



Neutral citation [2022] CAT 27

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 June 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

Class Representative

- and -

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

Defendants

RULING (COSTS)

1. The Tribunal has now given three judgments 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 judgment largely upheld by the Supreme Court, which issued its decision on 11 December 2020, remitting 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 filed a draft amended claim form following that judgment. The third judgment was given on 9 March 2022: [2022] CAT 13. It determined what should be the domicile date for the purpose of the CPO, which was a matter strongly disputed between the parties, and dealt with an application to amend the claim form and some ancillary matters. Following that judgment, a CPO was made on 18 May 2022.
2. Like the judgments, this ruling will refer to the Defendants as “Mastercard”. The ruling concerns two principal matters:
 - (1) The costs between 19 August 2021 and 9 March 2022 (i.e. following *Merricks 2* down to the judgment in *Merricks 3*); and
 - (2) Payment on account of costs under all the costs orders.

Since we have received several responsive written submissions on costs, there is additionally the question of the costs of preparing those costs submissions.

(1) Costs between 19 August 2021 and 9 March 2022

3. On the main issue which was in dispute in the hearing leading to the judgment in *Merricks 3*, Mr Merricks was successful. At the same time, there were some matters which arose following the judgment in *Merricks 2* which both parties

addressed at the hearing, including consideration of the draft amended claim form, the proposed wording of the CPO, and directions for future pleadings.

4. Mastercard submits that the cost for this period should be costs in the case. We do not agree. Although termed a CMC, the hearing in January 2022 was part of the process leading up to the making of the CPO. It was not a CMC in the collective proceedings themselves, which now get under way and for which the parties have indeed requested a separate CMC. The making of the CPO is a watershed in collective proceedings and to the extent that opposition by the proposed defendants occasions additional costs for the proposed class representative in the period leading up to the CPO, it is just and appropriate that those defendants should be liable for those costs.
5. In those circumstances, we consider that the appropriate order is that Mr Merricks should recover his costs of and associated with the hearing in *Merricks 3*, subject to a small discount to reflect the matters other than the domicile date which he would have had to address in any event at the hearing to amend his pleadings. In this case, we think that discount should be no more than 15%, and that element of the costs of both parties should be costs in the case. Therefore as regards the costs of and relating to the hearing on 14 January 2022 and the judgment of 9 March 2022, Mastercard is to pay 85% of Mr Merricks' costs and 15% of the costs of both Mr Merricks and Mastercard in that regard are costs in the case.
6. Mr Merricks sensibly does not seek summary assessment of those costs. As with all the other costs ordered to date, those costs will accordingly be subject to detailed assessment if not agreed.
7. Mr Merricks has filed a schedule of costs covering the period 18 August 2021¹ to 23 March 2022. The end date is stated to be chosen so as to cover the costs of preparing the various costs submissions, which largely concern the question of payment on account. The start date means that the schedule covers not only

¹ Since 18 August 2021 was the date of the judgment in *Merricks 2*, we do not think that the fact that the schedule is stated to start on that date and not on 19 August makes any material difference.

the costs of and related to the hearing on 14 January 2022 but all Mr Merricks' costs following the remittal judgment in *Merricks 2*. As stated in the schedule, it therefore includes costs of preparing the amended claim form and correspondence with specialist estates lawyers in England & Wales, Northern Ireland and Scotland. It also covers further experts' fees. Those further costs and fees do not appear to relate to the question of the domicile date but to the amendments following on the Tribunal's judgment in *Merricks 2* and Mr Merricks' wish to include the estates of those who died after the CPO application was made. Although Mastercard has suggested that the dividing line should be 6 January 2022 when it made its position clear as to the domicile date, we do not feel confident that this is the appropriate point. We think the fair and proportionate order is therefore that all costs between 18 August 2021 and 9 March 2022, insofar as not covered by the ruling in paragraph 5 above, shall be costs in the case. To be clear, that will include Mr Merricks' costs relating to preparation of his amendment to include the estates of those who died after the CPO application was made.

8. We deal separately at the end of this ruling with the costs of and relating to the various submissions on costs that are now before us.

