ALERT MEMORANDUM

Access To Justice: Supreme Court Rebalances the Scales in the FX Collective Proceedings

6 January, 2026

On 18 December 2025, the Supreme Court issued a significant judgment on collective proceedings, ruling on when collective proceedings should be allowed to continue and holding that cases with weak merits should not be permitted to proceed on an opt-out basis. The judgment is welcome news for defendants faced with speculative opt-out claims, and indicates that the English courts will not allow the collective action regime to function as a free-for-all regardless of a claim's merits.

Evans[1] is the first time the Supreme Court has considered the factors relevant to the Competition Appeal Tribunal's exercise of its discretion in determining whether collective proceedings in the Tribunal should be certified on an "opt-out" or an "opt-in" basis.[2] In its 2020 landmark decision on certification in *Merricks*,[3] the Supreme Court ruled that the

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1 [2025] UKSC 48.

2 "Opt-in" collective proceedings are brought on behalf of each class member who opts in by notifying the class representative that their claim should be included in the collective proceedings. "Opt-out" collective proceedings are brought on behalf of each class member, save for those that opt out by notifying the class representative that their claims should not be included, and any class member that is not UK-domiciled and has not opted in to the collective proceedings.

3 [2020] UKSC 51. See also https://www.clearyantitrustwatch.com/2020/12/mastercard-incorporated-and-others-appellants-v-walter-hugh-merricks-cbe-respondent/

question of whether to certify collective proceedings does not involve a merits assessment.[4] Nonetheless, if a claim meets the certification threshold, a separate question arises as to whether the claim should proceed on an opt-in or opt-out basis. In *Merricks*, the Supreme Court noted that the strength of the claims being pursued is relevant to the question of whether they should proceed as opt-out rather than opt-in, and in *Evans* the Supreme Court (reversing the Court of Appeal) ruled that (a) the vindication of rights through collective actions and deterring future wrongdoing; and (b) the protection of defendants from oppressive litigation, are both in the interests of justice. In balancing those interests, weak claims should not benefit from the legal and commercial advantages of opt-out proceedings (the "*leveraging effect*"),[5] even if they are capable of surviving a strike-out or summary judgment application.

I. PROCEDURAL BACKGROUND

A. The CAT's certification judgment

Mr Evans's proposed collective action[6] was founded on two European Commission infringement decisions concerning coordination in the G10 FX spot trading market (the "**Decisions**").[7] The Decisions found that a number of banks had participated in anti-competitive information exchanges in private chatrooms between 2007 and 2013. In each Decision, the Commission concluded that the conduct constituted an infringement by object,[8] and accordingly did not assess the effects of the conduct on competition.

Mr Evans's proposed opt-out proceedings were against the Decisions' addressees on behalf of a proposed class comprising large financial institutions with substantial individual claims and smaller entities and high-net-worth individuals with lower value claims. Mr Evans estimated that, taken together, the class encompassed tens of thousands of potential claimants and that the aggregate value of claims exceeded £2 billion (exclusive of interest).

As noted, Mr Evans sought certification on an opt-out basis. Rule 79(3) of the Competition Appeal Tribunal Rules 2015 (the "**Rules**") confers broad discretion on the Tribunal to take into account all matters it considers appropriate when determining whether proceedings should be certified on an opt-in or opt-out basis. This includes the matters it has already considered to assess the suitability of the claims to be brought as collective proceedings, but Rule 79(3) expressly provides that two additional matters are relevant to the Tribunal's assessment: (a) the strength of the claim; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings. Exercising its discretion under Rule 79(3), the Tribunal declined to certify the proceedings on an opt-out basis and ordered that the proceedings be stayed, granting permission for a revised application for certification on an opt-in basis to be submitted. In exercising its discretion, the Tribunal placed particular weight on the strength of the claims and the practicability of opt-in proceedings.

