SLAUGHTER AND MAY/

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FX COLLECTIVE PROCEEDINGS:

ANALYSING THE COURT OF APPEAL CERTIFICATION AND CARRIAGE JUDGMENT

Overview

On 25 July 2023, the Court of Appeal handed down its judgment in respect of two competing applications for a collective proceedings order (**"CPO"**)[1] relating to the European Commission's *Forex* settlement decisions from May 2019 (the **"EC Decisions"**).[2]

The Court of Appeal partially allowed the appeal from the Competition Appeal Tribunal's (the **"CAT"**) judgment (the **"CAT's Judgment"**)[3] and held that the CPO proceedings should continue on an opt-out rather than opt-in basis. The Court of Appeal dismissed the appeal relating to the CAT's decision on the carriage dispute.

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) the EC Decisions.

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

On 31 March 2022, the CAT held that both CPO applications should be stayed and that the Applicants should be given permission to submit a revised application for certification on an opt-in basis within a three-month period. In relation to the carriage dispute, the CAT held that, if it had been minded to certify on an opt-out basis, the carriage of the proceedings would have been granted to Evans rather than O'Higgins.

Both Applicants appealed the CAT's Judgment to the Court of Appeal. The Court of Appeal's judgment considers four key issues:

- whether the Applicant's challenge to the CAT's Judgment should be dealt with by way of an appeal or by way of a judicial review (the **"Jurisdiction Issue"**);
- whether the CAT applied the correct test and correctly exercised its strike out power (the **"Strike-out Issue"**);
- whether the CAT correctly decided that the CPO should be issued on an opt-in basis rather than an opt-out basis (the **"Opt-in v Opt-out Issue"**), and
- whether the CAT correctly decided that Evans should have carriage of the claims of class members as class representatives (the **"Carriage Issue"**).

Each of these issues is considered further below.

The Jurisdiction Issue

The Court of Appeal found that the Applicant's challenges to the CAT's Judgment should be dealt with by way of an appeal rather than by way of judicial review, and provided some guidance regarding the relationship between the two.

The Court of Appeal stated that the right of appeal should be construed broadly to minimise the scope of judicial review (on the basis that, among other things, such an approach is consistent with the principle of judicial efficiency).

The Court of Appeal also held that where there is any doubt about the route of challenge, the court should adopt the procedure adopted in this case (whereby the court sat both as the Court of Appeal and High Court) to avoid duplication of time and costs.

Strike-out Issue

The Court of Appeal confirmed that the CAT has the power to determine of its own motion whether a claim is viable, and can do this both at the certification stage and thereafter. In relation to the Applicants' challenges, the Court of Appeal found that the CAT was within its broad

[1] *Michael O'Higgins FX Class Representative Limited v Barclays Bank plc and other (Case No. CA-2022-002003 & A) and Mr Phillip Evans v Barclays Bank plc and others (Case No. CA-2022-002002)* [2023] EWCA Civ 876. 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).

[3] *Michael O'Higgins FX Class Representative Limited v Barclays Bank plc and other (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. For Slaughter and May's analysis of the CAT's Judgment see: FX collective proceedings: analysing the CATs certification and carriage judgment - Slaughter and May Insights

case management discretion to both consider the strength of the claim in a strike-out context and to defer making a decision to a later date. The Court of Appeal observed that the CAT examined the relevant issues in real depth and there was "*a difficult and finely balanced judgment call to be made*".

The Opt-in v Opt-out Issue

The Court of Appeal agreed with the CAT that the CAT had jurisdiction to certify claims on an opt-in basis even in situations where the proposed class representative only applied for certification on an opt-out basis.

The Court of Appeal then considered whether the CAT applied the correct legal test and correctly exercised its discretion in relation to the choice between opt-in and opt-out proceedings.

