



Neutral citation [2022] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

9 March 2022

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chairman)
JANE BURGESS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant /
Proposed Class Representative

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Respondents /
Proposed Defendants

Heard remotely on 14 January 2022

JUDGMENT (CONSEQUENTIAL MATTERS)

APPEARANCES

Mr Paul Harris QC, Ms Anneliese Blackwood and Mr Allan Cerim (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Mr Mark Hoskins QC, Mr Matthew Cook QC and Mr Hugo Leith (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Respondents/ Proposed Defendants.

A. INTRODUCTION

1. This is the third judgment of the Tribunal in these proceedings. The first judgment was given on 21 July 2017: [2017] CAT 16 (“*Merricks 1*”). The Tribunal there dismissed the application for a Collective Proceedings Order (“CPO”) but that decision was reversed by the Court of Appeal, in a decision largely upheld by the Supreme Court, which remitted the matter back to the Tribunal. The second judgment was given on 18 August 2021 following that remittal: [2021] CAT 28 (“*Merricks 2*”). The Tribunal there held that a CPO would be granted but refused permission to amend to add claims of persons who had died before the commencement of the proceedings and held that the proceedings could not include a claim for compound interest. Mr Merricks has filed a draft amended claim form following that judgment.
2. The background to the proceedings and underlying facts are set out in *Merricks 1* and will not be repeated here. This judgment uses the same abbreviations as *Merricks 2*.

B. THE ISSUE

3. Since the Tribunal has decided to grant a CPO for opt-out proceedings, it is necessary in the order to specify the domicile date: r. 80(1)(g). This is defined in r. 73(2) as follows:

““domicile date” means the date specified in a collective proceedings order or collective settlement order for the purposes of determining whether a person is domiciled in the United Kingdom...”

4. Mr Merricks seeks a determination that the domicile date shall be 6 September 2016, the date on which the claim form was issued. Mastercard submits that the domicile date should be 18 August 2021, the date of *Merricks 2* whereby the decision to grant a CPO was made. We will refer to these alternative dates for convenience as “the Claim Form date” (i.e. 6 September 2016) and “the CPO date” (i.e. 18 August 2021) although formally a CPO will not be made until the issue of the present judgment.

5. As in any opt-out collective proceedings, the domicile date operates to determine which persons who fall within the class definition are automatically included in the proceedings unless they opt out, and which persons will only be included if they opt-in: see the legislative provisions set out below. However, in the present proceedings the “domicile date” has wider and more significant implications. That is because of the way in which the class is defined in the claim form.
6. The claim form, as served in the application for a CPO, defines the class at para 22:

“The proposed class is: “Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the United Kingdom that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the United Kingdom for a continuous period of at least three months, and (2) aged 16 years or over”. All individuals who are living in the United Kingdom *as at the domicile date*, to be determined by the Tribunal in the CPO, and who meet this definition, are proposed to be included within the proposed class unless they choose to opt-out of the proposed Claim. All individuals who are living outside the United Kingdom *at the domicile date*, but meet this definition, will be able to opt-in to the proposed Claim.” [Our emphasis].

Further, para 23(d) stated:

“the proposed class representative is aware that this class definition excludes some individuals who might have good claims, in particular, ... (iii) the estates of individuals who meet the proposed class definition but who passed away before the domicile date. However, these exclusions are the consequence of seeking to create a clearly defined class, with parameters that can easily be understood by potential class members in order to determine whether they are within the class.”

7. Therefore, if the domicile date is the Claim Form date, then all individuals who otherwise meet the class definition and were alive at that date are within the class. But if the domicile date is the CPO date, then those who were alive on 6 September 2016 but have died before 18 August 2021 are outside the class.
8. If the class is defined by reference to persons living at the date of issue of the claim form, and a potential class member dies after the claim form has been issued and before the Tribunal gives a judgment granting a CPO, it should not cause a problem if the domicile date is specified at or close to the time of the making of the CPO. The class representative can then apply to amend the claim

form to substitute the personal representatives or authorised representatives of class members who have died in the interim. However, that is not the way the claim form has been drafted here. Although Mr Merricks has sought now to amend his claim form, he realistically accepts that if the CPO date is specified as the domicile date, limitation issues preclude an effective amendment to the class definition to bring those who have died since the claim form was issued but prior to the CPO date within the class.

