



Neutral Citation Number: EWHC 3464 (Ch)

Case No: HC-2017-001410  
CP-2019-000002

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/12/2020

**Before:**

**MR JUSTICE MORGAN**

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**Between:**

**IDEAL SHOPPING DIRECT LIMITED AND OTHERS**

**Claimants**

**- and -**

**(1) VISA EUROPE LIMITED**  
**(2) VISA EUROPE SERVICES LLC**  
**(3) VISA UK LIMITED**  
**(4) VISA INCORPORATED**  
**(together "Visa")**

**Defendants**

Claim Nos: HC-2017-000474,  
HC-2017-001411,  
CP-2017-000015,  
CP-2018-000017,  
CP-2018-000023,  
CP-2018-000025,  
CP-2018-000027,  
CP-2018-000029,  
CP-2018-000033,  
CP-2019-000001,  
CP-2019-000012,  
CP-2019-000016,  
CP-2019-000024,  
CP-2020-000001

**AND BETWEEN:**

**IDEAL SHOPPING DIRECT LIMITED AND OTHERS**

**Claimants**

**- and –**

**(1) MASTERCARD INCORPORATED**  
**(2) MASTERCARD INTERNATIONAL INCORPORATED**  
**(3) MASTERCARD EUROPE SA**  
**(4) MASTERCARD/EUROPAY UK LIMITED**  
**(together “Mastercard”)**

**Defendants**

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**Kassie Smith QC and Alexandra Littlewood** (instructed by **Scott + Scott UK LLP**) for the  
**Claimants**  
**Brian Kennelly QC, Daniel Piccinin and Isabel Buchanan** (instructed by **Linklaters LLP** and  
**Milbank LLP**) for the **Visa Defendants**  
**Mark Hoskins QC and Hugo Leith** (instructed by **Jones Day**) for the **Mastercard Defendants**

Written submissions following judgment

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

## **MR JUSTICE MORGAN:**

1. On 11 December 2020, I handed down judgment in these cases. The neutral citation of that judgment is [2020] EWHC 3399 (Ch). I will now deal with a number of matters which have been raised following that judgment. The terms which were defined in the earlier judgment continue to have the same meanings in this judgment.
2. In relation to costs, it has been agreed that the Claimants will pay the costs incurred by Visa and Mastercard in relation to the applications made by the Claimants and in relation to the applications made by Visa and Mastercard, subject to an exception in the case of Visa. The exception relates to the application made by Visa in relation to undertakings which had been given by the Visa Claimants. In relation to that matter, it is agreed that Visa will pay the Visa Claimants' costs. It is also agreed that the costs payable pursuant to these orders will be the subject of a detailed assessment on the standard basis, if not agreed. It is further agreed that the detailed assessment should be stayed pending any appeal from my judgment.
3. The parties are not agreed as to what, if any, order ought to be made in relation to the costs of the proceedings which were issued in these cases and which are now at an end. Visa and Mastercard say that, because the proceedings are now at an end, the right order is that the Claimants should pay Visa and Mastercard's costs of the proceedings. The Claimants submit that the court should not make such an order. The Claimants do not ask for an order that Visa and Mastercard should pay any part of the Claimants' costs of the proceedings (for example, on the basis that some of the Claimants' costs might be on matters which are of use in further proceedings brought by the Claimants) and so it would seem that the Claimants are saying that there should be no order as to the costs of the proceedings.
4. On the question of the costs of the proceedings, the Claimants make three points. The first point is that the costs incurred by Visa and Mastercard ought to be very modest (the Claimants say "minimal"). However, that is not in itself a reason for saying that even modest costs should not be recovered from the Claimants. The amount of such costs will be determined on the detailed assessment. The second point is that, if Visa and Mastercard incurred costs which went beyond modest costs, it was not reasonable for them to have done so. Again, that is a point for a detailed assessment and is not a reason not to order the Claimants to pay reasonable costs reasonably incurred. The third point is that it is said that this case is just like a case where a claimant discontinues part of a claim and continues with the remainder of its claim. The Claimants refer to CPR rule 38.6(2)(b). It is said that the present case is analogous to a discontinuance of part of a claim because the Mastercard Claimants have already issued further proceedings against Mastercard and the Visa Claimants will issue further proceedings against Visa. However, rule 38.6(2)(b) does not say that a claimant in such a case does not have to pay the costs of the other parties in relation to the discontinued part of the claim. Instead, the rule deals with the time for the detailed assessment of those costs.
5. I consider that the right order is that the Claimants should pay the costs of the proceedings incurred by Visa and Mastercard. On the detailed assessment, the Claimants can raise the points they have raised at this stage and, in particular, they can raise the possibility that the costs of the proceedings should not be assessed at the

same time as the other costs are assessed but should be assessed later. That matter will then be dealt with by the costs judge, if it is raised.

