual claim of this sort – even if they were economically quite substantial. But the nature of the class – in terms of identifiability, commercial sophistication, and ability to look after themselves and act in their own best interest – suggests that, in light of the efforts of firms like Hausfeld, there is simply no enthusiasm or desire to take this matter forward, even if it costs a class member nothing. That is a matter going, as we see it, more to "practicability" than to the nature and size of the class in question. We therefore consider this aspect further below.

(5) *Rule 79(2)(e): Ability to determine class membership.* For the reasons we have given, we consider that it is possible to determine class membership. This is not a case where it is impossible or even particularly difficult in the individual case to identify a member of the class, although in aggregate terms the administrative burden of identifying the class is likely to be great. We consider this to be a neutral factor in relation to the Opt-in v. Opt-out Issue. It is, obviously, a point in favour of certification in some shape or form, but we have already determined the Certification Issue in favour of the Applicants.

(6) *Rule 79(2)(g): alternative dispute resolution.* We do not consider this to be a relevant factor in terms of the Opt-in v. Opt-out Issue.

(4) The "additional" factors

373. As we stated in paragraphs 73 to 75 above, the additional factors of "strength of the claims" and "whether it is practicable for the proceedings to be brought as opt-in collective proceedings" are additional factors that apply specifically in relation to the Opt-in v. Opt-out Issue.

(a) "Strength of the claims"

374. We considered the meaning of "strength" in paragraphs 98*ff* above. We do not repeat that consideration here, but stress the following points:

(1) Consideration of "strength" should not involve a "mini-trial" and should be gauged principally by reference to the plausibility of the case made out in the pleadings. Of course, the Tribunal should always have regard to the totality of the material before it – but the pleadings are where a party's case is (or should be) stated, and the need to traverse other material ought to be limited.

(2) The Tribunal will be conscious that "strength" is being assessed at an early stage, before disclosure and other evidence. Cases can, and do, develop over time, and the Tribunal will be conscious that an ostensibly weak case may nevertheless succeed. In short, "strength" is a factor that is both important in determining the Opt-in v. Opt-out Issue; and one that needs to be approached with a degree of trepidation and caution. That is particularly so where the determination of the Opt-in v. Opt-out Issue may cause collective proceedings not to be brought at all.

(3) The "strength" factor, as articulated in the legislation, is not a factor that correlates strength with any particular outcome, but as a general rule it seems to us that the weaker a case, the less justification there is for certifying on an opt-out basis. Of course, this is one factor amongst many.

(4) A pleaded case may be strong or weak in one of two ways:

(i) A case may be clearly and fully pleaded, and yet be intrinsically weak.

(ii) A case may be weak – or not strong – simply because it lacks the necessary particularity to be evaluated. In other words, the pleading lacks the detail and specificity that might enable the Tribunal to evaluate the strength of the claim. We consider that it is appropriate, when considering strength, to have regard to this distinction, for in the latter case, the claim may be capable of improvement on amendment.

375. In the present case, the claims pleaded in the Applications are so weak that they are liable to be struck out, although (for the reasons we have given) we have not done so. Clearly, the claims pleaded in the Applications are weak in the second of the two senses used in paragraph 374(4) above. This lack of particularity makes it effectively impossible to gauge the strength of any case that might be made by the Applicants if they were to plead matters more fully. Of course, we cannot consider how the claims advanced by the Applicants could have, but have not, been articulated. That is an exercise in speculation. What we can do is look at the pleaded cases as they stand. We conclude that whilst they are framed largely on the basis of defensible economic theory, in terms of pleaded causes of action they are without substance, and are therefore weak in the first of the two senses used in paragraph 374(4) above. We conclude that the claims pleaded in the Applications are weak in both of the senses we have used and that this amounts to a powerful reason against certifying on an opt-out basis.

(b) "Practicable for the proceedings to be brought as opt-in collective proceedings"

376. We considered the meaning of the "practicable" factor in paragraphs 119 to 123 above. For the reasons we gave there, we consider that "practicable" needs to be considered from the standpoint of the members of the class concerned. This is not an evidence-based test in that there does not have to be specific evidence from class members, but a legal standard assessed by reference to a hypothetical person – the "class member on the Clapham omnibus" or, less colloquially, the reasonable class member.

377. The "practicable" test does not involve asking "how else could these proceedings be brought"? Rather, it requires consideration of why the more obvious route to access to justice – opt-in proceedings – is not being taken. If that route is not being taken because opt-in proceedings themselves constitute the barrier to access to justice, then that is a clear indicator in favour of opt-out certification. But – to go to the other extreme – if it is the case that the putative class just does not want to bring such proceedings, then the issue should not be forced, and proceedings should not go forward when the claimant class has evinced no desire to access justice. Put another way, as we noted in paragraph 122(3) above:

> "…"practicable" requires an assessment of why the putative members of the class are not willing to step forward and opt in. That assessment requires consideration of the practical bars to opting-in – lack of knowledge of the infringements, ignorance of the proposed action, cost of participation versus the likely benefits of such participation."

378. We have paid careful attention to the evidence as to why a book-building exercise has failed in this case. As the evidence before us describes – in particular that of Mr Maton, a partner in Hausfeld (the solicitors to the Evans PCR) – this is not a case where the Applicants have done nothing to attempt to "recruit" or "build a book" of opted-in claimants. To the contrary, there have been considerable efforts made. Mr Maton's evidence is very clear as to the substantial difficulties encountered in this process. He explains that his firm (which is highly experienced in this kind of activity, in which it specialises) contacted some 321 firms likely to have high volumes of FX trading and invested more than 6,000 hours over 4 years (leaving aside the costs of other specialist advisers) in trying to "build a book" of claimants, resulting in only 14 advisory retainers. Although some of these institutions had theoretical claims exceeding a million pounds, it was not then possible to assemble a large enough group to make a group action economically feasible, given the legal costs and risk associated with the claims.

379. We absolutely accept that the efforts on the part of the Applicants will have been great. Indeed, the circumstances we have described are testimony to that.

380. This evidence is no more than "background" – albeit very helpful background – to the question of "practicability". The evidence does not say very much about practicability from the standpoint of the class. We certainly accept that from the standpoint of the PCR, opt-in proceedings are not practicable. That is, if we may say so, so obvious that it really does not need stating: clearly, opt-in proceedings are not practicable if no-one is opting in.

381. But this is not the right question. The right question, in our judgment, is whether opt-in proceedings are practicable in the sense we have described. That involves consideration of the composition of the class(es) the Applicants seek to represent:

    (1) Mr Ramirez, for the Evans PCR, provided evidence of the composition of the Evans Application's two classes, Class A and Class B. The O'Higgins PCR also provided evidence, but we will proceed on the basis that the classes in both

Applications will broadly speaking be the same and we will, therefore, refer to the evidence of Mr Ramirez. As is clear from Mr Ramirez's evidence, working out class composition is a matter of informed speculation at this stage, since the Applicants are not in a position to do more than define their classes, rather than state absolutely the entities that fall within them.

(2) Mr Ramirez estimates a class size (combining Classes A and B) of 42,015 members.[194] Of these, 18,154 are financial institutions and 23,861 non-financial customers.[195] Mr Ramirez did consider that high-net-worth individuals (**HNWIs**) might participate in FX trading, but he considers that their inclusion would add unnecessary speculation.[196]

(3) Mr Ramirez's class figures contain a great deal of (entirely appropriate) speculation as to class size and composition. Thus, paragraph 69 of Ramirez 1 states:

> "… although I have selected the types of institutions that are most likely to have traded FX, I cannot conclude that each of these institutions did in fact trade FX during the overall infringement period. Further, … I have not included certain types of persons who may have traded FX during the overall infringement period, and could, therefore, be members of Class A or Class B, including small or micro enterprises and HNWIs. In my opinion, including the populations of these customers in my preliminary calculations would result in an estimated class size that may include numerous individuals and entities who are unlikely to have traded FX during the overall infringement period. For example, if I had included small enterprises (those with 10-49 employees) in my estimate of non-financial class members, the estimated class size would increase to 102,594. Including a portion of these excluded customers would require a degree of speculation, and given these limitations will be rectified following disclosure of the proposed defendants' transaction data, I view my estimates as a reasonably broad overview of the number of class members, which are perhaps conservative as they do not account for smaller firms or certain HNWIs who did trade with FX dealers or through intermediaries."

(4) The class composition assessed by Mr Ramirez contains only fairly large and inferentially sophisticated institutions – *(i)* financial institutions and *(ii)* non-

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[194] Ramirez 1, Table 4.

[195] Ramirez 1, Table 4.

[196] Ramirez 1 at paragraph 63.

financial customers with more than 49 employees. That, of course, makes perfect sense: it is generally speaking only fairly large and inferentially sophisticated institutions that will use the FX markets with any frequency, and so will have a claim of a material size.

(5) The volume of commerce across both Classes A and B[197] is nearly £116 trillion.[198] That is an average of approximately £2.76 billion per class member, although we recognise that, given the diversity in the class, an average may be more misleading than helpful.

(6) Mr Ramirez has also sought to assess the level of overcharge. Given what we have said about the formulation of the Applicants' claims, we treat these figures as extremely speculative, but they do represent the Evans PCR's present view of the value at risk. Across both classes, it is:

Quantum of claims	**Estimated Total**	**Average across class**
Claims without interest added	£2,155,000,000	£51,291
Claims with simple interest	£2,633,000,000	£62,668
Claims with compound interest	£2,687,000,000	£63,953

Table 6: Quantum of claims

We repeat what we say about the danger of averages; and stress that these figures do not take account of the potential for a pass through defence – which Mr

[197] We see no point in differentiating Classes A and B for the purpose of considering the class composition, although Mr Ramirez does do this exercise.

[198] i.e. £115,800,050 million. See Ramirez 1, Table 6.

Ramirez very fairly notes, and seeks to calculate. Nevertheless, it is clear that these are – on average – not insignificant individual claims, and that large institutions would have the potential to claim really quite large sums of money.

(7) What is clear is that the Evans Application – and, inferentially, the O'Higgins Application - are not *Merricks*-type claims, where the individual claims of the whole class, or substantially the whole class, are so small that one can see why the members of the class would simply not be interested in signing up to a claim that (viewed in class terms) ought to be brought to rectify a market-wide wrong.

(8) Moreover, the putative class members in the case of these Applications will, on the whole, be sophisticated potential litigants, capable of looking after themselves, certainly where their claims are of value. That is absolutely the case with the Evans PCR's class, where Mr Ramirez makes clear he has excluded from his analysis the smaller entities. We will return to the significance of that exclusion in a moment.

(9) Nor can it be said that the putative class members will be ignorant of these potential claims. To the contrary, the efforts of Hausfeld – contacting 321 firms – evidence that it appears not to be ignorance that is preventing a rush to join the proceedings. Rather, there appears to be a deliberate decision not to participate. We are conscious that we have not heard directly from any members of the putative classes. It may be that putative class members are so unimpressed with the claims that they do not wish to be associated with the actions; or it may be that those sufficiently interested have joined the *Allianz* proceedings; or it may be that the class members are so apprehensive about joining the proceedings because of the potential reaction of the Respondents that they are deterred from doing so; or it may be that decision-makers simply cannot be bothered to consider whether it is in their firms' interests to opt in or not. We have no material on which to base so specific a conclusion. We can only say that we can see no reason why it is not practicable for the putative class to join on an opt-in basis, given all the circumstances and in particular given the general sophistication of the putative class, the class knowledge, and the potential size of claim. The inference (and we consider it a strong one) is that potential class

members are not opting in because they do not want to, and not because opt-in proceedings are not practicable.

