Milbank

Insights

Litigation & Arbitration Group

A Carriage to Nowhere: CAT Willing to Certify FX Class Action, but Only on an 'Opt-in' Basis

17 June 2022

Contact

Julian Stait, Partner
+44 20.7615.3005
jstait@milbank.com

Emma Hogwood, Special Counsel
+44 20.7615.3058
ehogwood@milbank.com

Cormac Alexander, Special Counsel
+44 20.7615.3104
calexander@milbank.com

Mark Padley, Associate
+44 20.7615.3121
mpadley@milbank.com

Hollie Fenwick, Associate
+44 20.7615.3071
hfenwick@milbank.com

At the end of March 2022, the UK Competition Appeal Tribunal (the "**CAT**") handed down a detailed and wide-ranging 255-page judgment[1] in relation to two competing applications (the "**Applications**") for an 'opt-out' Collective Proceedings Order ("**CPO**") in follow-on damages proceedings arising out of the 2019 European Commission infringement decisions concerning cartels in the FX spot markets.[2] The claims were brought on behalf of approximately 40,000 users of the foreign exchange markets.

In the judgment of the majority,[3] the CAT found that it would be just and reasonable to authorise either proposed class representative ("**PCR**")[4] and that the claims advanced were eligible for inclusion in collective proceedings. However, the CAT indicated that it had serious doubts about the merits of the pleaded claims for market-wide harm and was only minded to grant an 'opt-in' CPO (where claimants need actively to opt into the proceedings, rather than being included automatically with the option to 'opt-out'). The CAT stayed both Applications, granting the PCRs permission to submit revised applications for certification of the proceedings on an opt-in basis within three months.

In addition to addressing certification, this was the first time that the CAT had to consider how to resolve the fact that two PCRs were competing to represent the same class (known as a 'carriage dispute'). The CAT took the point relatively shortly and, although it ultimately concluded that the Evans PCR should be preferred on the basis that it had advanced a marginally better-pleaded case (even though it had filed its CPO application slightly later in time), the CAT did not provide further guidance on how such disputes ought to be resolved in the future. Further guidance has, however, now been provided in the CAT's recent decision in *Trucks*, which will be the subject of a separate client alert.[5]

---

1 *Mr. Phillip Evans and Michael O'Higgins FX Class Representative Limited v Barclays Bank Plc and Others* [2022] CAT 16 (the "**Judgment**").
2 Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express).
3 Given by Sir Marcus Smith and Professor Anthony Neuberger.
4 The PCRs were Michael O'Higgins FX Class Representative Limited and Mr. Phillip Evans.
5 *UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others*; *Road Haulage Association Limited v Man SE and Others* [2022] CAT 25.

The decision is noteworthy because it follows a series of decisions granting opt-out CPOs that have been made in the wake of the Supreme Court's decision in *Merricks*,[6] which set down an apparently claimant-friendly approach to the certification of class actions. Defendants should take heart from the CAT's willingness to scrutinize claims that it considers lack merit and to refuse to certify opt-out proceedings where it would be more appropriate for such claims to be brought on an opt-in basis.

In this article, we first set out the background to the claims advanced by the two PCRs and then go on to consider the CAT's decision in relation to the following issues:

1. whether it was open to the CAT to strike out the claims and, if so, whether it should (the "**Strike-out Issue**");
2. whether it was just and reasonable for the PCRs to represent the class and whether the claims were eligible for inclusion in collective proceedings (the "**Certification Issue**");
3. whether the proceedings should be certified on an opt-out or an opt-in basis (the "**Opt-in v Opt-out Issue**"); and
4. whether, if the CAT were willing to grant the CPO on an opt-out basis, which of the PCRs would be most suitable to act as class representative (the "**Carriage Issue**").

The Claims

The Applications were made by (i) Michael O'Higgins FX Class Representative Limited, a special purpose vehicle incorporated for the purpose of bringing the claim and whose sole director and member is Mr. Michael O'Higgins (the "**O'Higgins PCR**") and (ii) Mr. Phillip Evans (the "**Evans PCR**").

Both PCRs sought to bring follow-on damages proceedings following the 2019 European Commission infringement decisions known as "Three Way Banana Split" and "Essex Express" (the "**Decisions**").[7] In summary, the infringing conduct involved individual traders (around ten or fewer across both Decisions[8]) exchanging information for the benefit of the traders involved and in order to identify occasions to coordinate their trading in the FX spot market.[9] As a result, a number of banks were found to have infringed Article 101[10] of the Treaty on the Functioning of the European Union by object for certain defined time periods.[11]

