Corrected pursuant to Rule 114(3) of the Competition Appeal Tribunal Rules 2015

Neutral citation [2024] CAT 57

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 October 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)

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

INTRODUCTION

1. With the agreement of the parties, the Tribunal is conducting the trial of these large and complex proceedings in stages. The Tribunal addressed four preliminary issues at a hearing in January 2023, leading to its judgment of 21 March 2023: [2023] CAT 15. The Tribunal subsequently determined the costs of those issues, by way of summary assessment: [2023] CAT 53.

2. In July 2023, the trial took place of two further issues, concerning (1) causation and (2) value of commerce. The nature of those issues is explained further below. This led to the judgment of 26 February 2024: [2024] CAT 14 (the "Causation and VoC Judgment").

3. In January 2024, the Tribunal heard further limitation issues that could not be dealt with in the January 2023 trial. Following supplementary written submissions in May 2024, the Tribunal gave judgment on 19 June 2024: [2024] CAT 41 (the "Further Limitation Judgment").

4. This ruling deals with the costs relating to the trials which led to the Causation and VoC Judgment and the Further Limitation Judgment. Each side has made full written applications concerning those costs, followed by further submissions responding to the other side's applications. Those submissions have been accompanied, as regards both judgments, by witness statements from a partner in the parties' respective solicitors. The volume of material supplied on the question of costs is therefore significant, no doubt reflecting the very substantial level of costs being sought.

5. The same abbreviations are used in this ruling as in the substantive judgments.

THE CAUSATION AND VoC JUDGMENT

6. This followed the trial of two issues, described in the Causation and VoC Judgment as follows at [6]:

> "(1) whether the domestic IFs and MIFs charged in the UK were as a matter of fact caused by the EEA MIFs which were the subject of the Decision; and (2) the value of commerce to which the UK IFs and MIFs applied."

7. The reference to causation "as a matter of fact" is important since the CR emphasised that the Tribunal was not addressing the hypothetical question whether, if the level of the EEA MIFs had been very different, they would then have had an effect on the level of the domestic UK IFs and MIFs: judgment at [7] and [172].

8. As regards these two issues:

   (1) the Tribunal rejected the CR's case that the EEA MIFs had any significant causative influence on the level of domestic UK IFs and MIFs: [171]; and

   (2) the level of VoC had been agreed by the parties' respective economic experts by the time of the hearing and was determined accordingly: [182]. The Tribunal decided the only outstanding disputed issue, concerning the inclusion of "on-us" transactions, in favour of the CR.

9. In light of this, Mastercard submits that it should recover 95% of its costs, to reflect its success on the causation issue. The costs of the VoC issue should be costs in the case, determined at 5% on the basis that this reflected the portion of Mastercard's costs related to that issue with some additional "allowance" for the CR's success on the "on-us" point.

10. The CR's primary submission is that the costs of the causation issue should be reserved, until the Tribunal determines the question of hypothetical causation: see para 7 above. Alternatively, if the Tribunal were to make a costs order, the CR submits that he should recover 20% of his costs to reflect his success "in respect of sub-issues on which he prevailed" with a corresponding discount to Mastercard's costs. That was converted in the CR's reply submissions to the contention that Mastercard's costs of the causation issue should be subject to an overall 40% discount. As regards the VoC issue, the CR claims that he should have all his costs of that issue, which he states comprised 12% of the costs of the trial (comprising 5% in relation to the "on-us" point and 7% in relation to the balance of the VoC issue); alternatively he should have 5% of his costs with the balance of the costs of the VoC issue being costs in the case. That should therefore result in a 10% discount off Mastercard's overall entitlement to costs (5% for the CR's costs and 5% off Mastercard's own costs).

THE FURTHER LIMITATION JUDGMENT

11. The January 2024 trial on limitation addressed three issues:

    (1) Was there deliberate concealment of relevant facts for the purpose of LA 1980 s. 32(1)(b)?

    (2) Was there a deliberate breach of duty for the purpose of LA 1980 s. 32(2)?

    (3) Is the time-bar on recovery of damages prior to June 1997 resulting from the limitation rules under English law here precluded or modified by the EU principle of effectiveness?