9. Given the potential size of the class in collective proceedings brought on behalf of consumers, the issue of persons dying after the issue of the claim form and before the grant of a CPO by the Tribunal will arise in most cases. However, it is particularly acute in the present case by reason of a combination of two factors:

- (1) the vast size of the class: the claim form estimated the size of the class (on the basis of persons alive when the claim form was issued) at 46.2 million people; and
- (2) the extended duration of the proceedings leading up to *Merricks 2*: the period between the issue of the claim form and the decision to grant a CPO is almost five years, due to the Tribunal's initial decision refusing a CPO and then successive appeals to the Court of Appeal and the Supreme Court.

10. Since around 600,000 people over the age of 16 in the UK die each year, if the domicile date is specified as being the CPO date, over 3 million claims will not be in the class whereas they will be included if the domicile date is specified as the Claim Form date. On the other hand, the practical consequence of specifying the domicile date as the Claim Form date is that a not insignificant number of people who are no longer living in the UK at the time when the CPO is issued will automatically be included in the proceedings unless they opt out, whereas those who are now living in the UK but were living abroad (so as not to have a UK domicile) at the time when the claim form was issued, will need actively to opt in if they wish to be included in the proceedings.

11. We should add that there is no issue between the parties as regards persons who should die after the domicile date (including in the future). Since they were members of the class at the time the claim form was issued, Mastercard accepts that the claim form can be amended to provide for substitution of the representatives of their estates. Such an amendment falls within r. 38(6) and (7)(c).

C. LEGAL FRAMEWORK

12. The basic framework for collective proceedings is set out in s. 47B CA 1998. Sub-sections 47B(1)-(2) and (4) are as follows:

“(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies (“collective proceedings”).

(2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.

[...]

(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.”

13. Pursuant to s. 47B(7)(c) CA 1998, a CPO must specify whether the proceedings are to be opt-in or opt-out collective proceedings. S. 47B(11) then provides the following definition:

““Opt-out collective proceedings” are collective proceedings which are brought on behalf of each class member except—

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.”

For this purpose, “specified” means specified in a direction made by the Tribunal: s. 47B(14).

14. Section 47B(12) states:
- “Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.”
15. The legislation therefore distinguishes between the concepts of a “class member” and a “represented person”. A class member is a person falling within the definition of the class: ss. 47B(8)(a) and 59(1). A represented person, as regards opt-out collective proceedings, is a class member who (a) was domiciled in the UK at the domicile date and has not opted out, or (b) has opted in: s.59(1).
16. Accordingly, the concept of the domicile date arises under the CA 1998 in the context of opt-out collective proceedings purely for the purpose of determining who in the class has to opt-out to avoid being a represented person or to opt-in in order to become a represented person.
17. The CAT Rules require that the claim form includes a description of the class: r. 75(3)(a). There is no requirement for the claim form to specify the domicile date. Nor, as Mr Harris QC, appearing for Mr Merricks, emphasised, does the legislation provide, by reference to any step in the proceedings, when the domicile date should be. That matter is left for determination by the Tribunal in its discretion.
18. We add for completeness that s. 59(1B) CA 1998 provides that to determine whether a person is domiciled in the UK for the purpose of these provisions, ss. 41-42 and 45-46 of the Civil Jurisdiction and Judgments Act 1982 apply. However, nothing turns on those provisions.

