SLAUGHTER AND MAY/

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FX COLLECTIVE PROCEEDINGS: ANALYSING THE CAT'S CERTIFICATION AND CARRIAGE JUDGMENT

1. Overview

On 31 March 2022, the Competition Appeal Tribunal (the "**Tribunal**") handed down its judgment in respect of competing applications for a collective proceedings order[1] that were filed as part of two 'follow-on' damages actions commenced before the Tribunal, based on the European Commission's *Forex* settlement decisions of May 2019.[2]

The judgment represents a significant setback for the applicants, with the Tribunal refusing to certify either application on the 'opt-out' basis requested by them. Looking beyond the facts of this case, the Tribunal's willingness to consider the strength of the applicants' claims - finding that they were so weak as to be liable to be struck out – is evidence that applicants seeking collective proceedings orders ("**CPOs**") cannot necessarily assume that the merits of their claims will not be tested by the Tribunal at the certification stage.

2. Case History

In 2019, Michael O'Higgins FX Class Representative Limited ("**O'Higgins**") and Mr Phillip Evans ("**Evans**") (together, the "**Applicants**") each commenced collective proceedings against various banks (the "**Respondents**") that were addressees of (at least one of) two settlement decisions adopted by the Commission in May 2019 in its *Forex* case (the "**EC Decisions**").

Both sets of proceedings were brought on an opt-out basis, seeking damages for losses allegedly caused by the separate infringements of EU competition law that were found in the EC Decisions in the G10 spot foreign exchange ("**FX**") market between 2007 and 2013.

Both Applicants applied to the Tribunal for a CPO that would enable them to bring claims against the Respondents on behalf of broadly similar classes of persons who allegedly suffered losses when trading FX instruments during the relevant period (as a result of "*market-wide*" harm allegedly arising from such infringements).

A hearing to determine the Applicants' CPO applications (the "**Applications**") was held in July 2021. The parties made submissions in relation to three key issues at the hearing:

- whether a CPO should be granted in respect of either (or both) of the Applications, i.e. whether they should be 'certified' (the "**Certification Issue**");
- if one or both of the Applications should be certified, whether certification should be on an opt-in or an opt-out basis (the "**Opt-in vs. Opt-out Issue**"); and
- if both Applications should be certified on an opt-out basis, which of the two Applicants should be permitted to take the collective proceedings forward (the "**Carriage Issue**").

In addition, although no strike-out application had been made by the Respondents, the Tribunal considered as an antecedent issue whether the Applications ought to be struck out pursuant to rule 41(1)(b) of the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**") (the "**Strike-out Question**").

Each of these aspects of the Tribunal's judgment is considered further below.

3. The Strike-out Question

The Tribunal found that the Applications were liable to be struck out because both Applicants' pleadings failed adequately to explain how the losses allegedly suffered by

[1] *Michael O'Higgins FX Class Representative Limited v Barclays Bank plc and others* (Case No. 1329/7/7/19) and *Mr Phillip Evans v Barclays Bank plc and others* (Case No. 1336/7/7/19) [2022] CAT 16. Slaughter and May acts for JPMorgan in relation to these proceedings.

[2] AT.40135-FOREX (Three Way Banana Split) and AT.40135-FOREX (Essex Express).

the relevant classes could be attributed to the limited infringements found in the EC Decisions.

Although the Tribunal ultimately concluded that it would not, at this stage, exercise its discretion to strike out the Applications, it put the Applicants on express notice that "*absent significant amendment and revision* [to their pleadings] *a future strike-out application may very well be on the cards*".

The Tribunal first considered whether it had jurisdiction to consider the Strike-out Question of its own initiative, given no application for strike-out had been made by the Respondents. The Tribunal concluded that the Tribunal Rules clearly conferred on it the power to strike out a claim of its own initiative, albeit this was a power that should only be used exceptionally. However, it concluded that the present case was "*sufficiently exceptional*" in light of the Tribunal's concerns about the way that the Applicants had pleaded causation.