12. As regards these three issues, the Tribunal held that the answer was "no" in each case: Further Limitation Judgment at [118]. As a result, the English and Norther Irish claims were held to be time-barred in respect of any loss suffered prior to 20 June 1997: [119].[1]

13. In the light of this, Mastercard seeks an award of its costs of the January 2024 trial.

14. The CR submits that the trial involved "four discrete issues", which he defines as:

    > "a. The application of the principle of effectiveness to section 32(1)(b) of the LA 80 – in particular, the disapplication of the requirement for deliberate concealment (the "EU Law Issue");
    >
    > b. Whether Mastercard had deliberately concealed relevant facts (the "Deliberate Concealment Issue");
    >
    > c. Whether Mastercard has deliberately committed a breach of duty (the "Deliberate Commission Issue"); and
    >
    > d. Whether the relevant facts could with reasonable diligence be discovered (the "Discoverability Issue")."

15. Recognising that Mastercard clearly succeeded on the first three of those four issues, the CR acknowledges that Mastercard will be the net recipient of any costs award. However, he contends that he succeeded on the "Discoverability Issue" and that he should therefore recover his costs of that "issue" with a corresponding disallowance of

[1] In the light also of the Tribunal's earlier judgments, [2023] CAT 53 and [2023] CAT 49.

Mastercard's costs of that "issue". On the basis that this was one of the four issues, the CR claims 25% of his "general costs" related to the January 2024 trial and also 5% of his costs of work done in relation to his own witness (Mr Jenkins) and one of Mastercard's witnesses (Mr Hawkins). In addition, he claims his costs relating to the "Discoverability Issue" incurred in preparation for the January 2023 trial, at which the question of s.32 LA 1980 was due to be heard but then had to be adjourned. Thus he asserts that the costs of the "discoverability issue" were incurred in two tranches: first, in preparing for the January 2023 trial, and then for the January 2024 trial at which it was argued.

GENERAL PRINCIPLES

16. The award of costs by the Tribunal is governed by rule 104 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"), which states, insofar as relevant:

> "(2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
>
> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount."

17. These provisions give the Tribunal a broad discretion as regards costs. In exercising that discretion in an English case, the Tribunal generally follows the practice of the High Court applying the CPR. I consider that the following principles apply.

18. First, although there is no prescribed "general rule" in the CAT Rules that the unsuccessful party should pay the costs of the successful party, corresponding to CPR 44.2(2)(a), where a party has been wholly successful it should generally be awarded its costs. That is also the approach to the award of expenses in the Court of Session, and the Tribunal is of course a UK tribunal. The question of who has been the successful party should be approached as a matter of common sense, in a practical and commercially realistic way.

19. Secondly, where there has been a trial of a preliminary issue or a split trial, a party that has been successful on that issue or that stage of the trial, should generally be awarded the costs of that issue or that stage. In *Merck KGaA v Merck Sharp & Dohme Corp* [2014] EWHC 3920 (Ch), following the trial of a preliminary issue on which the claimant succeeded, the defendants argued that they should not be ordered at that point to pay the costs of the issue since the claimant may not ultimately succeed on its claim. Rejecting that argument, Nugee J (as he then was) said at [6]:

> "It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial."

This approach was approved by the Court of Appeal in *Langer V McKeown* [2021] EWCA Civ 1792, [2022] 1 WLR 1255 at [37].

20. Thirdly, where a trial involves a discrete issue, which causes significant distinct costs to be incurred, it is appropriate to consider whether to make an issue-based order. The approach to such orders under the CPR was helpfully summarised by Mr Stephen Jourdan QC, sitting as a judge of the High Court, in *Pigot v The Environment Agency* [2020] EWHC 1444 (Ch) at [6] and followed by Cavanagh J in *Scales v Motor Insurers' Bureau* [2020] EWHC 1749 (QB) at [10]:

> "(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.
>
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate

> if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
>
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.
>
> (4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
>
> (5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
>
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."

