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Case No: A3/2017/3424

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS & PROPERTY COURTS, COMPETITION LIST
(CHANCERY DIVISION)

MRS JUSTICE ROSE

HC-2008-000002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2019

Before :

THE MASTER OF THE ROLLS

LORD JUSTICE BEAN

and

LORD JUSTICE FLAUX

Between :

LA GAITANA FARMS SA & OTHERS

La Gaitana
Appellants

- and -

BRITISH AIRWAYS PLC

Respondent

-and-

AIR CANADA & OTHERS

Part 20
Respondents

Mr Fergus Randolph QC & Mr Philip Moser QC (instructed by Edwin Coe LLP) for the
La Gaitana Appellants

Mr Jon Turner QC & Mr Michael Armitage (instructed by Slaughter and May) for the
Respondent

Mr Daniel Beard QC & Mr Thomas Sebastian (instructed by Linklaters LLP, Hogan
Lovells LLP, Squire Patton Boggs (UK) LLP, Shearman & Sterling (London) LLP and
Wilmer Cutler Pickering Hale and Dorr) for the Part 20 Respondents

Hearing dates: 16, 17 October 2018 and 15 January 2019

Approved Judgment

Lord Justice Flaux:

Introduction

1. This appeal is brought, with the permission of the judge, against the Order of Rose J dated 1 December 2017 dismissing certain of the appellants' claims against the respondent British Airways relating to flights between the European Union and third countries in so far as they took place in the period before 1 May 2004. To the extent that the Part 20 claims by the respondent against other airlines related to such flights for the same period, they were also dismissed. Before the judge and until just before the first appeal hearing in October 2018, there were four sets of claimants, of whom the current appellants formed one set. However, by the time the appeal hearing resumed in January 2019, the disputes between all the other claimants and the respondent had been settled and the respondent's Part 20 claims correspondingly discontinued. Accordingly, this judgment refers only to the appeal by the La Gaitana claimants.
2. The appellants' claim in these proceedings is that they were overcharged for freight services by the respondent and other airlines because the airlines were party to a hard-core cartel, whereby they agreed with each other the level of surcharges to be applied to charges for the carriage of air freight. The claim is for damages for loss arising from such overcharges on air freight carried between airports within the European Union and between airports in the European Union and third countries in Asia, South America and the United States. The overall claim relates to the period between 22 January 2001 and 14 February 2006.
3. The preliminary issues which were tried by the judge concerned the temporal scope of the appellants' right to damages. The airlines contended that, as a matter of law, there could be no claim for damages in respect of alleged overcharging on flights between the EU and third countries before 1 May 2004. That was the date on which air transport between the EU and third countries was first brought within the regime implementing the EU competition rules set out in Regulation 1/2003 (the so-called "Modernisation regulation"), applied to such air transport by Regulation 411/2004 which took effect from the same date. Before then, the competition rules were only applicable to the extent permitted by the transitional implementing provisions set out in what are now Articles 103 to 105 of the Treaty on the Functioning of the European Union ("TFEU"). The airlines contended that, by virtue of those provisions, the only entities with jurisdiction to determine the compatibility of an agreement or concerted practice with what is now Article 101 were the European Commission and the national competition regulatory authority which, in this country, was the Secretary of State and Monopolies and Mergers Commission ("MMC"), then the Director-General of Fair Trading, not the High Court.
4. The judge found in favour of the airlines in relation to this argument. She also rejected the appellants' argument that Article 6 of Regulation 1/2003 (which gave national courts the power to apply what is now Article 101) had retrospective effect. Accordingly she found that the appellants had no real prospect of succeeding in a claim for damages based on alleged infringement of Article 101(1) in respect of alleged overcharges on flights between the EU and third countries prior to 1 May 2004.
5. There was a further preliminary issue in relation to flights between airports in countries which were Member States of the European Economic Area ("EEA") but not of the EU

and airports in third countries, where the implementing provisions came into effect slightly later on 19 May 2005. The judge decided that preliminary issue in favour of the airlines for the same reasons. It was common ground before the judge and before this Court that the answer to that preliminary issue and to the appeal is the same as in relation to flights between the EU and third countries, so no separate argument was addressed to that issue.

