Neutral citation [2015] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1236/5/7/15

Victoria House
Bloomsbury Place
London WC1A 2EB

22 April 2015

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DSG RETAIL LIMITED
(2) DIXONS RETAIL LIMITED

Claimants

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SPRL

Defendants

Heard at Victoria House on 24 March 2015

RULING: PERMISSION TO SERVE OUT OF THE JURISDICTION

APPEARANCES

Mr Meredith Pickford QC, Ms Julianne Kerr Morrison and Mr Conor McCarthy (instructed by Wragge Lawrence Graham & Co LLP) appeared for the Claimants.

I. INTRODUCTION

1. This is an application for permission to serve out of the jurisdiction proceedings brought under section 47A of the Competition Act 1998 ("the CA"). It is made pursuant to the Practice Direction relating to the commencement of damages claims (2014). In a routine case, such an application would be determined on the papers. However, because the present application gave rise to a number of significant issues, and it is the first application made under the 2014 Practice Direction, I directed an oral hearing. Following the practice of the High Court, the application was heard without notice to the defendants: insofar as the Tribunal is being asked to exercise an extraterritorial jurisdiction, it would not be appropriate to expect the defendants to attend if the claimants themselves were unable to satisfy the Tribunal in the first instance that permission should be granted. Insofar as permission is granted, the defendants may apply to the Tribunal to set it aside pursuant to the Order made pursuant to this judgment.

2. The claim is what is commonly referred to as a "follow-on" action. It is based on the decision of the European Commission ("the Commission") in *MasterCard*, issued on 19 December 2007 ("the Decision"), finding that the legal entities representing the MasterCard organisation infringed what was then Art 81 of the EU Treaty (now Art 101 of the Treaty on the Functioning of the European Union) by, in effect, setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the EEA. This infringement was found to have lasted from 22 May 1992 until 19 December 2007 (i.e. the date of the Decision): Art 1 of the Decision. An application for annulment of the Decision was dismissed by the General Court of the EU on 24 May 2012: Case T-111/08 *MasterCard Inc and MasterCard Europe* [2012] (EU:T:2012:260). An appeal against that judgment was dismissed by the Court of Justice of the EU: Case C-382/12P, judgment of 11 September 2014 (EU:C:2014:2201).

3. The claim is brought against all three addressees of the Decision. The 1st and 2nd defendants are both American companies incorporated in Delaware. The 3rd defendant is a Belgian company domiciled in Belgium and a subsidiary of the 1st

defendant. Where it is unnecessary to distinguish between them, I shall refer to the three defendants collectively as "MasterCard".

4. The 2nd claimant, Dixons Retail Ltd ("Dixons RL") is the parent company of the Dixons group, the well-known operator of specialist retail stores selling consumer electronics and communications goods. The 1st claimant, DSG Retail Ltd ("DSG"), is a subsidiary of Dixons RL and operates stores in the United Kingdom. Although, in the Particulars of Claim accompanying the application, the two claimants are mostly referred to together as "Dixons", it is necessary to distinguish between them since the bases of their respective claims are different in material respects. Indeed, as Mr Pickford QC appearing for the claimants acknowledged, some of the pleaded assertions regarding what "Dixons" did or would have done clearly require amendment in this regard.

5. Both Dixons RL and DSG are English companies. Dixons RL has 11 other subsidiaries trading in, among other places, Belgium, Denmark, Finland, Greece, Ireland, Norway and Sweden. Those other subsidiaries are apparently incorporated in those countries, or at least outside the UK. They are not claimants in these proceedings but they are all claimants, along with DSG and Dixons RL, in proceedings commenced on 25 June 2014 in the High Court against the same three defendants (along with two others). The reason for DSG and Dixons RL bringing these proceedings under section 47A is to have the benefit of the different limitation period for competition damages claims that applies to such actions in the Tribunal. The claimants state that the High Court proceedings are brought to cover MasterCard's alleged infringements of competition law which fall outside the purely follow-on jurisdiction of the Tribunal, since:

> "MasterCard's infringements of competition law go beyond those found in the Decision" (Particulars of Claim ("PoC"), para 21).

6. The claimants explain that they are willing to agree to appropriate directions in due course for the effective management of the two actions together, e.g. by transfer of these proceedings to the High Court, provided that they preserve for these proceedings the limitation provisions which apply in respect of a claim under section 47A.