6. Visa and Mastercard seek orders that the Claimants make interim payments on account of the costs they are ordered to pay. CPR rule 44.2(8) provides that where the court orders a party to pay costs subject to a detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so. The Claimants say that there is a good reason not to do so in that the Claimants propose to appeal my decision (and therefore the consequential orders for costs). In some cases, the possibility of an appeal might be relevant to an application under CPR rule 44.2(8). For example, if a party says that it will appeal and that if were to win the appeal, but yet had make a payment on account of costs in the meantime, there would be a risk that the respondent to the appeal would not be in a position to repay the costs. It is not said that there would be a risk of that kind in this case. The mere fact of a proposed appeal by the Claimants is not a good reason in this case for not making an order under CPR rule 44.2(8) against the Claimants.
7. I therefore need to consider the amount to be paid on account by the Claimants. Mastercard says that it has incurred costs of some £202,000 in relation to the matters the subject of the order for costs. Mastercard says that the Claimants should pay it £120,000, which is just under 60% of its total costs.
8. Visa has provided a number of different figures for its costs but its detailed statement of costs shows costs of approximately £350,000, not including VAT. Visa accepts that some part of its costs is not recoverable because of the order for costs which, it is agreed, I should make against it (in relation to the application concerning the undertakings). Visa says that the right percentage to be taken off its costs on this account is 10%. Visa then asks for a payment of 60% on account of such costs. Taking the round figure of £350,000 as a starting point, and taking off 10%, that gives £315,000, 60% of which is £189,000; Visa says that the right figure to award is £190,000.
9. In relation to Mastercard's costs, the Claimants say that they are manifestly excessive and disproportionate. The Claimants refer to the partner's hourly rate. They refer to the amount of time spent by the solicitors. They say it was not necessary for Mastercard to have three counsel. Mastercard replies that the costs are not disproportionate because the sums claimed by the Claimants were very substantial. It is said that the issues were not straightforward and it is pointed out that the Claimants have not revealed their own costs. Mastercard also seeks to answer the specific points made by the Claimants and rely on the fact that they only seek a payment on account of 60%.
10. Mastercard's costs are very high. The case did not involve a substantial amount of documentation. The issues were not unduly complicated. What was required was to apply a number of the rules of the CPR to the relatively simple facts, and the reasons for what had occurred, as explained by Ms Hollway. The various contentions were the subject of existing authorities which needed to be analysed. At this stage, in advance of a detailed assessment, I consider that a detailed assessment will significantly reduce the costs claimed. I conclude that a reasonable sum for the purposes of a payment on account is £80,000. I add that I am not assessing the irreducible minimum but, instead, a reasonable sum as required by CPR rule 44.2(8).

11. Visa's costs are even higher than those of Mastercard. Visa says that it, rather than Mastercard, took on more of the burden of preparing the case for the hearing. However, I still do not understand why Visa's costs are so much higher than Mastercard's costs which were themselves, prima facie, far more than reasonable costs. One possibility is that Visa incurred significant costs in relation to its case about the undertakings but in that event Visa's suggested 10% deduction for that point would not be enough.
12. Visa's statement of costs refers to 15 fee earners. Five fee earners attended on the Defendants, seven fee earners attended on the Claimants and eight fee earners attended on others. Plainly, I do not know what was involved but it is hard to see how all of that could reasonably be justified. Fifteen fee earners attended on the documents which, again, is difficult to understand. As to the skeleton argument, seven fee earners were needed to assist counsel to prepare that. Seven fee earners were used to attend the hearing or prepare for the hearing. Visa was represented by three counsel.
13. I think that it is likely that Visa's estimate of 10% of its costs as referable to the application in relation to the undertakings is much too low. Further, Visa has not allowed for a set-off in relation to the costs it will have to pay the Claimants. Doing the best I can in these circumstances, I conclude that a reasonable sum for the purposes of CPR rule 44.2(8) is £110,000.
14. The Claimants ask for permission to appeal to the Court of Appeal on two points. The two points relate to, first, my decision that the unsealed amended claim forms were not claim forms for the purposes of CPR rule 7.5 and, secondly, my decision that the Claimants could not rely on CPR rule 3.10. Taking this second point first, I consider that it is appropriate to give the Claimants permission to appeal in relation to rule 3.10. I do not do so on the basis that the Claimants have a real prospect of success on that point in the Court of Appeal but rather on the basis that the authorities at first instance are in a state where a ruling of the Court of Appeal would be welcome. Further, the Claimants appear to have their sights on a further appeal to the Supreme Court if the Court of Appeal were to hold that it continues to be bound by a number of previous decisions of the Court of Appeal. As to the first point, I am not persuaded that the Claimants have a real prospect of success on that point. However, if I am to give permission to appeal on the second point, the Court of Appeal will no doubt be asked to consider in detail the way in which Electronic Working functions and it may be desirable to give permission to appeal on the first point so that the Court of Appeal can itself decide what to make of it. I am not asked to, and I do not, give permission in relation to my decisions in relation to CPR rules 6.15 and 6.16.

