CLIENT ALERT

Something for Everyone – the Recent UK Appellate Judgments on Collective Proceedings

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The UK's appellate courts cleared their competition law desks ahead of the summer recess, with the Court of Appeal handing down two judgments on 25 July 2023, in *Evans/O'Higgins* ("**FX**")[1] and in *UKTC* ("**Trucks**"),[2] in relation to collective proceedings followed a day later by a judgment from the UK Supreme Court, in *PACCAR*,[3] regarding the funding of collective proceedings. The ramifications of each will be significant for the UK's fast-developing collective proceedings regime.

The UK's appellate courts have given something to everyone. To proposed class representatives ("**PCR**s"), they have confirmed that opt-out claims can be brought, even for large and sophisticated class members and in respect of even "*very weak*" claims. It is difficult now to discern which opt-out class action will fail to be certified. Equally, however, the appellate court has armed Defendants with new weapons to impose complexity and costs on PCRs where there are conflicts between class members, and the likelihood is that defendants will seek out such conflicts more assiduously, given that the Court of Appeal has confirmed that they need to be dealt with from the outset in collective proceedings.

1 [2023] EWCA Civ 876. The appeal also addressed a number of "procedural" issues, including whether recourse from the CAT should have taken the form of judicial review before the Divisional Court or appeal to the Court of Appeal. These procedural aspects of the judgment are not addressed further in this note.

2 [2023] EWCA Civ 875. Again, the judgment also raised a number of "procedural" points that are not addressed here.

3 [2023] UKSC 28.

Whilst the Court of Appeal confirmed that the role played by funders was crucial to the success of the regime, the Supreme Court has required that the funding model that has become standard be adjusted and, in so doing, has ushered into place a model in which the interests of the funders and the class members are less closely aligned.

***FX* – opt-in versus opt-out**

This was an appeal from a judgment of the Competition Appeal Tribunal ("**CAT**") on 31 March 2022. Mr Evans and Mr O'Higgins (each a PCR) had each applied to the CAT for a collective proceedings order ("**CPO**") on an opt-out basis seeking damages alleged to have arisen from the European Commission's decisions in relation to FX spot trading (the "Three Way Banana Split"[4] and "Essex Express"[5]). In its judgment, the CAT:

(i) identified a number of weaknesses with both proposed claims, in particular the causative link between the information exchanges at issue in the Commission's decisions and the types of loss claimed by the classes, but granted both PCRs permission to submit revised applications;

(ii) determined of its own motion and by a majority that a CPO would be made only on an opt-in basis, something neither PCR had sought. It did so despite finding as a fact that if the CPO were made on an opt-in basis, the action would not proceed; and

(iii) determined that Mr Evans should have carriage of the collective proceedings rather than Mr O'Higgins.

The CAT's jurisdiction to certify a CPO as opt-out or opt-in

Both PCRs appealed against the CAT's decision to certify the claim on an opt-in basis in circumstances where neither PCR had sought to bring opt-in proceedings.

Rule 79(3) of the CAT Rules provides that in determining whether proceedings should be opt-in or opt-out, the CAT may take into account "*all matters it thinks fit*" including the strength of the claim and practicability. The CAT took the view that Rule 79(3) afforded it jurisdiction to choose between opt-in and out-out proceedings, even where the applicants had applied for one kind of proceeding only, in this case opt-out. The Court of Appeal confirmed that the CAT's view of its jurisdiction was correct: "…*Were it otherwise, class representatives would invariably select opt-out thereby making the statutory choice illusory*."

[4] *Forex-Three Way Banana Split* (Case AT.40135) Commission Decision 2020/C 226/05 [2019] OJ C 226/5.

[5] *Forex-Essex Express* (Case AT.40135) Commission Decision 2020/C 219/07 [2019] C 219/8.

The criteria for determining opt-in vs opt-out

The CAT had decided, by majority, that the proceedings should be certified on an opt-in basis because: (i) it regarded the strength of the claim as "*very weak*"; and (ii) by making the claim opt-in there was no access to justice deficit, even though the CAT found as a fact that were it to make such an order the proceedings would not go ahead. It also considered the following to be "weak" indicators in favour of opt-in: (i) the class representative was not a trade association; (ii) the funding arrangements would create an incentive to settle, at which point members of an opt-in class were more likely to show interest than an opt-out class; and (iii) settlements in the US showed that opt-in claims were practicable. The dissentient considered it was illogical for the majority to conclude that absent an opt-out order there would be no claim at all, but then order opt-in proceedings. Doing so was antithetical to the principle of access to justice.

