



Neutral citation [2023] CAT 53

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1266/7/7/16

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

9 August 2023

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

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**RULING: COSTS**

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1. On 21 March 2023, the Tribunal handed down judgment in these proceedings on four preliminary issues which were heard in January 2023: [2023] CAT 15 (“the Judgment”). This ruling uses the same abbreviations as the Judgment. On 25 May 2023, the Tribunal issued its ruling refusing applications by both sides for permission to appeal: [2023] CAT 33. This ruling addresses the outstanding applications concerning costs.
2. One of the four issues was decided in favour of Mastercard: the Limitation/Prescription issue. The other three issues were decided in favour of the CR. Mastercard applies for its costs of the first issue. The CR applies for his costs of the other three issues. In addition, Mastercard applies for its costs of the CR’s claim in respect of “Solo” debit cards. The claim regarding Solo cards was set down to be heard as a further preliminary issue in the spring of 2023 but on 26 January 2023 the CR informed Mastercard that he was not pursuing his claim in respect of Solo cards.
3. Both Mastercard and the CR filed written submissions in support of their respective applications for costs, and then further submissions in reply. The two sides are agreed that any costs ordered in respect of the preliminary issues should be determined by summary assessment. Mastercard urges that the same approach should be taken to the costs of the Solo cards claim. The CR contends that no order should be made now concerning that claim. Both sides have submitted costs schedules in support of the orders they are inviting the Tribunal to make.

### **The Preliminary Issues**

4. As noted above, the Tribunal determined four discrete issues by the Judgment following full argument at the January hearing. Those issues are set out in the Judgment at [5] and referred to as (1) the Limitation/Prescription Issue; (2) the PLSA s. 11(2) issue; (3) the Proper Law issue; and (4) the Exemptibility issue.
5. The CR was successful on issues (2)-(4) and Mastercard very properly accepts that the CR should have his reasonable and proportionate costs of those issues. There is a dispute concerning issue (2) in that the CR seeks to include his costs of a separate argument concerning PLSA s. 6(4) which is not now pursued by reason of the

Tribunal's decision concerning PLSA s. 11(2). There has been, and now will be, no determination of that argument and Mastercard submits that there should accordingly be a deduction from the costs which the CR claims under the head of issue (2).

6. We do not accept that there should be such a deduction. The argument as regards the Scots law of prescription was put on the basis of s. 11(2) or alternatively s. 6(4). It is not suggested that this was an unreasonable approach and it is by reason of the CR's success on s. 11(2) that the s. 6(4) argument is now not being pursued. Accordingly, we do not think it would be fair to deprive the CR of the costs of his preparatory work on s. 6(4) (which will obviously be much less than as regards s. 11(2)) when it is by reason of his success that this distinct argument is not going further.
7. As regards issue (1), on which Mastercard was successful, the CR contends that the costs of that should be reserved on the basis that it forms part of a broader question of limitation and was a refinement of that broader issue which had been the subject of the order made by the Tribunal at the CMC in September 2022. He submits that the costs should be determined only when there is final outcome on all aspects of the English law of limitation, while accepting that "since he lost the English law aspects of the "Limitation/Prescription Issue", he should not be able to recover his associated costs of that part of the overall English limitation issue." Moreover, he also accepts that he should not have his costs in any event of the Scots law arguments addressed under issue (1).
8. We reject the CR's proposed approach to issue (1). The issue as set out in the Judgment at [5] was fully argued by both sides. It was a discrete issue and was determined in favour of Mastercard. Indeed, the CR has applied for permission to appeal against that determination. We see no good reason to postpone a determination of the costs of that issue – and those costs will obviously not include costs of other aspects of limitation which remain outstanding. Moreover, if there is to be a summary assessment (which both sides regard as appropriate), we consider it preferable for that assessment to be made sooner rather than later. Accordingly, we order that Mastercard should recover its reasonable and proportionate costs of issue (1).