II. THE CLAIMS

7. The claims are brought for infringement of Art 101 TFEU on the basis of what are called the multilateral interchange fees ("MIFs") arrived at by decisions of an association of undertakings, as set out in the Decision. Those decisions by MasterCard concerned the intra-EEA fallback MIF ("the EEA MIF"), which it is alleged applied either directly or by way of a de facto floor for the national or bilaterally agreed MIF applicable in each country within the EEA where the Dixons group operates. Each relevant trading company in the Dixons group pays merchant service charges ("MSCs") to its acquiring bank for accepting MasterCard-branded consumer credit and debit cards. Under the heading "Causation and Loss", the PoC state, at para 133:

> "133.1 The MIF applicable to a given transaction was at all material times and continues to be passed on in full to Dixons as part of the relevant MSC.
>
> 133.2 The effect of the infringement as found in the Decision was unlawfully to inflate the MSCs which Dixons paid and continues to pay to Acquiring Banks in respect of transactions involving MasterCard-branded Consumer Cards."

8. However, the "Dixons" which paid these allegedly inflated MSC did not include Dixons RL, and para 9.11 of the claim form is incorrect in that regard. The MSCs were paid by Dixons RL's various trading subsidiaries in the different countries of the EEA where they traded. Save for DSG, those companies are not claimants in these proceedings.

9. The PoC set out the claims sought to be made by the two claimants at paras 114-115:

> "114. Dixons claims for all of the losses it has incurred as a result of the application of the EEA MIF to transactions in the United Kingdom.
>
> 115. Dixons Retail Limited claims for the losses it has incurred as a result of the application of the EEA MIF in each of the other jurisdictions relevant to this Claim, namely: the Republic of Ireland, Greece, Norway, Belgium, Denmark, Finland and Sweden on the following bases:
>
> 115.1 The application of the EEA MIF to transactions occurring outside the United Kingdom resulted and continues to result in substantial losses for Dixons Retail Limited through the reduced payment of dividends to Dixons [Retail Limited][1] by its subsidiary companies. As set out above, the EEA MIF applied directly in the

[1] The pleading refers to Dixons PLC but that is an error.

> relevant markets and/or acted as the de facto floor for the setting of any applicable Domestic MIF or bilaterally agreed MIF.
>
> 115.2 The operation of the EEA MIF outside the United Kingdom substantially impacted on the operation of Dixons' business in the United Kingdom on a routine and in recent years daily basis. Dixons Retail Limited has operated a cash pooling arrangement at least from 2002 where surplus funds from its subsidiaries are pooled on a daily basis. The application of the EEA MIF outside the United Kingdom, substantially reduced surplus cash available to Dixons Retail Limited to develop and invest in its businesses in the United Kingdom."

10. The claim put forward in para 114 relates only to UK transactions. Accordingly, that claim clearly relates to loss suffered by DSG in paying inflated MSCs.

11. The claim put forward in para 115.1 by Dixons RL is for loss of dividends received from its various foreign subsidiaries which themselves paid higher MSCs and therefore earned less revenue and profit. But in principle each of those subsidiaries would be able to claim against MasterCard for its individual loss. In those circumstances, the Court of Appeal's judgment in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 establishes that the parent company cannot claim for the reduction in dividends received from its subsidiaries as a result of loss for which the subsidiaries had a good cause of action. Having considered that authority, Mr Pickford very properly accepted that Dixons RL could not pursue a claim on that basis. He accordingly advanced Dixons RL's claim on the basis of para 115.2, explaining that the claim was for loss of *interest* which Dixons RL would have earned on the cash received. Since the trading subsidiaries remitted surplus funds each day, their own claims could not properly include interest and it was Dixons RL that directly suffered this loss itself. Thus Dixons RL was claiming interest as damages, following the landmark decision of the House of Lords in *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561.

12. The Particulars of Claim will need to be amended to make this clear, and attention also needs to be given in consequence to paras 134-138 of the pleading. Further, Mr Pickford said that the cash pooling arrangement also operated as between Dixons RL and DSG, so the claimants would wish to amend para 115.2 to include the interest lost by Dixons RL as a result of the reduced remittances from DSG.

13. Although in other circumstances it might have been appropriate for the pleading to be amended and re-filed before determining the claimants' application, since there remains a distinct and serious issue to be decided on the application it seemed preferable to proceed to a ruling, which can then be reflected in the subsequent amendment. I shall therefore consider the application on the basis that the claim by Dixons RL is limited in the manner described above.

