



Neutral citation [2023] CAT 8

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 February 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 SA (FORMERLY MASTERCARD
EUROPE S.P.R.L.)

Defendants

RULING (COSTS)

1. The Class Representative in these proceedings applied for permission to re-re-amend his Reply, which application was opposed by the Defendants. Following written submissions and at the conclusion of oral argument on 12 January 2023, we announced our decision that permission would be granted. On 3 February 2023 we issued our judgment setting out our reasons: [2023] CAT 5 (“the Judgment”). This ruling uses the same abbreviations as the Judgment.
2. In accordance with the Tribunal’s directions, both sides served written submissions concerning costs.
3. As regards preparation of the amendment itself, we think it is clear that the CR should bear those costs in any event. The amendment concerns matters that could and should have been pleaded in the original Reply or, so far as the “*Volvo* amendment”, at least in the Amended Reply.
4. The amendment introduces further arguments in reply to the Defendants’ limitation defence, and comprises three parts: Judgment at [12]. In practice, the first two parts raise similar considerations which will be determined together at a separate hearing now fixed for January 2024; the third is the *Volvo* amendment, raising an issue which will be determined following a joint hearing with claims against Mastercard brought by merchants who are similarly relying on the CJEU judgment in the *Volvo* case.
5. We directed that the Defendants should serve a response to the Re-Amended Reply. Although the costs of that may be regarded as costs occasioned by the amendment, this is not a case where the Defendants are amending an existing pleading. The desirability of such a response would have been the same if the CR had included the matters comprising the amendment in his original or amended Reply. Accordingly, we think that the fair position is that the costs of further work occasioned by the amendment and arising after 12 January should, as appropriate, stand or fall with the eventual resolution of the issues which the amendment has raised. We therefore reserve those costs.

6. That leaves much the most significant costs: the costs of the dispute concerning permission to amend. Each side contends that the other should bear all those costs.
7. As explained in the Judgment, we consider that both sides are to blame for the situation which had arisen. The CR should have pleaded these matters fully in his original Reply (or as regards *Volvo*, at least when putting forward the amended Reply when, we apprehend, it would not have been opposed and in any event it would not have involved a substantial hearing). He has no justification for failing to do so. However, Mastercard should then have made its position clear as regards s. 32 LA 1980 at or before the September CMC. Had it done so, the intention to amend would have been raised at that time and the Tribunal would have been able to manage this aspect of the proceedings appropriately. In particular, this issue would not have been fixed to be heard in January 2023, and the argument about a “late” amendment and disruption to the timetable for issues at the trial would not have arisen.
8. We therefore consider that in all the circumstances the just order is that each side should bear its own costs of the application for permission to amend, i.e. the correspondence, written submissions and oral hearing disputing the grant of such permission.
9. 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: 10 February 2023