



Neutral citation [2022] CAT 52

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 November 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 (AMENDMENT: COSTS)

1. On 14 October 2022, the Tribunal issued its judgment on the application by Mr Merricks to amend his claim form: [2022] CAT 43. Mr Merricks sought to expand the scope of the claims to encompass a run-off period of eight years. Mastercard opposed the amendment. The Tribunal held that Mr Merricks would be permitted to amend but only to allege a run-off of one year as regards the domestic interchange fees overcharge and a run-off of two years as regards the MSC run-off overcharge. The hearing of the application, which took place as part of a CMC, took less than one day.
2. The Tribunal directed that any consequential applications should be made in writing by 5pm on 4 November 2022. Mastercard duly submitted an application that it should be awarded its costs on the basis that a party applying to amend should normally bear the costs occasioned by the amendment. Mr Merricks also submitted an application that he should be awarded his costs on the basis that he had effectively been the winning party as regards his application. However, this application for costs on behalf of Mr Merricks was made only on 6 November 2022. The covering letter from Mr Merricks' solicitors apologised for the delay and requested that the application be admitted late "in circumstances where Mr Merricks was unable to meet the Tribunal's deadline". No explanation was given as to the reason for the delay.
3. Each application was accompanied by a schedule of costs. These showed estimated costs of a little over £65,000 for Mastercard and, remarkably, almost £136,000 (which included the costs of the application for costs) for Mr Merricks.
4. Both Mastercard and Mr Merricks have filed submissions in reply to the other's application.
5. We do not accept that Mastercard should recover its costs of opposing the amendment. The standard order that an amending party should pay the costs occasioned by an amendment applies where an amendment is not resisted. By contrast, in the present case, this amendment was opposed, resulting in a fully

argued, contested hearing. In those circumstances, costs would normally be awarded to the party that was the “winner”. Although Mastercard was successful to the extent of substantially limiting the scope of the run-off period, it had strongly opposed, on various grounds, the amendment to allow any run-off period and we do not think it can be described as being overall successful.

6. At the same time, even if we were to accept Mr Merricks’ late costs application, we do not consider that he can be described, on any common sense view, as the overall winner. Although he obtained some run-off period, this was substantially less than the eight years sought. In practical terms, this makes a massive difference in the potential amount of the claims. Contrary to the submission advanced in Mr Merricks’ application, success is not measured by counting up the various arguments which the lawyers for each side had put forward and seeing who was successful on each. Where the Tribunal makes an issues-based order, the question is who has been successful on each issue, not on each of the various arguments advanced in support of every issue. On the present application, there was only one issue: whether or not to allow the introduction of the claimed run-off periods. As to that, as stated above, Mastercard achieved a significant degree of success in resisting the scope of the amendment, and therefore significantly denied Mr Merricks the prize which he was seeking to achieve: cp *Roache v News Group Newspapers Ltd* [1998] EMLR 161 per Lord Bingham MR at 168. In the light of that, we regard as wholly unrealistic the suggestion in the application for Mr Merricks that if Mastercard had offered to consent to the much shorter run-off periods we allowed, there would have been no need for a contested hearing of the application.
7. Accordingly, we consider that the proper order is that neither party should recover its costs of the application. We do not think it appropriate here to make any separate order as regards the costs of the amendment itself. The substantive proceedings are at a very early stage and there is argument regarding the extent to which the amendment arose out of matters raised in Mastercard’s pleaded defence. In those circumstances, we think the costs of pleading, both as regards the amendment to the claim form and any consequential amendment to the

defence, should stand or fall with the other pleading costs and therefore be costs in the case.

8. This means that it is unnecessary to consider the details of the respective costs schedules. We would only add that we regard the figure of £65,000 in Mastercard's schedule as unreasonably high, but that appears to be a reflection of the hourly rates charged, on which we commented in our previous costs ruling in this case: [2022] CAT 27 at [19]. Moreover, we regard the figure of close to £136,000 in the costs schedule for Mr Merricks as manifestly disproportionate and unreasonable.

The Hon. Mr Justice Roth
Chair

Jane Burgess

Prof. Michael Waterson

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

Date: 25 November 2022