In assessing the strength of the claims, the Tribunal concluded that, whilst the expert reports referenced in

4 The Rules make separate provision for strike-out and summary judgment.

5 The Supreme Court used the term "*leveraging effect*" to describe the additional settlement pressure that opt-out collective proceedings exert on defendants, arising from the aggregation of large claim values and the size of the class, rather than by reference to the underlying merits. In particular, the Court recognised that such pressure may arise at a stage when no determination has been made as to causation or loss, and before any evidential assessment of whether the alleged infringement caused recoverable harm to individual class members.

6 Under Section 47B of the Competition Act 1998.

7 Case AT.40135-FOREX (Three Way Banana Split), European Commission Decision C(2019) 3631 final, 16 May 2019; Case AT.40135-FOREX (Essex Express), European Commission Decision C(2019) 3621 final, 16 May 2019.

8 See Article 101, Treaty on the Functioning of the European Union; Article 53, European Economic Area Agreement. Restriction of competition by object applies to certain types of coordination between undertakings that by their very nature present a sufficient degree of potential harm to the proper functioning of normal competition that the competition regulator does not need to examine their effects before finding an infringement of competition law.

the pleadings advanced a plausible case at the level of economic theory, the pleaded case on causation was so weak that the claim was liable to be struck out. The Tribunal did not strike out the claim as it considered that Mr Evans should be given an opportunity to address the defects identified by the Tribunal. Crucially, however, the Tribunal regarded the manifest weakness of the claims as a "*powerful reason*" militating against opt-out certification.[9]

On practicability, the Tribunal considered that this factor required an assessment of why the proposed class members were not willing to opt in to the proceedings, considering the practical bars to opting in. The Tribunal determined that opt-in proceedings were feasible, emphasising that many potential class members were sophisticated financial institutions that could be expected to be aware of both the proceedings and the opportunity to recover substantial sums. The apparent unwillingness of these potential class members was, therefore, treated as a deliberate choice rather than evidence of any procedural obstacle that made opt-in proceedings impracticable.

Ultimately, the Tribunal found that the strength of claims and practicability factors clearly and strongly pointed away from certification on an opt-out basis. The Tribunal recognised that certification on an opt-in basis would mean that the claims would not proceed, but considered that the claims were so weak that they should not be allowed to proceed on an opt-out basis.

B. The Court of Appeal's decision

Mr Evans appealed to the Court of Appeal, which allowed the appeal. It held that the Tribunal had erred in its approach to both strength and practicability of the claims. In particular, the Court of Appeal concluded that it was wrong for the Tribunal to essentially treat its provisional merits assessment as final to determine that the claims should be opt-in, knowing that doing so would bring an end to the claims, whilst simultaneously permitting the claims to be reformulated to address its concerns on the merits. Further, the Court of Appeal considered that the strength of the claim would generally be a neutral factor in deciding whether proceedings should be opt-in or opt-out (relying on its earlier decision in *Le Patourel*),[10] and that claim strength should not operate as a "*sliding scale*" with a weaker case proceeding on an opt-in basis and a stronger case on an opt-out basis.[11] The Court of Appeal further held that that the policy objectives of "*facilitating the vindication of rights*" and "*deterring future wrongdoers*" were relevant factors pointing in favour of opt-out proceedings, and where there would be no proceedings without opt-out terms, that is a powerful factor in favour of a claim being certified as opt-out.

The Court of Appeal grappled with an additional issue which was not before the Tribunal. Following the CAT's judgment, the European Commission published a fully reasoned contested infringement decision (*Sterling Lads*) addressed to a third party financial institution.[12] Unlike the settlement Decisions, the contested *Sterling Lads* decision contained substantially more information about the infringement it found, referring to the evidence the Commission relied on and why, on the facts, the infringement likely benefitted the third party bank and harmed competition. A dispute arose as to whether the *Sterling Lads* decision was admissible in the *Evans* proceedings. Mr Evans argued that the decision was admissible and provided powerful support for his appeal. The respondent banks contended that the new decision was wholly inadmissible under the general common law rule that findings of another decision-maker are not admissible as evidence of the facts found (*Hollington v Hewthorn*),[13] and in any event bore strictly limited evidential weight.