Having determined that it could and should consider the Strike-out Question of its own initiative, the Tribunal then moved on to assess whether it should exercise its discretion to strike out the claims. As a starting point for its analysis, the Tribunal made clear that, although in collective proceedings it is not necessary for *individual* loss to be pleaded, it is still necessary for an applicant to identify in its pleading the way in which the relevant infringement is said to have resulted in the loss or damage claimed. A pleading is liable to be struck out if it fails to articulate with proper particularity the causation element of the cause of action.

The Tribunal carefully analysed the Applicants' respective theories of harm and concluded that the extensive material filed by the Applicants did "*not contain material sufficient to support a proper plea of causation, loss and damage*". The Tribunal's overarching concern was that the Applicants' submissions on causation were too focused on economic theories and failed to translate those theories into "*a series of averments capable of being tried in a court*". Accordingly, the Tribunal concluded that neither Applicant had established "*reasonable grounds for making the claim*", such that their claims could be struck out pursuant to the Tribunal Rules.[3]

However, the Tribunal ultimately decided that it would not be appropriate for it to exercise its discretion to strike the claims out at this stage. The Tribunal observed that the Applications raise novel and difficult questions (particularly given the allegations of market-wide harm) and that the strike-out jurisdiction should not be exercised in an area of law that is subject to uncertainty, without the Applicants having had the opportunity to address the Tribunal's concerns as articulated in its judgment.

4. The Certification Issue

Having addressed the Strike-Out Question, the Tribunal moved on to assess the Certification Issue.

The Tribunal concluded that both Applications *could* be certified, having considered each of the various factors listed in the Tribunal Rules as being relevant to the questions of whether the Tribunal may authorise an applicant to act as a class representative (the "**Authorisation Condition**") and whether the claims are eligible for inclusion in collective proceedings (the "**Eligibility Condition**").[4] The Tribunal expressly acknowledged that, following the Supreme Court's judgment in *Merricks*,[5] the merits of the claims were not relevant to the Certification Issue (but could be relevant when considering strike-out and/or the basis on which certification is to be granted, i.e. the Opt-in vs. Opt-out Issue).

5. The Opt-in vs. Opt-out Issue

Since both Applications could be certified, it was necessary for the Tribunal to go on to consider the Opt-in vs. Opt-out Issue.

In doing so, the Tribunal agreed with the Respondents that the Applications should only be certified on an opt-in basis, despite acknowledging that, on the basis of the evidence put forward by the Applicants, certifying on an opt-in basis would in practice mean that the claims are unlikely to proceed in any form.

The Opt-in vs. Opt-out Issue was determined by a majority of two to one, with the President of the Tribunal, Sir Marcus Smith, and Professor Anthony Neuberger constituting the majority. The third panel member, Paul Lomas, disagreed with the majority's approach and set out his own reasoning in a dissenting opinion (see section 7 below).

The Tribunal was, however, unanimous in its finding that it had jurisdiction to determine the Opt-in vs. Opt-out Issue notwithstanding that neither Applicant was seeking certification on an opt-in basis. The Tribunal gave relatively short shrift to the suggestion that, as an opt-in option had not been placed "on the table" by the

[3] Rule 41(1)(b) of the Tribunal Rules.

[4] Rules 78 and 79(1)-(2) of the Tribunal Rules.

[5] *Mastercard Inc. and others v Walter Hugh Merricks CBE* [2020] UKSC 51.

Applicants, the only options open to the Tribunal were either to certify on an opt-out basis or not certify at all.

With regard to how the Opt-in vs. Opt-out Issue should be determined, the majority held that it was necessary to consider again the factors that go towards determining whether the Authorisation Condition and the Eligibility Condition are met. In addition, they held that the Tribunal is required to consider two further matters: the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in collective proceedings.[6] These additional factors are important, the Tribunal held, in determining whether opt-out proceedings – which will not necessarily have the "buy-in" from the class that opt-in proceedings will, by their very nature, possess – can be justified.