The Treaty provisions and the implementation of EU competition law

6. Before considering the judgment and the arguments on the appeal in more detail, I will consider the relevant provisions of the Treaty and the history of the implementation of EU competition law in relation to air transport. The provisions which are now Articles 101 to 105 in the TFEU were originally contained in Articles 85 to 89 of the EEC Treaty. They were renumbered 81 to 85 in the Treaty Establishing the European Union before assuming their present numbering in the TFEU. Save to a limited extent not material for the purposes of this appeal, their text has remained the same. So far as possible and to avoid confusion I will use the current numbering where necessary in square brackets in citations of authorities.
7. Article 101(1) sets out the prohibition on agreements and decisions 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. Article 101(2) provides that agreements or decisions so prohibited shall be automatically void. Article 101(3) sets out circumstances in which the prohibition in (1) may be declared inapplicable, broadly where the agreement, decision or concerted practice is pro-competitive overall. Article 102 prohibits conduct which is abuse of a dominant position by an undertaking. There is no equivalent exemption provision in that Article to Article 101(3). It is not alleged that the conduct of the airlines was contrary to Article 102.
8. Article 103 provides that the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, designed to achieve specific aims set out in the Article. As originally enacted, this was to be done within three years of the enactment of the EEC Treaty but that time limit was subsequently removed. The transitional provisions which were to apply until the entry into force of the provisions adopted under Article 103 are set out in Article 104 and 105.
9. Article 104 provides:

“Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.”
10. It was accepted by the appellants before this Court that the High Court is not one of the “authorities in Member States” for the purposes of that Article in the light of the decisions of the European Court of Justice in *BRT v SABAM* [1974] ECR 51 at [19] and *Ministère Public v Asjes* [1986] ECR 1425 (“*Asjes*”) at [55]-[56]. The authorities being

referred to are the administrative authorities entrusted with the task of applying domestic legislation on competition, in the case of the United Kingdom at the material time, the Secretary of State and MMC, then the Director-General of Fair Trading.

11. Article 105 then provides:

“1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.”

12. The initial implementation of what are now Articles 101 and 102 was by Regulation 17 of 1962, enacted pursuant to what is now Article 103. This Regulation came into force on 13 March 1962 and remained in force until 1 May 2004. Under Article 1, agreements, decisions and concerted practices of the kind described in Article 101 were prohibited: “no prior decision to that effect being required”. Article 2 provided for the possibility that negative clearance could be sought from the Commission. As the judge described in [16] of the judgment, Articles 4 to 9 set out a scheme whereby agreements, decisions and concerted practices (both existing and new) could be notified to the Commission for the application of the exemption in Article 101(3). Article 9 gave the Commission the sole power to declare agreements, decisions and concerted practices otherwise covered by Article 101(1) exempt pursuant to Article 101(3). Article 9(3) provided:

“As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article [101(1)] and Article [102] in accordance with Article [104] of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.”

13. Regulation 141 of 1962 came into force on the same day as Regulation 17. This provided that Regulation 17 did not apply to the transport sector since, as the recital explained, there were “distinctive features of the transport sector” so that it “may prove necessary to lay down rules governing competition different from those laid down or to be laid down for other sectors of the economy”. Some further indication of why air and sea transport had been excluded was provided in the Commission’s 10th report on Competition Policy in 1980 which referred to the weight that governments brought to bear “particularly in setting fares and sharing capacity on scheduled air services”.

