Neutral Citation Number: [2022] EWCA Civ 1568

Case No: CA-2022-001064

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Roth J, Jane Burgess and Professor Michael Waterson
[2022] CAT 13

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2022

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT

LORD JUSTICE GREEN
and
LORD JUSTICE MALES

- -

Between:

(1) MASTERCARD INCORPORATED **(2) MASTERCARD INTERNATIONAL INCORPORATED** **(3) MASTERCARD EUROPE SA**	**Appellants**
- and -	
WALTER HUGH MERRICKS CBE	**Respondent**

- -
- -

Sonia Tolaney KC and Matthew Cook KC (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Appellants**
Marie Demetriou KC and Anneliese Blackwood (instructed by **Wilkie Farr & Gallagher LLP**) for the **Respondent**

Hearing date: 3 November 2022

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Approved Judgment

This judgment was handed down remotely at 10:30am on Tuesday 29 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

Sir Julian Flaux C:

Introduction

1. The appellants (to whom I will refer as "Mastercard") appeal with permission granted by me against the Order of the Competition Appeal Tribunal ("the CAT") dated 9 March 2022. The appeal concerns a narrow but important point as to the determination of the "domicile date" in collective proceedings.

Factual background

2. The present claim was one of the first to be commenced under the new collective proceedings regime established by the Competition Act 1998, as amended by the Consumer Rights Act 2015. The claims combined in the collective proceedings are "follow-on" claims under section 47A of that Act, being claims for damages for Mastercard's breach of statutory duty in infringing Article 101 TFEU, as determined in a European Commission Decision of 19 December 2007.

3. The Claim Form was issued on 6 September 2016. [22] of the Claim Form defined the proposed class in respect of which an application would be made for a Collective Proceedings Order ("CPO"):

> "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."

4. [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."

5. It is to be noted that the class is thus defined in the Claim Form by reference to individuals who are both alive and living in the United Kingdom "as at the domicile date".

6. The class representative, Mr Merricks, who is the respondent to this appeal, applied for a CPO, but that application was dismissed by the CAT in its first judgment dated 21 July 2017 ([2017] CAT 16). He appealed to the Court of Appeal. On 16 April 2019, the Court of Appeal allowed the appeal and set aside the order of the CAT refusing certification ([2019] EWCA Civ 674).

7. Mastercard appealed that decision to the Supreme Court. On 11 December 2020, the Supreme Court dismissed the appeal and held that the application for a CPO should be remitted to the CAT ([2020] UKSC 51). On 18 August 2021, following the remittal hearing, the CAT granted the CPO applied for by Mr Merricks ([2021] CAT 28). At the remittal hearing, Mr Merricks sought permission to amend the Claim Form to include persons who had died before the commencement of the proceedings, which was refused by the CAT.

8. On 14 January 2022, there was a further hearing before the CAT to deal with consequential matters including determination of the terms of the CPO. On 9 March 2022 the CAT handed down the judgment which is the subject of this appeal, concluding that the appropriate domicile date was 6 September 2016, the date the Claim Form was issued.

Legal framework

9. The framework for collective proceedings is set out in section 47B of the Competition Act 1998, as added by the Consumer Rights Act 2015. Subsections (1)-(2) and (4) provide:

> "(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.".

10. Pursuant to subsection (7)(c) a CPO must specify whether the proceedings are to be opt-in or opt-out. Subsection (10) then defines opt-in proceedings and subsection (11) defines opt-out proceedings:

> "(11) "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."

11. By subsection (14) "specified" means specified in a direction by the CAT. Subsection (12) provides:

> "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."

12. The relevant provisions of the CAT Rules as regards collective proceedings are as follows:

> "73.—(1) The rules in this Part apply to collective proceedings and collective settlement. (2) In this Part—
>
> …
>
> "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;
>
> 80.—(1) A collective proceedings order shall authorise the class representative to act as such in continuing the collective proceedings and shall—
>
> …
>
> (g) specify the domicile date;
>
> 82.—(1) A class member may on or before the time and in the manner specified in the collective proceedings order—
>
> …
>
> (b) in the case of opt-out collective proceedings, either— (i) opt out of the collective proceedings; or (ii) if not domiciled in the United Kingdom at the domicile date, opt into the collective proceedings."

13. In addition to those Rules specific to collective proceedings, Rule 4 sets out governing principles very similar to the Overriding Objective in the Civil Procedure Rules. It provides so far as relevant:

> "4.—(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> …
>
> (d) ensuring that it is dealt with expeditiously and fairly;"

14. In the recent decision of this Court in *BT Group Plc v Le Patourel* [2022] EWCA Civ 593; [2022] Bus LR 660 at [36] Green LJ stated that: "Any Order made under the Rules must take into account the "General Principles" set out in Rule 4."

