Neutral citation [2016] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1241/5/7/15 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

21 December 2016

Before:

THE HONOURABLE MR JUSTICE BARLING
(Chairman)
PROFESSOR JOHN BEATH OBE
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

B E T W E E N:

SAINSBURY'S SUPERMARKETS LTD

Claimant

- and -

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

Defendants

Heard at Victoria House on 16 December 2016

RULING (MATTERS RESERVED FOR FURTHER ARGUMENT)

APPEARANCES

Mr. Derek Spitz (instructed by MdR) appeared on behalf of the Claimant.

Mr. Matthew Cook (instructed by Jones Day) appeared on behalf of the Defendants.

A. INTRODUCTION

1. The Tribunal handed down its judgment in these proceedings on 14 July 2016 (the "Judgment", [2016] CAT 11). The Judgment expressly reserved the following points for further argument (unless those points could be resolved by agreement):

   (1) The effect of taxation on the damages awarded (see paragraphs 508 and 548(7) of the Judgment).

   (2) The interest to be paid on those damages (see paragraphs 546 and 549 of the Judgment).

2. This Ruling takes the Judgment as read and adopts the definitions used in the Judgment.

3. The parties have resolved between themselves the effect of taxation on the damages awarded to Sainsbury's. The parties agreed that for each year of damages calculated in the Judgment:

   (1) The applicable corporation tax for that year should be deducted.

   (2) The resulting damages, net of tax, would be the total of all these years.

   (3) The total damages net of tax would then be grossed-up at the corporation tax applicable in 2016, being 20%.

4. The parties were unable to resolve between themselves exactly how interest was to be calculated on these damages. Three, relatively narrow, issues arose for determination:

   (1) First, whether interest should be calculated on the damages for each year <u>prior</u> to the deduction of corporation tax or <u>after</u> corporation tax had been deducted.

   (2) Secondly, for the purpose of calculating interest for the 30% of the overcharge that Sainsbury's would have saved by taking out less new debt (see paragraph 546(3) of the Judgment), whether the rates of interest should be those stated in Harman 2/§5.16 (Table 5-2) or those stated in Harman 4/§4.17 (Table 4-2).

   (3) Thirdly, if the rates of interest to be used were those stated in Harman 4/§4.17 (Table 4-2), what figure should be used for the year 2015-2016.

   We consider these three points in turn below.

B. CALCULATION OF INTEREST PRIOR- OR POST- THE PAYMENT OF CORPORATION TAX

5. As was noted in paragraph 3 above, the parties have agreed that damages should be calculated on the basis that the applicable corporation tax for any given year should be deducted, with the damages then being "grossed up" at the presently applicable rate. It is inconsistent with this approach for Sainsbury's then to propose that interest be calculated on the entire amount of the damages, including corporation tax.

6. Put this way, the proposition only has to be stated to be rejected, and Mr. Spitz, on behalf of Sainsbury's, sensibly did not press the argument very hard before us.

7. Shortly before the hearing, in a letter dated 15 December 2016, Sainsbury's put forward an alternative to the "pre-tax" approach, based upon the difference between the date of the accrual of the obligation to pay corporation tax and the date on which that obligation had to be discharged which, Sainsbury's suggested, would on average be about five months later.

8. Mr. Cook, on behalf of MasterCard, objected to this approach. Sainsbury's having, for a period of months, maintained its "pre-tax" approach, it was now too late for Sainsbury's to introduce a new, "hybrid" approach, falling somewhere between the "pre-tax" and "post-tax" approaches. The objection as to lateness was not a merely formal objection: Mr. Cook pointed out a number of areas which – if the "hybrid" approach were to be adopted – MasterCard would have wanted to investigate, notably:

   (1) The difference in time between the accrual of the obligation on Sainsbury's to pay the MIF and the date on which that obligation had to be discharged.

   (2) The manner in which Sainsbury's would have held monies intended to discharge its tax obligations.