21. Although rule 104 is more succinct and does not contain the elaboration of conduct set out in CPR rule 44.2(5), the approach in the Tribunal is broadly similar, mutatis mutandis. Where an otherwise successful party has lost on a distinct issue, if the issue was raised unreasonably that will usually justify an adverse costs order. However, unreasonable conduct is not a necessary condition for such an order: see per Birss J (as he then was) in *Wobben Properties GmbH v Siemens PLC* [2015] EWHC 2863 (Pat) at [8]. Equally, if the issue was raised reasonably, the otherwise successful party will not necessarily be subject to a discount off the recovery of its own costs just because it has lost on that issue. As Coulson J (as he then was) said in *J Murphy & Sons Ltd v Johnston Pipes Ltd (No 2 – Costs)* [2008) EWHC 3104 (TCC) at [10]:

> "In civil litigation it is almost inevitable that there will have been some point or argument, raised by the otherwise successful party but rejected by the judge, which will have added to the length of the trial. In my view, the mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order."

In short, where the party which is successful overall has lost on a discrete issue on which it acted reasonably, the governing criterion is whether any, and if so what, order in respect of that issue is just and appropriate in all the circumstances of the case.

22. Fourthly, the Tribunal should not adopt an over-granular approach to the identification of discrete issues. As Nugee J stated in *Merck* at [9]:

> "Any issue of any complexity is likely to involve sub-issues and sub-sub-issues on which one side or other has the better of the argument: this is not by itself a reason for departing from the general rule."

THE COSTS RELATED TO THE CAUSATION AND VoC TRIAL

23. On the issue of factual causation argued at the July 2023 trial, I reject the CR's contention that no order for costs should now be made because there remains an issue of causation in the counter-factual scenario to be considered in the future. Factual causation was a wholly distinct issue, which was subject to extensive disclosure, witness evidence (both factual and expert) and a trial over several weeks. Indeed, the CR applied for permission to appeal the Tribunal's decision on this issue.[2] As with the costs of the preliminary issues on limitation decided in March 2023 (which did not finally determine all matters of limitation), and for the reasons set out at para 19 above, I see no reason to postpone determination and payment of those costs: cp [2023] CAT 53 at [7]-[8].

24. As noted above, Mastercard was clearly the successful party on this issue. However, the CR submits that he "is in principle entitled to his costs in respect of the sub-issues on which he prevailed": Costs submissions, para 3(a)(ii). Those sub-issues were (a) what was the fallback rate of MIF in the so-called "early period" (i.e. 1992 to November 1996; and (b) whether the UK domestic IFs were set by reference to costs studies prepared by EDC. I regard that submission as wholly misconceived. In the first place, there is no "entitlement" to costs in respect of issues. Secondly, I regard these as precisely the kind of sub-issues referred to by Nugee J in the dictum set out above, which do not justify reflection in an overall costs order. Thirdly, it cannot be said that Mastercard's position on either of these issues was unreasonable. As regards (a), the Tribunal expressly found that the relevant rules are ambiguous: Judgment at [74]. As regards (b), Mastercard had pleaded that the reference rates were determined taking into account the costs studies, among other things, but it did not allege that those rates, and consequentially the domestic IFs, were "determined" by the EDC costs studies; and in

[2] Permission to appeal was refused by the Court of Appeal.

the trial it became common ground that those studies had some, although more limited, influence.

25. Accordingly, I consider that Mastercard should recover its costs of the factual Causation issue determined in its favour in the Judgment.

26. However, the question of the VoC, which was also the subject of the Judgment, was a wholly distinct issue. As Mastercard recognises, that should be taken into account and the costs of the VoC issue should be disposed of on a different basis.

27. The CR contends that he was the successful party on the VoC issue and "is entitled to his costs of the same": Costs submissions, para 21. I do not consider that this broad proposition is correct, even aside from the suggestion of 'entitlement'. The VoC issue concerned the determination of the value of Mastercard transactions each year of the claim period. That exercise involved disclosure of data from Mastercard and then extensive analysis by the experts. The experts were fortunately able to reach agreement and produced a joint table. But as to that, it cannot be said that either side was "the winner."

28. The question whether or not to include "on-us" transactions was a sub-issue that was essentially a question of fact and law. While the CR states that the VoC issue accounts for 12% of his costs, he significantly acknowledges that of this 12% the costs specifically of the "on-us" dispute accounted for 5% with the balance of 7% attributable to the costs of the rest of the VoC issue.

29. In my view, although the "on-us" question was a sub-issue, since it was the only question relating to VoC that was in dispute at the trial and it was the subject of some cross-examination as well as argument, it is fair that the CR should recover his costs of that sub-issue. The balance of costs of the VoC issue should be costs in the case.