The judgment of the CAT

15. At the outset of its judgment the CAT noted that the issue before it as regards the domicile date was that Mr Merricks was contending for a domicile date of 6 September 2016, the date when the Claim Form was issued, whereas Mastercard contended that the domicile date should be the date the decision to grant a CPO was made, 18 August 2021.

16. At [5] the CAT stated that 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. The CAT noted that in this case the "domicile date" had wider and more significant implications because of the way in which the class is defined in the Claim Form. Having set out the relevant paragraphs of the Claim Form (which I quoted at [3] and [4] above), the CAT recorded that if the domicile date was the Claim Form date then all individuals who otherwise meet the class definition and were alive at that date are within the class, whereas if it was the CPO date, those who were alive on 6 September 2016, but had died before 18 August 2021 are outside the class.

17. At [8] the CAT explained why that would not normally cause a problem but did in this case because of the way the Claim Form had been drafted:

> "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."

18. At [9] and [10] the CAT noted that the issue of people dying after the issue of the Claim Form and before the grant of a CPO will arise in most cases but was particularly acute

in this case by reason of a combination of the vast size of the class, estimated at 46.2 million and the delay of nearly five years. On the basis that 600,000 people over the age of 16 die each year, some 3 million claims will not be in the class if the domicile date is specified as the CPO date as opposed to the Claim Form date. If the domicile date is specified as the Claim Form date a not insignificant number of people who are no longer living in the UK at the time when the CPO is made will be automatically included unless they opt out, whereas those now living in the UK but who were living abroad when the Claim Form was issued will need actively to opt in if they wish to be included in the proceedings.

19. The CAT then set out the legal framework and the parties' submissions before setting out the Discussion section of its judgment from [24] onwards. At [24] it noted that the legislation does not specify that the domicile date should be at any particular time by reference to the proceedings or what considerations are relevant to the determination of the domicile date. It was agreed by both sides that this was a matter entirely in the discretion of the CAT. The CAT then set out four factors to which it considered that the exercise of discretion should have regard: (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.

20. At [26] the CAT noted that the bringing of collective proceedings by the proposed class representative comprises actual claims by the proposed class members and under section 47B(1) and (4) a CPO is required for the collective proceedings to *continue*. Accordingly, the individual claims are not contingent or potential future claims which only crystallise when a CPO is granted. The CAT said that it was fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made. At [27] it noted that the CAT Rules at r 75(3)(c) require that the Claim Form includes an estimate of the class size which would be problematic if the class size could only be ascertained in the future.

21. At [30] the CAT set out the rationale for the domicile date. I will quote this paragraph in full since much emphasis was placed upon it, particularly by Mastercard, in submissions to this Court:

> "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." (emphasis in the original consultation document).

22. At [31] the CAT turned to the context of the present case, noting that the present application was one of the first for a CPO under a new and innovative regime. It stated:

> "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."

23. At [32] the CAT made the point that all persons who would 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. It stated that:

> "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."

24. At [33] the CAT noted that, since the class was defined by reference to those living on the domicile date, if the CAT were to specify that date as many years after the issue of the Claim Form, it would have been impossible to determine what claims were included when the Claim Form was issued, which would have been inconsistent with the statutory structure for collective proceedings.

25. The CAT then made the point at [34] that given the vast size of the class there was likely to be a not insignificant number of people who were domiciled in the UK in 2016 but ceased to be so by 2021. If the Claim Form date is specified as the domicile date they will be automatically included unless they opt out. Although that might be regarded as a factor favouring the CPO date, the CAT said it bore in mind that if they were not resident in the UK prior to 21 June 2008 and thus within the infringement period, they would not be in the class in any event. For the great majority of those who

were resident in the UK for part or all of the infringement period, the CAT thought it was obvious that their domicile would not have changed between 2016 and 2021.

26. At [35] the CAT considered that the fact that significantly more people who would qualify for inclusion in the class if the domicile date was in 2016 will have died than if the domicile date were to be in 2021, and so for a greater portion of the class the election as to whether to opt in or out would fall on 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. That some people would die between the commencement of the proceedings and the time for election is inherent in the regime.

27. The CAT then turned to the interests of justice, noting at [36] that the reason why Mr Merricks was seeking the specification of the domicile date as the Claim Form date was because some three million people with valid claims when the proceedings were started will have died by 2021 and would otherwise be excluded. The CAT said that would be a windfall for Mastercard. It would result in a significant reduction in the size of the claim as put forward in the Claim Form and would result from the CAT's original erroneous decision to refuse a CPO and the prolonged process of appeal, neither of which was the fault of those who would be excluded.