9. We agree with Mr. Cook. It is now too late for this point to be raised. However, that is not the only – or even the main – reason on which we reject Sainsbury's "hybrid" approach. As we noted in the Judgment, damages have to be assessed with a "broad axe" in mind. It is, of course, right that matters of taxation be taken into account when assessing damages, but here too the "broad axe" applies. We consider that the "hybrid" approach is quite simply too redolent of unnecessary collateral inquiry, which (for relatively small amounts of money at stake) will only serve to delay and increase the expense of the assessment process.

10. Accordingly, we consider that the choice, here, is between the "pre-tax" and the "post-tax" approaches. For the reasons we have given, it is our conclusion that the "post-tax" approach is to be preferred.

C. HARMAN 2 OR HARMAN 4?

11. Sainsbury's pointed out that the Judgment explicitly refers to the use of the interest rates in Harman 2: see paragraph 546(3)(ii) of the Judgment. MasterCard pointed out that the approach of the Judgment (as summarised in paragraph 545 of the Judgment) was predicated on a "cost of new debt" approach, and that all that Harman 4 was doing was up-dating Harman 2. The Harman 4 rates should therefore be used in preference to the rates in Harman 2.

12. Both Harman 2 and Harman 4 were before the Tribunal at the trial, and are both referenced in paragraph 34 of the Judgment. It is clear from the terms of both Harman 2 and Harman 4 that Harman 4 is simply intended to update Harman 2. Harman 2/§§5.16 and 5.17 make clear that the interest rates there set out are calculated on the basis of incomplete data from Sainsbury's. Harman 4/§4.4 and 4.17 make clear that the interest rates have been re-calculated in Harman 4 in light of further information provided by Sainsbury's.

13. In these circumstances, it is clear that the reference in the Judgment to Harman 2 is a slip: the reference should have been to Harman 4. We take this opportunity to correct that error.

D. THE RATES FOR 2015-2016

14. The Judgment makes clear, in paragraph 546(3)(ii), that where Mr. Harman was unable to provide a figure for a given year "the figure for the preceding year should be used". That was the case for 2015-2016 in Harman 2, where the rate for 2014-2015 was used.

15. Sainsbury's suggested that Harman 4 – in contrast to Harman 2 – contained a figure for 2015-2016 which should be used in preference to the 2014-2015 figure. In principle that must be right, but only if the figure for 2015-2016 is a reliable one. In this case, it is clearly not:

    (1) The data for the interest rates in Table 4-2 in Harman 4/§4.17 derives from "Appendix 4-1".

(2) Although Table 4-2 does not contain any figure for 2015-2016, Appendix 4-1 does. However, the data on which the rate for 2015-2016 is based in Appendix 4-1 relies upon incomplete data. Mr. Harman only had available the data for the first two quarters of the 2016 financial year and – in our judgment – quite rightly left out of Table 4-2 the 2015-2016 rate, which is clearly out of line with the rates for the preceding years in any event.

16. Accordingly, we hold that the correct rate for 2015-2016 is that for the preceding year, 2014-2015, as stated in Harman 4/§4.17.

E. CONCLUSION AND DISPOSITION

17. On the three issues that were contentious before us, we hold that:

(1) The post- and not the pre-tax figures should be used for the purposes of calculating interest.

(2) The rates for calculating interest are those stated in Harman 4/§4.17.

(3) The rate for 2015-2016 is the figure for the preceding year as stated in Harman 4/§4.17, namely 2014-2015.

It follows that on these three contentious points, MasterCard has succeeded, and Sainsbury's has failed.

18. We understand that the detailed calculations necessary to implement our rulings have already been carried out by the parties and agreed. We leave it to the parties to draw up the necessary order for the final disposition of this matter, including provision for the costs of the hearing on 16 December 2016. Failing agreement on the question of costs, the parties should send to the Tribunal very brief submissions on costs by 16 January 2017, which the Tribunal will determine on the papers.

19. One final point remains: we understand that the outcome of this Ruling is that Sainsbury's will be obliged to repay some of the monies paid by MasterCard to Sainsbury's pursuant to the Judgment. That repayment should be made by 16 January 2017, together with interest calculated at the Bank of England base rate plus 3%.

The Hon. Mr Justice Barling Prof. John Beath OBE Marcus Smith QC

Chairman

Charles Dhanowa OBE, QC (Hon) Date: 21 December 2016

Registrar