Neutral citation [2019] CAT 10

**IN THE COMPETITION APPEAL TRIBUNAL**

Case Nos: 1236/5/7/15
1265 and 1268/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

9 April 2019

Before:

THE HON MR JUSTICE ROTH
(President)
PETER ANDERSON
SIMON HOLMES

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**(1) DSG RETAIL LIMITED (2) DIXONS RETAIL GROUP LIMITED**
**-and-**
**DIXONS CARPHONE PLC**
**-and-**
**EUROPCAR UK LIMITED (and others)**

Claimants

- v -

**(1) MASTERCARD INCORPORATED**
**(2) MASTERCARD INTERNATIONAL INCORPORATED**
**(3) MASTERCARD EUROPE SA**

Defendants

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**RULING – PERMISSION TO APPEAL AND COSTS**

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## A. INTRODUCTION

1. We handed down our substantive judgment in this matter on 14 February 2019 ("the Judgment"): [2019] CAT 5. In this ruling, we use the same abbreviations as in the Judgment. We have subsequently received (a) an application by the Defendants for permission to appeal; (b) applications by the Claimants for costs. We have received written submissions in response from the opposing parties (save that Europcar did not make additional submissions in relation to an appeal). All parties are content for us to resolve these matters on the papers.

## B. PERMISSON TO APPEAL

2. The Judgment addressed two wholly distinct grounds: (1) the proper interpretation of the CAT Rules; (2) the application of sect 32(1)(b) of the Limitation Act 1980 in the circumstances of these cases. For the purpose of permission to appeal, they require separate consideration.

3. As regards the interpretation of the CAT Rules, the arguments raised a novel issue which has not previously been considered. Although the number of cases affected by our decision is limited, since with the passage of time only a few claims are affected by the transitional provisions in question, our decision does have implications for some other proceedings pending before the CAT. While we have confidence in our decision, we recognise that, applying the test in CPR rule 52.6, it cannot be said that an appeal does not have a real prospect of success. Accordingly, we grant permission to appeal on that ground.

4. The discrete part of the Judgment concerning sect 32(1)(b) is, in our view, of a very different character. We there applied the approach set out in the very full judgments of the Court of Appeal in *The "Kriti Palm"* in finding that the claim in respect of the Domestic MIF was dependant on the distinct restriction of competition in the rule whereby the EEA MIF applied by default to domestic transactions, and that this thereby gave rise to a distinct cause of action. We regard that position as clear on analysis of the Decision and these claims, for the reasons set out in the Judgment. Furthermore, the Defendants conceded that the

Claimants could not with reasonable diligence have discovered the connection between the EEA MIF and the Domestic MIF. Accordingly, we do not think that on this distinct ground the Defendants have a real prospect of success and, in that regard, we therefore refuse permission to appeal.

## C. COSTS

5. The Defendants recognise that they did not succeed on all issues and so should be liable for a proportion of the Claimants' costs but seek a discount from full liability.

6. The Claimants were wholly successful on the first of the two issues, i.e. concerning the interpretation of the CAT Rules. However, that was a pure question of law. Although all parties filed evidence, that evidence went solely to the second issue, i.e. the test under sect 32(1)(b) of the Limitation Act. On that issue, the Defendants succeeded as regard the EEA MIF. While they lost as regards the Domestic MIF, that was the result of the legal analysis of the claims and the Decision in the light of the statutory limitation test. The argument on the facts was whether the Claimants could with reasonable diligence have discovered their right to claim as regards the Mastercard MIF at all, and on that question the Defendants succeeded.

7. We accept that in these circumstances a discount from the Claimants' costs is clearly appropriate. We consider that the proper approach should reflect the proportion of the argument and relative expense devoted to the various different issues, but we reject the suggestion that this can be achieved by counting up paragraphs in the Judgment in the way put forward in the Defendants' cost submissions. In our view, it is necessary to take a broad, overall approach. We think that some 30% of the argument and expense was attributable to the first ground (i.e. the CAT Rules). For the rest, given the Claimants' substantial success in real terms, but the fact that the preparation of the evidence filed went to matters on which the Defendants succeeded, we think that in broad terms half of the costs relating to the second issue should be recovered by the Claimants. That would suggest that the discount from the Claimants' overall cost should be 35%. However, by its application in each of the actions, the Defendants raised

various other grounds which were not in the end pursued. We have no doubt that the Claimants are correct in asserting that they incurred costs in responding to all of the grounds raised in the applications even though, ultimately, various grounds were not pursued and so are not addressed in the Judgment.

8. Taking the above into account and standing back from the matter, we consider that the fair and appropriate discount from the Claimants' recoverable costs should be 25%.

9. This was a two day hearing and the Claimants' schedules of costs show that very substantial costs were incurred. The Defendants have raised various queries regarding the costs set out in those schedules and any attempt at summary assessment of costs would require some detailed enquiry of the relevant Claimants. In these circumstances, we consider that the proper order pursuant to rule 104(5) of the 2015 Rules is that the costs should be subject to detailed assessment by a costs officer of the Senior Courts of England and Wales, unless agreed.

10. This Ruling is unanimous.

The Hon Mr Justice Roth
President

Peter Anderson

Simon Holmes

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

Date: 9 April 2019