UKSC 2012/0209

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM
HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION) (ENGLAND AND WALES)

Court of Appeal reference C3/2011/1995
Neutral citation of judgment appealed against: [2012] EWCA Civ 1055

BETWEEN:-

MORGAN ADVANCED MATERIALS PLC (FORMERLY MORGAN CRUCIBLE COMPANY PLC)

Appellant

- and -

DEUTSCHE BAHN AG & ORS

Respondents

Observations of the European Commission

pursuant to Article 15(3) of Regulation 1/2003

I. INTRODUCTION

1. In the CA98,[1] Parliament decided that the limitation rules relating to a claim for damages before the Tribunal based on a finding of an infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) by the Commission should operate by reference to whether there are, *inter alia*, "proceedings against the decision… in the European Court". The Commission submits that, in view of the nature and scheme of the CA98, "decision" should be construed consistent with the concept of a decision in EU law, and in particular, how a decision is understood in the context of judicial review of decisions finding infringements of Articles 101 or 102 TFEU.

2. The Commission emphasises at the outset that it does not take a position on whether a different limitation rule to that set out in s.47A could have better suited the purposes of the CA98 in providing for the Tribunal to have jurisdiction over "follow-on" claims for damages. The Commission's interest in submitting observations in these proceedings lies in the fact that the limitation rule chosen operates by reference to whether there are "proceedings against the decision … in the European Court," and the Court of Appeal's analysis of the concept of a "decision" gives rise to concern that this could jeopardise the coherent application of EU competition law in all Member States in relation to the exercise of the right to seek damages for losses consequent on breaches of EU competition law.

3. The Commission essentially agrees with the position taken by the Appellant in its Written Case on the interpretation of s.47A and it need not repeat the Appellant's arguments. The Commission will; (i) identify its concerns about the Court of Appeal's analysis, (ii) how, on a proper understanding of the concept of a "decision", s.47A should be interpreted and (iii) comment on the Respondent's objections to the Appellant's arguments.

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1 The Commission adopts the abbreviations used in the Respondents' Written Case

II. THE COURT OF APPEAL'S ANALYSIS

4. The Commission submits that there are two principal errors in the Court of Appeal's analysis; (i) it incorrectly characterises the nature of a Commission decision and the limits on its review by the European Courts under Article 263 TFEU and (ii) it does not sufficiently recognise the link between proceedings under Article 263 TFEU seeking the annulment of a finding that an undertaking infringed Article 101 or 102 of the Treaty and the limitation rule enacted in s.47A.

– The nature of a Commission decision and the limits on the scope of its review

5. The Court of Appeal refers, at [110] to the concept of an "infringement situation", this concept being the basis for the findings at [111] – [112] that,

> "That approach to identifying the relevant "decision" is logical. The first decision to be made by the regulatory body is whether or not the relevant prohibition has been infringed. That is the base decision. If the prohibition has not been infringed, that is the end of the matter. There would be no infringement situation that could give rise to potential liabilities of particular parties or undertakings. There would be no need to inquire further into what undertakings were legally responsible for the infringement and to which the Commission Decision would be addressed.
>
> That analysis fits in with the effect of the appeal process on deferring the trigger date for the limitation period. The appeal by the undertakings against infringement is an appeal against the basic decision that the relevant prohibition has been infringed. The result of a successful appeal might be that no infringement situation existed at all. It is not correct to describe an appeal against that infringement decision as an appeal against a decision addressed to a particular party. It is an appeal directed to the decision that an infringement situation exists because a relevant prohibition has been infringed. The appeal is not simply against the decision against a particular party or a particular addressee…."

