



Hilary Term
[2014] UKSC 24
On appeal from: [2012] EWCA Civ 1055

JUDGMENT

Deutsche Bahn AG and others (Respondents) v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc) (Appellant)

before

**Lord Neuberger, President
Lord Mance
Lord Sumption
Lord Toulson
Lord Hodge**

JUDGMENT GIVEN ON

9 April 2014

Heard on 11 and 12 March 2014

Appellant

Mark Brealey QC
Marie Demetriou QC
(Instructed by Clifford
Chance LLP)

Respondent

Jon Turner QC
Rob Williams
(Instructed by Hausfeld &
Co LLP)

Intervener

Nicholas Khan
(Instructed by The
European Commission)

LORD MANCE (with whom Lord Neuberger, Lord Sumption, Lord Toulson and Lord Hodge agree)

1. The issue on this appeal is whether claims against Morgan Advanced Materials plc (formerly Morgan Crucible Co plc) (the appellant) for loss allegedly suffered by reason of a cartel infringing article 81(1) TEC (now article 101 TFEU) are time-barred. The issue links with important substantive questions about the nature of the decisions of the European Commission (or European Court of Justice) which bind domestic courts as to the existence of such a cartel. It has been very well argued by counsel on both sides.

2. Article 81(1) prohibited “all agreements between undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”. The appellant and others operated an illegal cartel in the sector of electrical and mechanical carbon and graphite products. The appellant as whistle-blower disclosed the existence of the cartel to the Commission and a Commission Decision finding that article 81(1) had been infringed by the members of the cartel was issued on 3 December 2003. The appellant escaped any fine. The other cartel members received heavy fines.

3. Most of the cartel members appealed to the General Court, contending that it should annul the Decision or substantially reduce the fines. The General Court dismissed their appeals on 8 October 2008, and the time for any further appeal to the Court of Justice against the finding of infringement expired on 18 December 2008. Two of the companies lodged further appeals against their fines, but their appeals were dismissed by the Court of Justice on 12 November 2009, and are of no materiality to this appeal: *BCL Old Co Ltd v BASF plc* [2012] UKSC 45; [2012] 1 WLR 2922.

4. On 15 December 2010, Deutsche Bahn AG and others (the respondents) filed with the Competition Appeal Tribunal claims for damages for loss alleged to have resulted from the cartel. The claims were “follow-on” claims, that is claims made under section 47A of the Competition Act 1998 in reliance upon the European Commission’s finding (upheld in fact in all respects on the various appeals) that article 81(1) TEC had been infringed. Section 47A(4) assigns such claims to the Competition Appeal Tribunal, while section 47A(5) provides that

“.... no claim may be made in such proceedings—

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

ii) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.”

5. Section 47A(6) states that

“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 81(1) or article 82 of the Treaty has been infringed;”

Section 47A(8) provides that

“The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are—

i) the period during which proceedings against the decision or finding may be instituted in the European Court; and

ii) if any such proceedings are instituted, the period before those proceedings are determined.”

The inference from section 47A(8) is that, if and to the extent that a Commission decision upon which reliance could otherwise be placed under section 47A(6)(d) is set aside on appeal, there ceases to be any such decision for that purpose.

6. The advantage of follow-on proceedings (as opposed to independent High Court proceedings for infringement of article 81(1), or now article 101) is that, by section 47A(9) of the 1998 Act:

“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.”

7. A potential disadvantage is that rule 31 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) introduces a two year period for the bringing of any follow-on claim. Rule 31 defines that period as beginning on the later of two dates, being the end of the period defined by section 47A(8) of the 1998 Act or the date on which the cause of action accrued.

8. The issue thus arises whether the decision to which the above provisions refer is the Commission Decision viewed as a decision made against and not appealed by the appellant, or the Commission Decision viewed as a decision made against all the cartel members, appealed by most of them and finally upheld as to liability by the General Court. On the former approach the two-year limitation period began on 13 February 2004 when time expired for an appeal by the appellant to the General Court, and the present follow-on claims issued on 15 December 2010 were brought too late. On the latter approach it began only on 18 December 2008 when time expired for an appeal to the Court of Justice by those who had appealed to the General Court, and the follow-on claims were in time. The appellant therefore argue for the former approach, the respondents for the latter.

