

FX COLLECTIVE PROCEEDINGS: UK SUPREME COURT JUDGMENT

Overview

On 18 December 2025, the UK Supreme Court handed down its judgment in the long-running foreign exchange (FX) collective proceedings (*Evans v Barclays Bank plc & others*). The judgment represents a landmark decision for the competition law collective proceedings regime. The Supreme Court has provided important clarification on the test to be applied by the Competition Appeal Tribunal (CAT) when determining whether collective proceedings may be certified on an opt-out basis - such that class members will automatically be included in the claim without needing to take any active steps - or on an opt-in basis, which would require class members proactively to sign up to the relevant claim.

The Supreme Court unanimously allowed the appeals brought by all of the defendant banks on all four grounds of appeal, concluding the CAT had been entitled at the certification stage to refuse to grant the proposed class representative, Mr Phillip Evans, permission to bring opt-out collective proceedings against the banks. It therefore overturned the Court of Appeal's judgment which had found the CAT had erred in considering whether to certify Mr Evans' claim on an opt-in or opt-out basis.

Case history

In 2019, Mr Evans applied for permission to bring opt-out collective proceedings against various banks that were addressees of (at least one of) the European Commission's May 2019 *Forex* settlement decisions, in which the Commission found that there had been infringements of EU competition law in the G10 spot FX market between 2007 and 2013. The class that Mr Evans sought permission to represent comprised a mix of large, sophisticated financial institutions with significant individual claims, and smaller enterprises and high net worth individuals with lower value claims. Although Mr Evans' claim was brought as a follow-on action in reliance on the Commission's decisions, he alleged that the harm caused by the infringements did not only affect persons who

directly entered into transactions with the relevant banks, but that they also caused widespread, indirect harm to persons transacting with other banks or in the inter-dealer market.

The CAT considered Mr Evans' application for an opt-out collective proceedings order in July 2021. The banks did not contest certification, but argued that the factors listed in Rule 79(3) of the CAT Rules - particularly the strength of Mr Evans' claim and the practicability of opt-in proceedings - pointed in favour of Mr Evans' claim only being certified on an opt-in basis.

In its judgment of 31 March 2022, the CAT agreed with the banks. In particular, the CAT held that:

- Mr Evans' pleaded case on causation was so weak that it was liable to be struck out. Although the CAT did not ultimately exercise its discretion to strike out Mr Evans' case, its overall weakness was a powerful reason against certification on an opt-out basis;
- opt-in proceedings were practicable in this case given the class was largely made up of large and sophisticated institutions. Such class members were unlikely to be ignorant of their potential claims and their previous reluctance to sign up to a proposed opt-in claim was due to a deliberate decision on their part not to participate; and
- although the CAT accepted Mr Evans' evidence that the claims would likely not proceed at all if they were not certified on an opt-out basis, and considered that this factor pointed strongly in favour of opt-out certification, it was substantially outweighed by the strength and practicability factors described above.

The CAT therefore ordered that the proceedings should be stayed, with Mr Evans being given permission to submit a revised application for certification on an opt-in basis within three months.^[1]

The CAT's certification judgment was subsequently overturned by the Court of Appeal.^[2] In particular, the Court of Appeal found that:

- in relation to the strength of the claims, the CAT had incorrectly concluded that, because Mr Evans' case was in its view a weak one, this was a factor that pointed towards opt-in proceedings; and
- in relation to practicability, the fact that proceedings would be unlikely to proceed unless certified on an opt-out basis was a powerful factor in favour of opt-out proceedings.

The Supreme Court's judgment: factors relevant to opt-in vs. opt-out

The UK Supreme Court heard the banks' appeals against the Court of Appeal's judgment in April 2025. The banks' grounds of appeal focused on the correct approach that should be taken by the CAT when considering whether collective proceedings should be certified on an opt-in or opt-out basis under Rule 79(3) of the CAT Rules.

The Supreme Court unanimously allowed the banks' appeals in all respects, finding that the CAT had properly exercised its gatekeeping function and was properly entitled to conclude that Mr Evans' claim should only be certified on an opt-in basis. In doing so, the Supreme Court criticised the Court of Appeal for interfering with the CAT's exercise of its discretion and made clear that the evaluation of the factors relevant to certification is a matter for the CAT, as a specialist tribunal.