6. The Commission respectfully submits that this analysis is clearly incorrect in a number of respects, as appears from the judgment of the Court of Justice (sitting in full plenary formation) in *AssiDomän*[2] and from Commission decisions, such as the Decision that is the basis of the claims here. As the Appellant argues, there is no "base decision" that finds, *in abstracto*, that there is an "infringement situation".[3]

7. It clearly follows from *AssiDomän* that an application to the General Court is *not* "an appeal against the basic decision that the relevant prohibition has been infringed" and, contrary to the Court of Appeal, it is therefore entirely correct "to describe an appeal against that infringement decision as an appeal against a decision addressed to a particular party." As the Appellant has pointed out, a prayer for relief such as for the Court to "annul the contested decision in its entirety" (using "decision" in the sense of the instrument comprising the bundle of individual decisions relating to each addressee)[4] is inadmissible.[5] This follows from Article 263 TFEU, which confers standing on private persons to challenge only "an act addressed to that person or which is of direct and individual concern to them". It may be, as the Respondent insists, that the findings against each addressee of a decision "are interdependent with the findings made against the other parties",[6] but insofar as the finding of infringement addressed to A depends on an assessment by

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2 Case C-310/97P *Commission v AssiDomän Kraft Products* [1999] ECR I-5363 **[Auth/12]**.

3 Appellant's Written Case, paragraph 57. See also Joined Cases C-239/99P, etc, *Limburgse Vinyl Maatschappij and others v. Commission*, [2002] ECR I-8375 **[Auth/34, at paragraph 100**], where a "decision" is defined as follows: "[a]lthough drafted and published as a single decision, such a decision must be regarded as a group of individual decision establishing, in relation to each of the undertakings to which it is addressed, the breach or breaches which that undertaking has been found to have committed and, where appropriate, imposing on it a fine".

4 See the Judgment of the Tribunal [**Appendix/4, at paragraph 19(1)**].

5 Appellant's Written Case, paragraph 39.

6 Respondents' Written Case, paragraph 20.

the Commission of the conduct of B, C or D, A can challenge that assessment in proceedings contesting the finding of infringement made against it.

8. Similarly, in the context of an application for annulment under Article 263 TFEU in relation to a decision[7] finding that an infringement has been committed by several addressees, it cannot be said that the result of one such application can ever be that "no infringement situation existed at all"; as the Court of Justice held in *AssiDomän*, at [54] "although the authority *erga omnes* exerted by an annulling judgment of a court of the Community judicature …attaches to both the operative part and the *ratio decidendi* of the judgment, it cannot entail annulment of an act not challenged before the Community judicature but alleged to be vitiated by the same illegality." The limitation inherent to Article 263 TFEU as to the "act" that can be challenged means, as noted in *AssiDomän*, at [53], that the challenge "relates only to those aspects of the decision which concern that addressee."

9. The Commission notes that the Respondent does not make any sustained attempt to defend the notion that an action under Article 263 TFEU at the instance of one addressee of a decision can establish that "no infringement situation existed at all".[8] As further discussed below, the Respondent's arguments seek rather to interpret the limitation rule of s.47A in the light of what it sees as the substantive implications for liability of successful challenges under Article 263 TFEU.

– The link between proceedings under Article 263 TFEU and s.47A

10. As the Appellant points out, the bundle of individual decisions that may be the subject of challenge by each of the addressees of those decisions does not metamorphose into one general collective decision when it reaches the domestic legal order.[9] S.47A(8) restricts the right to bring an action for

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7 In the sense of the instrument comprising the bundle of decisions –see fn.4 above.

8 Respondents' Written Case, paragraph 11.

9 Appellant's Written Case, paragraph 46.

damages in the Tribunal "in reliance on a decision or finding of the European Commission" as long as "proceedings against the decision" are possible or are pending before the European Courts. S.47A(8) therefore operates by reference to proceedings governed by EU law and since such proceedings can only relate to the infringement found in relation to the applicant itself,[10] "decision" should therefore be construed to refer to the act addressed to an individual addressee.