9. The Tribunal (Marcus Smith QC, Mrs Margot Daly and Mr Dermot Glynn) by judgment of 25 May 2011 accepted the appellant’s case, and so struck out the respondents’ claims. The Court of Appeal (Mummery, Etherton and Sullivan LJJ) by a judgment dated 31 July 2012 ([2012] EWCA Civ 1055; [2013] Bus LR 125) accepted the respondents’ case and so restored their claims. The appeal comes to the Supreme Court with its permission.

10. Section 47A(9) of the 1998 Act reflects a general principle of European law, that domestic courts cannot take decisions running counter to a Commission decision finding an infringement of article 81 TEC or now article 101 TFEU. Domestic courts must therefore accept a Commission decision that a prohibited agreement or practice exists: Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369; Case C-199/11 *Europese Gemeenschap v Otis NV* [2013] 4 CMLR 141, para 65.

11. In contrast, the existence of any loss and of a direct causal link between any loss and the agreement or practice in question are matters for the national court: *Otis*, para 65. So too are “the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle

of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)”: Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, para 62. Likewise, it is “for the domestic legal system of each member state to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under article 81 EC, provided that the principles of equivalence and effectiveness are observed”: *Manfredi*, para 81.

12. In the present case, after reasons extending over 364 paras, the Commission Decision concluded by an operative part adopting a Decision consisting of four simple articles. The first declared that six named undertakings including the appellant “have infringed article 81(1) by participating,” for periods separately stated in the case of each, “in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products”. The second imposed separately specified fines (or in the appellant’s case no fine) “for the infringements referred to in article 1”, to be paid within three months to a specified bank account. The third required the immediate termination of the infringements and prohibited their repetition, and the fourth recited that the Decision was addressed to each of the members of the cartel, giving names and addresses, including the appellant’s. The operative part ended with a statement that the Decision was enforceable under article 256 TEC.

13. In accepting the respondents’ case, the Court of Appeal (in a judgment given by Mummery LJ with which his colleagues agreed) was influenced by considerations falling under three main heads. First, the issue was essentially one of domestic law: the claim was for private law damages, unrelated to the penalties or fines which sanction breaches of European law; section 47A was a domestic provision regulating (amongst other matters) limitation, a matter left to domestic law (paras 100-103), although section 47A was not in this respect to be compared with ordinary domestic limitation periods (paras 104-106). The objectives and scheme of section 47A were different, because, inter alia, the period it prescribes

“only impacts on certain aspects of the claims. Liability for infringement has already been established in the Commission Decision and is binding on the parties and the Tribunal. Only issues of causation and quantum are left to be determined by the Tribunal” (para 105).

Section 47A was therefore more about the allocation and distribution of judicial business within the system of domestic courts and specialist tribunals than concerned with the normal limitation policy of barring stale claims (para 106). However, it had also to provide for the possibility that the Commission Decision

might not actually be final or binding as regards civil claims, because it might be partially or completely set aside on appeal to the European Court of Justice (para 107).

14. Second, the Court of Appeal saw the statutory references to a “decision” establishing that the prohibition “has been infringed” as quite general in their natural and ordinary meaning, and as not referring to “a decision against, or as regards, a particular party or particular addressee of the Commission Decision” (para 110). It saw a decision that a cartel exists as a decision relating to “a single and continuous infringement based on common evidence and interdependent facts” (para 116). It saw the appellate process before the European Court of Justice as directed to the same “base” decision that there had been infringement, rather than to any decision against any particular party or addressee (para 112). Once infringement was found, it was true that the Commission had necessarily to levy individual fines on individual addressees, but appeals against fines were irrelevant to civil proceedings for damages (paras 114-115 - see also para 3 above).

15. Thirdly, the Court of Appeal regarded practical considerations as militating in favour of its interpretation (paras 118-119). It thought it more sensible that any follow-on claim should be postponed until the final decision on infringement was known, “so that all questions of causation, quantum and contribution could be resolved at the same time” (para 119). It noted that, on the appellant’s case, the appellant would itself have had no defence to liability for a single and continuous infringement by all the undertakings to which the Commission Decision had been addressed, even if all their alleged fellow cartel members had successfully appealed to the European Court of Justice and had the finding of infringement set aside (para 18). The Court of Appeal saw that as a consequence against which the appellant, in other contexts, would have been likely to dispute (para 17).