Importantly, while the Commission described the infringements as "*single and continuous*" in its Decisions, it recognised that they comprised a series of discrete acts.[12] The CAT, therefore, observed that it was relatively easy to see how a claim could be brought against one of the banks named in the decision in relation to a specific transaction (which is, broadly speaking, the claims advanced in the separate *Allianz* proceedings in the High Court).[13] However, in order to bring a claim on behalf of all market participants, the PCRs needed to show that the infringements found in the Decisions had caused market-wide harm, which the CAT said "*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*".[14]

In these circumstances, both of the Applications (although they differed in some respects) alleged market-wide harm in the form of a widening in the bid/ask spreads generally (the difference between the prices that traders quote for buying and selling currencies) to the detriment of customers in the foreign exchange

---

6 *MasterCard Inc v. Merricks* [2020] UKSC 51.
7 These decisions involved materially the same conduct, and so the CAT only felt the need to describe the infringing conduct in the "Three Way Banana Split" decision, Judgment at [154].
8 Judgment at [164].
9 Judgment at [162].
10 Article 101 prohibits agreements, decisions or concerted practices, the object or effect of which is to restrict competition.
11 Judgment at [136] and [166].
12 Judgment at [167].
13 *Allianz Global Investors GmbH & Others v Barclays Bank plc & Others* CL-2018-000840 ("**Allianz**").
14 Judgment at [182].

markets (including those who had traded with dealers who were not the subject of the Decisions).[15] In other words, they alleged that "*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*".[16]

In support of these claims, both PCRs relied extensively on economic theory put forward by expert economists. However, the CAT was concerned to stress that "*economic theory does not, in and of itself, constitute an arguable legal claim*" even when pleading market-wide harm.[17]

With this background in mind, the CAT first turned to consider whether the claims were susceptible to strike-out.

The Strike-out Issue

Although there was no application by the Respondents to strike out either of the claims, the CAT noted that it could act of its own initiative to consider whether a claim should be struck out on the hearing of an application for a CPO.[18]

The CAT found that neither Application (which, as noted above, relied heavily on economic theory) contained material sufficient to support a proper plea of causation, loss and damage on a market-wide basis and that, therefore, "*the claims, as presently framed, are so weak that they are deserving of strike-out*".[19] Importantly, the CAT was not convinced that there was an arguable case that "*a widening of the bid-ask spread in the face of the prevailing market rate could be sustained unless the market in question was uncompetitive…*".[20]

However, the CAT decided not to strike-out the claims at this stage, as (i) the Applications raised "*novel and difficult questions*" concerning the theory of market-wide harm, which is an area of law that is subject to some uncertainty and is in a state of on-going development; and (ii) the PCRs should be given the opportunity to address the concerns articulated by the CAT.[21]

The Certification Issue

Having decided not to strike out the claims, the CAT dealt with certification relatively succinctly. First, it held that it would be just and reasonable to authorise either of the PCRs to represent the class.[22] Whilst the CAT had some concerns about the level of funding necessary to fight the claims to the end (as well as the level of ATE insurance), it concluded that both PCRs were well qualified to, and would fairly and adequately, represent the interests of the class without a conflict of interest.[23] The CAT also noted, in line with the decision in *McLaren,*[24] that whether or not a PCR was incorporated did not constitute a material difference when assessing authorisation.[25]

Secondly, the CAT held that the claims were eligible for inclusion in collective proceedings because they:

---

15 Judgment at [186].
16 *Ibid*.
17 Judgment at [232] and [234(2)]. Although it was reluctant to be too prescriptive, the CAT posited two ways that such claims for market-wide harm might be pleaded in this case: (i) a statistical relationship between the findings in the infringement and effects on the market-wide bid/ask spread could be pleaded; or (ii) the additional cost to the market of the infringements could be articulated and particulars provided of precisely how that cost was transmitted or passed on, such that bid/asks spreads were widened across the market.
18 CAT Rule 41(1) and Judgment at [147[4]].
19 Judgment at [385 (1)].
20 Judgment at [239(2)(iii)] see also [238(3)(vi)].
21 Judgment at [241(2)].
22 CAT Rule 78.
23 Judgment at [246] – [289] and [289].
24 *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*, 1339/7/7/20 at [41] – [51].
25 Judgment at [260]-[262] and [359(2)].

1. were brought on behalf of an identifiable class of approximately 40,000 users of the foreign exchange market;[26]
2. raised common issues "*almost by definition*" in circumstances where loss is computed "*by reference to widening spreads across the market, without particular reference to individual transactions*";[27] and
3. were suitable to be brought in collective proceedings (again, in circumstances where the claims were framed explicitly as collective issues, it was "*more-or-less inevitable*" that this requirement would be met).[28]

The Opt-in v Opt-out Issue

Although the CAT decided that the claims could be certified, it disagreed with the PCRs' contention that it could only certify the CPO on the opt-out basis sought in their Applications.[29] In assessing this issue, the CAT stated that it was obliged to consider all of the factors going to the authorisation and eligibility conditions relevant to certification, but noted that these factors may need to be given different weight in the context of the Opt-in v Opt-out Issue.[30]

On this issue, the majority (Sir Marcus Smith and Professor Anthony Neuberger) differed from the other member of the Tribunal, Paul Lomas.