#### Summary Assessment

9. As regards issue (1), Mastercard seeks total costs of £109,564.82. This comprises:

Solicitors' fees (excl. costs submission)	£ 38,060.40
Counsel's fees (excl. costs submission)	£ 64,873.67
Preparation of costs submissions (solicitors and counsel)	£ 6,630.75

10. As regards the other three issues, the CR seeks total costs of £469,577.38, plus VAT. He has apportioned those costs as between each of issues (2)-(4) and the costs application itself, as follows:

Issue (2): PLSA s. 11(2) issue, and s. 6(4) PLSA:

Solicitors' fees	£ 50,499.30
Scottish Counsel's fees	£ 59,500
English Counsel's fees	<u>£ 11,531.25</u>
Total	£121,530.55

Issue (3): Proper Law issue:

Solicitors' fees	£ 27,955.75
Counsel's fees	<u>£ 44,065.75</u>
Total	£ 72,021.50

Issue (4): Exemptibility:

Solicitors' fees (incl Scottish solicitors)	£ 69,265
Counsel's fees	<u>£182,663.33</u>
Total	£251,928.33

Preparation of costs submissions (solicitors and counsel) £ 24,097

11. We recognise that on a claim of this gigantic size, these various issues assume even more than usual significance. Nonetheless, we regard these costs on both sides as unreasonable and disproportionate to issues that were essentially matters of legal argument which took under four days (the first day of the hearing being given over to a question of amendment of the claim).
12. We think the enormous size of the costs claimed is largely explicable on the basis of the hourly rates charged by the solicitors on both sides. In the earlier ruling on costs in these proceedings given on 22 June 2022 ([2022] CAT 27), which concerned only a payment on account and not a final, summary assessment, the Tribunal referred to the judgment of the Court of Appeal in *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, holding that there has to be “a clear and compelling justification” for the award of costs in excess of the guideline rate. That is a reference

to the Guideline Figures at Appendix 2 to the Guide to the Summary Assessment of Costs (“the Guide”) issued in November 2021. The guideline hourly rates for “very heavy commercial and corporate work” by centrally based London firms by solicitor’s grade are: Grade A: £512; Grade B: £348; and Grade C: £270. Here, the parties’ solicitors for the material period are charged as follows:<sup>1</sup>

Freshfields (for Mastercard): Grade A: £870; Grade B: £478; Grade C: £478.<sup>2</sup>

Wilkie Farr & Gallagher (for the CR): Grade A: £825//730; Grade B: £450;  
Grade C: £450.

13. By way of justification, the CR says in his costs submission that:

“the issues addressed in this particular hearing were of such complexity and required such specialist knowledge that one would expect solicitors to charge hourly rates which exceed the guideline rates.”

Mastercard states that the hourly rates “are consistent with market rates for specialist and experienced competition solicitors engaged to conduct high value and complex litigation.”

14. We emphasise that we are concerned only with the costs that are recoverable from the other side. Parties may agree with their solicitors to pay a much higher figure and we recognise that some solicitors indeed charge much higher rates. We also take into account that the guideline rates are just a guide, and that the Guide recognises at para 29 that in substantial and complex litigation rates in excess of the hourly rates may be justified. Further, we note that the guideline rates are now over a year old. However, we do not consider that these considerations can begin to justify rates which are, for Mastercard Grades A and C solicitors some 70% over the guideline rates, and for the CR Grades A and C solicitors in excess of 60% over the guideline rates. Taking a broad brush approach, we think that some 30% over the guideline is reasonable (producing rates for Grade A of £665.60 and Grade C of £351). Some further causes of the disproportionate figures claimed are:

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<sup>1</sup> The CR’s schedule of costs does not include the rates charged by the Scottish solicitors.

<sup>2</sup> By the time of preparation of the costs submissions, those rates had increased to £960 for Grade A and £525 for Grades B and C.