16. As to the Court of Appeal’s first head, section 47A is a provision of domestic law, and the procedures and limitation period governing civil claims for breach of article 81 (or now article 101) are matters assigned by European law to domestic law. But section 47A contains critical cross-references to a matter determined by European law. The decision establishing that article 81(1) has been infringed, to which section 47A(5) and (9) refer, is taken under European law by the Commission (subject to any appeal to the European Court of Justice). Further, it is a decision which is, under European law and not merely under section 47A(9), binding on domestic courts and tribunals. Under European law, it only leads to fines and an order to terminate the infringement. These are matters outside the scope of domestic Tribunal proceedings, just as an award of civil compensation is a matter for the Tribunal or High Court, outside the jurisdiction of the European Court of Justice. The Court of Appeal deduced from this distinction that European law is irrelevant to the nature of the decision to which section 47A refers. That was in my opinion an error. The decision to which section 47A refers is the decision taken by the

Commission under European law (here upheld by the European Court). The fact that it gives rise at the European level to fines and injunctive relief, and not to civil remedies, is beside the point. It is the only decision which there is. To understand its nature, regard must necessarily be had to European law.

17. Article 249 TEC provides “A decision shall be binding in its entirety upon those to whom it is addressed”, and article 288 TFEU is in very similar terms. But such terms leave open whether a decision operates on a unitary basis against all addressees, or as against each addressee separately. The nature of a decision under article 81(1) (now article 101(1)) has in this respect been explained by the European Court of Justice in Case C-310/97 P *AssiDomän Kraft Products AB v Commission of the European Communities* [1999] ECR I-5363. There, the Commission had by Decision dated 19 December 1984 found forty wood pulp producers to have been party to a cartel. Article 1(1) of the operative part of the Decision found concertation in the prices for wood pulp deliveries to the European Economic Community in 1975 to 1981, article 1(2) found concertation on actual transaction prices charged in certain Community countries, while article 1(5) found a practice of including in contracts for wood pulp sales clauses prohibiting the export or resale of the wood pulp purchased by customers. The Commission fined thirty-six of the forty producers, including nine established in Sweden, substantial sums. Twenty-eight of the addressees of the Decision (none of them Swedish) filed appeals seeking annulment of the Decision and of the consequent fines. The European Court of Justice by judgment of 31 March 1993 (Joined Cases C-89/85 and others, *Ahlström (A) Osakeyhtiö v Commission of the European Communities* [1993] ECR I-1307) annulled both article 1(1) of the operative part of the Commission Decision, holding that the conduct relied upon by the Commission “does not evidence concertation” (para 126) and article 1(2), holding that the addressees had not had an opportunity effectively to defend themselves in the administrative procedure against the allegation. It upheld the finding of practice made in article 1(5). Having annulled the finding of certain of the infringements, the Court then annulled or reduced the fines imposed by the Commission, and further annulled the undertakings imposed in consequence of the Commission’s findings of infringements which had now been annulled.

18. After delivery of the Court’s judgment, the Swedish addressees of the Commission Decision asked the Commission to re-examine their legal situation and to refund them the fines they had paid, to the extent to which they had been imposed for infringements found in articles 1(1) and 1(2) of the Decision which had been annulled by the Court. The Commission having declined to do this on 4 October 1995, the Swedish addressees brought proceedings on 15 December 1995, claiming that the Court should annul the Commission’s Decision of 4 October 1995 and order repayment of such fines. The Court of First Instance (now the General Court) on 10 July 1997 concluded that, although the Commission Decision must be treated as a bundle of individual decisions, it would be contrary to the principle of legality for

the Commission not to have to review its initial decision, and that the fines should be repaid. On further appeal, the Court of Justice set aside the Court of First Instance's decision.

19. The Court of Justice identified the issue as follows:

“49 Essentially, the appeal raises the question whether, where several similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action and obtained annulment, the institution which adopted them must, at the request of other addressees, re-examine the legality of the unchallenged decisions in the light of the grounds of the annulling judgment and determine whether, following such a re-examination, the fines paid must be refunded.”

The Court's answer included the following instructive passages:

“52 First, since it would be ultra vires for the Community judicature to rule ultra petita the scope of the annulment which it pronounces may not go further than that sought by the applicant.

53 Consequently, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Community judicature relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Community judicature.

54 Furthermore, 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.

55 The only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the Community Court is to determine the exact meaning of the ruling made in the operative part of the judgment. The authority of a ground of a judgment annulling a measure cannot apply to the situation of persons

who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever.

...

57 It is settled case-law that a decision which has not been challenged by the addressee within the time-limit laid down by article 173 of the Treaty becomes definitive as against him

....

