Neutral citation [2017] CAT 27

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

23 November 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
PROFESSOR COLIN MAYER CBE
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L

Respondents

RULING (COSTS)

INTRODUCTION

1. By a judgment handed down on 21 July 2017 (the "Judgment"), the Tribunal dismissed an application for a collective proceedings order ("CPO") under sect. 47B of the Competition Act 1998, as amended (the "CA"): [2017] CAT 16. As directed by the Tribunal, both the Applicant and the Respondents filed written submissions regarding costs on 18 September 2017. In particular, the Respondents sought an order for costs in their favour and for an interim payment of £629,247.50, corresponding to their expenditure on counsel's fees. The Applicant contended that the Tribunal has no jurisdiction to make an order for costs, and in any event strongly resisted the making of any order. The parties made further written submissions on 29 September 2017, responding to each other's contentions.

2. The Applicant further submitted that there should be an oral hearing to determine the Respondents' application for costs. Although the Tribunal has power to direct an oral hearing of any application, it would be wholly exceptional to do so only on the question of costs following the issue of a judgment, particularly when there is no suggestion that the Tribunal should conduct a summary assessment. In light of the very full written submissions received from both parties, the Tribunal does not consider that an oral hearing is necessary in this case.

JURISDICTION

3. As already indicated, the Applicant contends that the Tribunal has no jurisdiction to make an order for costs concerning an application for a CPO which was unsuccessful. That submission is based on Rule 98 concerning costs in Part 5 of the Competition Appeal Tribunal Rules 2015 (the "Rules"). Rule 98 provides, insofar as material:

> "(1) Subject to paragraph (2), costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative,…
>
> (2) Costs relating to an application made by a class member, whether or not that class member is a represented person under a collective proceedings order, may be awarded to or against that class member."

4. By reason of the dismissal of the application for a CPO, the Applicant was never authorised pursuant to sect. 47B(7)(a) to be the class representative: he was only the proposed class representative. On that basis, it is submitted that there was no class representative within the scope of Rule 98(1), and that accordingly no costs may be awarded against the Applicant.

5. The Tribunal's general costs rule is Rule 104. In particular, Rule 104(2) states, insofar as material:

> "The Tribunal may at its discretion…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."

6. Referring to this provision, the Applicant submits that it is "not a freestanding provision that overrides Rule 98" and that:

> "Rule 104 just gives the Tribunal the discretion to make such order for or against the class representative as it considers appropriate within the scope of Rule 98. It does not confer on the Tribunal a jurisdiction or discretion to award costs to persons or entities outside of the ambit of Rule 98."

7. We reject that submission as fundamentally misconceived. Rule 104 confers on the Tribunal a general power to award costs which applies to all proceedings before the Tribunal, including collective proceedings within Part 5 of the Rules: see Rule 3(a). Rule 98 is a particular rule which applies only once a CPO has been ordered since then the proceedings assume a different character with a class representative and a potentially very large class of represented persons. Rule 98 therefore qualifies the general power in Rule 104 by providing that only the class representative and not any of the represented persons may be subject to an award of costs (save in narrowly defined circumstances). If the application for a CPO is rejected, then there is not only no class representative but also no class of represented persons. There are simply the persons whom the Applicant for the CPO was proposing to represent and against whom there can accordingly be no question of imposing any liability for costs. If the application is unsuccessful, then Rule 98 is not engaged but the general power concerning costs in Rule 104 continues to apply.

8. We should add that it is also not correct that even if a CPO were granted, the Tribunal would have no jurisdiction to award costs outside the scope of Rule 98. Consistent

with the practice of the courts where there is a commercial third party funder, the Tribunal could in an appropriate case make a costs order under Rule 104 against the funder: see *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 at [1].