III. SERVICE OUT OF THE JURISDICTION

14. As regards the claims against the 3rd defendant, since it is domiciled in Belgium jurisdiction is governed by Regulation (EU) 1215/2012 (the recast Brussels Regulation). Art 7(2) of this regulation provides, as one of the special jurisdictions, that a person (which includes a legal person) domiciled in a Member State may be sued in another Member State:

> "in cases relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred."

15. It is well-established that this covers not only the place where the event giving rise to the damage occurred but also the place where the damage occurred: see eg Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917 at paras [19] and [23]. Since both claimants are claiming for loss suffered in the UK, they invoke the jurisdiction of the Tribunal under this provision. On that basis, no permission is needed for service out of the jurisdiction on the 3rd defendant.

16. The 1st and 2nd defendants are both domiciled in the USA, and their position can be considered together for the purpose of service out of the jurisdiction.

17. Neither the CA nor the Competition Tribunal Rules 2003 ("the Rules") contain specific provisions regarding jurisdiction over persons outside the UK. However, section 47A CA, pursuant to which these proceedings are brought, states that it applies to any claim for damages or a sum of money

> "which a person who has suffered loss or damage as a result of a relevant prohibition [of competition law] may make in civil proceedings brought in any part of the United Kingdom."

18. In my view, this makes clear that the jurisdiction of the Tribunal as regards such a claim is equivalent to that of the civil courts of this country, subject to the particular limitations expressly set out in section 47A to which I return below. Moreover, in proceedings where the forum of the Tribunal is likely to be treated pursuant to rule 18 of the Rules as being England and Wales, I see no basis as a matter of principle on which the Tribunal should exercise a jurisdiction over persons outside England and Wales that is broader, or narrower, than that of the High Court of England and Wales. The Tribunal's *Guide to Proceedings* (2005), which has the status of a practice direction pursuant to rule 68(2) of the Rules, indeed states as regards service out of the jurisdiction that the directions of the Tribunal in such a case will generally follow the methodology of the CPR and direct the claimant to serve by any method permissibly by Part 6 of the CPR: see at para 7.18. Accordingly, in determining applications to serve out of the jurisdiction in a case where the proceedings are likely to be treated as proceedings in England and Wales, the Tribunal will apply the same approach as that which applies to civil claims in the High Court.

19. The governing principles applied by the High Court for permission to serve out were helpfully encapsulated in *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep 313, in the judgment of Lloyd LJ (with whom Rimer and Aikens LJJ agreed) at [99]-[101]:[2]

> "99. The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, 1 CLC 205, at paragraphs 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. "Good arguable case" in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law.

[2] On further appeal to the Supreme Court, this summary was not disputed and Lord Clarke expressly approved it: [2013] UKSC 5, [2013] 2 AC 337, at [164].

100. Thirdly, the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This requirement is reflected in Rule 6.37(3) of the CPR, which provides that "The court will not give permission [to serve a claim form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim".

101. On the last of the three basic principles, two further points should be made. They arise from the now classic speech of Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460*, at 475–484. They are: first, where a claimant seeks leave to serve proceedings on a foreign defendant out of the jurisdiction, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. Secondly, in such a case the burden is on the claimant to persuade the court that England is clearly or distinctly the appropriate forum."

20. I address the three requirements in that order.

(a) Serious issue to be tried on the merits

21. Section 47A CA provides, insofar as material:

"(1) This section applies to—

(a) any claim for damages, or

(b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following—

…

(c) the prohibition in Article 101(1) of the Treaty;

…

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed;

…

(6) The decisions which may be relied on for the purposes of proceedings under this section are—

…

(d) a decision of the European Commission that the prohibition in Article 101(1) […] has been infringed.

…

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed."

22. Here, in contending that the Defendants infringed Art 101 as found by the Commission (and upheld by the EU Courts), the Claimants undisputably show a real prospect of success since: the Tribunal is bound by the Decision: section 47A(9). Further, I consider that in the manner summarised above the Claimants show a real prospect of establishing that they suffered loss as a result.

23. However, the Decision established an infringement up to 19 December 2007: self-evidently the Commission could not find an infringement beyond the date of the Decision. An issue arises because the Particulars of Claim claim for losses not merely well beyond that date but extending up to the present day, on the basis that MasterCard continues to infringe Art 101 by setting, implementing and operating the EEA MIF. This is alleged to constitute either "a single continuous infringement" or a "repeat of the same infringement across the whole period of Dixon's claim": PoC, para 100.