11. *AssiDomän* is not specifically addressed in the discussion section of the Court of Appeal's judgment, but it appears from [51] that the Court of Appeal considered that *AssiDomän* related only to fines, the Court of Appeal's analysis emphasising that s.47A relates, by contrast, to private law claims for damages, the procedures for which are not governed by EU law [101] – [103]. The Respondents adopt a similar approach, but *AssiDomän* is framed in much wider terms than merely upholding the Commission's refusal to refund the fines paid by those who had failed to contest the *Wood pulp* Decision within the limitation period; as the Court of Justice emphasises in particular at [54] – [55], the decision had become definitive against those parties in *all* respects, including the finding of an infringement. The fact that the finding of infringement is made in a public law decision does not mean *AssiDomän* is irrelevant to a damages claim; the spheres of public and private enforcement overlap since under s.47A it is the public law decision finding an infringement that constitutes the basis for a private law damages claim,[11] a position consistent with the Court of Justice's recent judgment in a damages case, *Europese Gemeenschap v. Otis*.[12]

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10 Or of course to the penalty imposed, but as follows from this Court's judgment in *BCL Old v BASF* [2012] UKSC 45, proceedings in the European Courts against penalties are not relevant to the present case.

11 See also, Appellant's Written Case, paragraph 14.

12 Case C-199/11 *Europese Gemeenschap v Otis NV ("Elevators")* [2012] ECR I-000 [**Auth/30**]. Discussed further below.

III. THE INTERPRETATION OF S.47A

12. In the light of the above, it is submitted that the ordinary meaning of s.47A is as contended for by the Appellant. The Respondent argues that if s.47A had been intended to operate in this way, different wording would have been used, but the Respondent's suggested wording overlooks the fact that (in the context of decisions applying Articles 101 or 102 TFEU) proceedings can only be brought against "a decision that a particular undertaking has infringed" those provisions.

13. The Appellant's interpretation is supported by s.60 of the CA98. The Respondents object that there is no EU authority on any "corresponding question" but although the Statement of Issues does refer only to the interpretation of the word "decision", the word appears in s.47A in the context of proceedings against the decision before the European Courts. As explained above, there is ample authority as to the meaning of a "decision" in that context, to which s.60 directs the Court to defer.

IV. OBSERVATIONS ON THE RESPONDENT'S ARGUMENTS

14. As noted above, much of the Respondents' Written Case goes not directly to the interpretation of s.47A itself, but to arguing that s.47A must be interpreted as contended for by the Respondents for reasons that relate to an infringer's substantive liability. The Respondents' arguments are illustrated by its paradigm case[13] of a situation where Cartelists A, B, C and D are found by a Commission decision to have infringed Article 101 TFEU between 2000 – 2008. A does not challenge the finding in any respect (typically because it was the immunity recipient)[14] but B, C, and D bring actions for annulment under Article 263 TFEU, which are successful in that the European Courts annul the finding of an infringement as concerns B, C and D for the period 2005 -2008.

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13 Respondents' Written Case, paragraph 54.

14 Respondents' Written Case, paragraph 77.

15. Despite claiming that the Court of Appeal's novel concept of an "infringement situation" forms no part of the Respondents' case, the Respondents' arguments proceed on the basis that the liability of Cartelist A is determined not by the findings of the decision that are definitive against A (in the absence of any action for annulment by A before the European Courts) but by "the decision as to the infringement as a whole"[15] which requires the Tribunal to proceed by "taking account of the outcome of any relevant appeal against the decision which bears on the (common) facts about the infringement on the basis of which liability in damages will be assessed." It is submitted that this is simply a recasting of the "infringement situation" concept used by the Court of Appeal.

16. It may be that the Court finds that the basis on which substantive liability is to be assessed is an issue that does not need to be determined in this Appeal, as the issue that has been defined is that of the interpretation of s.47A, which is a procedural rule about limitation, not a substantive rule about liability. Should the Court decide however that the interpretation of s.47A requires recourse to considerations of the "smooth working of the system",[16] then it is submitted that the Respondents' "Workability" arguments[17] are based on a misconception since, although there is no authority that is precisely on the point, all relevant authority points strongly in favour of *AssiDomän* being relevant to private law claims as well as to liability under public law.

17. As noted above, a decision which is definitive is definitive not only as regards the infringer's liability to pay any fine imposed by the Commission but also as regards the finding of infringement (without which no fine could lawfully be imposed). The Respondents seek to answer this by claiming that the *AssiDomän* principle cannot be applied to hold Cartelist A liable for damages simply by reference to the infringement that is definitive against A because

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15 Respondents' Written Case, paragraph 48 d.