9. The Applicant contends that his contention is supported by considerations of policy, in particular that the risk of an adverse costs order will be a significant deterrent to the making of a CPO application and so have a "chilling effect" on access to the courts which the collective proceedings regime is intended to enhance. However, the potential for exposure to significant adverse costs applies to the costs of the proceedings as a whole. The Applicant acknowledges that the Tribunal has jurisdiction to make an order against the class representative if the proceedings fail at trial. That reflects a conscious policy decision, as expressed in the Government's Response to its consultation on Private Actions in Competition Law (January 2013), specifically in the context of collective proceedings, at para 5.60:

> "The Government has therefore decided to maintain the loser-pays rule and to explicitly clarify in the CAT Rules of Procedure that this should be the starting point for cost assessment by the CAT."

Since as a matter of policy there is no immunity for the class representative from the loser-pays principle as regards the much more substantial costs of a trial of collective proceedings, we do not discern a policy to give protection from the adverse costs of an unsuccessful application for a CPO. If a person is ready, perhaps (as here) with the benefit of third party funding, to undertake the risks of collective proceedings and therefore of an adverse costs order should those proceedings fail, we do not see that they would be deterred from embarking on that course because they might have to pay the much lesser costs of an application for permission to bring such proceedings if that application was dismissed. What level of costs should be ordered in a particular case is of course an entirely separate matter.

10. We should add that the Applicant submitted that a defendant would be able to recover its costs of the pre-CPO stage from the class representative if a CPO was granted but the collective proceedings subsequently failed at trial. That obviously does not arise in the present circumstances but we have considerable doubt this would normally be appropriate. Our provisional view is that, as with any distinct application, the party

which opposes that application unsuccessfully should not normally be able to recover its costs of doing so, and indeed may be liable for the additional costs incurred by the applicant by reason of that opposition. If it were otherwise, that would deter an application for a CPO which was well-founded under the statutory regime, albeit that thereafter the claims in the proceedings proved unsuccessful.

DISCRETION

The general approach

11. Having determined that the Tribunal has jurisdiction to order costs against the Applicant, it is necessary to consider whether, and if so how, that discretion should be exercised in the present case.

12. As both parties recognise, Rule 104(2) gives the Tribunal a broad and general discretion. Rule 104(4) provides, insofar as material:

> "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;
>
> …
>
> (e) whether costs were proportionately and reasonably occurred; and
>
> (f) whether costs are proportionate and reasonable in amount."

13. The Applicant submits that the Tribunal should make no order for costs. He points out that there is no presumption in the Rules that costs follow the event, in contrast with CPR Rule 44.2(2). However, the fact that there is no general rule that the winner recovers its costs reflects the wide variety of proceedings that come before the Tribunal: see *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 at [21]-[22]. There, the Court of Appeal was commenting on the analogous provision in the previous Tribunal Rules at a time when private actions were few and far between. Even there, in the context of an appeal against a finding of infringement of the Chapter I Prohibition, the Court upheld the Tribunal's approach in that case of asking whether there was a winner in the proceedings and awarding costs accordingly. In

practice, when dealing with appeals or challenges by way of judicial review to the decision of a regulator, the Tribunal generally adopts a starting point that the loser should bear the costs: see *Intercontinental Exchange Inc v CMA and Nasdaq Stockholm AB* [2017] CAT 8, at [39]-[40] and the discussion of earlier authorities at [22]-[29]. In appeals against the determination of a dispute resolution by Ofcom under sect. 190 of the Communications Act 2003, the Tribunal has deliberately adopted a different starting point as regards Ofcom's liability for costs, recognising that Ofcom is there playing a quasi-judicial role: see *British Telecommunications Plc and others v Ofcom ("Ethernets")* [2014] CAT 20 at [14]-[16].

14. Since the Court of Appeal's judgment in *Quarmby*, the Tribunal's jurisdiction in respect of private actions has significantly expanded. In private litigation, the practice of the Tribunal is that the appropriate starting point is that the successful party should be awarded its costs: see e.g. *Albion Water Ltd v Dŵr Cymru Cyfyngedig* [2013] CAT 16 at [6]-[12].

