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UK's Supreme Court Opts in Favour of Banks in Upholding CAT's Refusal to Certify FX Class Action

Future class representatives will now need to satisfy the CAT at the certification stage that their proposed claims are sufficiently strong in order to obtain the benefit of the opt-out procedure. This should serve to strengthen the CAT's 'gatekeeper' role going forward.

The UK's Supreme Court has handed down its long-awaited judgment[1] in respect of the banks' appeal of the Court of Appeal's judgment[2] in relation to the Competition Appeal Tribunal's (the **CAT**) refusal to certify collective proceedings arising from two European Commission decisions concerning the foreign exchange market.[3] The judgment unanimously allowed the banks' appeal on all four grounds, overturning the judgment of the Court of Appeal and reinstating the CAT's first instance decision. Accordingly, the Class Representative's application for a collective proceedings order on an opt-out basis is refused. Gibson Dunn was pleased to represent UBS and Credit Suisse in these proceedings.

The banks appealed the Court of Appeal's judgment on the following four grounds:

1. Was the Court of Appeal wrong to find that the CAT erred in finding that the weakness of the proposed claims was a factor weighing against opt-out proceedings?
2. Was the Court of Appeal wrong to find that the CAT erred in its assessment of the practicability of bringing opt-in proceedings?

3. Was the Court of Appeal wrong to hold that the principles of "facilitating the vindication of rights" and deterring future wrongdoers are factors which weigh in favour of opt-out proceedings in general, or in the circumstances of this case?

4. Was the Court of Appeal wrong to treat the Sterling Lads ordinary decision addressed only to Credit Suisse and not considered by the CAT as admissible on a strike-out and to rely on that decision in its own judgment?

The Supreme Court found as follows in relation to each of those issues.

Issue 1

The CAT had found that the Class Representative's claims were so weak that they were liable to be struck-out; that was a powerful factor militating against certification of the proceedings on an opt-out basis. However, the Court of Appeal held that the CAT erred in this regard, finding that the strength of the claim is generally a neutral factor.

The Supreme Court found that the Court of Appeal had no proper basis for interfering with the CAT's assessment of the strength of the claim and with the weight the CAT gave to that assessment in choosing between opt-in and opt-out. That was because:

1. There was no inconsistency between the CAT's decision to postpone further consideration of whether to strike out the claim and the view of the majority that the weakness of the claim was a powerful factor against certifying on an opt-out basis. [78]

2. If a claim is very weak, it is likely to be more difficult to justify the opt-out procedure as striking a fair procedural balance between claimants and defendants (particularly given it exposes defendants to "the leveraging advantage" opt-out orders give claimants). It is also likely to be difficult to justify the opt-out procedure as a proportionate way of providing access to the CAT for the vindication of such a claim. [94]

3. By the time of the certification hearing, the CAT will be able in many, if not most, cases to form a view (even if provisional) of the merits of the claim and, where it is able to do so, the merits should not be a neutral factor. [104]

4. The Court of Appeal's further opinions about the strength of the claim, namely that the exercise of disclosure would require the defendants to disclose vast quantities of data and information and was intrinsically likely to generate relevant material, were misplaced. [106]

Issue 2

The CAT had concluded that it would have been practicable for the proceedings to proceed on an opt-in basis in light of its assessment of the composition of the class which contained a small group of sophisticated financial institutions and commercial entities who had substantial claims that made up the vast majority of the alleged aggregate claim value. However, the Court of Appeal overturned that finding, determining that if a claim would not proceed unless it was on an opt-out basis, this strongly favours making an opt-out order.

The Supreme Court found that the Court of Appeal had no basis for interfering with the conclusions of the CAT. That was because:

1. If it is practicable for claimants to bring opt-in proceedings, it is unlikely to be proportionate to confer upon them the additional advantages associated with the opt-out procedure and unlikely to be reasonable to expect the defendants to face the consequential commercial pressures to settle the claims on an opt-out basis regardless of their true merit. [112]

2. The collective proceedings regime is not intended to immunise claimants completely from the usual commercial considerations which have a role in determining when proceedings are thought to be sufficiently viable to be worthwhile. [115]

3. In assessing the practicability of bringing opt-in proceedings, an objective assessment is called for, in the sense that it should not depend on evidence about the subjective state of mind of, and legal advice received by, individual potential claimants. [119]