14. The blanket exclusion of air transport from the Regulation 17 regime was modified with effect from 1 January 1988 by Regulation 3975/87. This introduced a regime applying EU competition rules in the air transport sector including in Article 7 a provision which (as in Regulation 17) gave the Commission the sole power to issue decisions under Article 101(3). However, this Regulation only applied in respect of intra-EU flights. Flights between airports in the EU and airports in third countries remained subject to the transitional regime. The recitals to the Regulation gave some explanation for this approach: “air transport is characterized by features which are specific to this sector; ...furthermore, international air transport is regulated by a network of bilateral agreements between States which define the conditions under which air carriers designated by the parties to the agreements may operate routes between their territories.” In 1992, Regulation 2410/92 extended the regime in Regulation 3975/87 to domestic flights entirely within a Member State.
15. Finally, the Regulation 17 regime was repealed by Regulation 1/2003, enacted on 16 December 2002, but which came into force on 1 May 2004. This abolished the long-standing rule giving the Commission sole power to make decisions under Article 101(3). From 1 May 2004, the power to rule that the exemption in Article 101(3) applied was to be shared between the Commission, national competition authorities and national courts. To that end, Article 6 provides: “National courts shall have the power to apply Articles [101] and [102] of the Treaty”.
16. Recital (4) provides that: “The present system should ...be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article [101(1)] and Article [102] of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article [101(3)] of the Treaty.”
17. Accordingly, Article 1 provides:
 - “1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
 2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.”
18. As originally enacted, Article 32(c) provided that Regulation 1/2003 did not apply to air transport between Community airports and third countries. However, by Regulation 411/2004, enacted on 26 February 2004 but also coming into force on 1 May 2004, Article 32(c) of Regulation 1/2003 was deleted. The rationale for bringing air transport between the EU and third countries into the regime was explained in Recital (3):
 - “Anti-competitive practices in air transport between the Community and third countries may affect trade between Member States. Since the mechanisms enshrined in Regulation (EC) No 1/2003, the function of which is to implement the rules on competition under Articles 81 and 82 of the Treaty, are

equally appropriate for applying the competition rules to air transport between the Community and third countries, the scope of that regulation should be extended to cover such transport.”

19. Recital (4) provided that, in applying Article 101 and 102, air services agreements concluded between Member States and/or the European Community and third countries should be duly considered, in particular for the purpose of assessing the degree of competition in the relevant air transport markets.
20. Decision No 130/2004 of the EEA Joint Committee then applied Regulation 1/2003 to the EEA with effect from 19 May 2005.

The Commission Decisions

21. The existence of the present cartel was uncovered by investigations by a number of competition authorities and courts, including the European Commission. By its Decision in Case AT. 39258 *Airfreight* dated 9 November 2010 (“the 2010 Decision”), the Commission found that the airlines had committed a single and continuous infringement of Article 101(1). The Commission found infringement on intra-EU/EEA routes from 22 January 2001 to 14 February 2006 and on routes between the EU and third countries from 1 May 2004 to 14 February 2006. The Commission also found at [1040] to [1045] that the conditions of Article 101(3) were not satisfied, in particular:

“[1042] Prevention, restriction or distortion of competition being the sole object of the price arrangements which are the subject of this decision, there is no indication that the agreements and concerted practices between the airfreight service providers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this decision, are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.

...

[1045] The Commission has had regard to the fact that the parties were engaged in hard core cartel conduct. Furthermore, none of the addressees has made arguments to the standard required by Article 2 of Council Regulation (EC) No 1/2003. Accordingly, the conditions of Article 101(3) of the TFEU are not satisfied.”

22. The appellants placed particular reliance on these passages and on the various factual findings of the Commission, from which it was clear that there was in effect a course of conduct or of behaviour throughout the period from 2001 to 2006 and that the conduct before 1 May 2004 was not in any sense different from the conduct after that date or limited geographically to overcharging on intra-EU flights.
23. However, it is important to note that the Decision expressly did not deal with agreements or practices in relation to air transport between EU countries and third countries prior to 1 May 2004 as explained at [816]-[817] of the Decision:

“[816] Before 1 May 2004, Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector granted the Commission implementing powers to apply Article 101 of the TFEU with respect to air transport between EU airports. Air transport between EU airports and airports in third countries was, however, excluded from the scope of that regulation. Consequently, Article 101 of the TFEU could only be enforced by the authorities of the Member States and the Commission on the basis of the transitional regime set out in Articles 104 and 105 of the TFEU.