(10) As Mr Ramirez has made clear, his conservative preliminary class estimate is less diverse because of the persons he has excluded: see Ramirez 1 paragraph 69, which we have quoted in sub-paragraph (3) above. Had he included individuals and smaller entities (with fewer employees than 50), his class would obviously be bigger – rising to above 100,000 persons. The reason for the exclusion is that the increased class size "may include numerous individuals and entities who are unlikely to have traded FX during the overall infringement period".[199] But, of course, they may have done. It will have been in very low volumes, if it occurred at all, and the claim sizes will have been correspondingly small. The question is whether this much more diverse potential membership of the class ought to affect our conclusion as to practicability. We considered the question of diverse classes in paragraph 122(6) above. We consider that as regards this group of persons, the *Merricks* factors apply with great force. Their claims will be small; they may very well not know that they have a claim for a very small sum of money because of a couple of FX trades they undertook nine or more years ago; and even if they do know, they will very likely not care. We do not consider that these potential class members should alter our conclusion on practicability. That is because we consider that although it is not practicable for these persons to opt in, we should not allow a sub-class of persons, whose total claims will be a tiny fraction of those of the whole class, to cause what is a clear-cut conclusion on practicability to change. That would be to allow the tail to wag the dog.

382. This is a factor again pointing against opt-out collective proceedings, and we consider that it weighs strongly against certifying on an opt-out basis.

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[199] See Ramirez 1 paragraph 69.

(5) Conclusion

383. We conclude that we should not certify either Application on an opt-out basis. We have identified a number of factors that point weakly in favour of opt-in, rather than opt-out. In the order we have considered them, these are: *(i)* no pre-existing body (paragraph 370(3) above); *(ii)* level of funding (paragraph 370(5) above); and *(iii)* the existence of the *Allianz* proceedings (paragraph 372(3) above).

384. Cumulatively, these point away from certifying on an opt-out basis, but they are all by themselves pretty marginal. However, they are reinforced by the two specific factors articulated by the legislation as being especially relevant to the Opt-in v. Opt-out Issue ("strength" and "practicability"). For the reasons we have given, both of these point clearly and strongly away from certifying on an opt-out basis. In our judgment – in this case at least – these are factors of significant weight against certifying on an opt-out basis.

385. The factors that point in favour of certifying on an opt-out basis are those going to the point the Applicants understandably emphasised, and which we have referenced in paragraph 372(2) above, which is that this is not a case where there is a choice between opt-in and opt-out collective proceedings. Rather, the choice is between opt-out collective proceedings and no proceedings at all. As we have said, this is a factor that points strongly in favour of certifying on an opt-out basis, and is further reinforced by the fact that any damages recovered by the class will not be eroded by costs because, if the proceedings are certified as opt-out, costs can be paid out of the unclaimed damages. We consider that these factors, pointing towards certifying on an opt-out basis, clearly outweigh the factors described in paragraph 383 above, but are themselves substantially outweighed by the "strength" and "practicability" factors we reference in paragraph 384 above. These additional factors point against ordering certification on the opt-out basis so clearly and with such weight that the outcome of the Opt-in v. Opt-out Issue must be against opt-out certification. Not only are the "strength" and "practicability" factors intrinsically of weight, but they also attenuate or weaken the factors that point in favour of opt-out certification:

(1) 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.

(2) The weight of this factor is also attenuated by the "practicability" factor. It seems to us that whilst access to justice is very important, and indeed has been expressed to underpin the collective proceedings regime, where (as we have concluded) there is no practical reason why members of the putative class are not opting in, and where they appear (on the basis of the material we have seen) to be choosing not to participate in the claims framed by the Applicants, access to justice should not be forced upon an apparently unwilling class.

386. Accordingly, as regards both the O'Higgins PCR and the Evans PCR, we will make a form of order as described in paragraph 92 above.

387. We have said that the views of the Applicants would be a material factor in determining the Opt-in v. Opt-out Issue. We should be clear by what we meant by that. We consider that what the Applicants have said – as persons eminently suited to acting as representatives for the proposed classes – to be significant and of weight in approaching these Applications. That does not mean – and we do not consider that the Applicants have ever contended for this – that the interests of the Applicants require separate and additional evaluation. They do not. It is the class that matters. In assessing what is in the best interests of the class, we have paid very considerable regard to what the Applicants have said, including in relation to the Opt-in v. Opt-out Issue. That regard underlies the entirety of our consideration, and does not require articulation under a distinct heading or Section, which would be inappropriate.

D. THE CARRIAGE ISSUE

388. From our conclusion on the Opt-in v. Opt-out Issue, it follows that the question of carriage does not arise. This is a point that we should, nonetheless, decide, in case this matter goes further.

389. We consider that if we were minded to certify on an opt-out basis, the carriage of the proceedings should be granted to the Evans PCR and not to the O'Higgins PCR. In other words, we would – on this basis – be minded to grant the Application of the Evans PCR and stay the Application of the O'Higgins PCR. We have reached this conclusion for the following reasons.

(1) In many respects the Applications are (entirely unsurprisingly) very similar. In each case, we have the highest respect for each PCR and for the legal teams and experts they have instructed. Equally, the faults we have found (in particular an overspend on pre-certification costs and a shortfall in funding) apply similarly to both Applications. The question of carriage is a very marginal decision.

(2) Although it is correct to say that the O'Higgins PCR was "first to file" in comparison with the Evans PCR, for the reasons we have given, we do not consider this to be a point in favour of the O'Higgins PCR.[200]

(3) The O'Higgins PCR undoubtedly has an advantage in terms of the extent of ATE insurance, which is a material point, but of limited weight given the costs that the Respondents are likely to incur. We consider that the ability of a successful defendant to recover taxed/assessed costs is important, but it is only one of many factors. Neither the O'Higgins PCR nor the Evans PCR was, in our judgment, providing security (in the form of ATE insurance) coming close to the taxed/assessed costs that the Respondents would be entitled to recover, assuming they were to succeed in their defence at trial. The £10 million-odd difference in

[200] See paragraph 347 above.

ATE insurance cover between the rival PCRs is less than £2 million per Respondent, and does not amount to a particularly material difference.

(4) We consider the claims of the Evans PCR to be better thought through. We stress, however, that we are drawing a distinction between two cases which have both only just survived strike-out on this occasion. In respect of each, we have very serious concerns about the manner in which the claims put forward have been articulated. With that very substantial proviso, we have concluded that, viewed side-by-side on a relative basis, the claims articulated by the Evans PCR have been better thought through and represent, to our mind, a marginally better attempt at capturing an elusive loss than that attempted by the O'Higgins PCR.

(5) We stress that in reaching this conclusion, we are in no sense seeking to apply any kind of merits test. We are simply gauging the relative "strength" of the two claims in the sense described in paragraphs 98 to 118 above. To put the same point differently, we consider that the essential question to ask is which Applicant will better serve the interests of the victims that comprise the class(es) for whom the PCRs wish to act. Although we consider that the real answer to this question is "Neither", if required to reach a conclusion, we conclude in favour of the Evans PCR.

390. Accordingly, if we were required to do so, we would decide the Carriage Issue in favour of the Evans PCR, without taking into account the new material introduced by the Evans PCR after the oral hearings had concluded. It is to that new material that we now turn.

E. THE NEW MATERIAL INTRODUCED BY THE EVANS PCR

(1) Introduction

391. On 27 September 2021, the solicitors acting for the Evans PCR wrote to the Tribunal "to update the Tribunal on changes to Mr Evans' funding and insurance arrangements". In brief, these changes were as follows:

(1) First, Mr Evans had incepted an additional layer of ATE insurance providing additional cover in the amount of £10,500,000, thus bringing his total cover to £33,500,000.

(2) Secondly, Mr Evans had agreed with his funder to increase the funding commitment by £12,000,000.

392. These changes were verified in a further statement of Mr Evans' solicitors (**Maton 7**).[201]

393. Clearly, these changes have the effect of improving the offering of the Evans PCR as against that of the O'Higgins PCR. We set out the headline effects in the table below:

	O'Higgins PCR	**Evans PCR**
Total funding	£29,375,043	£34,487,152
Level of ATE	£33,500,000	£33,500,000

Table 5: Summary of the new position

394. Entirely unsurprisingly, the O'Higgins PCR objected to our considering this additional material; and we can understand exactly why these objections were made. Although – in light of the conclusions we have reached – it might be said that this additional material is academic, given that this matter may go further, and that this is a matter going to our discretion, we consider that we should deal with it in this Judgment.

395. We consider, therefore, the question of the admissibility of this evidence on the basis that, notwithstanding our decisions to the contrary, we are minded to certify on an opt-out basis and that, therefore, a carriage dispute arises between the two PCRs.

[201] Reflecting the fact that the additional materials relied upon by the Evans PCR were contentious, they have not been listed in Annex 2.

(2) Admissibility

(a) Objections taken

396. The essential objections to the additional material taken by the O'Higgins PCR were that:

(1) This was late evidence that the Tribunal could not and should not admit.

(2) The suggestion advanced by the Evans PCR that this was merely an "updating" exercise was "disingenuous and wrong".[202]

(3) Furthermore, the approach taken by the Evans PCR was, in the most fundamental way, unfair to the O'Higgins PCR, as it was (in effect) an opportunistic attempt to improve the Evans PCR's offering after a substantial hearing, so as to enable the Evans PCR to "steal" an advantage.

397. We consider these points below, beginning with the issue of whether this was indeed an "updating" exercise.

(b) "Updating"

398. We consider that the improvements to the Evans PCR's offering can in no way be described as an "updating" exercise. To this extent, we agree with the submissions of the O'Higgins PCR.

399. "Updating" a court up to the hand-down of a judgment is a duty that falls on all parties. But that duty relates to material developments that are not induced by the conduct of the party doing the updating. In this case, it is not possible to accept that these improvements to the Evans PCR's offering came to pass without some form of conduct or acquiescence on the part of Mr Evans himself. They would not have, as it were, simply fallen into Mr Evans' lap, without more.

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[202] To quote from the O'Higgins PCR submissions of 15 October 2021 on this point at paragraph 8.

400. So, we do not consider this to be an updating exercise, but rather an exercise intended to improve the basis upon which – if Mr Evans' Application were to succeed – the litigation would be conducted on behalf of the represented class.

(c) Late evidence

401. We do not, however, consider that the new material can appropriately be described as "evidence". If it were evidence, then we consider the decision not to admit it would be straightforward, for no proper excuse or justification for the late adduction of evidence has been advanced.

402. If, for instance, the Evans PCR wished to adduce further expert evidence then – whilst one would obviously wish to understand why the evidence was being adduced post-hearing – the chances of such material being admitted would be slim indeed.

403. But we do not consider that this material can, properly, be characterised as "evidence". Rather, it represents an augmented offering on the part of the Evans PCR. Essentially, the terms on which the Evans PCR would proceed with the litigation have changed, and changed in a potentially material way. We do not consider the Tribunal Rules regarding late adduction of evidence to be applicable. Indeed, we do not consider that those rules assist us, even by way of analogy. This is a change, but it is not new evidence. We have called it "new material" for a reason.

404. If the new material were introduced solely for the benefit of the Evans PCR, then we consider that we should have little hesitation in declining to consider it further. But – whilst we recognise the interests of the funders and others apart from the proposed classes in having the Evans Application succeed – the fact is that the new material also redounds to the benefit of the proposed class. When exercising our discretion, our primary concern, and what many of the relevant factors go to, is the interest of the class and the class's access to justice. We cannot simply spurn or leave out of account a development materially in favour of the proposed class.

(d) "Opportunistic"

405. As the interests of the proposed classes are engaged, in that the new proposals made by the Evans PCR undoubtedly benefit the classes that the Evans PCR wishes to represent,

we do not consider that the label opportunistic (with its pejorative connotations) is entirely justified. The fact is that both PCRs consider that they are best suited to represent the classes they wish to represent, and a responsible PCR will – we have no doubt – keep the quality of its offering under constant review. We suspect that the hearing before us caused something of a re-assessment by the Evans PCR, resulting in these materially improved terms. No doubt the desire for his Application to succeed was a factor in Mr Evans' mind, but we do not consider that fact to justify disregarding the new material when it involves such materially improved terms to the class.

406. It follows that the objection on admissibility must be rejected, and that we are obliged not to disregard this material, but instead to take it into account. However, the extent to which we take it into account must be constrained so as to avoid a "gaming" of this jurisdiction. We do not want to encourage late changes to the basis upon which a PCR proposes to represent a class. Accordingly, it seems to us that where an applicant, as here, makes a late improved offering, which has the effect of improving that applicant's offer as against that of a rival applicant, such that the outcome of the carriage dispute changes in the former's favour, then the rival applicant who would otherwise have been awarded carriage of the litigation should be given the opportunity of matching or beating the improved offer. If that occurs, it is the rival who is awarded carriage of the litigation.

