



Neutral citation [2022] CAT 19

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 May 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

RULING: APPLICATION FOR PERMISSION TO APPEAL

1. On 18 August 2021, the Tribunal handed down judgment following remittal of this case by the Supreme Court: [2021] CAT 28 (“*Merricks 2*”). The Tribunal held that a Collective Proceedings Order (“CPO”) would be granted. In light of that decision, it was necessary to specify a domicile date in the CPO. This was strongly disputed between the parties and following a further hearing, on 9 March 2022, the Tribunal issued its third judgment in these proceedings accepting Mr Merricks’ contention that the domicile date should be 6 September 2016: [2022] CAT 13 (“*Merricks 3*”). The Respondents (“Mastercard”) applied for permission to appeal against the decision in *Merricks 3*.
2. Both sides filed written submissions on the question of permission to appeal and they agreed that, as is usual in the Tribunal, this should be determined on the papers.
3. Pursuant to s. 48(1A)(a) of the Competition Act 1998, an appeal lies to (in this case) the Court of Appeal on a point of law arising from a decision of the Tribunal in collective proceedings “as to the award of damages”. Given that the decision as to the domicile date affects the scope of the class and therefore those who may recover damages, we agree with Mastercard that this falls within s. 48(1A)(a), such that the decision may be challenged by way of appeal and does not require the bringing of proceedings for judicial review: see *Paccar Inc v Road Haulage Association Ltd and UK Trucks Claim Ltd* [2021] EWCA Civ 299. We note that Mr Merricks does not seek to contest this question of jurisdiction.
4. Mastercard seeks to advance two grounds of appeal. All paragraph references below are to the judgment in *Merricks 3*, unless otherwise stated.

Ground 1

5. The Tribunal held, as was accepted by both sides, that the determination of the domicile date was a matter for the Tribunal’s discretion: para 24. The Tribunal set out four factors which it regarded as relevant to the exercise of that discretion: para 25. By Ground 1, Mastercard effectively contends that the Tribunal was wrong as a matter of law to have had regard to two of those four factors: i.e., the context of the particular case and the interests of justice. We regard that contention as untenable. In our view, it would be remarkable if a judicial body entrusted by statute with a general discretion

as regards a particular decision cannot have regard to those factors when taking the decision.

6. We also note that although Mastercard accepted that the question of the domicile date was entirely in the discretion of the Tribunal, Mastercard now seeks to argue that “the statutory regime required it to select a date at or around the CPO date as the domicile date”: Mastercard’s Application, para 11. We think that contention is inconsistent with the Tribunal having a discretion as to the appropriate date.

Ground 2

7. Mastercard’s second proposed ground concerns one of the matters referred to in the judgment in consideration of the context of the present case. Accordingly, it appears to be an alternative ground since Ground 1 contends that the only relevant considerations are the structure of the statutory regime and the rationale for having a domicile date, so that the context of the particular case (like the interests of justice) is not relevant in any event.
8. Ground 2 rests on a very narrow point. The Tribunal found that “the clear intention of the claim form considered as a whole” was that persons who were alive on the date the claim form was issued and otherwise met the class definition were included in the proposed class: para 32. Mastercard seeks to argue that this finding was wrong, by reference to various matters, in particular: (a) the proposed timetable for the litigation served with the claim form; (b) Mr Merricks’ skeleton argument for the original CPO hearing; (c) an exchange between the Tribunal and leading counsel for Mr Merricks at the remittal hearing; and (d) the revised proposed timetable for the litigation produced for that remittal hearing: Mastercard’s Application, para 16.
9. We do not see that this argument, even if it were correct, concerns a point of law.
10. Even if it did concern a point of law, we consider it is incorrect. Matters (c) and (d) on which Mastercard seeks to rely occurred in March 2021, four and half years after the issue of the claim form. We do not consider that they can affect the interpretation of the claim form as at the time it was issued. We also do not see that references in counsel’s skeleton argument for a hearing in January 2017 can govern the interpretation of a claim form issued over four months previously. Further, Mastercard does not

engage with the reference at para 32 of the judgment to para 25 of the claim form which clearly sought to estimate the class size on the basis of the numbers living in 2016. That specification of the estimated class size is significant as this is a requirement under the rules governing collective proceedings, as the Tribunal noted. The only point made by Mastercard is that the figure in the claim form was overstated since it made no deduction for those who had died since 1992. But that is nothing to the point: (i) the estimate was expressed as seeking to set out the number who were alive at the time of the issue of the claim form; and (ii) the claim form expressly recognised that this deduction would accordingly have to be made.

11. Moreover, even if the Tribunal's interpretation of the claim form was incorrect in this regard, there remains the other factor which weighed significantly with the Tribunal in determining the appropriate domicile date: the interests of justice. See at paras 36-38. Mastercard significantly does not suggest that the Tribunal's finding as to the interests of justice can be challenged.

Conclusion

12. Accordingly, we consider that neither of Mastercard's grounds of appeal have any real prospect of success and permission to appeal is refused.

The Hon. Mr Justice Roth
Chairman

Jane Burgess

Prof. Michael Waterson

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

Date: 13 May 2022