15. The question arises whether the same starting point should be adopted as regards the application for a CPO in the context of collective proceedings. The Applicant submits that the Tribunal should in principle make no order for costs relying, in summary, on the circumstances that:

    (a) there was no unreasonable conduct on his part or "any other exceptional stand out factor militating in favour of an award against him";

    (b) on the contrary, as this was a follow-on claim, following the decision of the EU Commission finding the Respondents in violation of competition law, the bringing of the claim was unsurprising and reasonable;

    (c) in several previous cases where a claim had been found inadmissible or had been largely dismissed, the Tribunal has made no order for costs: see in particular *British Telecommunications Plc v CMA ("VULA Price Control")* [2017] CAT 19; and

(d) in a number of Canadian jurisdictions an Applicant bringing an unsuccessful motion for class certification is not liable for costs in the absence of unreasonable behaviour.

16. We think it is desirable that there should be a level of consistency as regards the approach to costs on CPO applications. We would emphasise that a starting point is no more than that: it is subject to displacement or qualification on the basis of the various factors set out in Rule 104(4): see para 12 above. Having considered the Applicant's submissions, we are not persuaded that there are good grounds why the Tribunal should not adopt as a starting point on a contested CPO application that the loser is in principle liable for the relevant costs of the successful party. In particular:

(a) the fact that the Applicant's conduct was not unreasonable does not affect the starting point. The conduct of both parties is relevant to the exercise of discretion: Rule 104(4)(a). Where neither party has behaved unreasonably the net effect of their conduct is neutral;

(b) we do not think that the fact that a CPO is applied for to pursue follow-on claims should in itself alter the starting point. We expect that most collective proceedings are likely to come into that category. But in any event, the allegation that the present claims indeed followed-on from the EU Commission decision was strongly contested by the Respondents. We note that the other claims against MasterCard in the UK based on the UK MIF, and in particular *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 11 and *ASDA Stores Ltd and Others v MasterCard Inc* [2017] EWHC 93 (Comm), were brought as stand-alone claims;

(c) the previous decisions on costs referred to by the Applicant do not establish any general principle but turned on their particular circumstances. Thus the recent costs ruling in the *VULA Price Control* case largely rested on the fact that BT's appeal clarified the approach to the making of costs orders under sect. 193A of the Communications Act 2003 and led to the CMA providing further disclosure after the appeal had been initiated. That case concerned an appeal against an order for costs made by the CMA in respect of a price

control reference, in which BT expressly invited the Tribunal to give guidance as to the principles governing the operation of sect. 193A. The appeal was determined on the papers without any oral hearing; and

(d) the Canadian jurisdictions referred to by the Applicant have particular statutory provisions qualifying or displacing the normal loser pays approach. British Columbia adopted a no-costs regime. Ontario, while preserving the court's ability to award costs, enacted in sect. 31(1) of the Class Proceedings Act 1992 a provision specifying that:

> "In exercising its discretion with respects to costs…the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest."

There is no equivalent provision in the CA or, indeed, the Rules. We accept that such considerations may be taken into account in the exercise of discretion under Rule 104(2) but they do not affect the starting point.

17. We should add that, contrary to the submissions from the Applicant, we do not find any assistance from the particular regime of qualified one-way cost shifting that applies to personal injury claims under CPR Rule 44.13-44.16. That particular regime reflects policy considerations concerning the funding of personal injury litigation that are very different from collective proceedings under competition law: see Note 44.0.4 in *The White Book 2017.*

The present case

18. Accordingly, the starting point is that the Respondents were undoubtedly the successful parties: the application for a CPO was dismissed.