(3) Assessment in this case

407. The improved offering of the Evans PCR is in fact immaterial in the present circumstances. That is for a number of reasons.

408. We have concluded that we are not minded to certify on an opt-out basis, and so the Carriage Issue does not in fact arise. We are only, as we have stated, prepared to give the PCRs an opportunity to apply to be certified on an opt-in basis, as we have described in paragraphs 383 to 387 above.

409. However, we are concerned to ensure our view on the issue is properly and fully stated. Thus, assuming (contrary to the conclusions reached) a conclusion that opt-out certification is appropriate, and that therefore the Carriage Issue arises, we have concluded that – even without the improved offering – the Application of the Evans PCR is to be preferred over that of the O'Higgins PCR, although we accept that this is

an extremely marginal call. Even without the improved offering, we consider that carriage of these proceedings should, if a choice is to be made, be given to the Evans PCR, for the reasons we have given in paragraph 389 above.

Part IX: DISPOSITION

410. Our Judgment is not unanimous, but constitutes the decision of two of us. The dissent of Mr Lomas appears below, commencing at paragraphs 413*ff* below.

411. For the reasons we have given in this Judgment, the Applications are both stayed, and the Applicants are given permission (if so advised) to submit a revised application for certification on an opt-in basis within three months of the date of this Judgment.

412. We invite the parties to draw up an order in appropriate terms.

Part X: DISSENTING JUDGMENT

Paul Lomas:

(1) Introduction

413. With considerable regret, I dissent from the majority on the Opt-in v. Opt-out Issue. My conclusion is that a CPO should be granted on an opt-out basis for the reasons that follow. I adopt terms defined in the Judgment. Where I define additional terms, these appear in Annex 1 of the Judgment.

414. I agree fully with the importance of accurate and clear pleading, not least to enable the dispute to be properly defined, evidence to be gathered and the trial process appropriately managed. I share the concerns of the majority as to the lack of definition in pleading in relation to the theory of harm. As the CPO certification process developed, particularly after the hearing with the further submissions on theory of harm, I think the broad outlines of the theories of harm of both PCRs were emerging, albeit primarily asserted at a theoretical level and not in great detail. It is also important that there is some tolerance given to claimants articulating and pleading a theory of harm for

market wide price changes (which by definition is the sum of a myriad of small pricing and trading decisions that cannot be individually analysed and which need to be considered in aggregate) in such follow-on cases to respect the principle of effectiveness and to allow claimants to assert and test their putative rights in such cases. Had there been a hearing of a strike out application, and the application of the *Easyair* tests in the light of the analysis of pleadings in competition cases in *Stellantis*, it might well have been that the pleadings would have been refined to meet the required standard, at least as to be applied in these circumstances. However, as set out above, that process has not occurred and, as a result, the Applications have not been struck out. There is, therefore, no need to consider this issue further and nothing that follows in relation to the Opt-in v. Opt-out Issue is intended to have any bearing on that discussion.

(2) Divergence from majority view

415. I think that the approach taken by the majority on the Opt-in v. Opt-out Issue proceeds in the wrong direction for the following reasons. I have first set out the points here to assist in understanding those points of divergence. I then set out the approach that I would adopt.

(1) The majority proceed on the basis that an opt-in CPO will not, in fact, happen (see, for example, paragraphs 372(2)(ii) and 385(1)). It seems to me that there is a deep tension between determining (even if only by a small margin and whatever the views on pleading or evidence) that an application meets the criteria for certification (thereby enabling the class to have access to a process which will enable their claims to be adjudicated) and then selecting a procedural method which, on the evidence and assumptions, means that adjudication will not, in fact, occur. This seems to me to be inconsistent with principle of effectiveness and the approach recently taken by the Court of Appeal in *Stellantis*, see, in particular, paragraphs 26 and 29.

(2) Access to justice (although not a specific criterion under the Tribunal Rules) is clearly a critical policy behind the introduction of the collective proceedings regime in the CRA 2015. The approach taken in rule 79 (and rule 78) of the Tribunal Rules to certification represents the implementation, in the context of

a wide discretion, in the Tribunal Rules, of criteria to implement a balanced consideration of the issue of access to justice. I do not see how the broader objectives of access to justice are met by choosing a method (opt-in) which will either (i) not occur at all or which (ii) if it did occur, would mean that the overwhelming number of what is likely to be in excess of 40,000 proposed class members (**PCM**s) did not opt in. This could be because they had no knowledge of the proceedings and hence no opportunity. Or it could be because the costs of understanding the (new) process, and advantages and disadvantages, coupled with risks and administrative costs associated with opting in, outweighed their relatively small loss (even if, in fact, the process was very favourable to them). Finally, if a sizeable number of that (conservative) 40,000 PCMs did opt in, the opt-in process would become unmanageable. Access to justice has to be more than notional. Indeed, that has traditionally been much of the issue on "access to justice" ("open to all, just like the Ritz", the aphorism attributed to Sir James Matthew): it is theoretically available but under conditions, often, but not necessarily, economic, that mean that, in practice, it is not. I do not, therefore, agree with the majority, in paragraph 95(4) that, in this case, "opt-in collective proceedings go a long way to providing access to justice" or that the comment is automatically, or generally, true – it depends on the circumstances.

(3) Claimant commitment, and "buy-in"', to a case has clear policy benefits; it is the traditional position under English law. However, the CRA 2015 consciously introduced a process without such "buy-in" to reflect other policy considerations. It was foreseen at the time, and indeed part of the policy objective, that opt-out claims could be initiated by lawyers and PCRs who were not class members and that those claims could be litigation funded. Those arrangements are permitted by the Tribunal Rules. Many of the (legitimate) concerns of the majority seem to me to be inherent in any such opt-out process and are not specific to this case. Our role is to apply the Tribunal Rules and our discretion (as set out below) accepting the fact that statute has, indeed, introduced such a process, whilst being alert to control any improper use.

(4) Given a global class size of, in all likelihood, considerably more than 40,000 PCMs, even if an opt-in claim were to proceed at all, either the number of PCMs

opting in would be very small or there would be nothing more than a notional claimant involvement in the proceedings. If only 25% of UK domiciled PCMs opted in (a likely fanciful figure, but which would still leave some 75% of UK domiciled PCMs with their claims not adjudicated), the class size would be over 10,000, which would clearly result in very little control over the direction by any given claimant (even a large one). The process would still be run by the legal team, the PCR and the advisory board with limited ability for class members, individually or collectively, to shape the direction of the litigation (save, perhaps, votes on recommendations on settlement). Therefore, it is easy to overstate the real benefits of "buy-in" in practice for any opt-in structure that provides access to justice for a large class.

(5) The majority are mistaken when they state (in paragraph 96) that "[a]s we see it, the choice between opt-in and opt-out proceedings turns on this difference" (being "buy-in"). That difference is embedded in the process introduced by the CRA 2015 and will be the case in all opt-in/opt-out certification decisions. That approach also ignores the fact that the different processes have very different, and important, consequences for the procedural development of the case (number of class members, size of claim, fundability, settlement dynamics, feasibility, damages recovered, disclosure obligations etc). Moreover, the 1998 Act and the Tribunal Rules clearly contemplate opt-out proceedings in proceedings such as this, which are litigation funded with a primary role being taken by the legal team and/or the PCR who are making the application for the CPO, rather by than the class members who have committed to it and are taking the initiative. Too much emphasis is placed on the "buy-in" distinction.

(6) The approach of the majority on the "practicability" test in rule 79(3)(b) is also mistaken. The rule simply means what it says: that the Tribunal should weigh the objective practicability of the claim proceeding on an opt-in basis and what the implications for the proceedings would be (as I do below). There is no need either on an objective or subjective approach seeking to assess the motives of a putative PCM in doing so. There is very little evidence on those motives and it is, indeed, as the judgment recognises, an exercise in speculation. The Tribunal should be cautious, in any given case, about giving weight, as suggested in

paragraph 104 of the Judgment, to the idea that the unwillingness of a PCM to opt in is a negative measure of the merits, or the PCM's view of the merits, and, therefore, that "the additional benefits of opt-out proceedings over and above opt-in proceedings ought not to be conferred" – there may be many issues at play. This problem is not cured by the adoption of a "PCM on the Clapham Omnibus" test. That introduces the Tribunal's objective assessment of what a PCM ought to think about opting in; but the Tribunal's discretion should simply be based on what is likely to happen to the proceedings, in practice, if an opt-in CPO were made. Moreover, it is common ground that the class, in this case, is heterogenous; it is not possible to apply a single Clapham Omnibus type test to a class when there are different categories of PCM who will be subject to different circumstances, leading to different answers when each is considered objectively – and, in fact, very little is known about the PCMs or their differing circumstances.

(7) I am also troubled by the majority's approach, in paragraph 381(10) to the considerable number of smaller PCMs whom they admit would be excluded from an opt-in process but whom they regard as a smaller sub-class, in terms of the claims total, whose interests should not change a "clear-cut conclusion on practicability". It is in considerable part, but not only, because of the wider diverse groups of PCMs, often with smaller claims, that there is a high degree of impracticability for an opt-in approach.

(8) I think, therefore, that the majority are in error in basing their approach on: "practicable for whom" (paragraph 122(2) of the Judgment). Clearly, it is the interests of the PCMs that need to be considered, not the convenience of the PCRs. But the issue is, rather, an objective one 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) which then need to be weighed in the light of the wider criteria. I do not find the focus on the viewpoint of the PCMs, or, more importantly, an assessment of what their decision processes might, or should, be, helpful.

(9) I think that there are difficulties with the majority's position that opt-in proceedings in this case are theoretically practicable in the sense that they consider that they "ought" to be possible, on their assessment of the sums at stake and the likely interests of the PCMs, but their acceptance, as a matter of fact, that they will not happen. Practicability must be grounded in a real, not a theoretical, approach. This is particularly so where it is not possible to bring the possibility of opting in to the attention of a substantial part of the class.

(10) It does not assist, as in paragraph 380, to dismiss as trite the point that "opt-in proceedings are not practicable if no-one is opting in". Rather, one has to look at all the evidence on practicality, here only submitted by the PCRs, and form a view on the objective practicability of an opt-in CPO if ordered.

(11) In paragraph 121, particularly 121(2), the majority adopt a direction on practicability to the effect that if proceedings are practicable as opt-in, it indicates that they should be certified as such, albeit that that is only one factor to be considered. That reading is not justified by the Tribunal Rules. A more logical role for rule 79(3)(b), is that if opt-in proceedings were very onerous, that is a strong argument for opt-out. A fortiori, where they are actually not practicable, or the credible evidence is that they are not, or very unlikely to take place, then opt-out becomes the only realistic option.

(12) I am concerned that the majority's approach on practicality and PCM interest in the case could lead to an unfortunate situation. If a PCR leads no evidence on interest in joining an opt-in case, he/she is exposed to the challenge that they have not tried and should not get the support of opt-out because they have not shown that opt-in is impracticable; if he/she leads evidence of seeking interest, but unsuccessfully, then, on the majority's view, that is evidence of lack of support for the case itself and it should not be allowed to go forward under an opt-out process; but if he/she leads evidence of seeking "buy-in" that does show interest, then there is the obvious answer that a opt-in approach is practicable and that should be adopted. There will be cases (*Merricks* is one) where the opt-in practicability issues are self-evident (say because the individual claims are so low, or the class is measured in tens of millions rather than tens of thousands)

so that this issue does not arise; but that will not always be so and the opt-out procedure is not limited under the Tribunal Rules to such cases.