(2) Payment on account

9. In addition to the ruling above, the Tribunal has made the following orders for costs in these proceedings:
 - (a) Mr Merricks' costs up to service of the claim form on 9 September 2016 shall be costs in the case;
 - (b) for the period from service of Mastercard's response on 30 November 2016 to 23 November 2017 (the date of the original costs ruling following *Merricks 1*), Mastercard is to pay Mr Merricks 80% of his costs, and the balance shall be costs in the case; and

(c) for the period from remittal to the Tribunal on 11 December 2020 to the judgment in *Merricks 2* on 18 August 2021, Mr Merricks is to pay Mastercard's costs, and 15% of Mr Merricks' costs shall be costs in the case.

10. It is common ground that the Tribunal may order a payment on account of costs. Indeed, the Tribunal made such an order in favour of Mastercard in its ruling on 23 November 2017 after dismissing the CPO application in *Merricks 1*. Both Mr Merricks and Mastercard now respectively seek orders for payment on account of the costs ordered in their favour. The principles governing the amount of costs to be ordered on account are not in dispute: the court or tribunal should seek to order a realistic estimate of the reasonable costs likely to be determined on detailed assessment, with an appropriate margin to allow for an overestimate: *Excalibur Ventures LLC v Keystone Inc* [2015] EWHC 566 (Comm).

Mr Merricks' costs for period (b)

11. As regards period (b), Mr Merricks' solicitors served a summary schedule which shows the total costs incurred in the amount of £369,821.48 + VAT. Pursuant to the Tribunal's ruling, and as recognised in his solicitors' subsequent letter, Mr Merricks can claim 80% of that amount, i.e. £295,857.18 + VAT. Mr Merricks seeks an interim payment of 80% of this sum: £236,685.74 + VAT, or £284,022.88 in total.

12. Mastercard's objections to some particular elements of that schedule are somewhat surprising given that in the initial costs ruling of 23 November 2017, [2017] CAT 27, the Tribunal noted that Mastercard's costs of opposing the CPO application amounted to no less than £1,992,961, including solicitors' fees of over £1¼ million and Counsel's fees of well over £600,000: see at [26]. We do not suggest that this is in any way a benchmark against which Mr Merricks' fees should be measured: indeed, in the 2017 ruling the Tribunal stated that Mastercard's level of costs was wholly unreasonable and disproportionate: [28]. Nonetheless, the fact that Mastercard incurred that level of costs opposing the CPO application puts the costs incurred by Mr Merricks into perspective. For

example, Mastercard complains of the involvement of four Counsel (including three QCs) instructed by Mr Merricks for the original CPO hearing. However, Mastercard similarly instructed four Counsel on the application, including two QCs and a senior junior.

13. Moreover, we consider that Mastercard's particular objections to the costs of Mr Bacon QC and the various foreign lawyers are mistaken. Those costs were related to the grounds of Mastercard's opposition to the CPO application, concerning, respectively, costs matters under Mr Merricks' litigation funding agreement and the approach to collective or class actions in foreign jurisdictions. As regards the latter, it was reasonable for Mr Merricks to seek foreign legal advice to meet the objections and the resulting costs claimed are proportionate. In our 2017 costs ruling, we held that a reasonable and proportionate estimate for the fees of Mastercard's Counsel (claimed at over £600,000) was no more than £250,000 *excluding* the fees of specialist costs counsel: see at [31]. The total costs incurred by Mr Merricks for all his Counsel is £190,800 (plus VAT) and we consider that in all the circumstances of this exceptional case, that is reasonable and proportionate.

14. A separate objection is taken to the charging hourly rates of the individual solicitors. It is true that these are very markedly above the guideline hourly rates issued in November 2021 in Appendix 2 to the "Summary Assessment of Costs Guide", a fact that is even more striking given that they relate to a period 4-5 years earlier. Other things being equal, that would be a strong basis for making a substantial reduction in the amount recoverable: see para 20 below. However, even with those high rates, the total amount claimed for solicitors is £122,552.50. The explanation for that is that the schedule does not include a further approximately £300,000 in solicitors' time cost that was incurred but "not billed due to the litigation funding limits under Mr Merricks' previous litigation funding arrangement". Mastercard contends that this is irrelevant since Mr Merricks cannot recover under the indemnity principle for costs for which he is not liable. However, the fact that the solicitors therefore cannot charge for a significant part of the time actually worked, in our view, makes it reasonable for them to charge a higher rate for the time for which they can recover. The CPO application involved not only a heavy three day hearing but

also the prior service of a substantial written reply to Mastercard's objection to the application which was based on various grounds. This was also a pioneering application, being only the second CPO application since the collective proceedings regime came into force. Taking a broad brush approach for the purpose of interim payment and looking at the overall sum, we consider that £122,552.50 for solicitors' fees is reasonable and proportionate.