28. At [37] the CAT said that although Mastercard submitted that this was the consequence of the way the class definition was drafted, that definition left it entirely open to the CAT to determine the domicile date. The CAT continued:

> "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."

29. At [39] the CAT said that:

> "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."

30. In its Conclusion at [40] the CAT said that its conclusion that the Claim Form date should be the domicile date was reached on the particular circumstances of the case, but continued:

> "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."

The grounds of appeal

31. Mastercard pursues two grounds of appeal:

(1) That the CAT failed to exercise the discretion given to it by the Competition Act and the Rules in accordance with its statutory purpose and instead gave substantial and decisive weight to other factors which did not support its conclusion and/or were legally irrelevant and/or in any event could not justify a domicile date inconsistent with its statutory purpose.

(2) That the CAT erred in law: (i) in the approach it adopted to construing the Claim Form; and (ii) in respect of the resulting construction.

The parties' submissions

32. On behalf of Mastercard, Ms Sonia Tolaney KC submitted that the purpose which the CAT adopted for specifying the domicile date was an ulterior purpose falling outside the statutory purpose. The problem that the class representative had faced was all due to the deliberate drafting of the Claim Form. She also asked the Court to note that the Claim Form had been issued five days before the limitation period expired.

33. In relation to the drafting of the Claim Form Ms Tolaney KC made four points: (i) the Claim Form did not define the class as at the date of issue, which it could have done, but rather at the domicile date; (ii) the Claim Form recognised that the function of the domicile date is to determine who has to opt in and who has to opt out; (iii) the Claim Form expressly excluded claims on behalf of individuals who had died before the domicile date. Reliance was also placed on a notice about the proceedings published on the dedicated claim website at the same time as the Claim Form was issued which under the heading "Who would be in the proposed class?" stated: "The Collective Proceedings Order Application asks the Tribunal to allow the proposed claim to proceed on an "opt-out" basis on behalf of all individuals who are living in the UK at the time the claim is allowed to proceed…"; and (iv) it was appreciated that the Claim Form had been issued up against the limitation date.

34. Ms Tolaney KC further relied upon a Proposed Timetable for the litigation also served with the Claim Form which gave the "Expected domicile date" as February/March 2017, not the date of the Claim Form, which implicitly recognised that there would be a delay of some six months between the issue of the Claim Form and the domicile date

set when the CPO was made. She also referred to Mr Merricks' skeleton argument for the original CPO hearing before the CAT in 2017 where it was stated:

> "The Applicant suggests that the date on which the CPO is granted should be used as the domicile date, as this is the point at which there is an actual claim that is proceeding before the [CAT] in which the class members are included."

35. After the Supreme Court dismissed Mastercard's appeal, the matter was remitted to the CAT in 2021. Ms Tolaney KC relied upon an exchange between counsel for Mr Merricks and the chairman of the CAT, Roth J, where it was accepted that the domicile date was not going to be before the CPO was made, so was going to be some time in 2021. This was reflected in the Proposed Timetable for the remitted hearing which identified the expected domicile date as April/May 2021. It was also reflected in the judgment of the CAT of 18 August 2021 following the remittal hearing where at [57] it was stated: "In the present application, it is proposed that the domicile date should be around the same time as the date when the CPO is granted…"

36. Ms Tolaney KC asked the Court to note that at the remittal hearing Mr Merricks was not arguing for a domicile date earlier than the CPO date, but rather it was being argued that deceased persons should be included within the class. The CAT decided that the definition of the class in the Claim Form made it clear that deceased persons were excluded and refused permission to amend the Claim Form on the basis that any claim would have to be brought by the estates of the deceased persons and would now be time-barred.

37. She referred to the fact that the case management conference on 14 January 2022 was the first time when it was suggested by the class representative that the CPO date should be the Claim Form date. She submitted that until then neither side had ever contemplated that the CPO date would be, as she described it, backdated in that way. This was only suggested because of the limitation issues when the CAT refused permission to amend in August 2021 on limitation grounds. She submitted that this all demonstrated that the CAT's statutory discretion was exercised for the ulterior purpose of circumventing the class definition in the Claim Form and the limitation issue. This was not the statutory function of the domicile date. This was a point to which she returned and emphasised in her reply submissions.