D. SUBMISSIONS

19. Mr Harris stressed that the class definition in the claim form always recognised that the domicile date would be determined by the Tribunal and that Mr Merricks is not in this respect seeking to amend the claim form. He submitted that the domicile date has a purely administrative purpose. Since the Tribunal has a broad discretion as regards selection of the date, it should exercise that discretion so as to do justice on the facts of the case. Specifying the later CPO

date would exclude over five years of deceased persons. When the claim form was issued, in September 2016, it was reasonable to expect a hearing leading to a CPO in 2017. People should not be excluded from the class only because this case, as a pioneering case under a new statutory regime, went on appeal all the way to the Supreme Court and therefore took an exceptional length of time. People who had a proper claim as at the date of the claim form and therefore could have brought individual claims under s. 47A should logically be included in the class.

20. For Mastercard, Mr Hoskins QC emphasised that under the statutory regime the only function of the domicile date is to determine who has to opt in to be included or to opt out to be excluded. On that basis, he submitted that the framework of the regime means that the domicile date should be linked to the time when that opt-in/opt-out decision had to be taken. Moreover, notification of the proceedings and of the right to opt out/opt in inevitably focuses heavily on the UK. If the domicile date is the Claim Form date, there will be many class members who moved to live outside the UK since then who will not become aware of the proceedings and of their right to opt out, so they will be automatically included as represented persons and bound by the result of proceedings which they never decided to join. By contrast, if the domicile date is close to the date of the CPO, those who live in the UK at the time notification of the proceedings takes place can be presumed to become aware of it and therefore can exercise their right to opt out if they wish. Moreover, Mr Hoskins submitted that it would be illogical if those who are domiciled in the UK at the time a CPO is granted would actively need to opt in just because they were not so domiciled five years previously.
21. Furthermore, since the class is defined here in terms of those living at the domicile date, specifying the domicile date as the CPO date means that most of those in the class will be alive at the time when they have to take the decision to opt out or opt in. That, submitted Mr Hoskins, is a more desirable position than will result from specification of the domicile date as the Claim Form date, when in a not insignificant number of cases that election will fall to their personal representatives. Although in a class of any size there will always be some deaths between the making of the CPO and expiry of the time for opting

out/opting in, the number of such deaths is hugely greater here if the Claim Form date is adopted.

22. Mr Hoskins pointed out that in the other recent cases where a CPO has been granted, the domicile date specified has been the date, or close to the date, of the CPO. He submitted that that is the correct approach and the only reason why Mr Merricks seeks an exception is because of the way his claim form had been drafted. The Tribunal should not adopt a course which is detrimental to the underlying purpose of the legislative scheme just to remedy the consequences of the drafting of this particular claim form.
23. Mr Hoskins also referred to the skeleton argument for Mr Merricks at the time of the original CPO application where his counsel had submitted that the domicile date should be the date on which the CPO was granted. Similarly, the draft notice of the collective proceedings produced for the original CPO application was based on the assumption that the domicile date would correspond to or be close to the CPO date since it stated that those “currently living” in the UK would be automatically included in the claim and that only those “currently living outside the UK” would have to take active steps to participate. He submitted that this was correct as a matter of principle and Mr Merricks has now had a change of heart to suit his litigation purpose.

E. DISCUSSION

24. The legislation does not require that the domicile date should be at any particular time by reference to the proceedings, nor does it specify the considerations that should be relevant for determination of the domicile date. As both sides agree, this is a matter entirely in the discretion of the Tribunal.
25. In our judgment, that discretion should be exercised having regard to:
 - (i) the structure of the statutory regime;
 - (ii) the rationale for having a domicile date;

(iii) the context of the particular case; and

(iv) the interests of justice.

(i) The structure of the statutory regime

26. The bringing of collective proceedings by the proposed class representative combines actual claims by the proposed class members and a CPO is required for those collective proceedings to *continue*: s. 47B(1) and (4). Accordingly, the individual claims of potential class members are not contingent claims or potential future claims which can start or crystallise only if and when a CPO is granted. It is therefore fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made. This contrasts with the position where an applicant needs the permission of the court to start the proceedings, e.g. for judicial review: see s. 31(3) of the Senior Courts Act 1981; or for committal for certain kinds of contempt: see CPR r. 81.3(5).
27. The CAT Rules require that the claim form includes an estimate of the class size: r. 75(3)(c). That would be problematic if the class size could only be ascertained in the future.
28. There is a right for any member of the proposed class to object to the granting of a CPO: rule 79(5). (That indeed occurred on the present application: see *Merricks 2* at [16].) That right would similarly be problematic if at the time of the application it was unclear whether any objector was in fact a member of the proposed class.
29. As noted above, under the statutory scheme the domicile date is relevant only for opt-out proceedings to determine whether a class member will be automatically included (and thus become a represented person) unless they opt out, and conversely whether they have to opt in to be a represented person. It serves no other purpose. There is no need or even expectation for it to have a bearing on the class definition.