The judgment of the majority

The majority recognised that there were factors pointing towards certification on an opt-out basis. Key among these was the fact that, if certification on an opt-out basis was not granted, it was unlikely that the litigation would be able to continue.[31] It was noted that solicitors for the Evans PCR had embarked upon an extensive 'book-building' exercise over 4 years to recruit potential claimants for an opt-in claim, but that substantial difficulties had been encountered in this process, resulting in only 14 advisory retainers (even though some prospective claimants had theoretical claims exceeding £1 million).[32] However, the majority emphasised that "[o]*pt-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*".[33]

In this case, the majority held that there were two powerful reasons against certifying the Applications on an opt-out basis: (i) the weakness of the claims; and (ii) the practicability of bringing opt-in proceedings.[34]

In relation to the strength of the claims, the CAT emphasised that consideration of this factor should not involve a "mini-trial" and should be gauged principally by reference to the case advanced in the pleadings. Unsurprisingly, though, having already determined that the claims were liable to be struck out, the majority held that both Applications were weak and that "*this amounts to a powerful reason against certifying on an opt-out basis*".[35]

In relation to practicability, the majority noted that the relevant question was not whether opt-in proceedings were practicable from the perspective of the PCR, but whether they were practicable when assessing the size of the class and its composition.[36] The majority held that, in contrast to many other class action proceedings (including *Merricks*), the proposed class was comprised of mostly sophisticated entities "*capable of looking after themselves*" and with potentially high value claims. Nor could it be said that these

---

26 Judgment at [274]-[282].
27 Judgment at [283]-[285].
28 Judgment at [286]-[293].
29 Judgment at [367].
30 Judgment at [368].
31 Judgment at [372(2)].
32 Judgment at [378].
33 Judgment at [372(2)].
34 CAT Rule 79(3) and Judgment at [384].
35 Judgment at [375].
36 Judgment at [380]-[381].

class members were ignorant of the proceedings, given the book-building exercise, and (for whatever reasons) many seem to have made a deliberate decision not to opt into the proceedings.[37]

The majority concluded, therefore, that these "*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".*[38] That conclusion was supported by the following additional considerations:

- neither the Evans PCR nor the O'Higgins PCR was a "pre-existing body" whose established purpose was to represent a specific class that had suffered alleged harm (for example, a trade association), and both PCRs had brought the proceedings forward at the behest of lawyers they instruct, not at the behest of the class of victims;[39]
- the majority were concerned about the level of funding available to the PCRs to bring the collective proceedings to trial, and that a lack of sufficiently available funding could increase the pressure on the PCRs to enter into early settlements, contrary to the interests of the potential class members (who, it is to be expected, could exercise more influence in opt-in proceedings);[40] and
- there was a risk of overlap between the Applications put forward by the PCRs, and the *Allianz* claim (which has been brought against some of the same defendants/respondents).[41]

The dissenting judgment

In contrast to the majority, Mr. Lomas was concerned that the decision to certify the CPO on an opt-in basis did not achieve the broader objective of access to justice, which he noted is a critical policy consideration behind the collective proceedings regime. In particular, he argued that (among other things):

- the decision to proceed on an opt-in basis was impracticable and would mean that (i) either the proceedings do not occur at all, or (ii) if they do occur, an overwhelming number of proposed class members will not opt in;[42]
- it would be more expensive for PCRs to bring the case on an opt-in basis,[43] with less funding and ATE insurance available for such a claim;[44]
- the majority had overstated the ability for class members of opt-in proceedings to influence the litigation, when the size of any viable class would make it impossible for any individual claimant to exercise control over the litigation;[45] and
- the majority had placed too much emphasis on the (so far) limited interest and "buy-in" of the proposed class members and speculation as to their motives in not seeking to opt in.[46]

The Carriage Issue

If the CAT had decided to certify the CPO on an opt-out basis (as Mr. Lomas argued it should), it would then have had to determine which PCR was the most suitable to take "carriage" of the claim. Carriage disputes are a common feature of class action regimes in other jurisdictions such as the US and Canada, but this is the first time that the English Courts have had to address the complexities of such a dispute, having previously declined in the FX litigation to do so on a preliminary issue basis.[47]

---

37 Judgment at [378] and [381(9)].
38 Judgment at [385].
39 Judgment at [370(3)].
40 Judgment at [370(5)].
41 Judgment at [183]-[184].
42 Judgment at [415].
43 Judgment at [415(16)].
44 Judgment at [415 (18)].
45 Judgment at [415(4)].
46 Judgment at [415(5) and (6)].
47 *Michael O'Higgins FX Class Representative Ltd v Barclays Bank plc & others; Mr. Phillip Evans v Barclays Bank plc & others* [2020] CAT 9.