On the CAT's treatment of the strength of the claims, the appellants pointed out that the CAT majority had concluded that the claims were weak but, in the absence of a strike-out application from the defendants, had declined to strike them out, preferring instead to allow the PCRs the opportunity to replead before any definitive determination was made as to the strength of the claims. The appellants argued that it had been illogical for the CAT majority to defer that decision yet, at the same time, to have treated that tentative and provisional view on the merits as definitive and fixed, and attracting decisive weight in the opt-in/opt-out scales. If any weight was to be attributed to the merits, they argued, it could only become relevant after the reformulated pleadings had been submitted. The Court of Appeal agreed, commenting, "[t]*he strength of a claim (either way) is but one relevant factor that might (but need not) be taken into account. Generally, the strength of a claim will be neutral regardless of whether the proceedings are opt-in or opt-out … Even assuming the CAT was entitled to take its negative view on the merits into account it follows that it still needed to show how that assessment made opt-in preferable to opt-out. The factors the CAT will take into account should bear upon such questions as which option is better able to vindicate the claim, which affords better access to justice and which enables the case to be best case managed from the point of view of judicial efficiency, or by reference to some other relevant consideration…*"

The CAT had concluded that there was no access to justice deficit even if an opt-in order led to no claim being pursued. This was because the opt-in class members were large and sophisticated, and able to afford to bring proceedings and that if they did not do so, or opt-in, that was because they did not want to litigate.

The Court of Appeal disagreed, commenting that "*where there would be no proceedings save on opt-out terms, that is a powerful factor in favour of a claim being certified as opt-out. Access to justice is not just about the size and sophistication of the class members, but encompasses also the size of the claim and whether it would be proportionate or practical for the class members …. [t]o commence proceedings to recover that loss."* The Court of Appeal confirmed that access to justice considerations were not limited to consumers and SMEs but apply across the board. The fact that the class members in this case could be expected to be large and sophisticated did not affect the analysis.

Finally, the Court of Appeal castigated the CAT's negative treatment of the fact that the claims were pursued by lawyers and funders through special purpose vehicles: "*Third party funders and legal representatives, who act as the motor force behind claims, for profit, are integral to the viability of many claims. Insofar as this creates a risk of abuse or misuse the CAT can exercise control through cost control and other case management measures. I cannot however see how it can be treated as a feature weighing generically against opt-out proceedings, even marginally.*"

The Court of Appeal therefore concluded that the CAT had erred in relation to both the strength and practicability criteria. It considered that there was nothing to be gained from remitting the issue for a further contested certification hearing before the CAT and so it set the CPO aside to the extent that it made an order for opt-in proceedings and ordered that it be amended so that the proceedings are made opt-out upon an aggregate damages basis.

Carriage

On the carriage issue, the Court of Appeal confirmed that the norm is that the CAT will choose a single representative and that the decision is one in respect of which the CAT enjoys a wide margin of multifaceted discretion.

Conclusions on FX

The most striking aspect of the Court of Appeal's judgment is its acceptance that a claim the merits of which have been assessed as "*very weak*" can be certified on an opt-out basis. Equally significant was the Court of Appeal's rejection of any suggestion that there is some kind of sliding scale whereby opt-in proceedings should be preferred for weak claims and opt-out for strong claims. Indeed, it suggested that not having to establish a causal link with individual class members in an opt-out action, which may help alleviate what would otherwise have been weaknesses in a claim, may mean that opt-out proceedings are preferable given the objectives of the collective proceedings regime as a whole. What is also striking is that the Court of Appeal was not perturbed by the fact that it was said by one of the class representatives that they had chosen to bring an opt-out because they could not get sufficient investors to sign up to bring a claim (noting that this was not a problem for the group of 13 large investors such as Allianz, Pimco, Brevan Howard and others who brought their own claim against the banks), suggesting that even an absence of interest from potential class members is not a block to an opt-out. In this regard, the Court of Appeal has yet again underlined that the collective proceedings regime should be interpreted in a way which facilitates rather than impedes the bringing of claims by class members.