15. Accordingly, we think that the 80% proportion at £295,857.18 (plus VAT) is likely to be fairly close to a reasonable and proportionate figure. Although Mr Merricks has sought by way of interim payment 80% of that amount, we think a slightly higher margin for overpayment is appropriate and therefore hold that he should receive 75% of that figure, i.e. £221,892.88 plus VAT, or £266,271.45 including VAT.

Mastercard's costs for period (c)

16. Mastercard's solicitors have served a revised summary costs schedule in respect of the period December 2020 to March 2021² in the total amount of £778,661.82, made up as follows:

Solicitors' costs	£505,073.50
Counsel's fees	£251,804.32
Other disbursements	£ 21,784.00

17. The remittal hearing in March 2021 took two days (heard remotely). It essentially concerned two major issues: deceased persons and compound interest, with an additional point concerning the terms of the undertaking that Mastercard sought in terms of liability for costs. Mastercard states that its revised schedule is limited to its costs of those issues.
18. We have to say that we regard costs of over £0.75 million in relation to those matters as wholly unreasonable and disproportionate. We repeat what the Tribunal said with regard to Mastercard's costs in its 2017 ruling, at [29]:

² Although the Tribunal's order covered costs to 18 August 2021, Mastercard has sought to claim costs only to March 2021, presumably on the basis that no material costs were incurred between the hearing and issue of the judgment.

“A party to litigation is free to spend as much as it wishes on lawyers, but the Tribunal, like the courts, will control how much it can recover from the other side. In that regard, proportionality is not to be assessed simply by comparing the level of costs with the amount at stake in the litigation but having regard to all the circumstances, including consideration of the legal work which the nature of the case reasonably required. As Leggatt J said in *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), at [13]:

“In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants.”

19. From looking at the schedule, it seems to us that there are two distinct aspects which have contributed to the disproportionate total sums.
 - (1) As regards Counsel, Mastercard has used 3-4 Counsel throughout this period, including a senior junior (who then became a QC) as well as an experienced QC. By contrast, Mr Merricks used two Counsel, both QCs although the second was a very recent QC. We think that involvement of more than two counsel was disproportionate for this period of the proceedings although we recognise that sometimes delegation of work to an additional, more junior counsel can result in a saving. In our view, a generous allowance for Counsel over this period should be no more than £85,000.
 - (2) As regards the solicitors, the hourly rates charged by Freshfields for all levels of fee-earner other than trainees are very substantially in excess

of the guideline hourly rates issued in November 2021 for “very heavy commercial and corporate work by centrally based London firms”. In the months December 2020-January 2021, the rates were 25-39% above the guidelines; in February-March 2021, after the rates were increased, the partner rate was almost 70% above the guidelines. The effect of those higher rates is magnified by the extraordinary number of hours worked over this period by solicitors at partner and very senior associate level.

20. In *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, the Court of Appeal recently commented on the charging of rates well above the guideline rates in competition litigation. Males LJ (with whom Lewison and Snowden LJJ agreed) said, at [6]:

“If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate.”

21. We note that Mastercard does not put forward any justification for charging so far in excess of the guideline rates and indeed in its response to Mr Merricks’ application for costs, criticises those costs on the basis that Mr Merricks’ solicitors are charging rates well above the guidelines.
22. This is not a summary assessment of costs and we need to look at the matter in the round for the purpose of an interim payment. We do not accept Mr Merricks’ submission that Mastercard should not be entitled to its costs of the CMC which preceded the remittal hearing. Nonetheless, we think the reasonable and proportionate estimate for Counsel fees for this period is no more than £90,000 and for the solicitors’ fees, we think a reasonable and proportionate amount is £120,000. Making a slight deduction to allow for possible overpayment, the interim payment by Mr Merricks relating to this period will accordingly be £190,000.

