UK Class Actions: *FX* Decision Shows That the CAT Is Willing To Strike Out Poorly Pleaded Claims and Deny Opt-Out Certification

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Bill Batchelor
Partner / Brussels
32.2.639.0312
bill.batchelor@skadden.com

Bruce Macaulay
Partner / London
44.20.7519.7274
bruce.macaulay@skadden.com

Sym Hunt
Associate / London
44.20.7519.7284
sym.hunt@skadden.com

Mustafa Mirza
Trainee Solicitor / London
44.20.7519.7508
mustafa.mirza@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

40 Bank St., Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

In a ruling with wide implications for future class claims in the UK, the Competition Appeal Tribunal found claims relating to the FX markets too poorly pleaded on causation to justify certification for opt-out collective proceedings. Key takeaways from the CAT's ruling:

- **The CAT is willing to consider strike-out seriously at the certification stage.** The CAT considered striking out the claims of its own motion, and warned the proposed class representatives that they should consider 'significant amendment and revision' of their claims to avoid strike-out.
- **Follow-on claims are not bound to succeed.** Whilst follow-on private claims after regulatory rulings have the advantage — as against standalone claims — of being able to rely on an infringement finding, the CAT will give short shrift to pleadings it finds inadequate with regard to causation and quantification of loss.
- **A key battleground will be whether claims can be certified on an opt-out basis or not.** The *FX* class claimants indicated that their claims would only be viable on an opt-out basis, where they were certified to represent all eligible claimants, subject to individual companies opting out. This ruling shows that whether or not claims are certified is not necessarily the only important issue. Certification may be a pyrrhic victory for claimants if it is on an opt-in basis, where individuals must affirmatively act to be included in the class. That may ultimately lead to the claims being abandoned. Any appeal by class claimants will be closely watched.

Following the Supreme Court's *Merricks* judgment, class claims are generally permitted where found more suitable for a collective action — for example, simply because individual proceedings would be less viable. But the CAT has shown that it will filter out claims that show material defects, allowing early strike-out (in this instance, effectively the equivalent of dismissal) or permitting only an opt-in claim. Claims that are not viable on an opt-in basis because of uncertainty about the appetite of claimants to opt in, and/or because major claimants choose to sue independently, may therefore fail at this hurdle.

Background of the *FX* Case

On 16 May 2019, the European Commission (EC) handed down two separate settlement decisions, finding that a number of financial institutions had breached EU competition law by exchanging commercially sensitive information and trading plans in relation to ongoing foreign exchange (*FX*) trades, and by coordinating trading strategies.

The EC's decisions are treated as *prima facie* evidence of anti-competitive conduct in 'follow-on' private actions for damages. Michael O'Higgins and Phillip Evans, on behalf of a class of affected claimants, each made an application to the CAT for a collective proceedings order (CPO) pursuant to section 47B of the Competition Act 1998, to bring opt-out collective actions against the infringing banks. Due to their claims' similarity, the CAT addressed the applications together in what is known as the *FX* case. This similarity — and, in particular, the fact that the claims' proposed out-opt actions overlapped — raised the question of carriage *i.e.*, which (if any) class claimant should be granted a CPO, with the authority to pursue the claims for the class (Carriage Dispute).

On 6 March 2020, the CAT refused to hear the Carriage Dispute as a preliminary issue. It determined that that was not, as a matter of law, a discrete matter capable of being determined separately from certification. Further, given the novelty of the UK collective proceedings regime, the CAT thought it better to consider all issues relating to certifica-

tion together, and not in isolation.
This culminated in the certification hearing in July 2021, and the CAT's judgment of 31 March 2022 ([2022] CAT 16).

At the July 2021 hearing, the core dispute between the proposed class representatives (PCRs) and the respondents was not whether, in principle, the CPOs could be certified. Rather, the focus was on whether certification should be on an opt-in or opt-out basis. Ultimately, for the reasons outlined below, the CAT: (a) found that the claims, as pleaded, should not be certified on an opt-out basis; and (b) decided that the claims were so weak that they warranted being struck out but that, in the circumstances, the CAT should not exercise its strike-out discretion.

The CAT Showed It Is Receptive to Strike-Outs

The proposed defendants had not applied for the claims to be struck out, and the CAT considered that it should only consider strike out in 'exceptional' circumstances [147(1)]. Nonetheless, the CAT found that it would be 'irresponsible' not to consider strike out of its own initiative [148]. The CAT reached this view because pleadings need to enable the CAT to understand what evidence will have to be adduced in order for the claims to succeed [117], but there was 'no doubt' that the pleadings did not show reasonable grounds for making the claims [240].

Specifically, the CAT found that the claims were liable to be struck out because there was 'no pleaded case on causation' [241(1)] — *i.e.*, the claimants had not pleaded the alleged link between infringement and the causation of loss. The claimants relied on 'statistical correlation' and economic theory, which 'does not, in and of itself, constitute an arguable legal claim' [232]. What the claimants needed and failed to do was translate theory into averments that could be tried in a court [144, 233] and plead a causal link between breach and damage [209].

Nonetheless, the CAT ultimately did not strike out the claims because: (i) the claimants had not been told explicitly that they were in the 'last chance saloon' [147(3)]; and (ii) the issues in the case are particularly novel and untested [241(2)]. The CAT's ruling is, however, a clear warning that strike out is an option to be seriously considered by respondents to CPO applications. Specifically, the CAT put the Claimants 'on notice that absent significant amendment and revision a future strike-out application may very well be on the cards' [241(3)].