30. Rather than making cross-orders for costs on an issue-basis, it is simpler and more efficient to make orders by reference to a proportion of the costs related to the Causation and VoC trial. Mastercard states that its total costs of the trial were about £10.946 million, after excluding £475,000 in respect of experts' and solicitors' costs of the VoC

issue. That exclusion accordingly amounts to 4.15% of Mastercard's total costs. In addition, a small part of the trial costs, in terms of counsel and the time of solicitors' attendance, is attributable to the "on-us" question and I therefore think that it is reasonable to find that 5% of Mastercard's total costs were attributable to VoC. Given that Mastercard's total costs will necessarily be much higher than those of the CR, since the burden of the extensive disclosure on the Causation issue rested almost entirely on Mastercard, the discrepancy between this 5% of Mastercard's total costs and 12% of the CR's total costs is not surprising.[3] Mastercard has not isolated the proportion of its VoC costs generated by the "on us" question, but on a rough and ready basis I consider that 2% out of the 5% can be so attributed.

31. The CR estimates that his total costs of the VoC issue were about £375,000, and since this is 12% of his overall costs of the trial, that indicates that those costs are about £3.125 million. He states that his costs generated by the "on-us" question were about 5% of his total costs, i.e. £156,000. That accordingly equates to a little under 1.4% of Mastercard's total costs related to the Causation and VoC trial.

32. In consequence, the costs order shall be that:

    (a) The CR is to pay Mastercard 93.6% of its costs of and related to the Causation and VoC trial;

    (b) 3% of Mastercard's costs of and related to the Causation and VoC trial shall be costs in the case; and

    (c) 7% of the CR's costs of and related to the Causation and VoC trial shall be costs in the case.

[3] The CR's costs submissions are misconceived in treating the percentage appropriate to its costs as the applicable proportion of Mastercard's costs since the composition of the two sides' respective costs in this case is very different.

THE COSTS RELATED TO THE FURTHER LIMITATION TRIAL

33. As set out above, three discrete issues were addressed and determined in the Further Limitation Judgment. On each of those issues, Mastercard was successful.

34. Although the CR seeks to characterise the question "whether the relevant facts could with reasonable diligence be discovered" as a discrete issue, which it describes as the "Discoverability Issue", it was in reality a sub-issue that formed part of the inquiry and analysis of both the first issue concerning s. 32(1)(b) and the third issue concerning the principle of effectiveness. The reason the CR lost on the principle of effectiveness was not simply because of the application of the decision in *Arcadia*, but more fundamentally because the Tribunal found that the CR had failed to show that he could not reasonably have discovered the relevant facts: Judgment at [109]-[112]. Accordingly, I do not consider this to be a "discrete" issue from the three main issues, nor was it a question which was altogether resolved in favour of the CR.

35. Furthermore, if it were appropriate to drill down into sub-issues (which in my view, it is not), then it would be appropriate to reflect the way the CR's case changed in the course of the proceedings as to what facts were "relevant" for this purpose, and the Tribunal's rejection of the CR's contention that the EEA MIF being a fallback for domestic transactions was a "relevant fact": Judgment at [55]-[57].

36. Accordingly, I do not consider it appropriate to distinguish this alleged issue, nor do I think this is a case where it would be just to make any discount from Mastercard's costs. Mastercard should recover its costs of and related to the Further Limitation trial.

37. It follows that it is not necessary to consider specifically the costs of the preparation of the Joint Statement of Facts in advance of the January 2023 hearing, at which the aspects of limitation arising under s. 32 were adjourned. Those costs form part of the costs related to the Further Limitation trial. I shall only add that I reject as incorrect the CR's contention that the adjournment which caused the costs to be incurred in two tranches was due to "Mastercard's failure". As the Tribunal made clear in Judgment (Amendment No. 2) [2023] CAT 5 at [39]-[42], both sides were to blame for what occurred.

ASSESSMENT OF COSTS

38. It is appropriate, and both sides now agree, that the costs covered by this ruling should be determined by detailed assessment, if not agreed.

INTERIM PAYMENT

39. Mastercard seeks an interim payment on account of its entitlement to costs. It is not in dispute that such an order should be made. But the CR takes strong objection to the amounts sought, contending that the costs incurred by Mastercard are unreasonable and disproportionate.