24. The claim form states that the claim is "a 'follow-on' claim based upon the infringements as already found by the Commission in the Decision": para 9.8. That recognises the fact that the Tribunal's jurisdiction under section 47A, in its present form, is limited. The scope of that limitation has received judicial consideration on a number of occasions. For present purposes, it is sufficient to refer to the summary of the position set out by the Court of Appeal in the judgment of Arden LJ (with whom Patten and Beatson LJJ agreed) in *WH Newson Holding Ltd v IMI* [2013] EWCA Civ 1377, [2014] 1 All ER 1132:

> "[21] Of particular importance are the decisions of this court in *Enron 1* and *Enron 2*. In *Enron 1* this court, having examined the structure of section 47A, concluded (on a purposive interpretation) that a section 47A action had to be based on express infringement findings in the Commission's Decision. The CAT could not draw inferences or make further findings of infringement. Its function was limited to determining quantum and causation. Thus Patten LJ held:
>
>> "31 … It is not open to a claimant such as Enron Coal Services Ltd to seek to recover damages through the medium of section 47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the tribunal (whose jurisdiction depends on the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of section 47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue …
>>
>> 60. …The task for the tribunal [is] to identify the findings of infringement and award damages for any loss or damage which they have caused.""

25. It is necessary to apply that approach to the present claim, in order to identify the extent to which the claim is seeking to recover for loss caused by the infringements found by the Commission (which is permissible under section 47A), as opposed to alleging further infringements that were not established by the Commission and which the claimants would have to prove (which is beyond the scope of section 47A). In that regard, it is necessary to analyse the claim as between several periods. Furthermore, I bear in mind that all that the claimants have to show for present purposes is a real (as opposed to fanciful) prospect that they will succeed in showing that their claim comes within the former category.

<u>(i) 22 May 1992 to 19 December 2007</u>

26. This was the period expressly covered by the Decision and therefore, as noted above, it presents no problem.

<u>(ii) 20 December 2007 to 21 June 2008</u>

27. Arts 2-3 of the Decision required MasterCard to bring the infringement to an end within 6 months by formal repeal of the EEA MIF. On 12 June 2008, the Commission issued a press release reporting that MasterCard had provisionally repealed the EEA MIF with effect from 21 June 2008. On that basis, it can

reasonably be contended that the infringement continued until 21 June 2008. This was therefore not a new infringement and can come within the scope of section 47A.

(iii) 22 June 2008 to 30 June 2009

28. The claimants put their case as regards this period on two alternative bases. First, while not positively alleging that the EEA MIF was not duly set to zero (i.e. in effect, repealed) on 21 June 2008, the claimants require MasterCard to prove that this was done; and they assert that as from October 2008 MasterCard no longer set the EEA MIF to zero or introduced fees with equivalent effect, circumventing the remedy in the Decision. That is supported by two documents from the Commission, summarised as follows in paras 90.1-90.3 of the PoC:

> "90.1 on 1 April 2009, the European Commission issued a press release which stated that: "[i]n October 2008 MasterCard revised its acquirer pricing structure in the EEA, which included increasing certain existing acquirer fees (charged by a payment card scheme, in this case MasterCard, vis-à-vis its member banks in the framework of their adherence to the scheme), introducing a new fee on acquirers, and repealing certain acquirer fee waivers. However, these fees will now be repealed." MasterCard provided an undertaking that it would repeal these fees as of July 2009;
>
> 90.2 in the frequently asked questions memo issued by the European Commission on 1 April 2009, alongside the above press release, it was stated that the introduction of fees on 1 October 2008 "raised the question of whether MasterCard has effectively been circumventing the prohibition in the Decision to apply its MIF and put in place measures having the same or equivalent object or effect"; and
>
> 90.3 the memo confirmed that due to the increases in acquirer fees, the costs of acquiring banks were inflated such as to make the savings arising from the repeal of the EEA MIF impossible to pass on to Merchants."

29. The alternative claim is pleaded as follows:

> "91 In any event, even if the EEA MIF was set to zero between October 2008 and July 2009 and/or the acquirer fees put in place by MasterCard did not have the same or equivalent object or effect as the EEA MIF, it is averred that:
>
> 91.1 Dixons still has a claim for damages in respect of this period because the reduction of the EEA MIF was not passed on to Merchants that were subject to a MSC and/or Domestic MIF which had already been inflated by the EEA MIF; and
>
> 91.2 the application of the EEA MIF remained part of a single continuous or repeat of the same infringement across the whole period of Dixons' claim."

