



Neutral citation: [2022] CAT 5

IN THE COMPETITION
APPEAL TRIBUNAL

Cases Nos: 1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1383-1384/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

3 February 2022

Before:
THE HONOURABLE MR JUSTICE ROTH
(Chairman)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

DUNE GROUP LIMITED AND OTHERS

Claimants

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED

Defendants

AND BETWEEN

DUNE SHOES IRELAND LIMITED AND OTHERS

Claimants

- and -

(1) VISA EUROPE LIMITED
(2) VISA EUROPE SERVICES LLC
(3) VISA UK LIMITED

Defendants

RULING: COSTS

1. This ruling concerns the parties' applications for costs following the Tribunal's judgment issued on 26 November 2021, on the Claimants' application for summary judgment and the application by the Visa Defendants for permission to amend their defence: [2021] CAT 35 ("the Judgment"). The parties have all made written submissions on the question of costs. The same abbreviations are used in this ruling as in the Judgment.

The Mastercard Actions

2. The CAT rejected the application by the Claimants in the Mastercard Actions for summary judgment, insofar as it was not agreed. The Claimants very properly accept that in those circumstances they should pay Mastercard's costs of that application. Neither side suggests that those costs are suitable for summary assessment. Accordingly, there will be an order that those costs are to be subject to detailed assessment, if not agreed. Further, it is agreed that the detailed assessment is not to proceed until after determination of the Claimants' application for permission to appeal and, if permission is granted, the determination of the appeal.
3. Mastercard seeks an order for interim payment on account of its costs. The Claimants contend that the question of interim payment should also be postponed pending the outcome of any appeal. We do not agree. It is well established that an appeal does not operate as a stay on the liability to pay costs. While it is sensible that the process of detailed assessment should not proceed, given the time and costs which that involves, the same considerations do not apply to an order for interim payment. As Mastercard points out in its written submissions, there are no exceptional features in the present case which would justify a departure from the general approach, and no suggestion that Mastercard would be unable to repay an interim payment should an appeal be successful.
4. Mastercard has submitted a schedule of its costs showing a total of £272,459.62. That is a very high sum for a matter heard over three days with no live witnesses. We consider that it is not proportionate or reasonable, and note three aspects of the schedule in particular:

- (a) All the solicitors' work was done by grade A and grade C solicitors. As a result of the absence from the team of a grade B solicitor, it appears to us that a disproportionate amount of the work was done by a grade A solicitor instead of being delegated.
 - (b) The rate charged for the grade A solicitor was US\$1,126.25 (= £844.69) per hour. That is about 65% above the guideline figure for a grade A solicitor in a centrally based London firm for "very heavy commercial and corporate work" set out in the 2021 Guide to the Summary Assessment of Costs. We recognise that this is only a guideline and that for substantial and specialist competition litigation a figure in excess of the guideline may well be reasonable. However, the excess here is extremely large and we regard it as unreasonable.
 - (c) The solicitors spent over 25 hours working on Mastercard's skeleton argument that was settled by counsel. Mastercard had both leading and junior counsel preparing the skeleton. In those circumstances, we consider that for the solicitors to have spent this amount of time on the skeleton was disproportionate.
 - (d) The charge for the expert's report from Dr Gunnar Niels was over £92,000. We regard that as unreasonable. The report was 40 pages long and was very much a preliminary report, approaching matters in general terms without any complex analysis which, as Dr Niels explained, he would have to carry out in order to reach a full assessment and for which he would need much more information. Dr Niels had given expert evidence in the first instance trials against Mastercard and was very familiar with the background. Moreover, the last section of the report concerned disclosure about the exemptible rate of MIF, which did not relate to the issues determined in the Judgment for which Mastercard can recover its costs now.
5. We are conscious that it is not appropriate when determining an interim payment to conduct a granular reassessment of the costs claimed. Taking a broad brush approach, in the light of the above considerations we do not think that Mastercard's reasonable and proportionate costs are likely to exceed £200,000

and they may well be lower. We should add that the fact that the Claimants' total costs were almost £240,000 is not directly relevant. The Claimants' costs relate to the Visa Actions as well as the Mastercard Actions, including the various distinct matters raised by Visa. And we are not in any event determining whether the Claimants' costs are proportionate and reasonable (although we note that the rate charged by the grade A partner in the Claimants' solicitors, also based in London EC4, was £550 per hour).

6. We accept as correct Mastercard's submission that the amount of an interim payment should reflect an estimate of the likely costs that will be recovered, with an appropriate margin to allow for an over-estimate. We therefore order the Claimants to pay 70% of the above amount, i.e. £140,000, to Mastercard by way of interim payment on account of costs.