[817] Under these circumstances, the Commission will not apply Article 101 of the TFEU to anti-competitive agreements and practices concerning air transport between EU airports and airports in third countries that took place before 1 May 2004.”

24. That the Decisions were not intended to relate to flights between the EU and third countries is also clear from the dispositif or operative part. Article 1 decided there had been infringement of Article 101 and Article 53 of the EEA Agreement in relation to charges for flights between countries in the EEA (i.e. including the EU) in the case of British Airways from 22 January 2001 to 14 February 2006. Article 2 decided there had been infringement of Article 101 by the airlines in relation to flights between airports in the EU and airports outside the EEA (i.e. in third countries) from 1 May 2004 to 14 February 2006. Article 3 decided there had been infringement of Article 53 of the EEA Agreement by the airlines in relation to flights between airports in EEA countries and airports in third countries from 19 May 2005 to 14 February 2006. Thus, nothing in the operative part purported to make any findings of infringement in relation to flights between EU/EEA countries and third countries for the period prior to 1 May 2004 or 19 May 2005 respectively.
25. The 2010 Decision was annulled by the General Court of the ECJ on the application of the airlines, in relation to three specific issues as against British Airways and in full as against the other airlines. However, the decision was re-made in Case COMP/39258 *Airfreight* dated 13 March 2017 (“the 2017 Decision”) which adopted the findings of infringement in the 2010 Decision. Because the version of the 2017 Decision before this Court is confidential, I have referred to the relevant paragraphs in the 2010 Decision, although the same text, so far as relevant, is replicated in the 2017 Decision. The operative part of the 2017 Decision is framed differently, but similarly makes clear that the Commission did not make findings of infringement in relation to flights between EU/EEA countries and third countries prior to 1 May 2004.

The EU case law

26. A number of decisions of the European Court of Justice (“ECJ”) have considered the application of the competition rules to agreements covered by the transitional regime. The judge dealt with the EU case law in considerable detail in her judgment. I will consider it more shortly, only to the extent necessary to put in context the arguments raised by the present appeal.

27. The case law starts with *De Geus v Bosch & Van Rijn* Case 13/61 dated 6 April 1962, which was in fact the first ever reference to the ECJ. Bosch was seeking to enforce distribution agreements dating back to 1903 where, in breach of an export ban in the relevant agreements, de Geus, a Dutch distributor, was importing Bosch products into the Netherlands from Germany. The agreements were thus existing agreements at the time that Regulation 17/1962 came into force. De Geus was arguing that this export ban infringed what is now Article 101 and that, as a consequence, the agreements were void and unenforceable under Article 101(2).
28. The ECJ stated that the question referred by the Dutch Court was whether Article 101 had been applicable from the time of entry into force of the EEC Treaty in 1958 to which it held that “the answer must in principle be in the affirmative”. The ECJ continued, however, as follows:

“Articles [104] and [105] are, however, not of such a nature as to ensure a complete and consistent application of Article 85 so that their mere existence would permit the assumption that Article [101] had been fully effective from the date of entry into force of the Treaty and in particular that the annulment envisaged by Article [101(2)] would have taken effect in all those cases falling under the definition of Article [101(1)] and in respect of which a declaration under Article [101(3)] had not yet been made.

...

Moreover, in accordance with the text of Article [101(2)], which in referring to agreements or decisions 'prohibited pursuant to this Article' seems to regard Articles [101(1) and (3)] as forming an indivisible whole, this Court is bound to admit that up to the time of entry into force of [Regulation 17], the nullifying provisions had operated only in respect of agreements and decisions which the authorities of the Member States, on the basis of Article [104], have expressly held to fall under Article [101(1)], and not to qualify for exemption under [101(3)], or in respect of which the Commission has taken the decision envisaged by Article [105(2)].”