38. Ms Tolaney KC submitted that at [30] of the judgment the CAT had correctly identified the rationale of the domicile date which was to avoid subjecting defendants to claims by enormous international classes. However, as the remainder of the judgment demonstrates, the CAT had done something different. She submitted that the last sentence of [40] was crucial: "The two concepts [of class definition and domicile date] should be kept separate, and the domicile date limited to its particular statutory purpose". This was a recognition by the CAT that in this case it had not limited the domicile date to its statutory purpose but done something different to meet the perceived circumstances of the case. The CAT has ignored the statutory function or purpose which is to do with territoriality.

39. Ms Tolaney KC submitted that the failure of the CAT to specify the domicile date in accordance with its statutory purpose was an error of law. In support of the principle that a statutory discretion must be exercised consistently with the objects and scope of

the statutory scheme, she relied upon the decision of the Divisional Court in *R (World Development Movement Ltd) v Secretary of State for Foreign and Commonwealth Affairs)* [1995] 1 WLR 386. In that case the Foreign Secretary made a provisional decision to grant government aid to a project in Malaysia under the Overseas Development and Cooperation Act 1980 pending a full economic appraisal. The appraisal concluded that the project was uneconomic but the Foreign Secretary decided to go ahead with the aid anyway to avoid undermining the government's credibility. It was common ground that the Foreign Secretary had a discretion as to whether to grant aid and the question for the Court was whether the discretion was unfettered. The Court held that it was not. Ms Tolaney KC relied upon the statement of principle in the judgment of Rose LJ at 398B-C:

> "In the present case Mr. Pleming submitted that the power to furnish assistance is not absolute or unfettered, but could only be exercised to advance the purposes for which it was conferred. The principle is correctly summarised by Professor Wade in Administrative Law, 7th ed. (1994), p. 413: "statutory powers, however, permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.""

40. She also relied upon the statement of principle by Lewison LJ in *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121; [2018] QB 256 at [105]. That case concerned the discretion conferred upon the Court by section 7(9) of the Data Protection Act 1998. Lewison LJ said:

> "I am bound to say that I have difficulty with the notion that a discretion conferred upon the court by legislation is "general and untrammelled". A discretion conferred upon the court by legislation is conferred upon the court *for a purpose*. When the court is called upon to exercise that discretion it must do so in furtherance of the purpose for which it is conferred. The discretion under section 7(9) only arises if the court is satisfied that the data controller has failed to comply with his obligations under section 7. So the starting point for the exercise of the discretion is that there has been a breach of duty."

41. Reliance was also placed on what was said by Lord Hope of Craighead in *Stewart v Perth and Kinross Council* [2004] UKHL 16 at [28]:

> "…it is clear that the discretion which is vested in the licensing authority is not unlimited. The authority is not at liberty to use it for an ulterior object, however desirable that object may seem to it to be in the public interest…"

Ms Tolaney KC submitted that, applying these principles, the Court had to look rigorously at what the discretion in relation to the domicile date was conferred for. It was not a discretion in relation to the operation of the collective proceedings scheme as a whole or generally as to the interests of justice.

42. She submitted that, as was common ground, the purpose of the domicile date, which the CAT Rules required the CAT to specify, is to determine whether a person who falls within the class definition is domiciled in the UK for the purpose of being automatically included unless they opt out or whether they will only be included if they opt in. She accepted that the CAT had a discretion, so that the domicile date may be different in different cases, but submitted that the discretion was not unfettered and had to be exercised in accordance with the statutory purpose, which was to ensure that the Court did not assume jurisdiction over individuals domiciled abroad unless they specifically consent by opting in. It could not be exercised for the ulterior purpose of addressing limitation issues and remedying the drafting of the Claim Form.

43. In relation to reliance on rule 4 and the judgment of this Court in *Le Patourel* (the point made at [14] above), Ms Tolaney KC submitted that, as one could see from rule 4(2), the rule was really dealing with case management. It was not saying that jurisdictional limits imposed by Parliament could be stretched to meet the interests of justice.

44. Ms Tolaney KC eschewed any suggestion that the domicile date and the CPO date had to be the same, but she did submit that when Rule 73(1) (set out at [12] above) defines "domicile date" it uses the present tense "is domiciled" suggesting someone who is domiciled here when the CPO is made, not some earlier date which the CAT thinks appropriate or when the Claim Form was issued. She submitted that the same point about UK domiciled claimants when the CPO was made arose from [5.57] of the government consultation in 2013 quoted in [30] of the CAT judgment.

45. In relation to the second ground of appeal, Ms Tolaney KC submitted that, contrary to what was said in the skeleton argument for Mr Merricks, the construction of a written document, including a Claim Form, is a question of law and when, in construing a document the Court was looking at the intention of the parties, that was always the objective intention. At [32] of its judgment the CAT was looking at subjective intention which was not right.