63 Where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action against the decisions concerning them and obtained their annulment, the principle of legal certainty underlying the explanations set forth in paras 57 to 62 above therefore precludes any necessity for the institution which adopted the decisions to re-examine, at the request of other addressees, in the light of the grounds of the annulling judgment, the legality of the unchallenged decisions to determine, on the basis of that examination, whether the fines paid must be refunded.”

20. The essential principle derived from these statements was recently repeated in Case T-462/07 *Galp Energía España SA v European Commission* (unreported) 16 September 2013. Again, only some of the addressees of a Commission Decision had appealed, but they sought annulment of the Decision as against all its addressees. The General Court said:

“89 Principally, the applicants submit claims seeking annulment of the contested decision in its entirety and not in so far as it concerns them.

90 However, a decision adopted in a competition matter with respect to several undertakings, although drafted and published in the form of a single decision, must be seen as a set of individual decisions finding that each of the addressees is guilty of the infringement or infringements of which they are accused and imposing on them, where appropriate, a fine. It can be annulled only with respect to those addressees which have successfully brought an action before the European Union judicature, and remains binding on those addressees which have not applied for its annulment (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and

C-254/99 P *Limburgse Vinyl Maatschappij v Commission* [2002] ECR I-8375, paras 99 and 100).

91 Accordingly, the applicants are not entitled to seek the annulment of the contested decision in so far as it concerns other addressees.”

21. The judgments in *AssiDomän* and *Galp Energía* establish that a Commission Decision regarding the existence of a cartel constitutes a series of decisions addressed to its individual addressees, which remain binding or not according to the lodging and outcome of any individual appeals. A successful appeal by one addressee, establishing that there was no cartel, has no effect on the validity and effects of the Decision determining that there was such a cartel and levying a fine as against another addressee who has not appealed. This is so although article 81(1) (and now article 101(1)) applies to agreements and concerted practices (concepts which postulate the involvement of more than one party), and although a Commission Decision, such as that in question on this appeal, addresses in a single document all addressees by reference to one or more particular agreements or practices found to exist between all of them.

22. It follows in the present case that, even if the appeals against infringement by alleged cartel members other than the appellant had succeeded, that would in European law have made no difference to the findings as to the existence and scope of the “complex of agreements and concerted practices” in the relevant sector to which the Commission Decision found the appellant to have been party. The Commission Decision would have remained as against the appellant in full force and effect. That being the (only) Decision against the appellant in European law, it is also the only decision to which section 47A(5) and (9) apply. The respondents’ submission that a successful appeal by other alleged cartel members either nullifies or pro tanto modifies the existence of the relevant “decision” for the purpose of section 47A(5) would mean that there existed at one and the same time an unmodified decision for European purposes and an annulled or modified decision for domestic law purposes. That is the opposite of what section 47A postulates. The Tribunal, in dealing with civil claims, would not be bound by the European legal decision establishing that the prohibition had been infringed, as section 47A(9) contemplates, but by a different scheme developed in domestic law inconsistently with European law. The refusal under that domestic scheme of civil relief against the addressees who had not appealed would on its face infringe the European principles that domestic law should reach results consistent with legal rulings binding at the European level and that there should be an effective domestic remedy for breaches of European law established at the European level (see paras 10 and 11 above).

23. Reference was made to other provisions of the Competition Act 1998, such as sections 32, 36 and 46, dealing with the Office of Fair Trading's powers to make a decision that an agreement infringes the prohibition in Chapter I of that Act, and enabling any party to such an agreement to appeal to the Tribunal. These provisions may well raise a similar issue to the present in a purely domestic context (especially bearing in mind the provisions of section 58A paralleling section 47A), but, however that may be, they cannot in my opinion affect its answer in the context of section 47A. More generally, there is nothing surprising in domestic law about the proposition that a successful appeal by only one defendant held liable at first instance in conspiracy leaves unaffected the liability of another defendant also held liable at first instance for the same conspiracy, in the absence of any appeal by that other defendant.

24. The Court of Appeal recognised under its first head that section 47A proceeds on the basis that liability for infringement would already have been established in the Commission Decision and that only issues of causation, quantum and contribution would remain for the Tribunal or domestic courts to decide (see para 13 above, and paras 105 and 108 of the Court of Appeal's judgment). But this assumes that the Commission Decision will have decided all issues regarding the scope of the cartel. Otherwise, substantial issues regarding the nature of the infringement would remain for the Tribunal or domestic courts. That assumption is not easy to reconcile with the Court of Appeal's reasoning in its second main head, that the references to a "decision" establishing that the prohibition "has been infringed" are quite general in their natural and ordinary meaning, and do not refer to "a decision against, or as regards, a particular party or particular addressee of the Commission Decision" (see para 14 above).