40. Two broad principes apply to the evaluation of recoverable costs. First, although any party is free to spend as much as it chooses on litigation, only reasonable and proportionate costs are recoverable from the other side (except where indemnity costs are awarded). Accordingly, when determining the amount to be awarded by way of interim payment, it is appropriate to take a cautious approach. As Leggatt J (as he then was) said in *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), when determining an application for payment on account in 'hard fought' litigation:

> "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.
>
> 14. Where, as here, the court is not actually assessing the amount of costs to be recovered and has nothing like the level of information that could be required on a detailed assessment, there is additional reason to be conservative. The fact that the total costs claimed are very high cannot by itself be allowed to increase the sum awarded as an interim payment. I am sure that the costs claimed by the main group of defendants

> are neither reasonable nor proportionate. By what factor they should be discounted, however, to arrive at a reasonable and proportionate amount can only properly be determined by a detailed assessment."

41. Secondly, the assessment of costs should pay close regard to the Guideline rates, which are published and updated as an appendix to the Guide to the Summary Assessment of Costs. Updated rates were published in December 2023 to take effect on 1 January 2024. In *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, Males LJ, with the concurrence of Lewison and Snowden LJJ, 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."

That was a competition case between major international companies. The court reduced the costs claimed by 24 per cent.

42. In addition, when assessing the amount of an interim payment on account of costs, the Tribunal should seek to make a broad estimate of the reasonable and proportionate costs likely to be determined on detailed assessment, with an appropriate margin to allow for an overestimate: *Merricks v Mastercard (Costs)* [2022] CAT 27 at [10], following *Excalibur Ventures LLC v Keystone Inc* [2015] EWHC 566 (Comm).

43. I do not accept the submissions advanced on behalf of the CR that the Tribunal should modify its approach to costs because these are collective proceedings. It is entirely correct that the collective proceedings regime is designed to facilitate access to justice. That is why it permits proceedings to be brought on an opt-out basis, for a vast class, and for a class representative to seek for the benefit of the class members an award of aggregate damages. But at the same time, collective proceedings involve huge claims – here some £10 billion – and impose a very significant burden on defendants. They are usually brought with commercial funding and ATE insurance, as is the case here. Many claimants, including sizeable commercial entities, bringing individual proceedings to recover their loss are no better able to fund their claim than the commercial litigation funders who support collective proceedings.

The Causation and VoC Trial

44. As noted above, Mastercard's total costs of that trial were about £11.42 million. The trial was heard over three weeks and involved eight witnesses of fact, seven of whom were called by Mastercard, and an expect economist on each side. Some £475,000 of that total was attributable to solicitors and expert fees attributable to the VoC question. Mastercard's solicitors have filed a detailed schedule showing the breakdown of the balance of £10,946 million, as follows (in rounded figures):

Solicitors' fees:	£6,926,800
Counsel's fees:	£2,550,600
Expert fees:	£885,200
Other disbursements:	£582,800

45. Mr Sansom, a partner in Mastercard's solicitors, has sought to explain in his witness statement how such an extraordinarily high level of costs was incurred. However, it is clear that part of the explanation is the hourly rates charged by Freshfields, which I set out below, compared to the Guideline rates:

	Freshfields Rates		Guideline Rates	
	To 28.02.23	*From 01.03.23*	*To 31.12.23*	*From 01.01.24*
Grade A	£870	£960	£512	£546
Grade B	£478	£525	£348	£371
Grade C	£478	£525	£270	£288

46. For this trial, all the costs were incurred before the end of 2023, and therefore before the increase in the Guideline rates. As can be seen, in that period the rates charged by Mastercard's solicitors for Grade A fee earners were 70% and then over 85% above the Guideline rate; and the rates charged for Grade C fee earners were 77% and then 94% above the Guideline rate. The total hours spent by those solicitors were:

Grade A: 1,635 hours

Grade C: 4,868 hours

47. Before the increase that took effect on 1 January 2024, the Guideline rates had last been set with effect from 1 October 2021. In the Tribunal's Ruling on costs following the Preliminary Issues trial, we considered that an increase of 30% over the Guideline rates was reasonable, having regard to the fact that they were then over a year old and that the Guide recognises that rates in excess of the Guideline rate may be appropriate for complex cases: [2023] CAT 53. I do not accept Mastercard's submission that a greater increase than 30% is appropriate for the work for this trial. On the contrary, I see no reason to differ from that approach, which produced rates of £665.60 for Grade A and £351 for Grade C. That is still some 23-33% below the rates charged.