46. She submitted that it was trite that in construing the document one looked at it in its proper context which included looking at documents served as part of the same suite of documents, here the Proposed Timetable and the notice referred to at [33] and [34] above. Those documents and [23(d)] of the Claim Form made it clear that by definition it was intended that some people who died between the issue of the Claim Form in September 2016 and the expected date of the CPO in February/March 2017 would not be included in the class. She also submitted that it had been bold of the CAT to say at [32] what the intention was when in all the subsequent material until the case management hearing in January 2022 Mr Merricks had been contending for the domicile date to be the date the CPO was made. There was effectively a concession made by counsel at the hearing in August 2021 (referred to at [35] above) in relation to which Ms Tolaney KC relied upon what Rix LJ said in *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8 at [84]:

> "Although the question of construction being dealt with by the judge was ultimately one of law and the judge was therefore not strictly bound to accept Mr Kealey's concession with respect to this second presentation, I do not think that the judge ought to have rejected it. After all, the question of construction on a one-off presentation concerned only the parties to it, and Mr Kealey's

> concession had obviously been carefully considered and approved by his clients, who are clearly as experienced in reading and evaluating such documents as anyone. A judge would have to be very sure of his or her ground before rejecting such a concession."

47. On behalf of Mr Merricks, Ms Marie Demetriou KC submitted that for its appeal to succeed, Mastercard needed the statutory purpose of the domicile date to be narrow and specific, namely that the CAT should not assume jurisdiction over those domiciled abroad unless they specifically consent. However, there was nothing in the statute to support that narrow purpose. She pointed out that if that was the purpose, given that fifteen months have now passed since the CPO date and there is yet to be any notification of this claim because of the appeal, so that the opt in or opt out process is yet to be initiated, it would follow that, on Ms Tolaney KC's argument, in that interim period there will be people who have moved out of the jurisdiction who are nonetheless bound in by the CPO. However, Mastercard was not arguing that the domicile date should be the date of notification and as soon as it was not saying that, its statutory construction argument collapsed.

48. She submitted that the reality of the matter is that there is nothing in the statute that says that the domicile date has to be the CPO date or that supports the narrow purpose for which Mastercard contends, although she accepted that there would be many cases in which the CPO date was the appropriate domicile date as in the other recent cases in which the CAT had made a CPO.

49. In relation to section 47B of the Competition Act 1998, Ms Demetriou KC submitted that Mastercard's submission that the CPO date was the date when the CAT asserts jurisdiction over the claim is simply incorrect. Jurisdiction over any given claim is founded by the issue of the proceedings not the CPO, which is made clear by section 47B(3) and (4) which say that proceedings brought under section 47A "may be continued" in collective proceedings if the CAT makes a CPO. During the course of argument, Males LJ made the point that one was not talking about founding jurisdiction in the traditional sense of founding jurisdiction against a defendant, but if the class representative has not got a CPO and may never get one, why should he be able to say that jurisdiction was founded over people specified in the class.

50. Ms Demetriou KC accepted the force of that point, but said that jurisdiction was being used in a different sense here. The CAT had jurisdiction in the traditional sense over the defendants so that there was no question of the CAT asserting jurisdiction over persons over whom it should not do so. She accepted that, although the CAT had jurisdiction in principle in relation to claimants within the class, if they were domiciled abroad and had not opted in, there was a question as to why the claim should be continued on their behalf and this was undoubtedly a consideration that the CAT in the exercise of its discretion would take into account. What the CAT was doing at the stage when it made a CPO was not asserting jurisdiction but certifying the collective proceedings, permitting them to continue.

51. The CAT had correctly recognised that the rationale for the domicile date was to ensure a connection between the class members represented and the jurisdiction. However, she submitted that the real question for the Court was whether that meant that the statutory purpose of the domicile date was so narrow as to require the Court to set it at the CPO

date. It was clear from section 47B as a whole and, in particular (7) and (11), that Parliament has decided that the domicile date should not be fixed at a particular date but left to the discretion of the CAT. If Parliament had intended such a narrow purpose it could easily have provided expressly that the domicile date should be the CPO date. Furthermore, the statute was not saying that when setting the domicile date, the CAT had to ensure that nobody who was resident outside the jurisdiction at the date of the CPO was bound by the collective proceedings unless they opted in.

52. In relation to Ms Tolaney KC's point about the use of the present tense in the definition of "domicile date" in Rule 73(2) Ms Demetriou KC submitted that the word "is" was referring back to the domicile date itself, not the CPO. In relation to the primary legislation, Ms Demetriou KC submitted that section 47B(11) made it clear that any class member who was not domiciled in the UK at "a time specified" (i.e. the domicile date as directed by the CAT) had to opt in whereas those domiciled in the UK at the domicile date were automatically included unless they opted out. All the domicile date is doing is establishing a connection with the UK. It did not have the narrow purpose contended for by Mastercard of avoiding the inclusion in the class at the CPO date of any foreign domiciled person.