In this case, the CAT preferred the Evans PCR on the basis that *"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"*.[48] In saying this, however, the CAT emphasised that it was not seeking to apply a merits test, but rather it considered the strength of the two claims and which PCR would better serve the interests of the class of victims they were seeking to represent. It was also not swayed by the fact that the Application brought by the O'Higgins PCR was filed before that brought by the Evans PCR. However, the CAT expressed the view that *"[g]enerally 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*".[49]

Conclusion

This Judgment marks the first time that the CAT has decided against granting an opt-out CPO since the Supreme Court's decision in *Merricks* 18 months ago in December 2020. In doing so, the CAT appears to have been influenced throughout by its underlying scepticism as to the merits of the case being advanced, which almost led to a strike-out of the claims. While the Judgment necessarily turned on the specific facts of this case, we expect that the following will weigh on the minds of claimant law firms and funders in terms of their appetite to make future applications for CPOs:

- When alleging market-wide harm to a class of individuals, claimants will need to be careful to ensure that the claim does not rely on economic theory alone to demonstrate harm to the class, even at the certification stage, and it may be necessary to seek disclosure from respondents at an early stage.[50]
- Strike-out applications may become a more common feature at future certification hearings, given the CAT's decision to consider strike-out of its own motion in this case.
- Where a carriage dispute arises, the potential for wasted costs is considerable, because both PCRs will need to undertake the burden of a full certification hearing in light of the CAT's refusal in *FX* to resolve the dispute early by way of a preliminary issue.
- The CAT's criticism of the level of funding and ATE insurance available (an area where the Evans PCR felt the need to make late changes[51]) may have the effect of raising the threshold for the resources needed to bring collective proceedings.

Both PCRs were given three months to submit revised applications for certification of the proceedings on an opt-in basis, but it seems unlikely that this will be practicable (and neither PCR appears to have done so to date) and, instead, both PCRs have indicated that they intend to appeal the Judgment.

Global Litigation Contacts

London	100 Liverpool Street, London EC2M 2AT

Tom Canning	tcanning@milbank.com	+44 20.7615.3047
William Charles	wcharles@milbank.com	+44 20.7615.3076

[48] Judgment at [389(4)].
[49] Judgment at [350(3)].
[50] Judgment at [202].
[51] Judgment at [391]-[412].

Julian Stait	jstait@milbank.com	+44 20.7615.3005
Mona Vaswani	mvaswani@milbank.com	+44 20.7615.3002

New York | 55 Hudson Yards, New York, NY 10001-2163

Antonia M. Apps	aapps@milbank.com	+1 212.530.5357
George S. Canellos	gcanellos@milbank.com	+1 212.530.5792
James G. Cavoli	jcavoli@milbank.com	+1 212.530.5172
Scott A. Edelman	sedelman@milbank.com	+1 212.530.5149
Christopher J. Gaspar	cgaspar@milbank.com	+1 212.530.5019
David R. Gelfand	dgelfand@milbank.com	+1 212.530.5520
Robert C. Hora	rhora@milbank.com	+1 212.530.5170
Alexander Lees	alees@milbank.com	+1 212.530.5161
Grant Mainland	gmainland@milbank.com	+1 212.530.5251
Atara Miller	amiller@milbank.com	+1 212.530.5421
Sean M. Murphy	smurphy@milbank.com	+1 212.530.5688
Daniel Perry	dperry@milbank.com	+1 212.530.5083
Tawfiq S. Rangwala	trangwala@milbank.com	+1 212.530.5587
Stacey J. Rappaport	srappaport@milbank.com	+1 212.530.5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1 212.530.5651
Jed M. Schwartz	jschwartz@milbank.com	+1 212.530.5283

Alan J. Stone	astone@milbank.com	+1 212.530.5285

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

Adam J. Di Vincenzo	adivincenzo@milbank.com	+1 202.835.7510
Andrew M. Leblanc	aleblanc@milbank.com	+1 202.835.7574
Aaron L. Renenger	arenenger@milbank.com	+1 202.835.7505
Samir Vora	svora@milbank.com	+1 202.835.7544

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Lauren N. Drake	ldrake@milbank.com	+1 424.386.4320
Adam Fee	afee@milbank.com	+1 212.530.5101
Gary N. Frischling	gfrischling@milbank.com	+1 424.386.4316
David I. Gindler	dgindler@milbank.com	+1 424.386.4313
Y. John Lu	jlu@milbank.com	+1 424.386.4318
Alex G. Romain	aromain@milbank.com	+1 424.386.4374

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Litigation & Arbitration Group.