(13) There is no obligation to consider the criteria in rule 78(2), the Authorisation Condition, when considering the Opt-in v. Opt-out Issue, either generally or in this case. There is simply the general power in the Tribunal Rules under rule 79(3) to consider all matters that the Tribunal thinks fit, which could include issues raised by rule 78 but does not have to do so. Thus, the Tribunal is entitled to review each of the rule 78 criteria, but I think the majority are mistaken insofar as they conclude, for example in paragraph 368, that they ought to do so (although the Judgment confirms that this is not proposed to be a legal obligation). Since the majority view is that, having considered the rule 78 criteria, it is possible for the Tribunal to attach no weight to some, or all, of them, the practical difference in approach is limited. However, I do not agree with the majority at paragraph 370(3), with reference to the specific application of those rule 78(3)(b) criterion, that the fact that neither PCR is a pre-existing body is a factor pointing away from an opt-out CPO in this case (that will frequently be the case for such an order) but that a trade association would favour opt-out. The position is rather the converse, that a trade association's involvement would be highly relevant to the practicability criterion in rule 79(3)(b) and would favour an opt-in. There is no such trade association in this case, which favours opt-out, and it is not relevant whether the particular PCR in this case is a pre-existing body or not.

(14) The reliance on *Carnegie* in paragraph 95(3)(i) is misplaced with reference to the opt-in approach. Judge Posner was considering there the US opt-out jurisdiction (in which context, his powerful points are readily understandable).

(15) Insofar as it is part of the foundation of the decision of the majority, for example as foreshadowed in paragraph 372(3), the placing of an obligation on PCMs to opt out is a very light one. If they are seeking to pursue their own proceedings elsewhere, it is wholly de minimis, in the context of running major litigation on FX trading, to opt out of the CPO by a simple administrative process (particularly in this case where class definition is clear). If they are not pursuing

separate proceedings, it is difficult to see why they would wish to opt out; but it would still be a very simple process if they do.

(16) In paragraph 370(5)(iii), the majority conclude that the level of funding points slightly against opt-out. I do not agree. The issue of the PCRs having sufficient funds to pursue the case is common to both processes. It will not be cheaper for the PCRs to bring the case on an opt-in basis, but more expensive. To the extent that there are any issues with the level of funding, it supports opt-out (the issue of incentives to settle being a different point). As set out below, I think that the opt-out basis is likely to be considerably more attractive to funders, thereby offering better financial support for the PCMs (as well as the decreased PCM costs) and putting the PCR in a better position to advance the PCMs' case.

(17) I also think that there is a degree of tension between the majority's view in paragraph 370(5) that the level of funding in this case points against opt-out because it puts pressure on the PCR to settle; but that the opt-out process generally puts pressure on the Respondents to settle (for reasons set out in paragraph 88(3)) and that also points against opt-out; when settlement of claims is something that is generally considered to be desirable. There is a risk in giving too much consideration or weight, at this early stage, to factors that might affect whether a settlement is done and, if so, at what level.

(18) At paragraph 370(6), the majority consider the issue of ATE insurance and conclude that the factor is neutral. As set out below, I consider that it favours opt-out to a degree. An opt-out action will attract a more favourable funding package which offers the prospect of greater ATE insurance cover and, therefore, better protection for the Respondents. Moreover, there is reason to think it will lead to lower Respondent costs (which is the exposure that the ATE insurance is to cover).

(19) I do not agree that the *Allianz* proceedings point in favour of opt-in. On the contrary, on our limited knowledge of them, their focus is different and it is unclear that the same market-wide spread increase claim is made in those proceedings as in these Applications. If there were an overlap in legal substance

or as to damages claimed, it would be reasonably straightforward for the *Allianz* claimants to opt-out or to waive, in the *Allianz* proceedings, any claim to damages arising in these proceedings. As analysed below, I think that the *Allianz* proceedings are actually, on balance, a factor in favour of opt-out.

(20) Finally, I do understand the point of the majority that, as the evidence of Mr Maton shows, a considerable number of large FX market users, with potentially large claims, have been approached and decided not to pursue Hausfeld's proposal (albeit earlier, in different circumstances) of bringing a claim and, that, therefore, if potentially large claimants do not want to bring a claim, why, in effect, should one be given to them by ordering an opt-out CPO. However, and accepting that this is a very different case from *Merricks*, that is not the right question for the application of our discretion, which is, rather, to decide, in relation to an action that does meet the test for certification, by which procedure it should best proceed - in the interests of the PCMs, the Respondents and the good administration of justice. The fact that some potentially large, and potentially sophisticated, claimants chose, in earlier times and in different circumstances (before the major US settlements, before the Decisions and before availability of the CPO process), not to pursue a differently structured speculative future claim could be for a wide variety of reasons, not least the investment costs of understanding properly the issues, the internal costs of being involved in litigation, the associated risks, particularly in relation to something that was not their main line of business, for sums of money that that would, by definition, be small in relation to their scale of trading and where there is often (understandably) a bias against becoming involved in litigation. There are many good commercial reasons why organisations could have decided not to become parties to the proposed claim but that does not mean that they would not want compensation if it were shown that they had been overcharged for their FX activities. As discussed below, the Maton evidence, on balance, better supports the fact of impracticability of opt-in proceedings.

(21) In so far as the majority are concerned that an opt-out CPO "should not be forced upon an apparently unwilling class" and that would be an inappropriate use of the jurisdiction (paragraph 385(2), supported by paragraph 122(4)), I do not

agree. There are many rational reasons why a PCM should rationally have chosen not to join the earlier proposal; or could rationally decide now, even if they ever became aware of it, not to opt-in to proceedings but might welcome a successful opt-out claim and choose not to opt out of it. And those that did feel a claim had been foisted upon them would find it easy to opt-out if they so wished (however irrational that decision might objectively be in narrow financial terms).

(3) An alternative approach

(a) ***General Comments***

416. This is the first time that there has been an exercise of discretion by the Tribunal on a contested opt-in/opt-out question. There is, therefore, no decisional guidance and it is a matter of interpreting the Tribunal Rules, in context, and applying the discretion in the context of the facts of the particular Applications.

417. It is inherent in the structure of the decisions that the Tribunal must make on granting a CPO that the opt-in/opt-out discretion (which it must exercise, for the reasons set out the majority judgment at paragraphs 76ff) has to be exercised in circumstances where an application has already met the Authorisation and Eligibility Conditions, i.e. on a case that the Tribunal as already decided should proceed as collective proceedings. The issue for Tribunal at this stage is simply one of the right procedure to be followed for those proceedings.

418. The definition of the class by two PCRs, in similar terms, but with material differences, is discussed fully in the Judgment. The class consists of, perhaps, 40,000 PCMs, likely often large companies rather than individuals, that are domiciled in the UK (and a further considerable number that would have the right to opt-in from around the world). It is a heterogeneous class but the PCMs, in essence, have claims on identical grounds represented by changes in the spread (possibly by different amounts in different circumstances) applied to their FX transactions with either the Respondents or an identifiable group of other financial institutions. There are no obvious structures in this group (such as trade associations) which enable them more easily to be organised nor,

indeed, directly contacted about these proceedings – although they could be identified from the trading records of the financial institutions that were their counterparties.

419. There is considerable variation in the size of the claims across the class with a significant number of PCMs, albeit a small percentage of the total class, having large claims (at least on the PCRs' current damages calculation estimates). However, it is estimated by Mr Evans's expert, and not rebutted, that some 80% of the UK domiciled PCMs have claims of less than £16,000, some 44% have claims of less than £10,000 and some 77% of non-financial UK domiciled entities have an average claim of less than £3,500 – which sums are relatively small in the overall context of the trading involved and certainly in the context of the costs and risks of this litigation.

420. This is one of those procedural decisions which is of particular importance. Inter alia, it will almost certainly have a very large impact both on the total damages exposure of the Respondents but also on whether many PCMs (or indeed any PCMs at all, on the evidence before us that an opt-in case will not proceed) are compensated for the losses that they have suffered, if the claims were to be well founded.

421. That impact of the decision is reduced by the fact that a considerable percentage of the PCMs will not be resident in the United Kingdom. Those overseas PCMs would need to opt in to an opt-out CPO, because that procedure only applies to, and binds (unless they opt out), parties that are UK domiciled.

422. It might well be more likely that an overseas PCM would opt into an existing UK opt-out CPO than take the more complicated decision to opt in, and commit to, a proposed opt-in CPO. This is because an opt-out CPO would represent a case that was already underway, with financing in place and litigation processes being operated; it represents a real piece of litigation into which an overseas PCM could easily opt in and on which it could "free-ride" at no risk. This is a rather different exercise from (i) evaluating the pros and cons (including the investment of resources) of whether to be part of the initial core group of "critical mass" claimants necessary to make an opt-in CPO viable or even (ii) to opt in to an opt-in CPO which was viable and underway because the opt-in regime is a little more complex and does require greater examination of the risks and benefits (for example because of the chance of having to give disclosure or evidence, the re-

payment of financing out of damages, the likely more complicated financing and organisational/decision taking arrangements).

423. Rule 4 of the Tribunal Rules sets out governing principles for the Tribunal's operation and, hence, its discretion, reflecting the well-known overriding objective in Part 1 of the Civil Procedure Rules. Insofar as the Opt-in v. Opt-out Issue is concerned, the Tribunal's discretion is specifically directed in rule 79(3). In exercising the opt-in/opt-out discretion, in accordance with these provisions and in the unusual circumstances of an application for a CPO, at a very early stage, before indeed, proceedings are properly underway, the Tribunal needs to consider and weigh the interests of the PCMs, the Respondents and the good administration of justice.

(b) ***Factors***

424. Rule 79(3) is set out at paragraph 55 of the Judgment. It requires the Tribunal to consider: (i) the broader factors already considered in the context of eligibility in rule 79(2); (ii) two specific factors set out in rules 79(3)(a) ("Strength") and (b) ("Practicability"); and (iii) any other matters it thinks fit. It is, therefore, a very broad discretion, albeit operating under the governing principles of rule 4. It is a particularly difficult assessment because, at this early stage, it requires the consideration of a considerable number of factors that are inherently very uncertain, unclear and in the future. In this case, some of those factors are made more difficult by the difficulties alluded to in the judgment associated with the pleading and the theory of harm.

425. As new factors, Strength and Practicability require particular attention (see below). Beyond that, there is no particular order or hierarchy in the factors to be considered. However, in being directed to the factors in rule 79(2), the Tribunal clearly must do more than note its earlier consideration of these matters for the purpose of the suitability issue. It must reconsider those factors from the specific viewpoint of whether they are better satisfied by an opt-in or an opt-out order.

(c) ***Application of the criteria***

426. In the schedule to this dissent, I have set out my conclusions from examining each of the rule 79(2) factors from the specific viewpoint of whether they are better satisfied by

an opt-in or an opt-out order. In essence, and accepting that these are difficult judgments, in my opinion, the seven rule 79(2) factors collectively favour an opt-out CPO for the reasons set out therein, with three factors being clearly in favour, one difficult to assess but perhaps slightly in favour and three neutral. Certainly, when taken together, I consider that the collective effect is weighted towards opt-out. I now turn to the new factors of Strength and Practicability.

(d) ***Strength***

427. Since the Tribunal Rules were drafted, the Tribunal has the benefit of the Supreme Court's decision in *Merricks*. As we set out in the Judgment, this clearly establishes that, other than the strike out jurisdiction provided for in rule 41, which is specifically preserved in relation to CPO applications by rule 79(4), there is no independent merits test to be applied when considering a CPO application. In this case, we are not currently applying a strike out test (for the reasons discussed in the Judgment). In *Merricks*, the Supreme Court was not considering Strength in rule 79(3)(a), which was not in issue there, and, consequently, gave no specific assistance as to how it is to be applied, although the general statements made as to the nature of the regime do frame the issue of the exercise of the rule 79(3) discretion.

428. I fully recognise the very substantial evidential mountain that the PCRs have set themselves. I also recognise the risks for the effective conduct of litigation associated with pleading a case on a theoretical footing as to theory of harm, even given the inherent challenges associated with pleading allegations of harm affecting a whole market flowing from the specific acts the subject of a regulatory decision. These issues have been discussed in the Judgment. They are very fully expanded on by the Respondents. There are formidable difficulties in meeting the required standard of proof using, essentially, statistical and econometric methods in any claim and particularly in the context of the FX markets which are enormous and complex, with spreads being affected by many factors and where the infringements, however serious, seemingly having had a relatively direct commercial or transactional scope. However, whilst recognising those very considerable concerns, although we have heard extensively from experts as to how they would approach that exercise, it has not yet been done, at least in evidence submitted to us (there are suggestions that it has been done in other related

cases), and we have not yet heard other factual witness evidence that there might be relevant to the PCRs' case. Accordingly, there are limitations as to the weight that can be given to the Strength criterion at this stage of the case.

