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Court of Appeal Hands Down Judgment in the FX Collective Proceedings

Jurisdiction to Appeal; Opt-in vs Opt-out; Carriage

On 25 July 2023, the Court of Appeal handed down its judgment in Evans v Barclays Bank Plc & Ors [2023] EWCA Civ 876, widely known as 'the FX collective proceedings'. The judgment (available here) was handed down on the same day as the Court's judgment in UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrysler Automobiles NV) & Others [2023] EWCA Civ 875. Both judgments provide welcome additional clarity on matters of certification, and the FX judgment in particular provides useful guidance on (i) the statutory jurisdiction to appeal under section 49(1A) of the Competition Act 1998, (ii) the assessment of whether proceedings should be brought on an opt-in or an opt-out basis, and (iii) and the determination of carriage disputes.

BEFORE THE CAT

1. The appeals in FX arose from two rival applications for a collective proceedings order ("**CPO**"); one application was brought by Mr Evans and the other was brought by Michael O'Higgins FX Class Representative Limited. Both applicants sought certification on an opt-out basis in respect of claims that 'followed-on' from infringement decisions of the European

Commission in Cases AT.40135 FOREX (Three Way Banana Split) and AT.40135 FOREX (Essex Express).

2. Further to the submissions of the parties, the Competition Appeal Tribunal (the "**CAT**") considered whether certification ought to be granted on an opt-in or an opt-out basis and whether the Evans CPO application or the O'Higgins CPO application ought to have carriage of the collective proceedings. Additionally, of its own motion, the CAT considered the merits of the applications (and in particular whether the applications could survive a strike out application) and whether the applications satisfied the certification criteria. In its judgment ([2022] CAT 16), the CAT concluded (*inter alia*) that:

Certification criteria

3. Both applications were capable of satisfying the statutory criteria for certification.[1] However, as was common ground,[2] with both applicants seeking certification on an opt-out basis, only one application could ultimately succeed.[3]

Merits

4. Following consideration of the merits, there could be "*no doubt*" that "*the level of generality or abstraction [in the pleadings was such that] both Applications could be struck out*".[4]

5. Nevertheless, it would be premature to strike out the applications and, instead, the applicants should be placed "*on notice that absent significant*

[1] CAT Judgment, [364].
[2] CAT Judgment, [45(4)].
[3] CAT Judgment, [364].
[4] CAT Judgment, [240].

amendment and revision a future strike-out application may very well be on the cards".[5]

Opt-in vs opt-out

6. The factors in rule 79(3) of the Competition Appeal Tribunal Rules 2015 (the "**CAT Rules**") (ie, the strength of the claims and the practicability of opt-in proceedings) weighed against certification on an opt-out basis. In particular: (1) further to the CAT's consideration of the merits of the applications (see paragraphs 4 and 5 above), the 'strength of the claims' served as a "*powerful reason against certifying on an opt-out basis*";[6] and (2) it would be inappropriate for certification to be granted on an opt-out basis simply because, from the perspective of the proposed class representatives, the proceedings would not be viable if brought on an opt-in basis.[7] Further, having regard to the constitution of the class "*the putative class members […] will, on the whole, be sophisticated potential litigants, capable of looking after themselves […]*", which (among other things) further indicated that certification should not be granted on an opt-out basis.[8]

Carriage

7. If, contrary to the above findings, certification were to be granted on an opt-out basis (as sought by the applicants), the Evans CPO application would be preferable to the O'Higgins CPO application, such that the CAT

[5] CAT Judgment, [241(3)].
[6] CAT Judgment, [375].
[7] CAT Judgment, [77(2)], [376], [385].
[8] CAT Judgment, [376]-[382], [385].

would have granted the Evans CPO application rather than the O'Higgins CPO application.[9]

Disposition

8. In light of all of the above, the applications were stayed and both applicants were granted permission to submit a revised CPO application on an opt-in basis.[10]

BEFORE THE COURT OF APPEAL

9. Against those conclusions, the applicants appealed and brought protective applications for judicial review (the judicial review applications were brought to guard against the possibility that there was no jurisdiction to appeal under section 49(1A) of the Competition Act 1998). The key grounds of challenge to the CAT's decision were that (1) the CAT erred in considering of its own motion the merits of the applications and then deferring further consideration of the merits to a later stage;[11] (2) the CAT erred in its decision that certification ought to be on an opt-in basis rather than an opt-out basis;[12] and (3) the CAT erred in preferring the Evans CPO application over the O'Higgins CPO application.[13]

Jurisdiction

10. The Court helpfully clarified that the statutory jurisdiction to appeal is not limited to decisions which "*bring [a] claim to an end*"; the jurisdiction is to be interpreted purposively and extends to decisions "*as to how claims are*

[9] CAT Judgment, [389]-[390].
[10] CAT Judgment, [411].
[11] Judgment, [12(ii)], [61]-[62].
[12] Judgment, [12(iii)], [82].
[13] Judgment, [12(iv)], [139].