Equally striking is the confirmation that it is not necessarily practical or preferable for the claims of large and sophisticated corporate entities to proceed on an opt-in basis. If the costs of running the litigation would dwarf any prospective recovery by individual class members, opt-out proceedings are likely to be preferable. This suggests that opt-in proceedings will be few and far between indeed. This should dispel concerns some have expressed about it being more difficult to bring opt-out claims on behalf of corporate classes as compared to consumer classes.

The judgment as a whole makes for sobering reading for defendants. The Court of Appeal has continued with its insistence that there is a low bar for opt-out certification, raising the question of whether there is actually any merit in seeking to oppose certification for defendants where the claim is either follow-on or raises conventional competition theories of harm. It will be interesting to see how the Court of Appeal deals with some of the more novel abuse of dominance collectives that seek to stretch the application of competition law in to areas such as data and consumer protection, should they be certified.

***Trucks* – Managing Conflicts within a Class**

The key issue in this appeal was whether there was a conflict between two groups of class members which were part of a CPO application that had been allowed by the CAT, and if so, how should that conflict be managed.[6]

The Road Haulage Association ("**RHA**") and UKTC brought competing CPO applications seeking follow-on damages alleged to have arisen in respect of the European Commission's Trucks Decision.[7] In one of the first judgments considering a carriage dispute, the Tribunal ruled in favour of allowing RHA's CPO application to proceed on 8 June 2022.

The RHA is a trade association that promotes the interests of the road haulage industry. Its claim sought damages on an opt-in basis on behalf of a proposed class including those who had acquired new or used trucks from the OEMs identified in the Trucks Decision. These were key differences to the UKTC CPO application, which was brought on an opt-out basis and to a large extent excluded purchasers of used trucks. In making its determination to certify the RHA claim, the CAT considered that it was plausible that an overcharge on a new truck was to some degree passed on when it was sold and that the increase in truck prices resulting from any cartel overcharge may have affected the prevailing prices for used trucks. In other words, the claims of class members who were purchasers of new and used trucks conflicted to some degree. The CAT, however, did not consider that that conflict between purchases of new trucks and of used trucks in the RHA class precluded the grant of a CPO. It took the view that if the divergence of interest with regard to the level of pass-on was fairly disclosed so that those opting-in gave their consent, it would be contrary to the objective of the collective actions regime to find that the RHA could not fairly represent the class. It continued that if the CAT considered at any stage that diverging interests between new and used truck purchasers within the class caused problems, it could vary the CPO to define a sub-class covering used trucks and it could consider authorizing someone other than the RHA to act as class representative for that sub-class.

The Court of Appeal disagreed, holding that the CAT had been wrong not to recognize that there was an actual conflict between the purchasers of new and used trucks already, a conflict that it was necessary to address at the start of the proceedings rather than at some indeterminate point in the future.

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6 As with FX, there was a rolled-up hearing of the Court of Appeal and Divisional Court, given the lack of clarity as to whether recourse against the CAT's judgment should be by way of appeal to the Court of Appeal or judicial review. This aspect of the judgment is not considered further.

7 *Trucks* (Case AT.39824) Commission Decision 2017/C 108/05 [2016] OJ C 108/6.

As to what should happen, the Court of Appeal was "*firmly of the view that the conflict between new truck purchasers and used truck purchasers over resale pass-on which the RHA faces can be addressed by the erection of a Chinese wall within the RHA organization for the purposes of dealing with that issue. This will need to involve a separate team within the RHA acting for each of the two sub-classes, instructing different firms of solicitors and counsel and a different expert or experts … a different funder will need to be involved for one of those sub-classes, given that the conflict potentially extends to funding. … [T]he RHA will have to be able to satisfy the CAT that the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making in the litigation including as to settlement. In my judgment, the safest way of ensuring that will be to have separate funders for the two sub-classes, thereby avoiding the risk of a funder siding with the members of one of the sub-classes.*"

The Court of Appeal therefore concluded that the RHA will have to explain in detail to all class members in both sub-classes the nature and extent of the conflict in relation to the pass-on issues and how the RHA proposes to resolve the conflict by way of the Chinese wall and separate teams.