429. The Respondents submitted that it was clear from an analysis of the policy concerns relating to opt-out CPOs at the time of the CRA 2015 and the introduction of the Strength criterion for the Opt-in v. Opt-out Issue as a necessary step for the Tribunal to address, that, in essence, a weaker case should only be permitted under an opt-in process whereas an opt-out process would only be fit for stronger cases that merited it. This, they said, was reflected in the Guide. They argued that a weaker case should not go forward unless sufficient of the PCMs committed to it (by opting in) and were prepared to support it and act as active clients, implicitly because they considered that, although weak, it was strong enough to deserve that support. (This rationale 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. This result would limit the prospects for the opt-in jurisdiction for cases that did not have some external features making opt-in particularly viable (say a very effective trade body).)

430. However, the Respondents' proposed approach is not to be found, at least expressly, in the 1998 Act or the Tribunal Rules. Were there to be such an intention, in effect, that there was a presumption for opt-in unless a case were sufficiently strong to allowed to proceed on an opt-out basis (which would be a fundamental matter), it might have been expected that such an approach would have been clearly specified. In fact, there is a much more general discretion.

431. There are risks in an overly simple approach that a sufficiently strong case is suitable for opt-out and a weaker one only for opt-in. In particular, there seems no basis for the development of a form of progressive increasing scale of Strength (whether of percentage chances or otherwise) whereby: a case is so lacking in credibility or inadequately formulated that it fails ab initio despite the approach of the Supreme Court in *Merricks*; or it passes that bar but fails to meet a strike out test, whether of the Respondents' or the Tribunal's initiative; or it passes that strike out test but is only strong enough for an opt-in; or, finally, it is strong enough to qualify for opt-out. In such

an approach, Strength would be acting as a hurdle to be passed to access opt-out processes. That is not how the Tribunal Rules have set up the Strength test. That is particularly understandable given the difficulties, as set out in the Judgment, of forming any reliable view of either merits, or the strength of a claim, at such an early stage before the formal pleadings process is completed or having sight of the relevant evidence. Such a scale is not supported by the Tribunal Rules or the realities of such litigation. It is particularly difficult to apply here. As the Judgment points out, there remain substantial difficulties with the pleadings and knowing how the case is to be put at trial and what is to be proved. That makes too much reliance on the Strength criteria, in these specific circumstances, particularly difficult.

432. Strength, therefore, is only one factor to be weighed, although important. It needs to be set in the context of the other criteria and weighed with them to decide the right process for the case under consideration: in the light of a high-level assessment of the particular strengths of the claim, which process is better suited to meeting the overall rule 4 requirement? In this case, although there is a valid theoretical basis for the theory of harm, which cannot be dismissed a priori as untenable, the evidential challenges are very substantial indeed. Thus, it could be said either that, given those difficulties and risks, the substantial costs for both parties and Tribunal time should not be incurred unless the PCMs make a commitment and opt in; or that the only mechanism that makes such a case feasible is an opt-out basis because the economics and funding requirements, in the light of the risks, mean that only on that basis can sufficient resource be deployed effectively to present the PCMs' arguments and permit access to justice. Both these points risk conflating the issues raised, in this case, by the Strength test with the Practicability test, which are separate in the Tribunal Rules.

433. However, the issue is not whether this case is so weak that a CPO should only be granted on an opt-in basis because that will mean that it will not proceed (thereby saving costs and time) unless, contrary to the evidence before us, a sufficient number of PCMs now decide that they want it. That is not how the Tribunal Rules are set up. Rather the issue is, given that high level assessment of the strengths, which of the two processes is the better one for having the merits of the PCMs' case determined by the Tribunal. It is certainly arguable that the costs of establishing the best evidence that the PCMs could adduce are such that, in this case, the superior finance and resource which are likely to

be available in the case of an opt-out claim offer the PCMs the best chance of having their claims fairly determined on the merits (accepting that opt-out claims will usually bring that greater resource) and, thereby, meeting the rule 4 principles.

434. The consequence is not that Strength is immaterial but that there are balancing factors associated with the Strength criterion. To my mind, in this particular case, the Strength criterion, for all the issues that the case faces, is not determinative in the context of the other criteria. On balance, I would assess it as pointing towards opt-in but those balancing factors treat it as having a limited impact, particularly in the context of Practicability.

(e) ***Practicability***

435. However, whilst it is difficult, in this case, to take decisive guidance from rule 79(3)(a), the Strength criterion, in this case, there is a very powerful indication under rule 79(3)(b), the Practicability criterion. In essence, the only evidence on "whether it is practicable for the proceedings to be brought as opt-in collective proceedings" which is before us, establishes that it would, to a high degree of probability, albeit not to absolute certainty (in the sense of being positive proof of a future negative), not be practicable. The Respondents critiqued that evidence in submissions but produced no evidence themselves to counter the position.

436. In creating an opt-in class, it would be necessary to establish a critical mass of core claimants to make such a claim viable as an action. The (formidable) costs of bringing this action are not materially dependent on the size of the class. However, the total size of the damages claim is critical because it supports the funding to pursue the claim. That is a function of the number of class members and the size of their claims. In essence, that total likely damages claim has to be large enough for the economics of bringing the claim, with its costs and risks, to be rational. Once sufficient (presumably larger) claimants opt in so that point is reached, and a claim is viable and proceeds, there is then a separate issue of the extent to which it is possible to contact other PCMs to give them a fair opportunity to join the class. In this sense, practicability has two elements: (i) would a claim happen at all; and (ii) if it did, would it be practicable to bring the claim

to the attention of the remaining PCMs to give them a fair opportunity to consider whether they should opt-in.

437. The evidence that we have dates from before the Decision, the coming into force of the CRA 2015, which created the CPO jurisdiction, and, seemingly, the settlement payments in the USA and Canada. Those events might now change the views of potential opt-in class members, but that is uncertain. Subject to those limitations, however, the evidence was powerful.

438. The evidence before us consists of the witness statements of the two PCRs, their funders and, particularly, Mr Maton of Hausfeld, representing Mr Evans.

439. The evidence from the funders establishes, not surprisingly, that the current funding packages would not be applicable to an opt-in CPO (having been designed for an opt-out arrangement) and the current funders have no commitment to any arrangements for an opt-in CPO. Of course, those arrangements could be renegotiated or other funders approached, but the evidence also points to real difficulties, given the changed economics, in creating a viable new funding package on an opt-in basis.

440. More pertinently, Mr Maton details how he and his firm had previously sought to "build a book" for claims in relation to the FX infringements using forms of group action in the High Court which have some similarities to an opt-in CPO, although lesser protection against adverse costs. His evidence is very clear as to the substantial difficulties encountered in this process. He explains that his firm (which is highly experienced in this kind of activity, in which it specialises) contacted some 321 firms likely to have high volumes of FX trading and invested more than 6,000 hours over 4 years (leaving aside the costs of other specialist advisers) in trying to "build a book" of claimants, resulting in only 14 advisory retainers. Although some of these institutions had theoretical claims exceeding a million pounds (the category cited by the Respondents as those who would form a core group to initiate an opt-in CPO), it was not then possible to assemble a large enough group to make a group action economically feasible, given the legal costs and risk associated with the claim.

441. Mr Maton cites reasons why this is the case, which are generally credible. As articulated, the claim for damages would be generated by an infringing increase in the spread on FX

transactions. The large sums claimed are generated by the enormous size of the FX markets and FX transactions and, hence, the large absolute impact of very small changes in the prices at which (or spreads on which) transactions are conducted. By definition, as a marginal change in the spreads, the size of any claim will vary with the scale of a PCM's FX business but will be very small in the context of their trading activities, even for those PCMs with large absolute claims. Most organisations, particularly larger financial institutions, have processes for considering whether to enter into litigation (with its associated risks and costs) and for exercising good governance controls over it, including internal or external evaluations. Even the cost of internal or external legal advice to evaluate that option could be material as well as a distraction from an organisation's usual business and priorities. There are initial investigation costs and many organisations are (understandably) reluctant to become involved in litigation, particularly of this complexity and cost (disclosure of the sums already invested in this case would be a warning), and would want to understand their true exposure under the opt-in CPO regime, which is new and with which they will not be familiar.

442. It is credible, indeed understandable, that there are real difficulties in getting support for a claim which, by its very nature, will seem somewhat artificial and speculative to many PCMs, to risk costly disclosure and confidentiality issues (since they could not know in advance what orders the Tribunal might make on such issues), to give rise to internal or external legal and management costs, particularly if they were to be part of the core initial group, and to produce, if successful, damages which represent only very small percentages of the costs of the FX activities and which would be reduced to provide profit margins to funders.

443. Moreover, there are difficulties in contacting very large numbers of PCMs and no obvious trade associations or similar representative bodies to be a nucleus of activity in this respect and to take over (and reduce the individual cost of) assessing the viability of the case, to make recommendations as to how to proceed and trusted to undertake some level of management of the procedure. Whilst there is room for debate about the extent of these aspects, they clearly impede creating a strong opt-in claim and indeed, on the evidence, any claim at all. In submitting (but not providing evidence to support those submissions) that an opt-in CPO would be practicable, the Respondents did not offer to distribute the PCRs' proposition to potential opt-in claimants to the parties with

whom they transacted; but even that would be of limited benefit since many PCMs would not be trading counterparties of the Respondents but of other FX institutions.

444. It was submitted that some PCMs would be reluctant to join an opt-in claim because they feared reprisals from the Respondents on whom their FX trading, or banking relationships, depended. This was strenuously denied by the Respondents. We saw no real evidence to suggest that there would be reprisals and make no such finding. However, taking legal action, particularly somewhat speculative action, against a party with whom one has an important trading relationship is a factor that some PCMs might assess, if they regarded it as material at all, as a reason for not joining an opt-in CPO: it would only work against joining. Nevertheless, it is a factor to which I would give little weight.

445. The Practicability test is:

> "…whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover…"

446. This seems to me to be simple exercise of an objective assessment of probability. The Tribunal is required to consider the evidence and form a view, in essence, of the practical difficulties associated with mounting an opt-in action on the facts of the particular case.

447. The extent to which an opt-in CPO is practicable is not a binary issue but a matter of degree and to be assessed in particularly uncertain circumstances (not least since there is limited current experience in the creation of an opt-in CPO and none, that we are aware of, in analogous circumstances). This is, not least, because (a) a degree of impracticability can be overcome by the application of greater effort and resources and (b) the concept of an opt-in CPO that is practicable must include some assessment of how widely it meets the interests of the PCMs as a whole (rather than, say, just a core element).

448. Logically, however, the less practicable an opt-in CPO would be, the more the discretion should be exercised in favour of opt-out. In the limiting, perhaps theoretical, case where it is clear that an opt-in CPO is actually impracticable (in the sense that it cannot

happen), it seems that ought to be an exclusionary test for the opt-in approach. It can make little sense for the Tribunal to order a CPO (which, by definition, has already passed the Authorisation Condition and the Eligibility Condition to be awarded a CPO) on a procedural basis which means that it will not happen.

449. In this case, the only evidence that we have is from the PCRs. It 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 and certainly that a large percentage of the 40,000 UK based PCMs would opt in. In my opinion, this is a factor that weighs heavily in favour of an opt-out CPO. That reflects both the logic of the position and the overriding objective that we are balancing the respective interest of the PCMs, the Respondents and the administration of justice. I cannot see how we 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.

(f) Other items to take into consideration

450. The Respondents submitted forcefully, that the policy considerations leading to the 1998 Act did not envisage CPOs being for the benefit of significant businesses. Without analysing those submissions, or the extent to which the Tribunal can take those policy considerations into account, in detail, it is clear that neither the 1998 Act nor the Tribunal Rules are limited to individuals or SMEs and it seems difficult to give this general factor more weight than as being potentially material when considering the Practicability issue. Similarly, the CPO regime is not limited, by statute or in the Tribunal Rules to claims which are small in amount. What matters is their size and variability in the context of the PCMs' wider position and the costs and feasibility of bringing a case; which is not to ignore the fact that this case is rather different from *Merricks* and a number of the other cases that the Tribunal has seen so far which often pick up on consumer issues.