48. In his witness statement, Mr Sansom explains that the costs of disclosure were exceptionally high because of the fact that the allegations covered a period of 16 years going back to 1992, and concerned also events abroad. The solicitors therefore had to search through a range of both hard copy documents and legacy systems that were more difficult to interrogate. Much of the period pre-dates the widespread use of email, which is easier to search electronically. Mr Sansom has explained in detail the document review structure which Freshfields implemented in an effort to contain costs. Further, as regards factual witnesses, the solicitors had to seek out and interview a range of individuals who had retired or moved on to employment elsewhere, to find people able to testify to the relevant matters over this historic period. I am not impressed by the CR's attempt in his submissions to demonstrate the unreasonableness of Mastercard's costs by relating them to the number of documents actually disclosed or the number of pages of witness testimony. It is well known that the disclosure exercise involves going through a multitude of documents to find and locate those which are relevant, and similarly the task of gathering witness evidence amounts to much more than simply assistance in preparation of the statement of a witness once identified. Moreover, it is pertinent to recall that the CR applied late in the day for permission to call Mr Dhaene, which led to a flurry of exchanges and then additional work for Mastercard's legal team in a very tight timeframe to gather material to respond to his evidence, including identification of an additional witness who then had to be assisted in preparing his evidence. That is not a criticism of the CR; but in my view it undoubtedly had the effect of increasing Mastercard's costs.

49. Where I think the CR is open to some criticism is as regards the repeated complaints which were made on his behalf concerning inadequate disclosure, which inevitably caused extra time and costs to be incurred by Mastercard.

50. Accordingly, I accept that this was an unusually time-intensive trial in terms of the solicitors' preparatory work and I do not for the purpose of payment on account think it is appropriate to attempt to estimate a general reduction in respect of the hours claimed across the board. However, as regards the trial itself, it appears that two partners and a significant number of grade A and C solicitors attended. I do not think that more than three solicitors were reasonably required at that stage, only one of whom should have been a partner. The number of solicitors involved at the trial stage does, however, suggest that an over-generous approach may have been adopted to the involvement of additional solicitors at other stages as well.

51. I accept the point made on behalf of the CR about an excess of counsel. In particular, this trial itself, while not straightforward, was not of exceptional complexity, and it was not reasonable in my view to instruct two silks.

52. As regards the experts, I note that the charge of close to £900,000 set out in the schedule excludes fees for work on VoC (apparently a further £330,000). That seems to me grossly excessive for their work on the economics aspect of the argument on factual causation, even allowing for the fact that Mr Parker sought to conduct a regression analysis because of the indication that the CR's expert was undertaking a regression.

53. Mr Sansom has helpfully calculated what the total solicitors' costs would be if there were substituted the Guideline rates with a 30% uplift. This comes to £5.6 million. I will reduce that to £4.5 million on account of my observations above regarding the number of solicitors involved at the trial and, by reasonable inference, in various meetings. With a reduction for the cost of counsel and experts, on a broad brush approach I consider that an overall figure of £6.75 million appears reasonable, including allowance for the further time and expense on the VoC matters that were determined before trial. That is still a vast sum for a trial of this length. 93.6% of that sum is £6.32 million. Deducting a margin to allow for over-estimate, I determine the payment on

account should be 85% of that sum, i.e. £5.37 million. I note that this is less than half of the total costs apparently incurred by Mastercard on the causation issue alone.

The Further Limitation Trial

54. Mastercard has filed a costs schedule showing its costs of and relating to this trial at £3.196 million. I note that Mr Sansom states that this sum "is significantly less than the full amount of costs Mastercard incurred" as it does not include anything for the earlier preparation of these issues for the January 2024 trial when they were adjourned with "costs in the case", or for preparation of the costs submissions themselves. The schedule essentially comprises solicitors' fees of just under £2.2 million and Counsel's fees of almost £924,000. Mastercard seeks a payment on account of 65% of the total in the schedule, i.e. just over £2 million.