Relevance of strength of the claims to the opt-in vs. opt-out issue

The Supreme Court held that the CAT had properly concluded that the weakness of Mr Evans' claim was a powerful factor weighing against opt-out proceedings and that the Court of Appeal had no proper basis for interfering with the CAT's assessment in this respect.

The CAT had expressed significant concerns about Mr Evans' case on causation during the certification hearing, going so far as to find that his case was liable to be struck out. Although it ultimately opted not to exercise its discretion to strike out the claim ("*perhaps generously*", in the Supreme Court's view), the CAT remained entitled to treat its findings regarding the claims' merits as a factor weighing strongly against certifying them on an opt-out basis. Furthermore, the fact that Mr Evans' claim was a follow-on action based on the Commission's decisions did not necessarily mean that it was of sufficient strength because those decisions did not determine the effects of the infringements on the

market, which was the main element of the claim that the CAT had found fault with.

The Supreme Court disagreed with the Court of Appeal that the merits of the claim will ordinarily be a neutral factor in determining the basis of certification, finding instead that there may well be cases (such as this one) where the claim surmounts the strike-out threshold but the CAT is able to form a view that the claim's weakness points against it proceeding on an opt-out basis. Indeed, that is precisely what Rule 79(3) contemplates, given that the choice between opt-in and opt-out only arises where a claim has not been struck out.

In reaching its conclusion on strength, the Supreme Court highlighted the significant "*leveraging*" advantage afforded to claimants by allowing opt-out claims to proceed, i.e. the incentive that the opt-out procedure creates to settle even weak claims for more than merely "nuisance value" given the risk that, if the claim proceeds to judgment, aggregate damages will be awarded to the whole class. The Court considered that allowing claimants to benefit from this advantage even where their claims are very weak would be unlikely to be fair to defendants and contrary to the CAT's obligation to deal with cases justly.

Relevance of practicability to the opt-in vs. opt-out issue

The Supreme Court held that the CAT was entitled to take the view that: (i) although opt-in proceedings would not in fact be brought, this was because a significant number of large and sophisticated financial institutions with significant claim values had not shown any interest in opting in to a collective action; and (ii) in these circumstances, although it was not practicable for smaller entities and individuals to opt in, looking at the matter overall it could not be said that it was not practicable to bring opt-in proceedings.

As a starting point, the Supreme Court noted that the implication of Rule 79(3)(b) is that, if it is practicable for the proceedings to be brought on an opt-in basis, then they should be. This is because, in such circumstances, it is unlikely to be proportionate to confer upon the claimants the additional advantages associated with the opt-out procedure. However, this is only one factor (albeit an important one given it is singled out in the rules) which feeds into the overall evaluation which the CAT has to make, and its weight may vary from case to case.

Generally, where there is a large class of people with small claims (as in the *Merricks* proceedings) the opt-out procedure is likely to be the only basis on which it is practicable to bring proceedings. On the other hand,

[1] See briefing [here](#).

[2] See briefing [here](#).

where the class is made up of large commercial organisations which are claiming large sums, then opt-in proceedings are more likely to be appropriate.

Where the CAT identifies sub-classes of claimants with distinct profiles, as in this case, it should consider the practicability of bringing an opt-in claim for each group separately. If this yields a different conclusion for each group, it should then stand back and make an overall assessment. In this respect, the Supreme Court endorsed the CAT's detailed assessment of the composition of the class. The CAT distinguished between, on the one hand, large, sophisticated financial institutions, which were well equipped to pursue claims on an opt-in basis; and, on the other hand, smaller entities or individuals, for whom opt-in proceedings would be impracticable due to the modest value of individual claims and the difficulty of identifying and contacting potential claimants. The CAT's approach, which involved evaluating practicability for each group separately before making an overall assessment, was found to be both fact-sensitive and within its broad discretion.

Relevance of the principles of “facilitating the vindication of rights” and deterring future wrongdoers to the opt-in vs. opt-out issue

The Supreme Court also considered the Court of Appeal's finding that policies of facilitating the vindication of rights and deterring future wrongdoers are strong factors which point in favour of opt-out rather than opt-in proceedings. The Supreme Court determined that the Court of Appeal was wrong to reach this conclusion. Instead, the proper starting point in determining whether claims should be certified on an opt-in or opt-out basis is one of neutrality, without any presumption or predisposition in favour of either.