451. A critical policy issue behind the CPO regime was access to justice, in circumstances where claims would not otherwise be brought and infringing parties might, for that reason, avoid compensating those that had suffered loss. In a sense, this issue is close to the overriding objective as a high-level policy point. The issues that access to justice raises are largely given voice in the specific requirements in the Tribunal Rules (not least in the Practicability criterion). To the extent that it does require to be taken into account on a stand-alone basis, access to justice seems to favour an opt-out solution (as it generally will) particularly where, on the evidence before us, the vast majority of PCMs would not have a real (or, indeed, any) opportunity to opt-in. The satisfaction of access to justice concerns must be real not notional and present a viable pathway for PCMs to have their claims adjudicated.

452. It was argued that the Guide indicates a preference for opt-in (at paragraph 6.39). This issue is addressed in the Judgment. I agree that no presumption (a higher standard) is created in the Guide, or is discernible from the 1998 Act or the Tribunal Rules. The Guide does state a natural and understandable preference for proceedings to be opt-in, given the impact of opt-out and the value of greater client involvement in litigation, "where practicable", in the context of rule 79(3)(b). The Respondents accept this limitation. Given my assessment of the Practicability issue, I think that the limitation has particular force in this the exercise of the discretion in this case. This is irrespective of the wider question as to the weight to be given to the reference to a preference in the Guide in the context of the specific criteria set out in the Tribunal Rules.

453. The Guide also anticipates that the Strength criterion would usually be met in a follow-on action (such as here), although I recognise that the Strength issues in this case are not about the fact of an infringement (which is the likely principle focus of the comment in the Guide) but about the PCRs' theories of harm and causation. The Guide also makes it plain that an assessment of the Strength criterion must be high level. It clearly cannot be detailed or constitute a mini-trial, not least in a case like this where the strength issues essentially relate to quality of evidence that will be obtained in the future to support a theory which, albeit not particularised in detail, is tenable intellectually, even if difficult to prove, and which must be considered at trial on all the evidence. The approach in the Guide seem to caution against placing too much weight on the Strength criterion in this particular case.

454. There were forceful submissions on the extent to which data limitations posed, variously, further evidential or legal problems for the PCRs' cases. These points were argued both to undermine the strength of the claims and to support an opt-in CPO because of the ability to obtain disclosure from the PCMs (for example on jurisdiction clauses or location). Clearly, however, the threat of such disclosure applications by the Respondents is an objective reason why PCMs might reasonably be cautious about the costs of joining an opt-in CPO. More widely, it is difficult to give much weight to such issues at such an early stage in the proceedings with little engaged debate on precisely what data is available, what impact that has on establishing the theory of harm in the light of any "work arounds" or simplifications or reasonable assumptions or estimates might be possible (without opening up the 'broad axe' debate). The PCRs, and their funders, are clearly on notice of the issues and must accept the risk that if they cannot surmount these hurdles and their cases, or parts of them, fail, there would be very severe adverse financial consequences for them.

(4) Conclusion

455. Whilst I fully recognise the very substantial issues that these claims face, not least at the evidential level of proving a theory of harm to the required standard, and the genuine difficulties associated with applying the Strength criterion in this case, I find more persuasive, the nature of the class (size, heterogeneity, difficulty of contact), the Eligibility criteria, the implicit costs positions and, particularly the impact of the position on the Practicability criterion, as, collectively, favouring an opt-out process.

456. It is clear that the Tribunal has to take into account the interests of the Respondents in exercising its discretion. In that respect, on the likely outcome of an opt-in CPO (that it did not proceed at all – which the majority assume would be the result), not only would the PCMs' claims not be tested on their merits, the Respondents would have avoided having to respond to the substance of claims which have already led them to pay some €1.07bn in fines to the EU for the specific breaches relied on here in this follow on action, a significant number of other fines of a similar level to other regulators for related FX infringements and (with other banks who are not Respondents) some US$2.3bn in compensation in class actions in the US and other material sums in Canada.

457. Conversely, were these claims to proceed under opt-out and succeed, it is just that compensation should be paid by the Respondents. Were they to proceed but ultimately fail, the Respondents' exposure is essentially that of legal costs (and some internal administrative costs). That falls into two elements: adverse costs that are assessed (if not agreed) and recovered as a result of costs orders from the Claimants (or their funders) after the case and those other costs (traditionally some 30% of the total) which are not assessed to be recoverable and are described in the Judgment as the shortfall between incurred costs and taxed costs.

458. As regards the first element, the crucial issue is that there is full financial support, essentially through the medium of ATE insurance, for the contingent obligation to settle the Respondents' assessed adverse costs. ATE insurance cover is already in place to the level of some £33.5m (although, as discussed, that may well not be sufficient). If the proceedings were to go forward on an opt-out basis, it would be critical that there should be close review of the Respondents' (reasonable and legitimate) costs and constant vigilance to ensure that the ATE insurance (or other financial) protection was fully in place to ensure that the Respondents carried no credit risk on their adverse costs rights. This is an obligation that the PCRs (and their funders) must respect fully. They would have initiated the litigation and stand to benefit from its success; they must fully accept the risk of the financial consequences of that decision, including fully protecting the Respondents against their reasonable adverse costs, particularly given the evidential risks of which they will, presumably, have been advised. If they are unable to do so, at any stage, the litigation would not proceed and the funders would be liable for the consequences. Moreover, as discussed elsewhere, an opt-out process will attract higher levels of funding and therefore offer better ATE protection: the adverse cost rights of the Respondents are better protected by an opt-out process.

459. The second element (the shortfall between incurred costs and taxed costs) would still be considerable, of course. If the costs were such that current ATE were fully absorbed, that shortfall would be of the order of £10-15m (and it could easily be more). However, the Respondents are all numbered amongst the world's largest and best capitalised financial institutions with large and robust balance sheets. This litigation is of the same order as many other claims and fines challenges that they have faced in relation to allegations about their FX behaviour. Indeed, the Respondents submitted to us that

disputes of this nature were a "fact of life" for large banks. They all are amply resourced, financially and in terms of highly skilled legal teams, to defend these claims. Moreover, the Respondents have, at least to date, been sharing some of the burden between them which significantly reduces the cost to each (although I appreciate that each is independently advised and there will, inevitably, be a considerable amount of duplication). Moreover, those irrecoverable costs would be split between some 6 Respondents. An "exit" cost from this litigation of the order of £2-3m a Respondent would likely not seem unreasonable to them in the light of the wider claims and costs at issue.

460. Moreover, essentially the same issue would arise in the context of an opt-in CPO, if it proceeded at all. However, an opt in action would very likely involve greater legal costs (given the slightly greater complexity of opt-in proceedings) and greater shortfall costs.

461. Accordingly, as I see it, both the adverse costs and the shortfall costs position for the Respondents is preferrable to them under an opt-out CPO.

462. This is a difficult exercise of discretion on which views can reasonably differ. However, for the reasons set out here, my conclusion is that the CPO should proceed on an opt-out basis.

463. Should that have been the case, it would have been necessary to determine the Carriage Issue. For the avoidance of doubt, although I think the issue is finely balanced, I share the view of the majority in paragraph 389(5). Under rule 78(2)(c) the Tribunal has to decide which CPO would be most suitable. I agree that the Evans PCR has, marginally, produced the more persuasive application as seen from the point of view of which PCR was more likely to be able to pursue the case of the victims, the PCMs.

Schedule of Rule 79(2) Factors

1. Under rule 79(2)(a), the Tribunal must consider whether collective proceedings are "an appropriate means for the fair and efficient resolution of the common issues". I consider that this criterion favours an opt-out CPO in this case.

2. Efficiency is not compromised by an opt-out approach. The data disclosure obligations on the Respondents on a market wide claim will be essentially the same and highly

driven by the technical ability to download trading data at an IT level, as has occurred in the US litigation already, at least to a degree. (Although the Respondents argue that some data issues would be alleviated by disclosure orders against the opt-in class members, it is difficult to evaluate the scale of that issue at this stage.) The procedural aspects will not obviously be less efficient under an opt-out approach. Indeed, given the greater procedural simplicity and the existing clear financing and ATE insurance structure, an opt-out approach is likely to be efficient for the Respondents and the PCMs in this case and the Respondents have presented no evidence to the effect that opt-in is more efficient.

3. An opt-out approach raises larger liability risks for the Respondents, since it will generate a much larger claim. However, those eventuate only in circumstances where the Respondents have been held to be legally liable to pay compensation to those that have suffered loss (as a class), which does not seem unfair. It is not obvious that the Respondents' costs would be higher in an opt-out procedure than in an opt-in one; indeed, one would expect them to be lower. Moreover, there is no reason to think that the Respondents would be less well protected as regards recovery of those costs if they were successful in their defence - indeed, they are more likely to be better protected under the opt-out procedure which offers the prospect of higher levels of ATE insurance cover to protect their adverse costs rights (as a result of the great sums claimed and the more attractive financial position for funders).

4. As discussed in the Judgment, the opt-out procedure does, inherently, and, generally, in most foreseeable cases, increase the pressure on the Respondents to settle the action by comparison with an opt-in process. The total sum claimed is higher under opt-out. However it is small in comparison with the fines and compensation that that Respondents have already paid in connection with FX infringements, including those specified in the Decisions, generally. The size of the claim could be argued both to encourage and to reduce the prospect of settlement, depending on the circumstances. However, a settlement is more efficient because it enables the precise terms to be negotiated to suit the circumstances and interests of the parties, including the funders and, in particular, because it avoids what PCMs, funders and Respondents would see as wasted value in the unclaimed element of a judgment, which, under opt-out proceedings costs rules, would "leak" to charity rather than being used for the benefit of one or other

party in the settlement. It is a separate question whether that increase in pressure, which flows directly from the Tribunal Rules in all opt-out cases, constitutes "unfairness" to the Respondents, who would retain full rights to fight the action if they thought the merits supported it. However, that effect does need to be weighed against the benefit, and fairness, to the whole class of having their claims including in the proceedings (as opposed to, on the evidence, none of their claims). Moreover, there are efficiency gains in a structure that incentivises a negotiated settlement that reflects each side's assessment of the merits.

5. At a basic level, there is a question of whether it is "fair" to the Respondents to have to address claims that the PCMs have not committed to, or individually chosen to bring. However, that is inherent in the introduction of the opt-out regime.

6. Finally, a powerful factor to consider under this head is that, on the evidence, which was not really contested by the Respondents, an opt-in CPO, even if it were, contrary to the evidence and assumptions, to proceed at all, would, almost certainly, only include a small number of the PCMs, leaving a long "tail" who would not, in practice, have access to compensation were the claims to succeed, not least because they cannot be contacted. It seems more fair that all claims should be adjudicated rather than only those of the PCMs who can be identified and contacted and offered the possibility to join and opt-in action.

7. Under rule 79(2)(b), the Tribunal must consider the relative costs and benefits of the proceedings. It seems to me that this too favours an opt-out approach. There would have to be, on any view, a very significant book building and client management process in any opt-in CPO, particularly if it were to include a material percentage of the PCMs. Given the very substantial costs of bringing this case, any opt-in critical mass of claimants would likely have to be very considerable in numbers as well as size of claim. This would give rise to large associated costs that would not be present in opt-out proceedings. Whilst the Respondents might very much prefer to be at risk for those costs rather than to damages to a wider group of claimants, I do not think that is the kind of benefit that should sway the discretion. The evidential costs would be broadly similar under each process, given the way in which the theory of harm is put, save that the Respondents would seek to use disclosure to test aspects of the PCMs cases which

would (whatever its other merits) increase costs for the opt-in procedure. There would be materially increased costs in distributing damages, if the case were successful, in the case of an opt-out CPO, because the class would be much bigger and it would be necessary to identify and contact the PCMs. However, that would only arise as part of the cost of providing compensation to a wider class whose claims had succeeded, which is, in the round, a benefit.