Conclusion on Trucks

The Court of Appeal's conclusion that the new and used truck purchasers must have separate legal teams and experts is one that will add significantly to the complexity and cost of these proceedings, costs that are likely to be ultimately borne by defendants. While the overcharge issues that arise in the proceedings will be common to both groups, pass-on will require entirely separate treatment. In practice, this is unlikely to have far-reaching implications for other claims, given that conflicts between different class members can be expected to be the exception rather than the rule (and even in this case, it will need to be seen what scope there is to argue for a used truck overcharge following the trial in *BT/Royal Mail*).

Although the Court of Appeal suggested that also obtaining separate funding would be "*safest*", it is clear from the judgment that this is not a requirement (unlike the Chinese wall within the RHA and separate legal and expert teams). Key is that the funding arrangements "*do not interfere unreasonably with ordinary independent decision-making in the litigation including as to settlement.*" Entirely separate funding teams, and funds, within a single funder would seem to be entirely capable of bringing this about. No doubt class representatives will want to ensure that funders stick strictly to the line of not even being seen to influence the conduct of collective proceedings.

***PACCAR* – Litigation Funding Arrangements and Multiples-Based Pricing**

This appeal also arose from the applications for CPOs made by the RHA and UKTC arising from the Trucks Decision. The question the Supreme Court had to determine was whether a litigation funding agreement ("**LFA**"), which remunerated the funder of a successful collective action by reference to a percentage of the damages ultimately recovered, was a damages-based agreement ("**DBA**") within the meaning of section 58AA of the *Courts and Legal Services Act 1990* as amended in 2013. If so, the LFA in question (and many if not all of the LFA's underlying the many collective proceedings that are making

their way through the CAT at present) would be unenforceable because DBAs are prohibited in opt-out competition law collective proceedings pursuant to section 47(c) of the *Competition Act 1998*.

The Supreme Court, by a 4-1 majority,[8] held that an LFA remunerating a funder by reference to a percentage of the damages ultimately recovered was a DBA. It did so because it concluded that litigation funding fell within the scope of claims management services in the relevant legislation, which includes "*the provision of financial services or assistance.*"[9]

Conclusions on PACCAR

As Lady Rose observed in her dissent, most if not all of the LFAs underlying the many collective proceedings that are before the CAT at present will be unenforceable by reason of this judgment. Nevertheless, the reality is funders and PCRs/class representatives to collective proceedings will have already largely prepared for this outcome and put alternative arrangements in place to cover this contingency. Accordingly, it is unlikely that this judgment will see claims being dismissed.

Instead, what is likely, unless and until legislation is amended allowing the kinds of LFAs that had until now become commonplace, is that LFAs will allow funders a multiple of their spend, rather than a percentage of recoveries. This will result in the introduction of a potential divergence between the interests of funders and class members, particularly for larger claims, as it will no longer be in the interests of both funders and class members to maximize recoveries – that cannot have been what Parliament intended. For the benefit of the regime as a whole, and the vindication of individuals' rights which the Supreme Court and Court of Appeal have emphasised is the purpose of the collective proceedings regime, legislative amendment will be required to allow the kinds of LFA that had been commonplace prior to this judgment, something that is unlikely this side of a general election.

Conclusion

The UK's appellate courts have given something to everyone in collective proceedings in the UK. To PCRs, they have confirmed that opt-out claims can be brought, even for large and sophisticated class members and in respect of even "*very weak*" claims. It is difficult now to discern which opt-out class action will fail to be certified. Equally, however, the appellate court has armed Defendants with new weapons to impose complexity and costs on PCRs where there are conflicts between class members, and the likelihood is that defendants will seek out such conflicts more assiduously, given that the Court of Appeal has confirmed that they need to be dealt with from the outset in collective proceedings.

[8] Lady Rose, a former CAT chair, dissented.

[9] The Supreme Court judgment is concerned with interpretation of the relevant statutory provisions, the details of which need not be addressed in this note.

Whilst the Court of Appeal confirmed that the role played by funders was crucial to the success of the regime, the Supreme Court has required that the funding model that has become standard is adjusted and in so doing, has ushered into place a model in which the interests of the funders and the class members are less closely aligned. Legislative reform will, consequently, be required to allow LFAs to be put in place in which the interests of funders and class members are aligned, to the benefit of the collective proceedings regime and access to justice more generally.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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