16 Respondents' Written Case, paragraph 44 c.

17 Respondents' Written Case, paragraph 51 *et seq*.

A's liability depends on "the decision as to the infringement as a whole",[18] which in turn requires the Tribunal to have regard to the European Courts' findings in the actions brought by B, C and D.

18. Contrary to the Respondents,[19] it is submitted that this is not an answer to the application of the *AssiDomän* principle: similar arguments to those made by the Respondents[20] were made by the addressees of the *Wood pulp* decision who belatedly sought to have their fines set aside, arguing that it would be manifestly unjust to disregard the Court of Justice's decision in the *Wood pulp* case[21] on the merits of the decision which had become definite against them. The Court of Justice nevertheless affirmed the principle of legal certainty and rejected the claims for repayment.

19. Contrary to the Respondents,[22] *Europese Gemeenschap v Otis*[23] does recognise the principle of the binding effect of decisions that have become definitive in cases where damages are claimed for alleged losses resulting from joint activity. *Otis* is a preliminary ruling under Article 267 TFEU from proceedings before a national court where the Commission claims damages from all the members of the *Elevators* cartel, on the basis of their joint and several liability and, as noted at [22], not all challenges to the *Elevators* Decision had been resolved by the date of judgment in *Otis*. Nevertheless, at [51] the Grand Chamber of the Court of Justice confirmed that the principle of *Masterfoods*,[24] (now given legislative expression in Article 16 of Regulation

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18 Respondents' Written Case, paragraph 48 d.

19 Respondents' Written Case, fn.52.

20 Respondents' Written Case, paragraph 74.

21 Joined Cases C-89/85 etc. A. *Ahlström Osakeyhtiö and Others v Commission ("Wood Pulp")* [1993] ECR 1307 [**Auth/22**].

22 Respondents' Written Case, paragraph 72.

23 Case C-199/11 *Europese Gemeenschap v Otis NV ("Elevators")* [2012] ECR I-000 [**Auth/30**].

24 Case C 344/98 *Masterfoods and HB* [2000] ECR I 1136 [**Auth/36**].

1/2003) also applies, "when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU."[25] This implies in turn that "the national court is required to accept that a prohibited agreement or practice exists" where that has been established by a Commission decision that has become definitive against its addressee.[26] This requirement flows from the need to ensure the coherent and uniform application and practical effect of EU law. It is also a specific expression of the division of powers within the EU legal order between, on the one hand, national courts and, on the other, the Commission and the European Courts.[27]

20. Furthermore, in a damages case, giving effect to the definitive character of the infringement against A does not imply choosing legal certainty over material justice; whereas in *AssiDomän* the obligation to pay the fines was a clear and direct result of the infringement found by the *Wood pulp* decision, in a damages case liability to pay damages depends not only on the Commission's finding of an infringement, but on the Claimants' ability to show that they suffered losses that were caused by the cartel.[28] Thus, in the Respondents' paradigm case, although A's infringement would be definitive against it, if the annulments secured by B, C, and D reflected a lack of evidence of their participation in any infringement, it would be very difficult for purchasers of

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25 Case C-199/11, *Europese Gemeenschap v Otis NV and others*, *("Elevators")* [2012] ECR I-000 [**Auth/30 at paragraph 51**].

26 Case C-199/11, *Europese Gemeenschap v Otis NV and others*, *("Elevators")* [2012] ECR I-000 [**Auth/30 at paragraph 65**].

27 C-344/98, *Masterfoods and HB* [2000] ECR I-11369 [**Auth/36, at paragraph 56**]. See also Case C-199/11, *Europese Gemeenschap v Otis NV and others*, [2012] ECR I-000, [**Auth/30 at paragraph 54**].