Certification on an Opt-out Basis Cannot Be Taken for Granted

In *FX*, the claimants were clear that an opt-in action was 'undesirable and impracticable', and each sought certification only on an opt-out basis. The CAT acknowledged that, if a claim can only be brought on an opt-out basis, that fact 'has significant weight' but 'cannot be in and of itself a sufficient reason' for certifying on an opt-out basis [372(2)(ii)]. In the present case, key factors for determining whether the claims should be certified on an opt-out basis were: (i) the strength of the claims; and (ii) the practicability of an opt-in action. The CAT decided that both issues weighed heavily against the claims proceeding on an opt-out basis.

Consistent with its findings on the question of strike-out, the CAT was unable to find that the claims were strong, not because it considered the claims necessarily to be inherently weak, but because they were so deficiently pleaded that it was not possible to gauge whether they had any intrinsic strength. The CAT found this to be 'a powerful reason against certifying on an opt-out basis' [375].

The CAT also rejected the proposition that an opt-in action was impracticable. Although it was clear that the claimants had struggled to garner claimants for an opt-in action, the CAT found that this indicated a lack of appetite amongst claimants rather than any impracticability [381]: 'access to justice should not be forced upon an apparently unwilling class' [385(2)]. This conclusion 'weigh[ed] strongly against certifying on an opt-out basis' [382].

The CAT has given each claimant three months in which to submit revised applications for opt-in proceedings, but the claimants' indications thus far are that they do not intend to proceed on that basis.

The Importance of Whether Claims Are Certified on an Opt-out Basis

At a certification stage, *whether* certification is granted is not the only key battle. The type of class certified, opt-in or opt-out, is also crucial. The CAT's findings regarding the circumstances in which claims should be certified on an opt-out basis are significant. In the present case, these findings may bring an end to the claims because funding now may not be available. But, even in cases where opt-in proceedings are viable for a claimant, resistance by the CAT to certification on an opt-out basis may have a material impact.

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The CAT expressed concern that certifying an opt-out class could place undue pressure on the defendants to settle claims that may have little merit rather than proceed to judgment because, in practice, opt-out cases tend to be settled at a significant discount to the full damages claimed.

Where an opt-out claim is certified, damages are sought based on the entire class (less any opt-outs). But individual class members must apply for their share of any recovery. In practice, 60% is a high rate of uptake by class members [88(3)(ii)], and the PCRs in *FX* did not project a higher level than this. (Under the Competition Act 1998, unclaimed funds (*i.e.*, the 40%) may be used to cover costs that are not recoverable from defendants such as certain fees paid to lawyers, third party funders and insurers, and otherwise must be paid to charity.) Therefore, the CAT considered it reasonable to assume that, in negotiating settlements with defendants in opt-out proceedings, the sum agreed on will be calculated based on the amount likely to be actually paid out to class members and lawyers, funders, and insurers — without regard to charitable contributions. In other words, the upper bound for settlement figures is likely to be not much more than 60% of the total quantum sought in damages.

By contrast, where proceedings are limited to those who have opted in, there is no such thing as unclaimed damages. Therefore, the CAT assumed that a settlement in opt-in proceedings would be negotiated with reference to 100% of the loss alleged.

As the CAT recognised, an important consequence of this is that the settlement pressure on defendants in opt-out proceedings is greater because the relative risk taken by a defendant proceeding to judgment is greater than in an opt-in action: They face damages of up to 100% of proven loss by contrast to a settlement of likely no more than 60% of that figure.

Therefore, while it is self-evident that potential defendants will want to prevent opt-out certification, this may become an increasingly important issue in light of the relative ease of seeking certification more generally. Prevailing on the opt-out issue may represent a significant victory for respondents.

Carriage Dispute

Because the CAT refused to certify either claim on an opt-out basis, there was no need to decide which claim should proceed (*i.e.*, who has carriage). Nonetheless, the CAT remarked that the 'essential question' would be which class claimant would better serve the interests of the alleged victims comprising their respective class. The CAT found that 'the real answer to this question is "Neither"'.

Notwithstanding that strong conclusion, the CAT stated that, had it been required to rule on carriage, it would have found both claimants similarly situated in terms of qualifications to bring the case and availability of funding. With apparent reluctance, the CAT concluded that the Evans claim was 'better thought through' and 'a marginally better attempt at capturing an elusive loss' [389(4)], and therefore would have prevailed in any carriage dispute [390].

Conclusion

The CAT's *FX* ruling is the most significant development in the UK's class action regime since *Merricks*. Claimants cannot afford to be complacent that the straightforward *Merricks* certification test will enable them to pursue class actions unconstrained. Strike-out is a real possibility, and opt-out class actions need to be justified and properly pleaded.

The poorly pleaded elements of the claimants' case to which the CAT took exception — namely bare reliance on economic evidence rather than a pleaded case on causation — are common challenges in many antitrust claims. The gulf between the prerequisites for finding an administrative violation, as the EC did (where no actual effects need be proven) and a tortious claim (requiring proof of causation and loss) means there is no certainty of a successful civil claim. This is particularly true in cases of more informal alleged collusion, such as information sharing and loose concerted action. There the answer may simply be that there were no tangible effects and the participants made no change to their market conduct as a result of the alleged collusion.

Whether or not the *FX* claimants are permitted to appeal against the ruling (and whether or not any appeal succeeds), there are bound to be more twists in UK class action regime as the CAT works through other pending CPO applications.