



Neutral citation [2024] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 January 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
THE HONOURABLE LORD ERICHT
JANE BURGESS

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

Heard at Salisbury Square House on 16 January 2024

RULING (ADMISSIBILITY)

APPEARANCES

Ms Marie Demetriou KC and Ms Ligia Osepciu (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Ms Sonia Tolaney KC, Mr Timothy Otty KC, and Mr Matthew Cook KC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

1. This is an application by Mastercard to rely on additional documents, all of which are in the public domain. They amount to 276 documents. They are all newspaper articles or letters published in newspapers, being either national or regional publications.
2. For Mr Merricks, inclusion of these additional documents was objected to: Ms Demetriou KC submitted that they are not relevant. If they are not relevant, then clearly they should not be admitted.
3. We have not looked at them in detail as would be necessary to rule on relevance, but from the summary of what those documents can provide that is set out by Mastercard in its proposed supplement to the parties' agreed Statement of Facts it seems to us that they are potentially relevant to at least some issues that are before the Tribunal in this trial.
4. On that basis, we think it would not be right to refuse to admit them on the basis of irrelevance, and of course Ms Demetriou will have the opportunity to make submissions on relevance of any particular documents during the course of the hearing. We proceed therefore to consider the application on the assumption that these documents meet the relevance test.
5. The background to the application is as follows. At a case management conference (CMC) in this case in September 2022 it was decided that there will be a trial of the limitation issues in the case to commence in January 2023. An order was made following that CMC, drawn up on 10 October 2022, directing that there be such a trial. Paragraph 10 of the order stated:

“The parties will file an agreed statement of facts addressing what information relevant to limitation was in the public domain by no later than 4.00 pm on 11 November 2022.”

That accordingly placed an obligation on both parties to provide that statement.
6. There were a few short extensions to that deadline and a joint statement of facts was duly filed on 25 November 2022.
7. The trial then commenced almost exactly a year ago, in January 2023. However, at the outset of that trial, it became clear that there was a distinct question of deliberate

concealment being raised under section 32 of the Limitation Act as regards England and Northern Ireland and under the broadly equivalent section 6(4) of the 1973 Scottish statute. Therefore, once that became evident, it was decided that that aspect or those aspects should be adjourned to a later trial and that is the trial which is starting today. The joint statement of facts, therefore, was no longer relevant to the trial which took place last January.

8. Mr Merricks proceeded to amend his case on limitation and prescription. A material amendment to his reply was served on 10 October 2023.
9. On 7 December 2023, witness statements were served in reply to the first round of witness statements. These included a statement from Mr Jenkins, adduced by Mr Merricks. What was said by Mr Jenkins about material in the public domain in his statement prompted further searches by those advising Mastercard for press articles.
10. It is those further searches which resulted in the 276 articles to which I have referred and are the subject of this application. They were found over the week following the service of Mr Jenkins' witness statements. Mastercard provided, first, a list of them to Mr Merricks on 15 December and the copies of the documents shortly afterwards, on the same day.
11. Ms Demetriou submitted that this was a breach of paragraph 10 of the order of 10 October 2022 and that the *Denton* test, as it is called, which applies under the Civil Procedure Rules and has been applied by analogy in this Tribunal, therefore is engaged. She submitted that the criteria of that test are not met, and that the documents should therefore be excluded.
12. We do not accept that paragraph 10 of the October 2022 order is of a character which attracts the high test in *Denton*. This was not like an order directing disclosure from one party to another. The order created an obligation on both parties to consider what facts were in the public domain that may be relevant to the question of limitation. That indeed is how the parties understood it.

13. Ms Demetriou confirmed in response to a question from the Tribunal that Mr Merricks as well as Mastercard contributed materials for the joint Statement of Facts. If, therefore, relevant material by way of published newspaper articles were omitted from the original joint statement of facts, it seems to us that that was a failure by both sides.
14. We accept that it was a passage in Mr Jenkins' witness statement which prompted the further search by Mastercard that produced these additional documents. While that may be an explanation, it is not in our view an excuse: we think they should have been produced earlier. If in late October after service by Mr Merricks of his amended reply, or indeed early November of last year, these documents had been produced, we think no problem could possibly have arisen. It is unfortunate that it was only in mid-December that they were provided.
15. However, we would stress that these are documents in the public domain that were available to both sides. Further, both sides should have produced them insofar as they are relevant. Further, we think there is no real prejudice to Mr Merricks in these documents now being included. If they are irrelevant, then self-evidently his case is not prejudiced. If they are relevant, or some of them are relevant, we consider that the time since 15 December, given the nature of these documents, namely that they are short articles and many are duplicative as is often the case when a newsworthy matter is reported across several news publications, then Mr Merricks' legal team have had sufficient opportunity to address them.
16. We were not impressed by the submission on the part of Mr Merricks that those representing him cannot ascertain the purpose for which these documents are being relied on. We think that is sufficiently clear from the supplement to the joint Statement of Facts served by Mastercard pursuant to the Tribunal's order of 3 January 2024.
17. There is only one additional matter: we think Mr Jenkins should not be open to criticism for what he says in paragraph 64 of his witness statement by reference to the joint Statement of Facts as it was before him. He was relying on that statement and on his memory. No doubt he would have phrased that passage in his witness statement differently if the revised Statement of Facts had been available.

18. With that proviso, we grant this application, and the amended Statement of Facts will accordingly be the one before the Tribunal.

The Hon. Mr Justice Roth
Chair

The Hon. Lord Ericht

Jane Burgess

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

Date: 16 January 2024