28 Case C-199/11 *Europese Gemeenschap v Otis NV ("Elevators")* [2012] ECR I-000 at [65] [**Auth/30**]. See also, Appellant's Written Case, paragraph 45.

the relevant goods from B, C and D to show that the prices they paid were cartelised prices.[29]

21. Even on the Respondents' premise about A's liability being affected by the outcome of B, C and D's actions under Article 263 TFEU, the Respondents' paradigm is an extreme case that is not representative of the generality of cases.[30] In the present case, of the six undertakings identified in Article 1 of the Decision, only one, Conradty, did not cooperate with the Commission; all the others cooperated at least to the extent that they "did not substantially contest the facts on which the Commission based its allegations"[31] and some, such as Carbone Lorraine, provided substantial evidence of the parties' infringement. Upon the expiry of the limitation period under Article 263 TFEU, the Decision became definitive against the Appellant, Conradty and Hoffmann. It was clear at the outset therefore that the possibility that "no infringement situation existed at all"[32] simply could not arise: there were at least three parties who allowed the Decision to become definitive against them, without any challenge to its findings. As the Tribunal noted, at [46], "justice delayed is justice denied, and if an addressee has elected not to

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29 In this respect, the Respondents overstate the assistance that is likely to be available from the Commission's Decision; their statement (at Respondents' Written Case, paragraph 54 a) that the Commission will have found that prices were raised by the cartel is generally incorrect: cartels are established as restrictions by object, rendering it unnecessary for the Commission to show that the cartel had actual effects on prices. Although it should be acknowledged that the Decision here does extend to finding effects [**Appendix/5 at recitals 151, 236 and 245**] this is not generally the case with the Commission's cartel Decisions.

30 As correctly noted in the Respondents' Written Case, paragraph 26, most of the Commission's cartel enforcement is driven by its leniency regime, with cases typically initiated by the disclosure to the Commission by an immunity applicant of substantial evidence of the cartel and its participants. The threshold for obtaining immunity from fines is high and furthermore, it is usual that at least some of the other participants will, on discovering that the matter is under investigation, also seek leniency by providing the Commission with further evidence of the cartel. Cases where all participants (save for the immunity recipient) have a realistic prospect of securing the annulment of all or a substantial part of the Commission's findings are therefore now rare.

31 [**Appendix/5 at, e.g recital 329].**

32 [**Appendix/5 at, e.g recital 329**].

appeal, it is difficult to see why section 47A proceedings should be put off until all the *other* addressees of the decision have had their appeals determined."[33]

22. The Respondents' contentions about "workability" must be seen in the context of the fact that claims for damages for infringements of Articles 101 and 102 TFEU can also be brought in the High Court, where the normal limitation rules apply, without the constraints of s.47A. Far from proceedings subject to the normal limitation rules being unworkable, the Commission understands that cases tend to be brought in the High Court rather than the Tribunal. The jurisdiction of the High Court is not limited to "follow-on" actions, but in practice, many cases in the High Court do rely heavily on a Commission decision and are commenced notwithstanding that challenges to the Commission's decision by some of the Defendants remain pending. *National Grid v ABB* illustrates how case management decisions can resolve the sort of difficulties the Respondents invoke.[34]

23. Finally, the Commission notes that in 2012 the United Kingdom Government issued a consultation paper on reforming private actions in competition law and the conclusions drawn from the responses were published in January 2013.[35] It is notable that one of the conclusions is that the Government has decided to extend the Tribunal's jurisdiction to include "standalone" cases.[36] For this purpose, the Government decided that the limitation periods for the Tribunal should be harmonised with those of the High Court, with the usual six year limitation period to apply to claims for damages in the Tribunal.

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33 [**Appendix/4**].

34 [**Auth/19, notably at paragraph 7**].

35 Department for Business, Innovation and Skills, "Private Actions in Competition Law: A consultation on options for reform – government response"

36 Ibid. Paragraphs 4.5 – 4.7.

V. CONCLUSION

24. The Commission hopes that these observations are of some assistance to the Court in deciding the case pending before it. If the Court finds it necessary to seek definitive guidance on any question of European Union law raised by these proceedings, it is of course open to this Court to refer a question to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU.

NICHOLAS KHAN

Legal Service
European Commission
200 Rue de la Loi
1049
Brussels

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