25. The assumption is however clearly correct. The decision referred to in section 47A cannot be a decision in the air that there was an unspecified infringement. It must be a decision that a cartel existed between specified parties during specified periods, that is, the decision in the operative part of a Commission Decision to which the Court of Justice referred in *AssiDomän*, paras 53-55. It is the decision found in the present case in article 1 of the operative part of the Commission Decision. As the Court of Appeal put it in a decision cited by Mr Jon Turner QC in his submissions for the respondents, section 47A has the effect that "the defendant cannot deny that it has committed whatever infringement the regulator has found" and that "the decision that there was an infringement, and a particular infringement, is conclusive": *Enron Coal Services Ltd v English Welsh and Scottish Railway Ltd (No 2)* [2011] EWCA Civ 2, [2011] UKCLR 303, paras 50 and 53. Further, "What the Tribunal cannot adjudicate on, in a claim for damages, is whether there has been any, and if so what, infringement": *Enron*, para 142. Finally, however, contrary to the Court of Appeal's reasoning in its second head, the Commission Decision is addressed separately to each addressee, so that a successful appeal by one addressee has no effect on its validity against another addressee who has not appealed.

26. The third head of the Court of Appeal's reasoning proceeds to a considerable extent upon a basis which begs the essential issue. It is only possible to speak of awaiting a "final decision on infringement" to be given on an appeal to the European Court of Justice by another addressee of the Commission Decision, if that appeal is capable of affecting the Commission Decision in so far as it impacts on an addressee who has not appealed. As regards the Commission Decision on the scope of the cartel, on the basis of which questions of causation and quantum will fall to be decided as against an addressee who has not appealed, this will not be the case. Only as regards contribution could it be the case, in so far as a successful appeal by another addressee will deprive an addressee who has not appealed of a potential contributing party. In practice, it may therefore be appropriate to adjourn the determination of contribution proceedings, until all appeals by other addressees have been determined. But it remains the case that, as against a non-appealing addressee, the Commission Decision that there has been a cartel involving all addressees stands, even though some of them may and do appeal successfully. That the appellant would, in other circumstances, have been likely to argue the opposite sheds no doubt on this.

27. In the respondents' submission, the practical difficulties or incongruities do not end there. If (as in *AssiDomän*) only some addressees appeal, and are successful on appeal in having a finding that there was a cartel annulled, how, the respondents ask, could or would the Tribunal or High Court determine questions of causation or quantum as against an addressee who had not appealed? The answer in my opinion is that the Tribunal or High Court would have to determine all such questions on the basis that there was a cartel as the Commission had held, bindingly, against the non-appealing addressee of its Decision. In the result, therefore, a non-appealing addressee of a Commission Decision may, at least theoretically, find itself carrying full civil liability (without any fellow cartel members from which it may seek contribution) in respect of a cartel, the existence of which has been negated on appeal by its alleged fellow cartel members. All that can be said is that, if there was really no cartel (or a more limited cartel than found by the Commission Decision), it might be difficult for a claimant to prove that it had suffered any loss caused thereby. Further, in the case of a whistle-blower like the present appellant, a hypothesis of no cartel is self-evidently unreal. Finally, of course, the situation is likely to remain hypothetical in most cases, as it did in the present.

28. In the result, none of the heads of the Court of Appeal's reasoning is in my opinion sustainable. A Commission Decision establishing infringement of article 81 (now article 101) constitutes in law a series of individual decisions addressed to its individual addressees. The only relevant decision establishing infringement in relation to an addressee who does not appeal is the original Commission Decision. Any appeal against the finding of infringement by any other addressee is irrelevant to a non-appealing addressee. Under section 47A(5), the relevant decision establishing that article 81 had been infringed is thus in the present case the

Commission Decision dated 3 December 2003, and, once the time for the appellant to appeal against that Decision had expired on 13 February 2004, the respondents had under section 47A(8) two years within which to bring a follow-on claim.

29. The follow-on claim for civil damages which the respondents in fact only made on 15 December 2010 was thus out of time. The appeal falls accordingly to be allowed, the Court of Appeal's judgment must be set aside, and the Tribunal's judgment dated 25 May 2011 striking out the respondents' claim restored.