19. We do not think that the novelty of the regime for collective proceedings or the potential uncertainty as to how the Tribunal might approach expert evidence is a reason for giving the Applicant immunity from a costs award in this case. This was, on any view, a very ambitious application for what would have been one of the largest class actions seen in any jurisdiction in the world. It was hardly typical of the kind of case that may be expected to be brought by way of collective proceedings. The

difficulties of establishing an appropriate measure of pass-through across every sector of retail commerce in the UK, and further of devising a fair method of distribution as between the members of this enormous proposed class, were unsurprising.

20. However, on an important issue, i.e. the authorisation of the proposed class representative, the Respondents put forward extensive submissions which largely failed: see the Judgment at [92]-[140]. That was a discrete aspect of the case: the Respondents instructed a specialist costs QC to argue it at the hearing and we note from the schedule of costs attached to their present application that a specialist costs junior counsel was also instructed. In those circumstances, we think it was unsurprising and reasonable that the Applicant then also felt it necessary to instruct a specialist costs QC to contest this part of the argument. We recognise that a part of the costs argument advanced by the Respondents regarding the terms of direct liability under the Funding Agreement was accepted by the Tribunal, and led the Applicant to put forward a draft amendment to cure the deficiency. But it was only to that limited extent that the Respondents' opposition to the authorisation of the Applicant as class representative met with success (and even that draft amendment was opposed in supplementary submissions from the Respondents: see the Judgment at [118]-[127]).

21. Since the authorisation of the Applicant was an entirely separate issue from the question of certification of the claims, we consider it is appropriate to disallow a part of the Respondents' costs. Moreover, we consider that the Applicant would be entitled to recover a part of his costs of meeting the unsuccessful arguments raised against him on that issue. Rather than making cross-orders, the better approach is to reflect the overall position in a single deduction from the Respondents' costs. In our view, if the Respondents' opposition had been confined to the narrow matter on which they succeeded, their argument could reasonably and proportionately have been advanced by leading counsel instructed on all the other issues and it would not then have been proportionate to bring in an additional QC simply to address that narrow point on the Funding Agreement. Accordingly, we consider the Respondents' costs of specialist costs counsel should be disallowed. Further, we note that the Respondents in their submissions say that no more than 18% of their total costs (including counsel's fees) relate to the funding issues. We also note that the argument on funding, and therefore

regarding authorisation of the Applicant, took up a little over half a day of the 2½ days hearing.

22. Adopting a broad brush approach, after deducting the fees of specialist costs counsel, we consider that the Respondents should be awarded 80% of their costs. We emphasise that in reaching that proportion we are not suggesting that 20% of the Respondents' costs relate to the funding issue. The 20% deduction reflects both the Respondents' own costs and a contribution to the Applicant's costs, also taking account of the fact that to the limited extent referred to above the Funding Agreement was found to be defective for the purpose of authorisation of the Applicant.

23. The Respondents further seek interest on their costs. However, we consider that the Applicant is correct in his submissions that the Rules in their current form do not enable the Tribunal to award interest on costs. We recognise that this is a lacuna in the Rules which requires urgent attention.

24. Accordingly, the order will be that the Applicant is to pay 80% of the balance of the Respondents' costs after the deduction of the fees of Mr Ben Williams QC and Mr Roger Mallalieu; and that if not agreed, such costs are to be subject to detailed assessment on the standard basis by a costs officer of the Senior Court of England and Wales, pursuant to Rule 104(5)(b).

PAYMENT ON ACCOUNT

25. The Respondents seek a payment on account of their costs. It is not in dispute that the Tribunal has jurisdiction to make such an order pursuant to Rule 104(2).