Factors going to the Authorisation Condition and the Eligibility Condition

Having considered again the various factors relevant to assessing the Authorisation Condition and the Eligibility Condition, the Tribunal concluded that the following factors pointed "*weakly*" in favour of certifying on an opt-in basis:

- the fact that neither Applicant is a "pre-existing body" (such as a trade association);
- the Applicants' levels of funding (and the risk that lack of sufficient funding will lead to the Applicants being pressured into an early settlement); and
- the existence of separate English proceedings making claims of a similar nature.[7]

The Tribunal emphasised that the above factors were all by themselves "*pretty marginal*". However, they were reinforced by the two additional factors that required consideration: the strength of the claims and the practicability of opt-in proceedings.

Strength of the claims

The Tribunal held that "strength" cannot simply be equated to the test for strike-out. Rather, in assessing "strength" the Tribunal should consider whether the claim is "*plausible*" or "*strong*" on the basis of the material before it, including in particular the way the claim has been pleaded, but also taking into account the sort of evidence that would have to be adduced in order for the claim to succeed.

The Tribunal held that its consideration of "strength" should not involve a "mini-trial", but should be based primarily on the plausibility of the pleaded case. It noted that a pleaded case may be strong or weak in one of two ways – it could be:

- intrinsically weak (even if clearly and fully pleaded); or
- weak simply because it lacks the necessary particularity to be evaluated.

The Tribunal acknowledged that in cases where opt-in proceedings are theoretical only, in the sense that the litigation will in reality come to an end if certification is not granted on an opt-out basis, the "strength" factor must be applied with "*particular care and caution*".

In the case of the Applications, the Tribunal had already established that the claims pleaded by the Applicants were so weak that they were liable to be struck out. Further, the Tribunal also concluded that "*in terms of the pleaded causes of action,* [the cases] *are without substance*". They therefore fell into both categories of "weakness" described above, which the Tribunal held was a "*powerful*" reason against certifying on an opt-out basis.

Practicability of opt-in proceedings

The Tribunal held that the question of whether opt-in proceedings are practicable should be considered from the standpoint of the members of the relevant class. However, given the subjective intentions and thinking of putative class members are likely to be unknown, this will generally consist of an objective assessment of the practical bars to opting in from the perspective of a reasonable class member (the "*class member on the Clapham omnibus*").

In conducting this assessment, the Tribunal should again have regard to all of the material before it, including the evidence of the relevant applicant, as well as any diversity in the composition of the class.

Applying this to the Applications, the Tribunal found that opt-in proceedings were practicable from the perspective of the members of the relevant classes, taking into account their composition. Specifically, the Tribunal noted that the class was, on the whole, likely to be made up of large and sophisticated institutions, each with claims of a material size. It also concluded that putative class members are unlikely to be ignorant of their potential claims.

[6] As prescribed by rule 79(3) of the Tribunal Rules.

[7] *Allianz Global Investors GmbH and others v Barclays Bank plc and others (Case 1430/5/7/22 (T)).*

In reaching this conclusion, the Tribunal pointed to the evidence adduced by one of the Applicants regarding its legal representatives' extensive – but largely unsuccessful – efforts to contact those in the class as part of a "book-building" attempt. The Tribunal noted that it was not ignorance that was "*preventing a rush to join the proceedings*" but rather there appeared to be a "*deliberate decision not to participate*". The Tribunal also observed that "*access to justice should not be forced upon an apparently unwilling class*".

The Tribunal acknowledged that there may be individuals and smaller entities who fall within the relevant classes, who will likely have much smaller claims and who may not be aware that they have a claim. However, the Tribunal did not consider that the interests of that sub-class, constituting "*a tiny fraction of the whole class*", should alter its conclusion on practicability, on the basis that this "*would be to allow the tail to wag the dog*".

As such, the Tribunal concluded that practicability was a factor again weighing strongly against certifying on an opt-out basis.

Conclusion on the Opt-in vs. Opt-out Issue

Taking the above factors as a whole, the Tribunal concluded that the Applications should not be certified on an opt-out basis. The Tribunal acknowledged that this was despite the fact that the claims were unlikely to proceed at all if not certified on an opt-out basis.