Furthermore, the CAT is required to strike a balance between assisting claimants to obtain redress and protecting defendants from “*oppressive litigation*”. The Supreme Court noted that “*access to justice is something to which both claimants and defendants are entitled*” and that the collective proceedings regime “*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*”.

Admissibility of European Commission decisions against non-addressees

The Supreme Court also provided helpful guidance regarding the admissibility in subsequent proceedings of findings of other decision makers (e.g. regulators) in

prior proceedings or investigations. This issue arose as the Court of Appeal's judgment placed a significant emphasis on the findings of the European Commission in a separate infringement decision, addressed to a non-defendant, which post-dated the CAT's certification judgment (the “**Sterling Lads Decision**”). The Sterling Lads Decision concerned similar conduct to that described in the infringement decisions relied on by Mr Evans but, having been made following a contested procedure before the Commission, contained significantly more detail.

The Supreme Court found that the Sterling Lads Decision was inadmissible against the banks. In reaching this finding, the Supreme Court confirmed that the rule in *Hollington v Hewthorn* [1943] KB 587, which provides that findings of fact made by another decision-maker are not to be admitted in a subsequent trial, applies to proceedings before the CAT, therefore overturning the Court of Appeal's previous finding to the contrary. Further, it found that the rule applies in “*what may be called its strong form*” because the banks were not parties to the procedure which led to the Sterling Lads decision and “*[it] would in those circumstances be fundamentally unfair to admit the findings made by the Commission as evidence against the [banks]*”.

Significance of the Supreme Court's judgment

The Supreme Court's judgment will be of great interest to potential class representatives considering commencing future collective proceedings in the CAT, to funders, and to defendants faced with such claims. The following points are of particular significance:

- By approving the approach initially taken by the CAT to determining whether a claim should be certified on an opt-in or an opt-out basis, the Supreme Court has made clear that there will be circumstances in which it will be appropriate for the CAT to conclude that a claim should not be permitted to proceed on an opt-out basis. This may be the case even where the proposed class representative is not willing or able to bring an opt-in claim, e.g. because there has been insufficient interest from potential class members in signing up to such a claim. This represents a significant shift from previous Court of Appeal decisions (e.g. *Le Patourel and Gutmann*) which suggested opt-out certification would be appropriate in most cases.
- The Supreme Court has also emphasised the importance of weighing the interests of defendants against those of claimants when making case management decisions, including regarding certification. In particular, its finding that the strength of a claim is an important factor that should

[1] See briefing [here](#).

[2] See briefing [here](#).

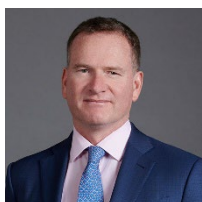
be considered when determining if it should be certified on an opt-out basis will be welcomed by proposed defendants to collective proceedings. The judgment may lead to greater scrutiny of proposed opt-out proceedings, particularly where the class comprises sophisticated entities for whom opt-in proceedings are likely to be practicable.

- A central theme of the Supreme Court's judgment is the reaffirmation of the CAT's important gatekeeper function in collective proceedings. The Court emphasised that decisions regarding certification - particularly the choice between opt-in and opt-out - are exercises of evaluative judgement entrusted to the specialist tribunal. Appellate courts should not interfere merely because they might have reached a different conclusion, but rather only in cases of legal error.

- The Supreme Court also emphasised that the CAT must strike a balance between facilitating access to justice for claimants and protecting defendants from unmeritorious or oppressive litigation, without any bias in favour of opt-out (or opt-in) proceedings. The Supreme Court's confirmation that the rule in *Hollington* applies to the CAT will come as welcome news to proposed defendants to collective proceedings, as it confirms the CAT must consider carefully whether decisions made in other proceedings and regulatory investigations will be admissible as evidence against defendants.

Slaughter and May act for JPMorgan in relation to these proceedings and led the appeal.

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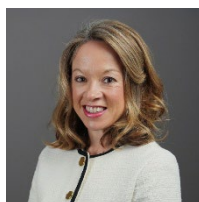
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