8. Rule 79(2)(c) requires the Tribunal to consider separate proceeding elsewhere. There are at least two groups. Class action proceeds were brought in the USA, Canada and Australia for separate losses not claimed in this case, but on similar theories of harm, resulting in the payment of substantial damages, at least in the USA and Canada in a variety of actions. They are not otherwise relevant to the exercise of the discretion.

9. Secondly, there are the *Allianz* proceedings discussed in the Judgment. These are clearly relevant, but the issue is two sided. These proceedings demonstrate that processes bearing some similarity to an opt-in CPO, albeit using the procedures of the High Court, are possible. However, the main claim in those proceedings appears to be the direct losses that the claimants suffered as counterparties to specific transactions with the Defendant banks the terms of which were adversely affected by the infringements which illegally manipulated the level of the "fix" for a given exchange rate. That is a very different, and direct, claim for the losses those institutions claim to have suffered; the PCMs in this application are not making those primary claims. Their theory of class wide harm relates to spreads being widened generally as a consequence of the specific infringements. Their relevant trades are those that were not directly impacted by infringements (that is the whole theory of harm issue).

10. There appears also a claim in the *Allianz* proceedings based on illegal coordination to widen spreads. That might be a more closely related theory of harm to that advanced in these Applications but its extent is unclear and it appears to be related (a) to alleged specific agreements to widen spreads and/or (b) transactions affected by those agreements. If correct, that would be a different case from the market-wide general effect from general behavioural coordination and asymmetries of information alleged in these applications – although the precise nature of those proceedings is not clear to us.

11. There has been no suggestion that it is possible for any party (other than perhaps the isolated PCM) to join such an action (to which they do not have a unilateral right) and it would offer a very different risk/return assessment, with uncertain terms for any participation, for such a PCM by comparison with a CPO before this Tribunal. Moreover, it seems, given the lapse of time since these events and the fact that the *Allianz* proceedings themselves date from 2018, very possible that limitation issues now bar PCMs from joining the *Allianz* proceedings at this time.

12. Conversely, the *Allianz* proceedings have the effect that some large potential PCMs are already pursuing at least some of their claims elsewhere, thereby reducing the prospect of them being prepared to participate in an opt-in CPO, particularly as initial core claimants, in these proceedings.

13. We have already concluded that the existence of the *Allianz* proceedings does not prevent these applications passing the Eligibility Condition. On balance, their existence is a marginal point in favour of opt-out because they render the (potentially powerful) support from the claimants in those proceedings for, and participation in, an opt-in CPO (probably considerably) less likely to provide the critical mass to initiate an opt-in action.

14. Rule 79(2)(d) raises the issue of the size and nature of the class. The class size would be, at least, in the mid five figures (perhaps 40,000 domiciled in the UK) and it is difficult to identify and contact those PCMs to solicit their involvement in an opt-in case. In addition, the users of the FX markets are agreed to be reasonably heterogenous, albeit to have essentially identical claims (at least as far as the widening of spreads theory of harm is concerned), and not forming part of trade associations or other communities that would act as "hubs" for claims. This factor would rather strongly favour an opt-out CPO, in preference to an opt-in basis. Particularly given the analysis in relation to the (separate) practicability consideration, it is difficult to see that justice could credibly be done between the Respondents and, at the very least, a large number of those who would have suffered loss other than on an opt-out basis.

15. It is undeniable that a relatively small (but still very material) number of PCMs have large claims. This was considered in the evidence, particularly the expert evidence of

Mr Ramirez filed on behalf of Mr Evans, and is a point strongly taken by the Respondents. This seems a powerful point in favour of opt-in proceedings, in itself: if PCMs with claims of this magnitude, which, by definition, are likely to be large organisations, are not prepared to pursue an opt-in claim, why should the Tribunal help them by categorising it as opt-out and allowing it to proceed on their behalf? The answer to this lies in the fact that, even on this analysis, such claimants amount to less than 10% of the class by number. That would still leave some 36,000 of the UK domiciled PCMs with no claim or compensation, not least because (a) they could not be contacted to consider participating in the action and (b) however benign the opt-in regime is, they would still need to expend considerable resources in understanding their risks, costs and options for what would be a very small sum in the context of their other business activities. That outcome does not seem consistent with the purpose and intention of the CPO regime. This issue is also relevant to the discussion of the Practicability test.

16. Rule 79(2)(e) related to the ability to identify whether a person is a member of the class or not and was considered under the Eligibility Condition in the Judgment. It does not assist in relation to an opt-in/opt-out distinction since the position is the same as regards PCM definition on either basis.

17. Under Rule 79(2)(f) the Tribunal has to consider whether the claims are suitable for an aggregated award of damages. However, this criterion applies equally as between the two bases for a CPO and does not assist with that decision.

18. Similarly, as regards Rule 79(2)(g), alternative dispute resolution, under a variety of procedures, would be available under either type of CPO but we are not aware of any relevant voluntary redress schemes. Although there are differences as to the process for the Tribunal's approval of a settlement under either route, they do not seem to me to assist in determining which basis of CPO would be more appropriate.

19. As discussed above under Rule 79(2)(a), there are differences between the two process as regards the incentives on settlement. I will not repeat those here. It seems to me difficult, and not necessarily appropriate, to speculate on how these factors, amongst, no doubt, many others, might play out in terms of making settlement more or less likely or on what the resulting terms might be. Moreover, this criterion is really directed at

the availability of alternative dispute resolution mechanism (which does not assist with the Opt-in v. Opt-out Issue) rather than the likely negotiating strength of the parties under either process.

Sir Marcus Smith
President

Paul Lomas

Prof Anthony Neuberger

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 31 March 2022

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(paragraph 1, footnote 1 of the Judgment)

TERM/ABBREVIATION	FIRST USE IN THE JUDGMENT
1998 Act	Paragraph 1
2 Travel	Paragraph 151
Allianz	Paragraph 179
Applicants	Paragraph 7
Applications	Paragraph 7
ATE insurance	Paragraph 301
Authorisation Condition	Paragraph 17(2)
BritNed	Paragraph 169 (footnote 88)
Carnegie	Paragraph 95(2)
Carriage Issue	Paragraph 10
Certification Issue	Paragraph 10
Class A	Paragraph 194
Class B	Paragraph 194
collective proceedings	Paragraph 9
Commission	Paragraph 1
CPO	Paragraph 1
CRA 2015	Paragraph 14
Damages Directive	Paragraph 219
Decision(s)	Paragraph 1
Donnybrook	Paragraph 300
Easyair	Paragraph 208
EEA	Paragraph 4

Eligibility Condition	Paragraph 17(1)
Essex Express Decision	Paragraph 1
Evans Application	Paragraph 3
Evans PCR	Paragraph 3
Fix	Paragraph 162 (in quotation)
FX	Paragraph 4
G10	Paragraph 4
Guide	Paragraph 103
irrecoverable costs	Paragraph 335(2)
Merricks	Paragraph 13
Non-Respondent Dealers	Paragraph 186
Non-Respondent Trades	Paragraph 191
O'Higgins Application	Paragraph 2
O'Higgins PCR	Paragraph 2
Opt-in v. Opt-out Issue	Paragraph 12
PCM	Paragraph 415(2)
PCR	Paragraph 2
Respondent Trades	Paragraph 191
Respondents	Paragraph 4
Sainsbury's **(First Instance)**	Paragraph 221
Sainsbury's **(SC)**	Paragraph 223
Stellantis	Paragraph 125(3) (footnote 55)
Strike-out Question	Paragraph 47
taxed/assessed costs	Paragraph 335(2)
TFEU	Paragraph 4
Therium	Paragraph 300
Timing of Carriage Dispute Decision	Paragraph 11

Three Way Banana Split Decision	Paragraph 1
Tribunal Rules	Paragraph 19

ANNEX 2

LIST OF MATERIALS BEFORE THE TRIBUNAL

(paragraph 28 of the Judgment)

APPLICATIONS, PLEADINGS AND SUBMISSIONS		
O'Higgins PCR Re-Amended Collective Proceedings Claim Form	O'Higgins Claim Form 26 November 2020 (re-amended) 28 January 2020 (amended) 29 July 2019 (originally filed)	Application by the O'Higgins PCR as PCR for a CPO under section 47B of the 1998 Act.
Evans PCR Amended Collective Proceedings Claim Form	Evans Claim Form 17 April 2020 (amended) 11 December 2019 (originally filed)	Application by the Evans PCR as PCR for a CPO pursuant to section 47B of the 1998 Act.
Respondents' Joint CPO Response	Joint CPO Response 26 February 2021	Joint response from all Respondents to the O'Higgins Application and the Evans Application.
Reply on behalf of the O'Higgins PCR to the Respondents' Joint CPO Response	O'Higgins Reply 23 April 2021	The O'Higgins PCR replying to the objections to the O'Higgins Application advanced by the Respondents in the Joint CPO Response.
Reply on behalf of the Evans PCR to the Respondents' Joint CPO Response	Evans Reply 23 April 2021	The Evans PCR replying to the objections to the Evans Application advanced by the Respondents in the Joint CPO Response.

Written submissions on the carriage dispute on behalf of the O'Higgins PCR	O'Higgins Carriage Submissions 23 April 2021	The O'Higgins PCR's submissions addressing the Carriage Issue.
Written submissions on the carriage dispute on behalf of the Evans PCR	Evans Carriage Submissions 23 April 2021	The Evans PCR's submissions addressing the Carriage Issue.
Respondents' Joint Rejoinder on the applications for a CPO	Respondents' CPO Rejoinder 4 June 2021	Joint reply from all Respondents to the O'Higgins Reply and the Evans Reply.
Reply submissions on the carriage dispute on behalf of the O'Higgins PCR	O'Higgins Carriage Reply 11 June 2021	The O'Higgins PCR responding to Evans Carriage Submissions.
Reply submissions on the carriage dispute on behalf of the Evans PCR	Evans Carriage Reply 11 June 2021	The Evans PCR responding to the O'Higgins Carriage Submissions.
Surrejoinder on behalf of the O'Higgins PCR	O'Higgins Surrejoinder 11 June 2021	The O'Higgins PCR replying to the Respondents' CPO Rejoinder.
Surrejoinder on behalf of the Evans PCR	Evans Surrejoinder 11 June 2021	The Evans PCR replying to the Respondents' CPO Rejoinder.
Neutral statement on merits on behalf of the O'Higgins PCR	O'Higgins Merits Neutral Statement 7 July 2021 (annotated by Respondents)	Statement summarising the O'Higgins PCR's 'case theory'; the sources of information which it knows or believes to exist and which it would seek to use in its analysis; and the damages methodology it proposes to use to

	5 July 2021 (annotated by Evans PCR) 29 June 2021	capture the harm caused to the proposed class by the conduct of the Respondents (subsequently annotated by the Evans PCR and jointly by the Respondents).
Neutral statement on merits on behalf of the Evans PCR	Evans Merits Neutral Statement 7 July 2021 (annotated by Respondents) 5 July 2021 (annotated by O'Higgins PCR) 29 June 2021	Statement summarising the Evans PCR's proposed proceedings, the factual foundation for the proposed proceedings, the Evans PCR's theory of harm and supporting expert evidence, proposed classes and proposed quantum methodology based on available data (subsequently annotated by the O'Higgins PCR and jointly by the Respondents).
Neutral statement on benefit to the class on behalf of the O'Higgins PCR	O'Higgins Funding Neutral Statement 5 July 2021 (annotated by Evans PCR) 3 July 2021 (amended) 29 June 2021 (originally filed)	Amended statement summarising the O'Higgins PCR's arrangements to fund its costs of pursuing the class claim and to cover the risk of adverse costs orders from pursuing the class claim, plans for the distribution of claim proceeds and the nil cost of funding to class members (subsequently annotated by the Evans PCR).
Neutral statement on funding on behalf of the Evans PCR	Evans Funding Neutral Statement 6 July 2021 (annotated by O'Higgins PCR) 5 July 2021 (amended) 5 July 2021 (annotated by O'Higgins PCR) 29 June 2021 (originally filed)	Amended statement summarising the Evans PCR's funding arrangements as regards the interests of the proposed class members and the interests of the Respondents (subsequently annotated by the O'Higgins PCR).