26. The total costs incurred by the Respondents up to 30 June 2017 were £1,992,961.60. That breaks down, according to the summary schedule served with the Respondents' present application, as follows:

Solicitors' professional fees	£1,252,096.10
Counsel's fees	£629,247.50
Foreign lawyers' fees	£95,971.82
Other disbursements	£15,646.18

27. After making the adjustments pursuant to the order set out above, counsel's fees are reduced to £559,197.50. The maximum recoverable up to 30 June 2017 is then £1,538,329.20.[1]

28. We recognise that this was a claim estimated at around £14 billion and that it is reasonable for any company, however large, facing the prospect of a claim of that size to leave no stone unturned in mounting its opposition. Nonetheless, it should be borne in mind that on this application: (a) the Respondents put in no evidence, whether factual or expert; (b) no disclosure of any kind was ordered; and (c) the oral argument took 2½ days (of which a little over half a day concerned the Funding Agreement). We do not question the expenditure by the Respondents on foreign lawyers, given that both sides put in copious reference to U.S. and Canadian jurisprudence which was helpful. But apart from that, we have to say that we regard costs of this magnitude as wholly unreasonable and disproportionate. We say that as regards both counsel's and solicitors' fees.

29. A party to litigation is free to spend as much as it wishes on lawyers, but the Tribunal, like the courts, will control how much it can recover from the other side. In that regard, proportionality is not to be assessed simply by comparing the level of costs with the amount at stake in the litigation but having regard to all the circumstances, including consideration of the legal work which the nature of the case reasonably required. As Leggatt J said in *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), at [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

[1] i.e. 80% x (£1,992,961.60 - £70,050).

> 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."

30. We appreciate that according to the costs budget which he filed, the Applicant apparently spent £1.75 million in making the CPO application. Without expressing a view on the reasonableness of that figure, we should say that as regards a CPO application we do not regard the level of expenditure by the applicant as a relevant comparator when considering the defendant's costs. An applicant has necessarily to do substantially more work, and the Applicant here put in full witness statements and a report from joint experts.

31. This is not a summary assessment of costs, but for the purpose of arriving at the appropriate figure for a payment on account it is necessary to reach some provisional view as to what level of costs is likely to be awarded and then err on the side of caution: see *Excalibur Ventures LLC v Texas Keystone Inc and others* [2015] EWHC 566 (Comm), per Christopher Clarke LJ at [22]-[24]. Taking a very broad brush approach and having regard to the very full skeleton argument that was prepared by the Respondents' counsel for the hearing, we consider that a reasonable and proportionate figure for counsel's fees (excluding specialist costs counsel) would be no more than £250,000. Considering what was involved on the Respondents' side, we find it difficult to see that the reasonable and proportionate figure for solicitors' fees could be any higher than that for counsel. However, we are conscious that we have not been provided with a breakdown of the slightly over £1.2 million charged by the Respondents' solicitors. In these circumstances, we are simply unable to come to even a very provisional estimate of the global figure for the reasonable and proportionate costs which the Respondents may be likely to recover on detailed assessment.

32. In these circumstances, we approach the question of payment on account by starting with the figure we set out above on account of counsel's fees and the actual expenditure on foreign lawyers (c. £96,000) and other disbursements (c. £15,600) set out above. We have regard to the fact that any liability of the Applicant will be met by a third party funder and therefore does not impose hardship on him personally, and

we also bear in mind that the Applicant is applying to the Court of Appeal for permission to appeal against the Judgment. Taking all this into account, we think that it is appropriate to award 80% of that total, without further deduction, having regard to the fact that we are unable to arrive at even a broad estimate of the reasonable and proportionate figure for solicitors' fees that would also be recoverable. Accordingly, we order an interim payment on account of costs of £289,280 (= 80% x £361,600). The Applicant is to pay that sum within 28 days from the date of this Ruling, unless he makes a reasoned application within 7 days for an extension of that period.

COSTS OF THE PRESENT APPLICATION

33. Finally, there is the matter of the costs of this application for costs, which it is convenient to deal with now. In the light of our ruling above, we order that the Applicant shall also pay 75% of the Respondents' costs of its application for costs, such costs to be subject to detailed assessment if not agreed.

The Hon. Mr Justice Roth
President

Professor Colin Mayer C.B.E.

Clare Potter

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

Date: 23 November 2017