53. Ms Demetriou KC submitted that cases like *World Development Movement* did not assist. She accepted the principle that courts and public bodies should not act for ulterior purposes, but the CAT was not acting for an ulterior purpose here. The relevant statutory provision in that case was set out in section 1(1) of the Overseas Development and Cooperation Act 1980:

> "The Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature."

54. It had been found on the facts that the development in question was not one which promoted the development or maintained the economy of Malaysia because it was uneconomic, so it was unsurprising that the Court found that the decision of the Government, which was essentially to maintain the financial assistance to save face, was not a decision within the statutory purpose. In the present case, the purpose was not set out in the statute in that specific way.

55. Ms Demetriou KC pointed out that the Court had not said that the government could not take account of political goodwill or saving face in reaching its decision, just that it could not do so if that was its only purpose because the statutory purpose was to promote development. This was clear from the judgment of Rose LJ at 402E-G:

> "The Secretary of State is, of course, generally speaking, fully entitled, when making decisions, to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests. In the present case, the political impossibility of withdrawing the 1989 offer has been recognised since mid-April of that year, and had there, in 1991, been a developmental promotion purpose within section 1 of the Act of

> 1980 , it would have been entirely proper for the Secretary of State to have taken into account, also, the impact which withdrawing the 1989 offer would have had, both on the United Kingdom's credibility as a reliable friend and trading partner and on political and commercial relations with Malaysia. But for the reasons given, I am of the view, on the evidence before this court, that there was, in July 1991, no such purpose within the section. [i.e. no purpose to promote development] It follows that the July 1991 decision was, in my judgment, unlawful."

56. Ms Demetriou KC said that she was not going to make submissions about the other cases which Ms Tolaney KC had relied upon since they were only relied upon to make good the general proposition that discretions have to be exercised in accordance with the statutory purpose, not an ulterior purpose, which was not a proposition that was disputed.

57. She drew attention to the statement in Mastercard's skeleton argument that it was not contending for a universal and definitive rule that the domicile date must always be on or around the CPO date, but Ms Demetriou KC submitted that this was inconsistent with Mr Tolaney KC's submission as to the narrow statutory purpose of the domicile date, that on the date when the CAT assumes jurisdiction, the CPO date, there should be no foreign domiciled individuals in the class unless they opt in. Ms Demetriou KC submitted that that was exactly the same thing as having a definitive rule that the domicile date must be the CPO date.

58. She submitted that Mastercard, having disavowed that the domicile date always had to be the CPO date, said that in this case the CAT was required to choose the CPO date because a not insignificant number of foreign domiciled individuals would otherwise be automatically included. However, she submitted that could not be the statutory test, as it was far too vague. It would leave the CAT trying to fix a domicile date by reference to when the least number of foreign domiciled individuals would be included. She submitted that this illuminated that this appeal was not really about an error as to the statutory purpose. The real complaint was that the CAT had given insufficient weight to the factor of the not insignificant number of foreign domiciled individuals who would otherwise be automatically included, but that was not a complaint that Mastercard could make in this Court unless they could show that the CAT erred on *Wednesbury* grounds, which it had not sought to do, quite understandably.

59. Ms Demetriou KC submitted, by reference to the decision of this Court in *Le Patourel*, that the overall purpose of the collective proceedings regime is to vindicate the rights of individuals who could not bring claims otherwise. Given that overall purpose, she submitted that, on the basis that if Mastercard were right some three million people who did have claims when the Claim Form was issued will have lost those claims through no fault of their own, it is obvious that the CAT was right in its specification of the domicile date. However, she emphasised that she did not need to show that the CAT exercised its discretion correctly, only that it did not stray in law.

60. In response to Ms Tolaney KC's reliance on the limitation issue, Ms Demetriou KC submitted that the class members had valid claims when the Claim Form was issued which were not time-barred. It is only because of the five-year delay and the way the Claim Form was drafted that, on Mastercard's case, any of those with valid claims

would fall outside the class if the CPO date was the domicile date. The limitation point was a non-point but in so far as it was a point at all, it was in Mr Merricks' favour because it reinforced the injustice of Mastercard's position.