30. Even if the infringement was brought to end on 21 June 2008, it seems to me well arguable that it continued to cause loss to merchants for some time thereafter; and that the charges paid by the claimants therefore continued to reflect the old EEA MIF that was the subject of the Decision. Mr Pickford referred to some past decisions of the Tribunal which supported the proposition that where damages caused by an infringement were suffered after the infringement terminated, they fell within the scope of a section 47A claim. In my view, that must be correct as a matter of principle: the issues for decision in such a case remain confined to causation of damage and quantum, and do not involve any finding of a further infringement. It is impossible at this stage to assess to what point the claimants may establish the continuation of such loss, but I consider that their prospect of recovery on that basis are more than fanciful. Accordingly, the claim as set out in para 91.1 crosses the threshold of showing a real prospect of success.

31. I have some difficulty understanding the allegation in para 91.2 which appears to conflict with the premise on which para 91 is based. Moreover, in my judgment, the pleading at para 90 alleges findings of infringement that are not encompassed by the Decision. As regards the period June-October 2008, the claimants do not even allege that Mastercard failed to repeal the EEA MIF, and I do not consider that they can show a real prospect of success merely by requiring the defendants to prove the contrary. Indeed, the Commission documents which are quoted in the PoC clearly indicate that in the view of the Commission, which was evidently monitoring the situation, the EEA MIF was repealed. As regards the fees introduced by MasterCard in October 2008, that was manifestly a new fee structure. The Commission in the memorandum quoted in para 90.2 raised the question whether the fees had the equivalent effect to the EEA MIF. So that issue would have to be determined at trial, involving examination of the new fee structure, in what respects it differed from the EEA MIF, and whether it gave rise to the same anti-competitive effect – since the Decision found a restriction on competition by effect not by object. Whether the claimants may have a reasonable prospect of succeeding on that issue is beside the point. Such inquiries fall outside the scope of proceedings permitted by section 47A.

(iv) 1 July 2009 onwards

32. In its press release of 1 April 2009, the Commission outlined MasterCard's proposal to change its fee arrangements with effect from July 2009. The claimants assert that MasterCard indeed introduced a new set of rates which became effective on 1 July 2009. Those rates and the accompanying new rules introduced a number of significant changes from the previous rules. It is important to note that the Decision did not find that the setting of any MIF would infringe Art 101. The Decision states, at recital (13), that it:

> "does not prevent MasterCard … from adopting an entirely new MIF (other than the Intra EEA fallback interchange fees …) that can clearly be proven to fulfil the four cumulative conditions of Article [101(3)] of the Treaty based on solid empirical evidence."

Further, the Commission press release of 1 April 2009, to which the claimants refer, includes the following comments as regards these new rules:

> "In principle, … payment systems may be characterised by usage externalities and appropriately set interchange fees can help to optimise the utility of a card network to merchants and final consumers. In order for a MIF to fulfil the conditions of Article [101(3)] of the … Treaty, in particular the conditions of sufficient benefits to consumers and proportionality, the methodology to establish the MIF needs to provide for adequate safeguards to balance the negative effects of the MIF as identified in the Decision. The benchmark applied by MasterCard in its revised methodology aims at providing such a safeguard….
>
> The calculation of a MIF on the basis of this methodology leads to a weighted average MIF which is currently the lowest world-wide both for credit and debit card transactions. The empirical evidence of transactional benefits for merchants provided by MasterCard, in combination with the announced transparency enhancing measures … and its repeal of the scheme fee increases of October 2008, are considered by [the Commissioner for Competition] to be sufficient in order to conclude that it is not appropriate to pursue MasterCard for non-compliance with the Decision … or for infringing the antitrust rules."

33. I think it is clear from the Commission's own comments that the question whether or not the revised rules applicable from 1 July 2009 onwards infringe Art 101 has not been determined. Moreover, consideration of that question would require assessment as to whether those rules satisfy the conditions for exemption under Art 101(3).

34. In addition, the claimants note in the Particulars of Claim that by June 2009 MasterCard had withdrawn authority from its European Board, on which the various European banks were represented, to set or approve the EEA MIF. In its defence in

the High Court proceedings, MasterCard contends that as a result of these changes it ceased to be an association of undertakings for the purpose of Art 101 (as had been found in the Decision). This would accordingly be a further issue to be determined on any challenge to the MIF set in July 2009 in order to establish whether there was an infringement of the competition rules.

35. I have no doubt that these various factors mean that any allegation concerning MasterCard's conduct after 1 July 2009 falls outside the jurisdiction of the Tribunal under section 47A in its present form.