The Visa Actions

7. The Claimants submit that they should recover against Visa 50% of their costs on the basis that they succeeded on points (a) and (d) as set out in the Judgment at [109]. Visa disagrees and submits that overall Visa should receive 70% of its costs, which percentage allows for the fact that the Claimants had a measure of success. Visa also seeks a payment on account of its costs.
8. As regards the respective parties' measure of success, we do not think that is to be estimated by the fact that the Claimants succeeded as against Visa on two of the four heads listed in the Judgment at [109]. A better reflection of the issues before the CAT is found in the list of issues at [29]. However, the first of those seven issues was the asymmetric counterfactual. Although the Claimants succeeded on that issue, it was not argued at this hearing since the CAT had already decided it in the context of Visa's application for a reference to the CJEU in December 2020: see [2020] CAT 26. The Claimants were at the time awarded their costs of that application. In response to the summary judgment application, Visa took the sensible course of merely adopting its argument from the previous hearing, realising that the CAT could be expected to reject it, so as to found the basis for an appeal, and it was not argued at the hearing. Of the other six issues, four were decided in favour of Visa and two in favour of the Claimants. Moreover, Visa filed an expert's report and the Claimants incurred

fees in consulting experts (which costs accounted for about 25% of the Claimants' total costs): the expert involvement was related entirely to the issues on which the Claimants lost. Further, the Claimants' overall costs covered also the time and work involved in meeting arguments from Mastercard in the Mastercard Actions.

9. Having regard to the above circumstances and the substance of the various issues, in our view Visa should be entitled to recover 70% of its costs and the Claimants should be entitled to recover from Visa 20% of their costs. Rather than making cross-orders for costs, we think it is more satisfactory to make a single order. Taking into account the fact that Visa's costs would reasonably be somewhat higher than those of the Claimants, since it served factual evidence on the operation of the Visa scheme and potential counterfactuals, we consider that the appropriate order is that Visa should be awarded 55% of its costs from the Claimants.
10. As in the Mastercard Actions, the parties agree that there should be a detailed assessment of costs and that this assessment should be stayed pending the outcome of any applications for permission to appeal and, if granted the determination of the appeal or appeals.
11. Visa seeks an interim payment on account of its costs. For the same reason as set out above, we consider that no stay is appropriate as regards any interim payment. Visa's solicitors have filed a schedule of costs showing total costs of £808,252.30. That is in our view a staggering sum for these applications and the three day hearing involved. In our view, it is neither reasonable nor proportionate. We note several aspects of the schedule which may explain how such a high figure is reached:
 - (a) For both prior advisory work and the hearing itself, Visa instructed two QCs and two junior counsel. By comparison, we note that Mastercard used one QC and one junior and that the Claimants (who faced two opponents) are similarly only seeking the costs of one QC and one junior. The amount spent by Visa on counsel's fees was five times the amount spent by Mastercard, which in our view cannot remotely be justified on the basis that Visa were raising two additional issues. It is

of course open to any party to instruct as many counsel and pay them as high a fee as it wishes, but that does not make this a reasonable or proportionate cost that can be recovered from the other side.

- (b) As with Mastercard, all the solicitors' work was done by grade A and grade C solicitors. As a result of the absence from the team of a grade B solicitor, it appears to us that a disproportionate amount of the work in particular as regards the preparation of Visa's witness statements was done by grade A solicitors instead of being delegated.
- (c) The rate charged for the senior grade A solicitor was £850 per hour. We make the same observation in respect of that rate as set out in para 4(b) above.
- (d) Although a relatively small part of the total, "attendances at hearing" is charged for four solicitors, including two partners. We appreciate that those who worked on the case may be interested to observe the hearing, particularly when it is a remote hearing which they can watch from their desks. However, that does not make it reasonable or proportionate so as to be a recoverable cost. We note that Visa's charge under this item is close to double that of Mastercard.

12. As with Mastercard, for the purpose of interim payment we take only a broad brush view of what may be the likely level of reasonable costs. Looking at Visa's costs overall, we think that would be higher than for Mastercard because of the additional, Visa-specific issues, which required factual evidence. In our view, Visa's reasonable and proportionate costs should not exceed £275,000. Applying the proportion awarded, i.e. 55%, we direct that the Claimants should pay a little over 72% of the resulting figure so as to produce a round sum of £110,000.

Conclusion

13. For the reasons set out above, we order that:
- (a) in the Mastercard Actions:

- (i) the Claimants shall pay Mastercard's costs of the summary judgment application, those costs to be subject to detailed assessment if not agreed;
 - (ii) the detailed assessment shall be stayed pending the outcome of any appeal by the Claimants;
 - (iii) the Claimants shall make an interim payment on account of those costs in the sum of £140,000, that sum to be paid within 21 days.
- (b) in the Visa Actions:
- (i) the Claimants shall pay 55% of Visa's costs of the summary judgment and amendment applications, those costs to be subject to detailed assessment if not agreed;
 - (ii) the detailed assessment shall be stayed pending the outcome of any appeal by the Claimants and/or Visa;
 - (iii) the Claimants shall make an interim payment on account of those costs in the sum of £110,000, that sum to be paid within 21 days.

The Hon Mr Justice Roth
Chairman

Tim Frazer

Paul Lomas

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

Date: 3 February 2022