61. The other point Ms Tolaney KC had placed emphasis on was the history of the case and what had been said on behalf of Mr Merricks at an earlier stage about the domicile date. Ms Demetriou KC submitted that this was totally irrelevant to the question of statutory construction, which was a matter for the Court and in any event, the reason why the class representative had not previously argued that the domicile date should be the Claim Form date was that there was thought to be a much more powerful argument which ultimately failed, that the Claim Form on its proper construction encompassed people who had died, including people who had died before the Claim Form was issued. It was only when that argument and the application to amend failed that the argument about the domicile date came into sharp focus.

62. In relation to the second ground of appeal, Ms Demetriou KC noted that Mastercard sought to attack one of the findings of the CAT in the section of the judgment dealing with the context of the case as one of the four broad heads which the CAT took into account in exercising its discretion. She submitted that it was difficult to see where this ground went since it is perfectly clear that, when issuing the claim, Mr Merricks did not intend the result contended for by Mastercard, in other words he did not intend that people who had a claim when the proceedings were issued but who died at any point in the next five years would be excluded from the class and their estates would not be able to pursue their claims. She submitted that the gravamen of the point which the CAT was making at [32] was that no-one expected that it would take five years for the CPO to be made. The pleading contemplated that it might take a few months. She accepted that the reference to the intention of the Claim Form was slightly loose language.

63. What she submitted in relation to this ground was that, in summary, it was shooting at the wrong target. The CAT was saying no more than that it cannot have been intended that the domicile date would be specified five years after the Claim Form. Reading more into [32] of the judgment was to seek to construe it as a statute.

Discussion

64. In my judgment, the Court should approach the issues raised on this appeal on the basis that the overall purpose of the collective proceedings regime, as the CAT recognised, is to provide access to justice for individual claimants who would not otherwise be able to obtain legal redress. This point was put very clearly by this Court in *Le Patourel* at [29]:

> "Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase *ex ante* incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis

> is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims."

Unless it could be said that the specification of the domicile date was somehow constrained by it having some narrower statutory purpose, the CAT was entitled to approach the discretion which it is common ground that it was given by the Competition Act 1998 and the CAT Rules with a view to giving effect to that overall purpose of the regime.

65. The CAT was no doubt correct to conclude at [30] that the rationale for the domicile date was to avoid subjecting defendants to claims by enormous international classes, but the fallacy in Mastercard's entire argument on this appeal is that this meant that the statutory purpose of the domicile date and the discretion given to the CAT in specifying the domicile date was somehow limited to the same extent. I agree with Ms Demetriou KC's submission that the effect of Mastercard's case that the statutory purpose was limited in that way would be that the domicile date would always have to be the CPO date or a date near to the CPO date, even if wider considerations which gave effect to the overall purpose of the regime pointed to a different date. However, there is simply nothing in the statutory provisions in the present case which limits the CAT's discretion in that way. Nothing in the statute dictates when the domicile date should be or defines the purpose of the domicile date, a fundamental distinction between this case and other cases relied upon by Mastercard, such as *World Development Movement*, where the statute defines and limits the statutory purpose of the provisions under consideration.

66. Despite the spirited submissions advanced by Ms Tolaney KC, none of her various points leads to the conclusion that the statutory purpose of the domicile date is limited in the way for which Mastercard contends. The point about the various documents served with or at the same time as the Claim Form all proceeding on the basis that the CPO date would be the domicile date and submissions on behalf of Mr Merricks also having proceeded on the same basis until the case management hearing in January 2022 is of no relevance when the issue in the case is one of statutory construction. In any event, as Ms Demetriou KC submitted, when the Claim Form and accompanying suite of documents were served, it is clear that no-one thought that there would be a five-year delay before the CPO was made. Whilst it is true that, at the remitted hearing in August 2021, counsel for the class representative was advocating the CPO date in 2021 as the domicile date, attention was focused on seeking to amend the Claim Form to include persons who had died before the CPO was made and it was only when that application for permission to amend failed that attention shifted to the domicile date being specified as an earlier date.

67. So far as limitation is concerned, the members of the class had valid claims when the Claim Form was issued which were not time-barred. It is only because of the five year delay in the making of the CPO and the way in which the Claim Form was drafted that, if Mastercard is right in its argument that the domicile date should be the CPO date, some three million members of the class who have died since the Claim Form was issued will have lost their claims as Ms Demetriou KC correctly said, through no fault of their own. I agree with her that any limitation issue is really in favour of the claimants because that consequence of Mastercard's argument would be unjust. The CAT was entitled to have that point in mind when it exercised its discretion.