In relation to the CAT's assessment of the strength of the claims under Rule 79(3)(a) of the Competition Appeal Tribunal Rules 2015 (the "**CAT Rules**")[4], the Court of Appeal cited its decision in *Le Patourel*,[5] which was given after the CAT's Judgment. The Court of Appeal in *Le Patourel* observed that in most cases the strength of a case might be neutral as a factor in the choice between opt-in and opt-out. In line with this finding in *Le Patourel*, the Court of Appeal in this case found that the CAT was mistaken in treating the strength of case factor as a sliding scale test with a weaker case going to opt-in and stronger case to opt-out.

In the context of the strength of the claims analysis, the Court of Appeal also observed that when the CAT revisits the question upon remittal it will have (i) the advantage of the European Commission's decision in Sterling Lads[6] ("**Sterling Lads**"), an ordinary decision addressed only to Credit Suisse concerning a separate infringement in relation to similar FX conduct which was published after the CAT's Judgment, (ii) the accrued experience of over 30 cases involving collective actions; and (iii) the advantage of a growing body of appellate case law. In relation to Sterling Lads, the Court of Appeal dismissed the arguments that the decision, being a separate European Commission's decision against a bank which is not a defendant to the CPO proceedings, is inadmissible in the proceedings.

In relation to the CAT's assessment of practicability under Rule 79(3)(b) of the CAT Rules, the Court of Appeal held that where no proceedings will continue save on opt-out basis, that is a powerful factor in favour of opt-out (a point that it thought was clear from case law).

Finally, the Court of Appeal found that two other principles pointed in favour of opt-out in the case: (i) the purpose of the collective proceedings regime is to facilitate rather than impede the vindication of rights; and (ii) the collective proceedings regime should be applied in a manner which encourages ex ante compliance (i.e. it acts as a deterrent to future wrongdoing).

Carriage Issue

The Court of Appeal upheld the CAT's decision on carriage and held that Evans (rather than O'Higgins) should act as a class representative in the opt-out proceedings. The Court of Appeal observed that the CAT's choice was a "*quintessential multifactorial evaluation*" and that the CAT was "*vastly better placed*" than the Court of Appeal to form a view on carriage.

Significance of the Court of Appeal's judgment

The effect of the Court of Appeal's judgment is that Evans' claims can proceed on an opt-out basis and the case is remitted for further case management to the CAT.

Both the respondent banks and O'Higgins have applied for permission to appeal to the Supreme Court.

The Court of Appeal's judgment contributes to a growing body of appellate case law concerning the operation of the collective proceedings regime which the Court of Appeal has indicated it hopes shall assist with the CAT's certification of future CPO claims. In particular, the Court of Appeal's judgment indicates a willingness to apply related regulatory findings, in this case the Sterling Lads decision, to assist the CAT in the case management of CPO cases in their early stages, and clarified that the CAT must present a connection between an application's strength and its rationale for certification on an opt-in or opt-out basis with respect to the strength of claim criteria under CAT Rule 79(3).

Interestingly, the judgment was handed down simultaneously with a Court of Appeal judgment in a CPO appeal in the *Trucks*' case (which was given by the same panel) and a day before the Supreme Court's judgment in the *PACCAR*[7] case.

It remains to be seen to what extent the Court of Appeal's judgment will affect the CAT's approach to issues like the opt-in vs opt-out choice, strength of the claims assessment and carriage disputes. However, the Court of Appeal's judgment forms part of a growing trend of claimant friendly appellant case law, whilst continuing to confer on the CAT broad discretion as a specialist tribunal.

[4] Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648)

[5] *Le Patourel v BT Group PLC and another* [2022] EWCA Civ 593.

[6] AT.40135-FOREX (Sterling Lads)

[7] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others ("PACCAR")[2023] UKSC 28.* A recent decision from the Supreme Court which found that certain litigation funding agreements relied upon damages based agreements which are unenforceable within opt-out proceedings and must comply with the Courts and Legal Services Act 1990 and Damages-Based Agreements Regulations 2013/609 in order to be enforceable within opt-in proceedings.

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