- (a) On both sides, for much of the hearing two partners attended. We consider that attendance of only one partner is reasonable.
  - (b) Issue (2) concerned exclusively Scots law. While some assistance from English counsel may be reasonable, we regard fees of over £11,000 for assistance from two English leading counsel as disproportionate.
  - (c) We find the total of counsel's fees for issue (1) and issue (4), and Scottish counsel's fees for issue (2), unreasonably high.
  - (d) We recognise that preparation of costs submissions for the CR was more time-consuming than for Mastercard as it involved more issues. Nonetheless, we regard a total fee of over £24,000 for that exercise as wholly disproportionate.
15. Accordingly, as regards Mastercard's claimed fees, we shall (a) allow for only one partner's attendance at the hearing; (b) reduce the balance of the solicitors' fees by 35% to £22,590.36; reduce total counsel's fees to £55,000; and reduce the costs of the costs submissions to £5,000. That produces a figure of £82,590.36. Standing back, we think that is a reasonable but still generous figure for the costs of issue (1) and the consequent application for costs.
16. As regards the CR's claimed fees, we shall (a) remove the costs of one partner's attendance at the hearing; (b) reduce the balance of the solicitors' fees by 30%; (c) reduce English counsel's fees for issue (2) to £5,500 and for issue (4) to £90,000; (c) reduce Scottish counsel's fees for issue (2) to £55,000; and (d) reduce the fee for the costs submissions to £15,000. That produces a figure of £307,866.78. That is still a remarkably high figure for a hearing of under three days with no evidence, and well above the figure which Mastercard submits should be awarded,<sup>3</sup> but having regard to the scale of this litigation we shall assess the CR's costs on a summary basis in that amount plus VAT, producing a total figure of £369,440.13.

### **Solo Cards**

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<sup>3</sup> This figure includes an hourly rate adjustment. In its reply costs submissions, Mastercard submits the figure should be £280,000 subject to any further hourly rate adjustment.

17. The CR submits that the costs of the Solo Cards issue requires detailed consideration of how the issue arose and when Mastercard gave relevant disclosure. However, the fact remains that the CR in his initial claim form seeking a CPO included a claim in respect of Solo cards. The claim form stated at para 113 that the CR made no claim “in respect of any schemes that were not operated under [Mastercard’s] interchange network rules.” By its response to the CPO application, Mastercard on 30 November 2016 stated that Solo cards were not operated under its interchange rules. The CR maintained the claim, and Mastercard reiterated the position with more detail in paras 18 and 150 of its defence served on 9 May 2022. The CR nonetheless continued with the claim and sought disclosure from Mastercard.
18. We of course recognised that the CR could not be satisfied that Mastercard was correct in its position until he received disclosure. But Mastercard was correct, and if a claimant chooses to maintain a claim against a defendant after it has been denied, and abandons the claim after disclosure, there would have to be some wholly exceptional reason for the defendant not to recover its costs. A defendant does not have to bear the costs of showing that there was no claim against it.
19. We see no exceptional reason here. Accordingly, we consider that the CR should pay Mastercard’s costs of the claim in respect of Solo cards.
20. Mastercard has put in a separate schedule of costs of dealing with the Solo cards issue, showing total costs of £267,528.48. That remarkably high figure is explained on the basis of the costs of “an extensive disclosure exercise” including collection and review of documents in three countries. Mastercard also points to the size of the Solo cards claim, at over £500 million including interest.
21. However, we do not feel in a position summarily to assess those costs, which relate to an issue on which the Tribunal has not heard any argument. Those costs are accordingly to be assessed on the standard basis, if not agreed. Moreover, we think it is appropriate to stay any assessment of those costs to await further costs assessments that may be ordered in this litigation. Either party may apply to lift the stay in future. In the meantime, we consider it appropriate to order an interim payment of £75,000 on account of those costs.

## Conclusion

22. Accordingly, for the reasons set out above:
- (a) the CR is to pay Mastercard's costs of issue (1), summarily assessed at £82,590.36;
  - (b) Mastercard is to pay the CR's costs of issues (2)-(4), summarily assessed at £369,440.13 (including VAT);
  - (c) the CR is to pay Mastercard's costs of the claim in respect of Solo cards, such costs to be assessed on the standard basis if not agreed. The CR is to make a payment on account of those costs in the sum of £75,000.
23. These awards are to be set off against one another, so that Mastercard is to pay the CR the sum of £211,849.77. Such payment is to be made within 21 days of the date of this ruling.
24. This ruling is unanimous.

The Hon. Mr Justice Roth  
Chair

The Hon. Lord Ericht

Jane Burgess

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

Date: 9 August 2023