68. Although, as I have said, Ms Tolaney KC eschewed any suggestion that the domicile date and the CPO date have to be the same in every case, the effect of the narrow statutory purpose of the domicile date for which she contends, which is to ensure that, on the CPO date, there should be no foreign domiciled individuals in the class unless they opt in, is that the domicile date and the CPO date do have to be the same. However, as I have said, there is nothing in the statute or the Rules which supports that conclusion and if that had been the intention of Parliament, it could easily have said so. Certainly the use of the present tense in the definition of "domicile date" does not support that conclusion. The words "is domiciled" are clearly referring back to the "date specified" not to "a collective proceedings order".

69. Contrary to Ms Tolaney KC's submission, referred to at [38] above, the last sentence of [40] of the judgment is not a recognition by the CAT that it had exercised its discretion in this case for an ulterior purpose. The CAT was addressing a different point in that sentence, as is clear from the previous sentence, namely the undesirability of the way the Claim Form had been drafted to make the class definition dependent on the domicile date and the need to keep the two concepts of class definition and domicile date separate. The CAT was simply making the point that Claim Forms should not be drafted as this one was in future.

70. Once it is recognised that the statutory purpose of all the provisions, including the domicile date, is the broad one identified in *Le Patourel* as cited at [64] above, it follows that the discretion given to the CAT as to specifying the domicile date is unfettered, save that in exercising the discretion the CAT cannot disregard that overall statutory purpose. The CAT clearly did not do so here. On the contrary, it recognised that, if it acceded to Mastercard's case that the domicile date should be the CPO date then, on the facts of this case, it would follow that some three million people who had valid claims when the proceedings were started in 2016 who had died by 2021 would be excluded from the class. As the CAT said at [36] of its judgment, this would be a windfall for Mastercard. To put the same point another way, the effect of Mastercard's case would be to thwart, at least to a significant extent, the overall purpose of the regime.

71. Given that the discretion of the CAT is unfettered save for the requirement to have regard to the overall purpose of the regime, I agree with Ms Demetriou KC that this Court could not and should not interfere with the way in which the CAT exercised its discretion unless it had erred in law. The Court should be particularly careful not to interfere with exercises of discretion or case management decisions by the CAT as an expert specialist tribunal: see [57] of the judgment in *Le Patourel*. In the present case, that need for appellate judicial restraint does not arise because I agree with the way in which the CAT exercised its discretion and do not consider that it made any error of law.

72. Even if, contrary to that conclusion, Mastercard were right as to the statutory purpose of the domicile date being limited in the way for which it contends, the decision of the CAT does have proper regard to that purpose, which it identifies clearly at [30] of its judgment and which was one of the factors to which it had regard in exercising its discretion (see [25] of the judgment). Contrary to Mastercard's submissions, specifying the Claim Form date as the domicile date in the present case did not disregard the rationale for or purpose of the domicile date which the CAT had identified. Only persons who were domiciled in the UK when the Claim Form was issued are thereby

automatically included in the class unless they opt out. All such persons had a close connection with the UK at that time and the fact that some of them may have moved abroad and no longer be domiciled in the UK since the Claim Date does not negate that close connection at the time when proceedings were commenced.

73. Accordingly, specifying the domicile date as the Claim Form date did give effect to the rationale for the domicile date even if it also took account of other wider considerations. As is clear from the passage in the judgment of Rose LJ in *World Development Movement* cited at [55] above, the CAT was entitled to have regard to those other wider considerations to which it referred, including the interests of justice. Indeed, as Green LJ made clear at [36] of the judgment in *Le Patourel*, in making an order specifying the domicile date, the CAT was obliged to take account of the "Governing Principles" in Rule 4 of the CAT Rules which include dealing with each case justly and fairly. Taking account of the interests of justice, as the CAT did in this case, was not only appropriate, but obligatory.

74. So far as the second ground of appeal is concerned, I agree with Ms Demetriou KC that [32] of the judgment is rather awkwardly worded but that the CAT is not, as Mastercard contends, looking at the subjective intention of the class representative in the wording of the Claim Form. Rather it is making the more general point that it cannot possibly have been intended that people who had a valid claim when the Claim Form was issued but who died in the next five years would be excluded from the class and their estates would be unable to pursue their claims. In my judgment there is nothing remotely objectionable about that expression of objective intention. Obviously, when the Claim Form was issued no-one expected that it would be five years before a CPO was made. That much is clear from the Proposed Timetable referred to at [34] above, which anticipated a CPO being made in February/March 2017. Accordingly, in my judgment there is nothing in the point made in the second ground that in construing the Claim Form the CAT made an error of law. The exercise of discretion by the CAT in the present case was unimpeachable.

75. For all these reasons, the appeal must be dismissed.

Lord Justice Green

76. I agree.

Lord Justice Males

77. I also agree.