to be run or adjudicated upon".[14] It followed that all grounds raised by the appellants fell within the statutory jurisdiction to appeal. The Court also noted that "*[t]he occasions where the only issue is one of judicial review should be rare*".[15]

11. This additional guidance on jurisdiction to appeal is welcome and ought to reduce uncertainties as to whether grounds of challenge to a decision of the CAT are properly brought by way of appeal or by way of judicial review. As a result, this guidance may also reduce the instances in which appeals to decisions of the CAT are accompanied by parallel protective applications for judicial review. This would itself be a welcome development given the additional cost and case management burden of bringing and dealing with parallel appeals and judicial review applications.

Case management discretion

12. The Court noted that it was clear from both the CAT Rules and the Supreme Court's judgment in *Merricks v Mastercard Inc & Ors* [2020] UKSC 51 that the CAT has the power of its own motion to determine whether a claim is viable, which was noted to be "*an important tool in the CAT's gatekeeper armoury*".[16] Defendants will see this restatement of the CAT's role as a gatekeeper on matters of certification as a welcome reminder that CPO applications are to be subject to meaningful scrutiny.

13. As to the deferral of the assessment of the merits, the Court emphasised that this was a case management decision and that, in those circumstances, the Court could "*only ask whether the CAT was within its broad case*

[14] Judgment, [56].
[15] Judgment, [60].
[16] Judgment, [65].

management discretion to defer the decision".[17] Having regard to the factors the CAT considered when making its case management decision, the Court concluded that the CAT had acted within its discretion; there was therefore no basis for the CAT's decision to be overturned.[18]

Opt-in vs opt-out

14. The Court upheld the CAT's unanimous decision that it had jurisdiction to choose as between opt-in proceedings or opt-out proceedings, even where applicants apply only for an opt-out CPO. If it were otherwise "*class representatives would invariably select opt-out thereby making the statutory choice [between opt-in and opt-out] illusory*".[19]

15. Nevertheless, the Court found that the CAT erred in its assessment of whether the proceedings should be certified on an opt-in or an opt-out basis. In particular:

    a. The CAT was wrong to have treated its provisional view as to the merits of the claim (see paragraphs 4 and 5 above) as "*more or less decisive […] in the scales against opt-out, knowing and intending that this would bring the claim to an end*".[20]

    b. Further, it is necessary for the CAT to have linked any decision it might make as to the strength of the claims to its choice as to whether the proceedings should be opt-in or opt-out; it is not the case that the 'strength of the claims' operates as "*a sliding scale with a weaker case going to opt-in and a stronger case to opt-out*".[21]

[17] Judgment, [9], [62], [78].
[18] Judgment, [78], [81].
[19] Judgment, [83].
[20] Judgment, [134].
[21] Judgment, [134].

c. Additionally, the CAT was wrong to prefer certification on an opt-in basis where the (broadly) unchallenged evidence indicated that an opt-in action would not be practicable.[22]

16. In light of the above, the Court concluded that "*the CPO should be set aside to the extent that it made an order for opt-in proceedings and it should be amended so that the proceedings are made opt-out upon an aggregate basis*".[23] The Court also noted that "*[t]here is nothing to be gained from remitting the issue for a further time consuming and expensive contested certification hearing before the CAT*".[24]

17. This outcome will be welcomed by SMEs which, for a variety of reasons (including their commercial relationships with defendants) may have claims of a material value but (i) would prefer not to pro-actively opt-in to a collective action[25] yet (ii) would wish to recover alleged losses through opt-out proceedings. In that regard, the Court's decision furthers the legislative intention that the collective proceedings regime affords a means of redress for both consumers and businesses.

Carriage

18. The Court declined to interfere with the CAT's decision to prefer the Evans CPO application over the O'Higgins CPO application. In that regard, the Court concluded that the choice "*was a quintessential multifactorial evaluation*" and that the "*challenge [brought] is as to the weight the CAT attached to the various considerations as to which the CAT, as the expert in how*

[22] Judgment, [9], [134].
[23] Judgment, [138].
[24] Judgment, [138].
[25] Which, if enough SMEs took the same approach, would render opt-in collective proceedings unviable. Relatedly see CAT Judgment, [378] and [381(9)].

proceedings play out at the nuts and bolts level, is vastly better placed than the Court of Appeal to form a view".[26]

19. The Court's reluctance to interfere with the CAT's decision on issues of carriage is not surprising and is consistent with prior authority that the CAT has a wide discretion on matters as to certification.[27] It follows that, absent an error of law, the opportunity to secure carriage of collective proceedings is likely to start and finish in the CAT.

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[26] Judgment, [146].
[27] NB, the Court made a similar point in *UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrysler Automobiles NV) & Others* [2023] EWCA Civ 875, [100].