36. I therefore conclude that the claimants can show a serious issue to be tried on the merits in their claim under section 47A only as regards MasterCard's conduct and the level of the MIF up to 21 June 2008, and any damage allegedly suffered thereafter as a result of that conduct. They cannot pursue their claim in the Tribunal as regards alleged breach of Art 101 constituted by the acts of MasterCard after 22 June 2008. That does not, of course, preclude them from seeking to advance those allegations in their High Court claim: section 47A(10).

37. I would add that this distinction as between claims that may be made in the Tribunal and claims that may only be made in the High Court, with all the attendant difficulties, will be swept away once the Consumer Rights Act 2015 comes into force. The new legislation will introduce a revised section 47A giving the Tribunal unrestricted jurisdiction in competition claims in England and Wales. However, that obviously does not apply to the present application.

(b) Jurisdictional gateways under PD 6B

38. The claimants rely on two of the gateways specified in para 3.1 of PD 6B to the CPR:

    (a) this is a claim in tort where damage was sustained within the jurisdiction and/or resulted from an act committed in the jurisdiction: para 3.1(9); and

(b) the 1st and 2nd defendants are necessary and proper parties to the claim being pursued in these proceedings against the 3rd defendant: para 3.1(3).

39. As regards the tort gateway, I think that is clearly passed by DSG which was charged and paid the allegedly higher MSCs to its acquiring banks in England. As regards Dixons RL, I think it has a good arguable case that the damage for which it claims, as explained above, is to be regarded as damage sustained within the jurisidiction although I do not consider (if that is still alleged) that its loss results from acts committed in the jurisdiction.

40. In any event, I am satisfied that these two defendants are necessary and proper parties to the claim pursued against the 3rd defendant. They were the three addressees of the Decision. They appear to represent MasterCard as an international payment organisation jointly with the 3rd defendant, at least as regards its activities in Europe. And they are jointly and severally liable for the damage allegedly suffered by the claimants.

(c) The appropriate forum

41. Both claimants are English companies and their application states that the significant bulk by volume of MSC payments arose in England and Wales. The losses claimed all occurred in England. Although the claim by Dixons RL will involve consideration of the MSCs charged in various other European jurisdictions, it would be very inconvenient and cause much duplication if Dixons RL had to claim for the element of its loss caused by the MSC in each country in the court of that country instead of as part of a single set of proceedings. Furthermore, the High Court proceedings against these three defendants involve claims covering the various European countries where the subsidiaries of Dixons RL traded. There is likely to be much overlap between the present case and those High Court proceedings, in which the three defendants to this claim have accepted service and filed a joint defence. The intention, as I noted at the outset, is for appropriate directions to be given for this case to be heard together with the High Court claim.

42. In all the circumstances, I am satisfied that England and Wales is clearly the appropriate forum for the determination of this dispute.

IV. CONCLUSION

43. For the reasons set out above, permission is refused for service of the claim as presently pleaded alleging infringing acts by the defendants after 22 June 2008, but is otherwise granted on the basis that the pleadings are amended in accordance with this ruling, in particular so as to make clear the basis on which Dixons RL seeks to recover loss and damage.

V. POST-SCRIPT

44. This application was heard without notice, as is usually the case for an application for permission to serve out. As on any application without notice, the applicant is under a duty to make full and frank disclosure of matters material to the application. That means not only that care needs to be taken in setting out the factual basis for the application, but also that the Tribunal's attention should be drawn to any significant objections to the application that the defendants could reasonably be expected to raise if they were before the Tribunal. The duty does not require disclosure to the same degree as on an application for a without notice injunction, such as a freezing order, where granting the application has immediate and potentially serious consequences for the defendant. The factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission. Nonetheless, within the limited scope of that inquiry, if the claimant is aware of such factors as might cause the Tribunal to doubt whether permission should be granted, they should be clearly disclosed. This approach is well established on the authorities: see, eg, *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep 731, per Toulson J at [23]-[29]; *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, per Lawrence Collins J at [180]-[182].

45. In applications before the Tribunal, it will often be more appropriate for such disclosure to be made in a statement accompanying the claim form and similarly attested by a declaration of truth, rather than in the claim form itself. The Tribunal cannot be expected to go through a long claim form or Particulars of Claim teasing out material objections to service out of the jurisdiction. Moreover, since the

Tribunal will generally seek to deal with such applications on the papers, compliance with the duty of full and frank disclosure cannot be left to counsel's skeleton argument for a hearing since in most cases there will not be a hearing.

The Hon. Mr Justice Roth

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

Date: 22 April 2015