29. The first paragraph of the operative part at the conclusion of the judgment states:

“Until the entry into force of the Regulation envisaged by Article [103] together with Article [101(3)] of the treaty, Article [101(2)] is applicable only to those agreements and decisions which the authorities of the member states, acting under Article [104] of the treaty, have expressly declared to come within Article [101(1)] and to be ineligible for exemption under Article [101(3)], or to those agreements which the commission, by decision under Article [105(2)], has held to be contrary to Article [101].”

This judgment is thus inconsistent with the national courts having some form of parallel jurisdiction with the national competition authorities or the Commission to make a determination of infringement under Article 101(1).

30. The question whether Articles 101 and 102 had direct effect came before the ECJ in *BRT v SABAM* [1974] ECR 52. The Belgian Court referred a number of questions in relation to agreements which were alleged to impose unfair trading conditions in breach of Article 102. A preliminary point arose because the Commission had instituted a procedure against SABAM under Article 3 of Regulation 17/62. The Commission argued that, by virtue of Article 9(3) of that Regulation (quoted at [12] above), the national court was no longer competent to consider the application of Article 102. The ECJ rejected that argument, noting at [19] (to which I have already referred at [10] above) that the reference in Article 9(3) to “authorities of the Member States” was to entities entrusted with applying domestic competition law. Accordingly, the ECJ held at [20] and [21] that Article 9(3) did not exempt a national court before which the direct effect of Article 102 was pleaded from giving judgment, but that where the Commission had initiated a procedure under Article 3 of Regulation 17 of 1962, the court may, in the interests of legal certainty, stay its proceedings until the Commission has made a ruling.
31. The ECJ continued at [22] in a passage particularly relied upon by the appellants:

“On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between member states, or that there is no doubt of the incompatibility of that behaviour with Article [102].”
32. The first part of that paragraph is evidently referring to circumstances where it is clear to the national court that the relevant agreement does not infringe Article 101. As the judge said at [30] of her judgment, the judgment in *SABAM* raised two important questions key to the determination of the preliminary issue: “(a) how could Article [101] be given direct effect, in light of the exclusive jurisdiction conferred on the Commission by Regulation 17 to apply Article [101(3)]? and (b) how did the doctrine of direct effect operate in areas not covered by any implementing measures adopted under Article [103]?”
33. So far as the first of those questions is concerned, as the judge said at [31], subsequent decisions of the ECJ gave guidance as to what the national court should do when applying Article 101(1) in various situations. The case law is summarised in the decision in *Delimitis v Henninger Brau AG* [1991] ECR I-977 at [43] and following, in particular at [50]:

“If the conditions for the application of Article [101(1)] are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article [101(1)] is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions,

the agreement may on no account be the subject of an exemption decision under Article [101(3)].”