55. The Further Limitation trial was very different in character to the Causation and VoC trial. The issues were largely questions of law, although it is clear that much work had been required to produce the joint statement of facts. However, three witnesses of fact were called, one by the CR and two by Mastercard. The CR put forward a case alleging that Europay was very concerned to keep matters about MIFs confidential and one of Mastercard's two witnesses was essentially responding to that.

56. Nonetheless, the CR took a far-reaching approach to disclosure sought from Mastercard relating to how it viewed confidentiality and its general communications strategy. The disclosure, and the limited oral evidence, were relevant to the allegations by the CR that Mastercard had "fostered a culture of secrecy, non-transparency and non-disclosure in relation to interchange fess" and that it had "deliberately committed a breach of Article 101 TFEU". This resulted in a contested hearing in June 2023 based on a Redfern schedule. The Tribunal did not grant the CR all the disclosure he sought, on the grounds that this would have been disproportionate, but significant disclosure was nonetheless directed in response to the CR's request. As for the Causation and VoC trial, this covered an extensive period going back to 1992. The observations of Mr Sansom as regards the particular challenge and burden of disclosure for the Causation and VoC trial apply to this disclosure exercise as well. As so often, it is the work of disclosure which accounts for the bulk of the time charged.

57. The hourly rates charged by Freshfields were as set out at para 45 above. Therefore my comments about the substantial discrepancy with the Guideline rates again apply. Mastercard submitted that as the Guideline rates were increased as from 1 January 2024, then for the purpose of a payment on account the 30% uplift allowed by the Tribunal in its previous costs rulings in this case, and here for the Causation and VoC trial, should apply to those new rates. That is misconceived. In the first place, the new rates were expressly stated to apply only from 1 January 2024; they were not made retrospective although there would obviously be many cases after that date where the assessment concerned costs incurred before that date. Here, the great majority of solicitors' costs were incurred before that date. Secondly, part of the justification for the 30% uplift was that the rates to which it was applied were out of date. Since the new rates for Grades A and C solicitors (where the greatest discrepancies arise) are a little over 6% above the old rates, any uplift on the new rates would have to take that into account: i.e. a reduced uplift of around 23-24% would be applied. The overall result is the same. Accordingly, the overall solicitors' costs of £2.2 million fall to be reduced for present purposes, in round terms, to 1.7 million.

58. From Mastercard's schedule, it again appears that two partners attended court for the 6 day trial, along with several associates. I regard that as unreasonable and disproportionate. And although I accept that some time was spent seeking to identify and interview suitable witnesses, in a case where Mastercard called only two witnesses and their statements were not particularly lengthy, to have spent 1,175 hours on preparation of witness evidence (including 155 hours of partner time), strikes me as wholly disproportionate, even allowing for the fact that Mastercard's solicitors may have interviewed more potential witnesses than the two who were called. On a broad brush approach, I will reduce the overall cost of solicitors for this trial to £1.25 million as a more reasonable sum.

59. Mastercard used three leading counsel for this trial. It explained that Mr Otty KC was instructed with regard to the third issue involving the EU principle of effectiveness because he had represented Mastercard at the earlier hearing concerning EU law and the so-called 'cessation requirement' and so was familiar with the jurisprudence: see the Further Limitation judgment at [11]. It is true that Mr Otty did not attend court for the whole of the hearing. However, Mr Cook KC, who appeared at this trial, had also

represented Mastercard at that earlier trial. While re-instructing Mr Otty may have been convenient, I think that it was disproportionate. Altogether, for a trial of this length and nature, I consider that £300,000 is a reasonable allowance for combined counsel's fees.

60. With the extras of a little over £50,000, that produces a total of £1.6 million. Standing back, I regard that as generous, but not unreasonable, for this trial in a case of this substance. For the purpose of a payment on account, I will again apply a small discount to reflect a cautious approach and determine the payment at 85% of this sum, i.e. £1,360,000.

Conclusion

61. Accordingly, the CR shall make a payment on account of costs to Mastercard of:

(a) £5.37 million in respect of the costs of the Causation and VoC trial; and

(b) £1.36 million in respect of the costs of the Further Limitation trial.

62. Usually, a period of 14 days is allowed for payment. However, in view of the amount involved, I direct that the CR shall have 28 days from the date of release of this ruling to pay Mastercard the sum of £6,730,000 on account of costs.

The Hon. Mr Justice Roth
Acting President

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

Date: 17 October 2024
Corrected: 7 November 2024