The Court of Appeal found that the *Sterling Lads* decision was admissible. Green LJ placed particular emphasis on the specialist and "*sophisticated*" nature of the CAT, reasoning that the Tribunal was not required to apply common law rules of evidence with the same rigidity as an ordinary court, and the Tribunal has a wide

9 [2022] CAT 16, at [375].

10 Justin Le Patourel v BT Group PLC & Anor (II) [2025] EWCA Civ 1061.

11 [2023] EWCA Civ 876, at [134].

12 Case AT.40135-FOREX (*Sterling Lads*).

13 Hollington v F Hewthorn & Co Ltd [1943] KB 587.

discretion as to the evidence to be admitted.[14] On that basis, it was concluded that the Tribunal could take account of the new *Sterling Lads* decision.

The Court of Appeal remitted the claim to the Tribunal to reconsider the merits, having provided its own more positive assessment of the strength of the claims, relying heavily on the contested *Sterling Lads* decision. The respondent banks appealed to the Supreme Court.

II. THE SUPREME COURT'S JUDGMENT

The Supreme Court unanimously overturned the Court of Appeal's decision and in so doing provided guidance on the correct approach to the exercise of the Tribunal's discretion under Rule 79(3) in determining whether proceedings should be certified on an opt-in or opt-out basis.

A. Strength of the claims

The Supreme Court held that the Tribunal's assessment of the weakness of the claims was properly regarded by the Tribunal as a factor weighing strongly against opt-out proceedings. It rejected the Court of Appeal's finding that the merits of a claim are a neutral factor in determining opt-out v. opt-in. Endorsing the "*sliding scale*" approach of the Tribunal, it held that the less confidence in the merits of the claim the Tribunal has, the harder it is to conclude that the "*leveraging effect*" of opt-out proceedings against defendants "*is fair and a price worth paying in the overall interests of justice*".[15]

The Supreme Court was critical of the Court of Appeal's assessment of the merits of the claim. It held that the Court of Appeal had no proper basis for interfering with the Tribunal's merits assessment, or the weight the Tribunal attached to that assessment in determining whether the claim should proceed as opt-out or opt-in, and that it "*should have left the evaluation of the strength of the claim to the specialist body entrusted with that task*".[16]

B. Practicability

On the practicability factor, the Supreme Court endorsed the Tribunal's approach of considering different groups within the class separately and then to "*stand back*" and assess practicability overall, rather than requiring opt-in proceedings to be practicable for every class member.[17] This approach prevents the distortion of the practicability assessment by class members with very small claims, of which they may not be aware, for whom opt-in proceedings would plainly be impracticable. The Supreme Court cautioned against allowing such sub-classes to dictate the outcome for the entire class, describing that as allowing the "*tail to wag the dog*".[18]

C. No presumption of opt-out or opt-in

The Court of Appeal considered that the principles of "*facilitating the vindication of rights*" and "*deterring future wrongdoers*" were relevant factors that point in favour of opt-out proceedings. The Supreme Court held that these were policy aims which the collective actions regime was designed to further, but that they are counterbalanced by the competing policy aims underpinning the regime of protecting businesses from the burden of defending unmeritorious claims. The Tribunal is required to strike a balance between those policy aims and, therefore, the proper starting point on the question of opt-in or opt-out is a neutral one with no bias in favour of either opt-in or opt-out. As the Supreme Court noted, "*access to justice is something to which both claimants and defendants are entitled*".[19]

The Supreme Court also rejected the contention that where a determination of opt-in would end the claim, that would be a powerful factor in favour of opt-out. The Supreme Court considered that the Tribunal was right not to treat this factor as a "*trump card*" noting the obvious dangers in allowing class representatives to make that assertion *in terrorem.*[20] In particular it endorsed the Tribunal's observation that "*access to justice does not, in our judgment, mean that every case*