(ii) The rationale for the domicile date

30. We consider that the rationale for the domicile date was to avoid subjecting defendants to claims by enormous international classes. Further, it was not considered appropriate automatically to include people who lacked a close connection with the UK in UK legal proceedings without a conscious decision of the persons concerned. The Government's response to the consultation which preceded the introduction of the collective proceedings regime, *Private actions in competition law: A consultation on options for reform – Government response* (January 2013), stated:

“5.56. The Government recognises that business would rightly have concerns if a claim could be brought against them in the UK courts on behalf of anyone in the world and that these concerns would be exacerbated if there was any risk of them paying compensation twice for the same offence. It notes that both the Civil Justice Council, in its Draft Court Rules for Collective Proceedings (2010) and the drafters of the Financial Services Bill (2010), proposed that foreign claimants would have to actively opt-in to a claim, rather than automatically being included. The Civil Justice Council noted in the Explanatory Notes to the Rules that these provisions “*were intended to avoid any arguments in relation to national sovereignty which might arise if the provisions purported to assert jurisdiction to decide cases for foreign domiciliaries who have taken no active part in the proceedings.*”

5.57. **The Government has therefore decided that the ‘opt-out’ aspect of a claim will only apply to UK-domiciled claimants**, though non-UK claimants would be able to opt-in to a claim if desired.”

(iii) The context of the present case

31. This was one of the first applications for a CPO under a new and innovative regime. A particular feature of this case is that the proposed class representative chose to define the class by reference to the domicile date, which would then be determined by the Tribunal. If instead he had defined the class in terms of persons alive on the date the proceedings were commenced, the issue we are confronting would not have arisen.
32. All persons who otherwise fall within the definition of the class and were alive when the proceedings were commenced on 6 September 2016 had a claim at that date. We consider that the clear intention of the claim form, considered as a whole, is that they should be included. Pursuant to r. 75(3)(c), the claim form

at para 25 estimates the class size at about 46.2 million. That figure was clearly calculated on the basis of the numbers living in 2016: see the explanation in para 25 and, further, para 4.1.4 of the joint experts' report annexed to the claim form.

33. Since the class is here defined by reference to those living on the domicile date, if the Tribunal were to specify that date as being after – and indeed many years after – the issue of the claim form, then it would have been impossible to determine, when the claim form was issued, what claims were included. That would, in our judgment, be inconsistent with the statutory structure for collective proceedings discussed above.
34. Given the vast size of the class in these proceedings, there is likely to be a not insignificant number of people who were domiciled in the UK in 2016 but ceased to be so by 2021. Insofar as those people otherwise fall within the class definition, specification of the domicile date as the Claim Form date means that, although now domiciled abroad they would be automatically included in the proceedings unless they opt out. Although that might be regarded as a factor favouring the CPO date, we bear in mind that if they were not resident in the UK prior to 21 June 2008, and thus in the infringement period, they will not be within the class in any event. For the great majority of those who were resident in the UK in all or part of the infringement period, we think it is obvious that their domicile will not have changed between 2016 and 2021.
35. We do not think that the fact that significantly more individuals who would qualify for inclusion if the domicile date was in 2016 will have died than if the date were to be in 2021, so that for a greater portion of the class the election to opt in or out would fall to their personal representatives, militates in favour of the later domicile date. The position would be no different if the claim form had defined the class by reference to those living on the date the proceedings were commenced. The fact that some proportion of class members will die between the commencement of proceedings and the time for election is inherent in the regime.