Note on Mr Evans' Theories of class-wide harm	Evans Note on Theories of Class-Wide Harm 15 July 2021	Addressing the Tribunal's question during the hearing as to how Mr Evans intends to show that the anti-competitive conduct identified by the Commission had class wide harm and the Chairman's request for clarification how the infringements caused loss.
Statement of case on causation of harm on behalf of the O'Higgins PCR	O'Higgins Theory of Harm Submissions 6 August 2021	Providing further information as to the O'Higgins PCR's case on causation of harm in response to the Tribunal's letter of 20 July 2021.
Further submissions on theory of harm on behalf of the Evans PCR	Evans Theory of Harm Submissions 6 August 2021	Providing further information as to the Evans PCR's case on causation of harm in response to the Tribunal's letter of 20 July 2021.
Respondents' joint response to the PCRs' further submissions on theory of harm	Joint Theory of Harm Response 13 September 2021	Respondents' joint response to the O'Higgins Theory of Harm Submissions and the Evans Theory of Harm Submissions.
Reply on causation of harm on behalf of the O'Higgins PCR	O'Higgins Theory of Harm Reply 24 September 2021	The O'Higgins PCR's reply to the Joint Theory of Harm Response.
Reply on theory of harm on behalf of the Evans PCR	Evans Theory of Harm Reply 24 September 2021	The Evans PCR's reply to the Joint Theory of Harm Response.

WITNESS STATEMENTS		
First statement of Michael O'Higgins in support of the O'Higgins Application	O'Higgins 1 28 July 2019	Addressing the O'Higgins PCR's suitability to bring the claim and act as representative for the Proposed Class.
First statement of Neil Purslow in support of the O'Higgins Application	Purslow 1 28 July 2019	Outlining the core terms of the funding arrangements between Therium and the O'Higgins PCR.
First statement of Belinda Hollway in support of the O'Higgins Application	Hollway 1 28 July 2019	Addressing the history of the US proceedings and settlements and the interrelationship between the US proceedings and the O'Higgins Application.
First statement of Phillip Evans in support of the Evans Application	Evans 1 10 December 2019	Addressing the Evans PCR's suitability to act as the class representative.
First statement of Anthony Maton in support of the Evans Application	Maton 1 10 December 2019	Summarising: the steps taken to obtain disclosure of the Commission Decisions before filing; the steps taken to identify and collate information and materials in respect of infringements of competition law concerning FX trading; pre-action correspondence with the Proposed Defendants and their legal representatives; and the relevant experience of the Evans PCR's legal advisers.
Second statement of Michael O'Higgins in support of the O'Higgins Application	O'Higgins 2 28 January 2020	Updating the Tribunal in relation to certain developments since O'Higgins 1, namely: suitability of the O'Higgins PCR; litigation plan and funding arrangements.

Second statement of Belinda Hollway in support of the O'Higgins Application	Hollway 2 28 January 2020	Addressing the change of name of Scott+Scott Europe LLP to Scott+Scott UK LLP and recent developments in the US foreign exchange litigation.
Third statement of Belinda Hollway in support of the O'Higgins Application	Hollway 3 31 January 2020	Addressing the appropriate time for the O'Higgins PCR to obtain an anti-avoidance endorsement from the ATE insurance providers.
Second statement of Anthony Maton in support of the Evans Application	Maton 2 17 April 2020	Addressing the amendments the Evans PCR sought to make to the Evans Application and providing additional information in relation to the Evans PCR's funding and insurance arrangements.
First statement of Adrian Chopin in support of the Evans Application	Chopin 1 10 June 2020	Addressing Mr Chopin's professional experience and providing information about the funding arrangements for the Evans Application.
Second statement of Adrian Chopin in support of the Evans Application	Chopin 2 23 June 2020	Responding to further information requests made on behalf of the Proposed Defendants dated 18 June 2020.
Third statement of Anthony Maton in support of the Evans Application	Maton 3 20 October 2020	Updating the Tribunal in relation to changes to the Evans PCR's funding arrangements that were made following Maton 2.
Third statement of Michael O'Higgins in support of the O'Higgins Application	O'Higgins 3 23 April 2021	Updating the Tribunal on certain developments and in response to: (a) the Joint CPO Response; and (b) the documents filed in the Evans Application.

Fourth statement of Belinda Hollway in support of the O'Higgins Application	Hollway 4 23 April 2021	Responding to the Joint CPO Response and addressing the Carriage Issue.
Second statement of Neil Purslow in support of the O'Higgins Application	Purslow 2 23 April 2021	Responding to the Joint CPO Response addressing whether the O'Higgins Application should only be permitted to proceed (if at all) as an opt-in action and why Therium has agreed to fund the O'Higgins Application on the basis that the proceedings should be run as an opt-out action.
First statement of Damian Mitchell in support of the O'Higgins Application	Mitchell 1 23 April 2021	Responding to the assertion made in the Joint CPO Response that the proceedings should be brought on an opt-in basis rather than on an opt-out basis.
Second statement of Phillip Evans in support of the Evans Application	Evans 2 23 April 2021	Addressing: (a) why it would be neither practicable nor desirable to bring the proposed collective proceedings on an opt-in basis; and (b) the Carriage Dispute. In addition, providing an update in relation to funding and insurance arrangements.
Fourth statement of Anthony Maton in support of the Evans Application	Maton 4 23 April 2021	Addressing the practical difficulties with bringing Mr Evans' proposed proceedings on an opt-in basis (responding to the Joint CPO Response) in relation to the suitability of opt-in proceedings; describing the funding structure for the Evans Application which provides that payment of unrecovered costs is to be made out of undistributed damages; updating the Tribunal regarding the status of other international FC collective actions and other claims in the UK relating to alleged FX

		misconduct; and providing an overview of the additional relevant experience, particularly in the field of collective proceedings, that the Evans PCR's legal representatives have obtained since Maton 1.
Third statement of Adrian Chopin in support of the Evans Application	Chopin 3 23 April 2021	Responding to the Joint CPO Response and specifically to explain the impact of the Evans PCR's funding arrangements if the claim was to be certified as opt-in collective proceedings.
First statement of Mark Bickford-Smith in support of the Evans Application	Bickford-Smith 1 23 April 2021	Outlining possible instructions in relation to investment funds following examples provided in the Joint CPO Response suggesting that class members, including class members structured as funds, may have passed on increased costs relating to FX transactions, rather than absorbing them.
Fourth statement of Michael O'Higgins in support of the O'Higgins Application	O'Higgins 4 11 June 2021	Updating the Tribunal on certain developments since O'Higgins 3 and responding to points raised by the Evans PCR in Evans 2 and Evans Carriage Submissions.
Fifth statement of Belinda Hollway in support of the O'Higgins Application	Hollway 5 11 June 2021	Replying to submissions filed by the Evans PCR in relation to the Carriage Issue on 23 April 2021, namely: the Evans Carriage Submissions; Evans 2; Chopin 3 and Maton 4.
Fifth statement of Anthony Maton in support of the Evans Application	Maton 5 11 June 2021	Responding to factual matters raised in the O'Higgins Carriage Submissions and Hollway 4.

Fourth statement of Adrian Chopin in support of the Evans Application	Chopin 4 11 June 2021	Responding to the O'Higgins Carriage Submissions and Hollway 4 in relation to funding arrangements and addressing the economic viability of opt-in collective proceedings in response to the Joint CPO Response.
Sixth statement of Belinda Hollway in support of the O'Higgins Application	Hollway 6 3 July 2021	Correcting information presented in the O'Higgins PCR's submissions and evidence of 11 June 2021 and the O'Higgins Funding Neutral Statement as they relate to the ATE insurance and related anti-avoidance endorsements.
Third statement of Neil Purslow in support of the O'Higgins Application	Purslow 3 3 July 2021	Explaining a correction in the details provided by the O'Higgins Application in relation to the anti-avoidance endorsements put in place in relation to the O'Higgins PCR's ATE insurance cover.
Sixth statement of Anthony Maton in support of the Evans Application	Maton 6 5 July 2021	Updating the Tribunal in relation to changes to Mr Evans' funding arrangements.
Fifth statement of Adrian Chopin in support of the Evans Application	Chopin 5 5 July 2021	Updating the Tribunal in relation to the costs of funding and increase to the LFA budget as a contingency to enable the Evans PCR to incept additional anti-avoidance cover if required.

EXPERT REPORTS		
Amended preliminary expert report of Professor Francis Breedon in support of the O'Higgins Application	Breedon 1 28 January 2020 (amended) 28 July 2019 (originally dated)	Expert report assessing loss caused to the proposed class by the Three Way Banana Split and Essex Express cartels, proposing a methodology for assessing such loss and a providing a preliminary estimate of damages.
First expert report of Richard Knight in support of the Evans Application	Knight 1 9 December 2019	Expert report providing an explanation of the FX market and an analysis of the behaviour identified in the Three Way Banana Split and Essex Express Commission Decisions.
Amended first expert report of Professor Dagfinn Rime in support of the Evans Application	Rime 1 16 April 2020 (amended) 9 December 2019 (originally dated)	Expert report considering the impact of the Three Way Banana Split and Essex Express cartels and assessing whether they caused harm to the proposed class.
Amended first expert report of John Ramirez in support of the Evans Application	Ramirez 1 16 April 2020 (amended) 9 December 2019 (originally dated)	Expert report proposing a methodology for estimating the class sizes, the related volume of commerce for each class, quantifying any harm suffered by the proposed class members and assessing pass on.
First expert report of Dr B Douglas Bernheim in support of the O'Higgins Application	Bernheim 1 23 October 2020	Expert report evaluating Professor Breedon's methodology to calculate damages, whether there is likely to be sufficient data to estimate pass on and calculate an aggregate award of damages, and any differences between and relative merits of the methodology outlined in Breedon 1 and Ramirez 1.

First supplementary expert report of Professor Francis Breedon in support of the O'Higgins Application	Breedon 2 23 April 2021	Expert report replying to matters raised in the Joint CPO Response and the Evans Application.
Second expert report of Dr B Douglas Bernheim in support of the O'Higgins Application	Bernheim 2 23 April 2021	Expert report responding to matters raised in the Joint CPO Response and providing an update to Bernheim 1 to address certain case law developments.
Second expert report of Richard Knight in support of the Evans Application	Knight 2 23 April 2021	Expert report commenting on matters raised in the Joint CPO Response, Breedon 1 and Bernheim 1.
Second expert report of Professor Dagfinn Rime in support of the Evans Application	Rime 2 23 April 2021	Expert report commenting on Breedon 1, Bernheim 1 and the Joint CPO Response.
Second expert report of John Ramirez in support of the Evans Application	Ramirez 2 23 April 2021	Expert report commenting on the methodologies in Breedon 1 and Bernheim 1, the differences in preliminary harm estimates between Ramirez 1 and Breendon 1 and matters raised in Bernheim 1 and the Joint CPO Response.
Second supplementary report of Professor Francis Breedon in support of the O'Higgins Application	Breedon 3 11 June 2021	Expert report replying to matters raised in Evans Reply, Evans Carriage Submissions, Knight 2, Rime 2, Ramirez 2 and the Respondents' CPO Rejoinder.
Third expert report of Dr B Douglas Bernheim in support of the O'Higgins Application	Bernheim 3 11 June 2021	Expert report responding to matters raised in Knight 2, Rime 2, Ramirez 2 and the Respondents' CPO Rejoinder.

Third expert report of Richard Knight in support of the Evans Application	Knight 3 11 June 2021	Expert report commenting on Hollway 4, Breedon 2 and Bernheim 2.
Third expert report of Professor Dagfinn Rime in support of the Evans Application	Rime 3 11 June 2021	Expert report commenting on Breedon 2 and Bernheim 2.
Third expert report of John Ramirez in support of the Evans Application	Ramirez 3 11 June 2021	Expert report responding to arguments in the Respondents' CPO Rejoinder and arguments and comments in Breedon 2 and Bernheim 2.