Although the Tribunal accepted that this risk of claims not proceeding at all was a factor that pointed strongly in favour of an opt-out certification – as was the fact that any damages recovered by the class in opt-out proceedings would not be eroded by costs, which could be paid out of unclaimed damages – these factors were substantially outweighed by the "strength" and "practicability" factors which pointed in favour of opt-in.

The Tribunal therefore ordered that the proceedings should be stayed, with the Applicants being given permission to submit a revised application for certification on an opt-in basis within three months of the date of the judgment.

6. The Carriage Issue

In light of its conclusion on the Opt-in vs. Opt-out Issue, the Tribunal held that the question of carriage did not arise. However, it nonetheless went on to consider it.

The Tribunal concluded that, if it had been minded to certify on an opt-out basis, the carriage of the proceedings would have been granted to Evans and not to O'Higgins. This decision was reached on the basis that, whilst the Applications are very similar and a number of the relevant factors do not point in favour of either of the Applicants, the claims of Evans were "*better thought through*". However, the Tribunal acknowledged that this decision was "*very marginal*", and noted that the real answer to the essential question of which Applicant would better serve the interests of the members of the class(es) for whom the Applicants wished to act is in fact: "*Neither*".

7. Dissenting opinion

Mr Lomas dissented from the majority on the Opt-in vs. Opt-out Issue. Mr Lomas instead concluded that a CPO should be granted on an opt-out basis (although he agreed with the majority's concerns about the weaknesses in the Applicants' pleaded claims).

Mr Lomas' view was based primarily on the "*deep tension*" he perceived between the majority's view that the Applications meet the criteria for certification and the majority's decision to select a procedural method which means that "*adjudication will not, in fact, occur*".

Mr Lomas also disagreed with the majority's assessment that opt-in proceedings would go a long way to providing access to justice. In his view, even if the proceedings were able to continue on an opt-in basis, it was likely that the overwhelming number of the proposed class members would not opt in (particularly smaller entities with smaller claims), which is a factor that "*weighs heavily in favour of an opt-out CPO*".

8. Implications of the judgment

The judgment represents a significant setback for the Applicants in the FX collective proceedings, which (as acknowledged by the Tribunal) had previously adduced evidence suggesting that their claims were unlikely to proceed on an opt-in basis. Both Applicants have already announced an intention to appeal.

More generally, the judgment represents one of the first decisions taken by the Tribunal where it has had to grapple with the question of opt-in vs. opt-out and the first decision where it has considered a carriage issue (although the Tribunal's views on the latter are strictly *obiter*). The Tribunal's analysis provides helpful guidance on how those questions should be addressed in future cases.

It remains to be seen to what extent the judgment will affect the UK's fledgling collective proceedings regime; however, it is worth noting that:

- following the Supreme Court's judgment in *Merricks*, which was handed down in December 2020, many commentators predicted that it would probably lead to an increase in large-scale opt-out collective

proceedings being commenced in the UK. The Tribunal's subsequent decisions in 2021 to grant opt-out CPOs in *BT*[8] and *Trains*[9] provided further support for those predictions. The FX judgment represents the first time since the test for certification was clarified in *Merricks* that the respondents to a CPO application have successfully challenged the nature of the collective proceedings brought against them;

- while the bar to certification remains low in light of *Merricks*, and should not involve a merits assessment, the Tribunal has made it clear in the FX judgment that it is willing to consider the strength of the relevant claims in the context of both strike-out applications and the choice between opt-in and opt-out proceedings;

- the Tribunal made some noteworthy remarks about the general nature of opt-out proceedings. In particular, the Tribunal echoed some of the concerns expressed by Lords Leggatt and Sales in their minority judgment in *Merricks* that the very nature of the opt-out proceedings means that there is a risk of speculative actions for large amounts of damages; and

- looking beyond the collective proceedings regime specifically, the Tribunal's findings in relation to the importance of pleading a clear case on causation will likely be of wider relevance, particularly in the context of claims alleging market-wide harm.

[8] *Justin Le Patourel v BT Group PLC and other [2021] CAT 30.*

[9] *Justin Gutmann v First MTR South Western Trains Limited and others [2021] CAT 31.*

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