Mr Merricks’ costs pursuant to para 5 of the present ruling

23. Mr Merricks' solicitors have served a costs schedule covering his costs between 18 August 2021 and 23 March 2022. That shows his total costs in the amount of £519,788.71 plus VAT. The breakdown of this total is as follows:

Solicitors' costs	£ 394,009.00
Counsel's fees	£ 82,093.33
Specialist lawyers' fees re estates law	£ 7,500.00
Experts' fees	£ 35,966.38
Other disbursements	£ 220.00

24. However, as noted at para 7 above, this is manifestly over-inclusive since it covers all the costs following the judgment in *Merricks 2*, including an estimate of preparing the submissions as to costs, and not simply Mr Merricks' costs of and related to the hearing in *Merricks 3*. This creates obvious difficulties in seeking to arrive at an estimate of the relevant costs for the purpose of an interim payment.

25. As regards Counsel's fees, the schedule shows fees for five Counsel but only three of those appeared at the January 2022 hearing. Taking account of the fees only of Mr Harris QC, Ms Blackwood and Mr Cerim reduces the total for Counsel to £65,865, and we reduce it further to £60,000 to reflect the fact that the fees for Ms Blackwood and Mr Cerim also appear to encompass their participation in preparation of the costs submissions. £60,000 seems to us a reasonable and proportionate total for costs relating to the January 2022 hearing.

26. As regards the solicitors' fees, even taking account of the fact that they cover more than relates to the January 2022 hearing, they are in our view wholly unreasonable and disproportionate. The situation is very similar to that concerning Freshfields' fees discussed above: the charging of hourly rates far in excess of the guideline rates and the number of hours involved, including at partner level. The fees include over 107 hours by one partner charging £825 per hour (61% over the guideline) and over 120 hours by another partner charging £730 per hour (42% over the guideline).

27. It is altogether impossible on the basis of this schedule to arrive at an estimate of the reasonable and proportionate solicitors' fees recoverable pursuant to the ruling in paragraph 5 above. One approach would be to order no interim

payment in respect of solicitors' fees. However, we think that would be harsh in circumstances where Mastercard is being awarded an interim payment. We will therefore adopt a figure which seems to us, on a very broad brush basis, the minimum likely to be assessed in respect of this period. That figure is £80,000.

28. For the reasons set out in para 7 above, we exclude the specialist lawyer's fees and experts fees from the estimation of costs relating to the contested issues that were the subject of *Merricks 3*.
29. Accordingly, Mastercard is to pay Mr Merricks £143,024 by way of interim payment in respect of this period (i.e. $85\% \times (\pounds 60,000 + \pounds 80,000 + \pounds 220) + \text{VAT}$).

The costs of preparing the costs submissions

30. Neither side has obtained anything approaching the amounts they sought by way of overall interim payment but as regards the costs of the most recent hearing and a payment on account in respect of period (b), Mr Merricks' submissions on costs have been largely successful. We think that he should therefore recover 50% of the costs of the submissions on costs. We do not have any statement setting out those costs as a discrete item. But we do not think the reasonable costs of the argument about costs should be substantial. We deprecate the spending of large sums of costs to argue about costs and regard it as wholly disproportionate that Mr Merricks' brief costs submissions were prepared by four counsel, including two QCs, in addition to the costs incurred by solicitors in the preparation of costs schedules. We determine the payment on account in respect of those costs at £6,000 plus VAT.

Conclusion on interim payment

31. On the basis set out above:
 - (1) in respect of period (b), Mastercard is to pay Mr Merricks £266,271;
 - (2) in respect of period (c), Mr Merricks is to pay Mastercard £190,000;

- (3) in respect of the costs of and relating to *Merricks 3*, Mastercard is to pay Mr Merricks £143,024;
- (4) in respect of the costs of the costs submissions, Mastercard is to pay Mr Merricks £7,200.

Setting off the payments, the result is that Mastercard is to pay Mr Merricks the sum of £226,495 inclusive of VAT. The payment is to be made within 28 days of the date of this ruling.

The Hon. Mr Justice Roth
Chairman

Jane Burgess

Prof. Michael Waterson

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

Date: 22 June 2022