14 By virtue of Rule 55(1)(b) of the Rules.
15 [2025] UKSC 48, at [95].
16 [2025] UKSC 48, at [109].
17 [2025] UKSC 48, at [119].
18 [2025] UKSC 48, at [123].
19 [2025] UKSC 48, at [140].
20 [2025] UKSC 48, at [110].

that can only be brought on an opt-out basis must be permitted to proceed on that basis".[21]

D. Use of subsequent EC decisions against non-addressees

The Supreme Court held that a European Commission infringement decision concerning a non-addressee was inadmissible in collective proceedings, and that the Court of Appeal erred in relying on the contested *Sterling Lads* decision when reconsidering the CAT's certification ruling.

In holding the *Sterling Lads* decision inadmissible, the Supreme Court reaffirmed the common law principle in *Hollington v Hewthorn*,[22] which prevents factual determinations reached in separate proceedings by a different decision-maker from being relied on against parties who were not involved in those proceedings. The principle is founded on fairness, which requires the Tribunal to base its findings on its own evaluation of the evidence rather than the evaluation of another decision-maker. The Supreme Court confirmed that this common law principle applies in the Tribunal and operates with particular force where, as in this case, the proposed defendants were not parties to the process that produced the Commission's findings, such that admitting those findings would be "*fundamentally unfair*".[23] The Supreme Court did, however, accept that material that would be inadmissible at trial can in principle assist the Tribunal at the certification stage to ascertain what evidence can reasonably be expected to be available at trial.

III. CONCLUSIONS

Collective actions, especially opt-out collective actions, provide significant advantages to claimants which are capable of opportunistic exploitation. The leveraging effect of the opt-out regime creates incentives to settle weak claims for more than "*nuisance value*". In its judgment, the Supreme Court puts strong emphasis on the policy aims of the collective actions regime, which is to facilitate access to justice for claimants and deter future wrongdoing, but critically, also to protect defendants from oppressive litigation, a policy aim which the Court of Appeal had "*lost sight of*".[24] The Tribunal, in its gatekeeper function, has been entrusted to exercise its discretion to strike the balance between assisting claimants and protecting defendants from oppressive litigation. Absent an error of law, the Supreme Court has cautioned that appellate courts should not interfere with the Tribunal's evaluative judgment of where that balance lies.

In the light of the competing policy aims of the regime, there cannot be a presumption either way in favour of opt-in or opt-out – the starting point for the Tribunal is neutral. The burden on defendants of an opt-out class action must be proportionate, and accordingly, the merits of a claim is a relevant factor for the Tribunal at certification. As the Supreme Court noted, "*if clearly unmeritorious claims are allowed to proceed on an opt-out basis which involves an unjustified leverage advantage for claimants... the result will not be due enforcement of the competition rules but over-enforcement, contrary to the public interest*".[25]

The judgment also confirms that the burden of an opt-out action for defendants is unlikely to be proportionate where the class principally constitutes well-resourced sophisticated commercial entities with claims large enough to make it economical to bring claims outside of the collective actions regime. If those claims are suitable for the CAT's collective actions regime at all, there is a strong indication from the Supreme Court that the interests of justice point strongly in favour of opt-in.[26]

Ultimately, while the issue on appeal was a discrete question on the factors relevant to the Tribunal's exercise of its discretion in determining opt-in v. opt-out, proposed defendants will welcome the Supreme Court's broader emphasis on access to justice for defendants to rebalance the emphasis in recent cases on access to justice for claimants. The Supreme Court was

21 [2025] UKSC 48, at [140].
22 Hollington v F Hewthorn & Co Ltd [1943] KB 587.
23 [2025] UKSC 48, at [153].
24 [2025] UKSC 48, at [138].
25 [2025] UKSC 48, at [141].
26 [2025] UKSC 48, at [117].

clear that the collective actions regime and the public interest require both.

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