4. The CAT performed the required assessment. It concluded that it should not allow a sub-class of persons whose total claims were by value a tiny fraction of the aggregate claim (in this case a very large number of individuals and entities who are alleged to have suffered small losses) to alter their conclusion on practicability. [123]

5. It was difficult to see why large entities with substantial claims should be able to proceed by way of opt-out collective proceedings. [124]

6. The Court of Appeal failed to heed its own judgment in *Le Patourel*[4] and embarked on its own examination and assessment of factual and expert evidence presented by the Class Representative to the CAT. [131]

7. The CAT's determination that less weight should be given to the interests of persons with small claims which in aggregate had a low financial value of the total claim did not involve any legal error and was a judgment which it was reasonably open to the CAT to make. [136]

Issue 3

The Court of Appeal held that the principles of "facilitating the vindication of rights" and "deterring future wrongdoers" are factors relevant in this case which point in favour of opt-out proceedings.

The Supreme Court found that the Court of Appeal was wrong to reach that conclusion because:

1. Whilst principles of "facilitating the vindication of rights" and "deterring future wrongdoers" are factors that can be considered, they must be "counterbalanced by the need to safeguard the rights of defendants". As such, under the statutory scheme, the starting point is one of neutrality and there is no presumption or predisposition in favour of either of opt-in or of opt-out. [138]

2. Reliance on "access to justice" as requiring certification on an opt-out basis does not sufficiently recognise that access to justice is something to which both claimants and defendants are entitled. [140]

3. If clearly unmeritorious claims are allowed to proceed on an opt-out basis, the result will not be due enforcement of the competition rules but over-enforcement, contrary to the public interest. [141]

Issue 4

The Court of Appeal regarded the ordinary decision of the European Commission in Sterling Lads addressed only to Credit Suisse as "admissible, relevant and providing strong support for Mr Evans' claim". [142]

The Supreme Court found that this was inappropriate and the Court of Appeal's reasons for doing so did not "hold water" because:

1. The rule in *Hollington v Hewthorn* (i.e., that factual findings made by another decision-maker are inadmissible in a subsequent trial) does apply before the CAT. The underlying principle is a sound one which ought to be adopted in proceedings before the CAT irrespective of whether the authorities articulating that principle are binding on the CAT as a matter of precedent. [152]
2. The rule applies here in what may be called its strong form because the banks were not party to the procedure which led to the Sterling Lads ordinary decision. [153]
3. The rule is not limited to decisions made by persons acting in a judicial or quasi-judicial capacity. It applies to anyone who has previously expressed an opinion about what conclusions should be drawn from factual evidence. [155]
4. The Sterling Lads ordinary decision was therefore not admissible before the English court, as against defendants who were not addressees of that decision, as evidence of facts found in the decision. [157]
5. The Sterling Lads ordinary decision against Credit Suisse does not either record any evidence relevant to the claims against the banks or assist in identifying relevant evidence which can reasonably be expected to be available at a trial. [160]

Comment

The Court of Appeal's judgment significantly lowered the threshold for certifying collective proceedings on an opt-out basis by finding that weak and unmeritorious claims were able to take advantage of the opt-out procedure. The Supreme Court's judgment will therefore be welcomed by defendants facing opt-out collective proceedings in the CAT as an important restatement of the need for proper scrutiny of proposed collective proceedings at the certification stage. It makes clear that weak and unmeritorious claims should not be able to benefit from the procedural advantages that the opt-out procedure affords claimants.

The judgment also confirms that appropriate regard must be given to defendants' rights to access to justice and the need to safeguard those rights when assessing whether proposed collective proceedings should be certified on an opt-out or opt-in base. As Lord Sales, Lord Leggat and Lady Rose stated, the "sophistication of the collective proceedings regime shows that it was not intended simply to provide a stick with which anyone who claims, however implausibly, to have suffered loss can beat infringing undertakings into paying them substantial damages".

Future class representatives will now need to satisfy the CAT at the certification stage that their proposed claims are sufficiently strong in order to obtain the benefit of the opt-out procedure. This should serve to strengthen the CAT's 'gatekeeper' role going forward.

[1] [2025] UKSC 48.

[2] [2023] EWCA Civ 876.

[3] *Michael O'Higgins FX Class Representative Ltd and another v Barclays Bank Plc and others*.

[4] [2022] EWCA Civ 593.

The following Gibson Dunn lawyers prepared this update: Doug Watson, Dan Warner, and Jack Crichton.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Class Actions, Antitrust & Competition, or Litigation practice groups, or the following in London:

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