(iv) The interests of justice

36. As set out above, the reason why Mr Merricks seeks specification of the Claim Form date is because some three million people with valid claims when these proceedings were started will have died by 2021 and would otherwise be excluded. That would be a windfall for Mastercard: it would lead to a not insignificant reduction in the size of the claim as put forward in the claim form served in 2016. And it would result from the original, erroneous decision of this Tribunal to refuse a CPO and then the prolonged process of appeals, neither of which is the fault of those who will thereby be excluded from the class.
37. Although Mastercard submits that this is simply the consequence of the way in which Mr Merricks and his lawyers chose to draft the class definition, that definition leaves it entirely open to the Tribunal to determine the domicile date. All that can be said is that the drafting of the class definition gave rise to this risk. That does not mean that the Tribunal should in its discretion choose a date which has this result, depriving those with claims in 2016 at the time these proceedings started of the opportunity to have those claims included in the collective proceedings and therefore of any remedy at all.
38. A major purpose of the collective proceedings regime is to provide an effective means for consumers to vindicate their private rights which could in theory be the subject of an individual action but where the bringing of such claims individually is not practicable: see *Merricks v Mastercard* [2020] UKSC 51 per Lord Briggs at [45]. Specification of the Claim Form date would enable the inclusion in these proceedings of claims which could in theory have been brought individually on the date when these proceedings were commenced, without any violence to the principle of limitation since this does not involve changing the class definition to extend the class. In our judgment, it is therefore consistent with the objective of the statutory regime.
39. Since the connection of domicile to automatic inclusion in the proceedings is maintained, we do not see that selection of the earlier Claim Form date is in any way contrary to the rationale for the domicile date, as set out in para 30 above.

F. CONCLUSION AND AMENDMENT

40. For all these reasons, we determine that the domicile date should be specified as the Claim Form date, i.e. 6 September 2016. However, we have reached this decision on the particular circumstances of this case. We consider that for CPO applications in the future, it is undesirable for the class definition to depend on the domicile date. The two concepts should be kept separate, and the domicile date limited to its particular statutory purpose.
41. Mr Merricks has applied for permission to amend the claim form to reflect the decision in *Merricks 2* and the domicile date, and to permit claims to be continued by the personal or authorised representatives of class members who die after the proceedings were commenced. The draft amended class definition is as follows:

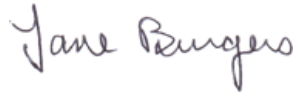
“The ~~proposed~~ class is: “Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the United Kingdom that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the United Kingdom for a continuous period of at least three months, and (2) aged 16 years or over; together with the personal/authorised representative of the estate of any individual who meets that description and was alive on 6th September 2016, but subsequently died.” All individuals who are living in^{4A} the United Kingdom as at the domicile date, such date to be determined by the Tribunal in the CPO, and who meet this definition, are ~~proposed to be~~ included within the ~~proposed~~ class unless they (or the representative of their estate) choose to opt-out of the ~~proposed Claim~~ collective proceedings. All individuals who are living outside of the United Kingdom at the domicile date, but meet this definition, will be able to (or the representative of their estate will be able to) opt-in to the ~~proposed Claim~~ collective proceedings. On the basis that the domicile date is 6th September 2016, that domicile location is determined by reference to the consumers, not (in the case of those who subsequently die) by reference to the domicile of the representatives of their estates.”

42. As we understand it, subject to the contested issue regarding the domicile date which we have resolved, Mastercard does not oppose that amendment. We accordingly grant Mr Merricks permission to amend.
43. This judgment is unanimous.

^{4A} “Living in” is used as short-hand for the requirements of s.59(1B) Competition Act 1998, namely, that “Sections 41,42,45 and 46 of the Civil Jurisdiction and Judgments Act 1982 apply for the purpose of determining whether a person is regarded as “domiciled in the United Kingdom” for the purposes of this Part.”



The Hon. Mr Justice Roth
Chairman



Jane Burgess



Prof. Michael Waterson



Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 9 March 2022