34. Mr Philip Moser QC (who acted for the other appellants, whose disputes with the airlines have been settled, at the appeal hearing on 16 and 17 October 2018, but who was also instructed with Mr Fergus Randolph QC for the present appellants at the resumed hearing on 15 January 2019) relied upon this paragraph in support of a submission that, even under the transitional regime, in a case where there could be no question of the Commission granting an exemption under Article 101(3) (which he submitted was the position here in the light of the 2010 and 2017 Decisions) the national court would have jurisdiction to award damages for an infringement of Article 101(1). Elsewhere in his submissions, however, he accepted that the line of cases of which *Delimitis* formed part were cases where Regulation 17/62 applied and the transitional regime had come to an end.
35. In my judgment, neither *SABAM* nor the *Delimitis* line of cases, all of which are concerned with the regime under Regulation 17 are of any assistance in determining whether the national courts would have had jurisdiction under the transitional regime (before the enactment of Regulation 17 or, in the present case, Regulation 1/2003), where there had been no determination under either Article 104 or Article 105, to find an infringement of Article 101 and award damages. In any event, even if the second sentence of [50] of *Delimitis* were applicable to cases under the transitional regime, this is not a case where it can be said that the relevant agreements and practices “may on no account be the subject of an exemption decision under [Article 101(3)]”, for reasons elaborated later in this judgment.
36. On the other hand, the judge’s second question, as to how the doctrine of direct effect operated under the transitional regime, is addressed in the two subsequent decisions of the ECJ which she considered. In the first, *Asjes* [1986] ECR 1457, the Tribunal de Police de Paris sought a preliminary ruling in criminal proceedings against executives of airlines and travel agencies, who had been charged with infringing the French Civil Aviation Code because they had sold airline tickets applying tariffs different from the tariffs approved by the Minister which were binding on all traders under the Code. The referred question asked whether these provisions were consistent with the EEC Treaty, which the ECJ interpreted (see [17] of the judgment) as asking whether it was contrary to Member States’ obligations under the Treaty to enforce such approved tariffs if those tariffs were found to be the result of an agreement, decision or concerted practice contrary to Article 101.
37. The ECJ set out at [18] to [24] of its judgment the context in which the approved tariffs were being imposed, namely international agreements concerning civil aviation such as the 1944 Chicago Convention, which affirmed the principle of a State’s sovereignty over the airspace above its territory and set up a network of bilateral agreements authorising air routes between countries. It was accepted by the French government, however, that the bilateral agreements to which they were party did not require them to ignore EU competition rules when approving tariffs.
38. The ECJ noted the views of the French and other governments that, under the transitional regime, in the absence of a measure under Article 103 such as Regulation 17 giving effect to Articles 101 and 102 (*Asjes* having been decided before Regulation 3975/1987 was enacted), it was for the national competition authorities or the

Commission under Articles 104 and 105 respectively to ensure Articles 101 and 102 were complied with and the national court could not make a finding that those provisions were infringed. The ECJ recorded the contrary argument of the Commission at [49] of its judgment:

“The Commission, on the other hand, considers that the absence of the implementing measures referred to in Article [103] does not mean that national courts cannot, where the matter arises, be called upon to rule on the compatibility of an agreement or a particular practice with the competition rules since those rules have direct effect.”

39. Given that this is essentially the same argument as Mr Moser QC advanced before the judge and in this Court, it is important to see how it was dealt with by the ECJ. Having set out the passage from the *Bosch* case cited in the first paragraph of the quotation at [28] above, the Court noted at [62] that what is now Article 104 envisages that a decision by national competition authorities on the admissibility of agreements, decisions or concerted practices will only be made when submitted for their approval under national competition law. Under what is now Article 105, the Commission is empowered to record any infringements of Articles 101 and 102 but does not have the power to declare Article 101(1) inapplicable within the meaning of Article 101(3). Accordingly the Court held at [63]-[64] that the fact that an agreement, decision or concerted practice may fall within the ambit of Article 101 did not suffice for it to be considered prohibited by Article 101(1) and consequently void under Article 101(2). This would be contrary to the principle of legal certainty, since it would have the effect of prohibiting and rendering automatically void certain agreements, even before it was possible to ascertain whether Article 101 as a whole was applicable to them.
40. At [65] the ECJ reiterated what the Court had said in *Bosch* that, until implementing measures were introduced under Article 103, agreements and decisions are prohibited under Article 101(1) and automatically void under Article 101(2) only in so far as they had been held by national competition authorities, pursuant to Article 104, to fall within Article 101(1) and not to qualify for exemption under Article 101(3) or in so far as the Commission had recorded an infringement pursuant to Article 105.
41. At [66] the ECJ recorded the Commission’s argument that *Bosch* was distinguishable because there was no equivalent in the air transport sector to the provisional validity conferred by Regulation 17 on existing agreements such as the distributorship agreements in that case. The ECJ rejected that argument, saying at [67] and [68]:

“[67] Those arguments cannot be accepted. The rules set out in the judgment of 6 April 1962 continue to apply so long as no regulation and no directive provided for in Article [103] has been adopted and consequently no procedure has been set in motion to give effect to Article [101(3)].

[68] It must therefore be concluded that in the absence of a decision taken under Article [104] by the competent national authorities ruling that a given concerted action on tariffs taken by airlines is prohibited by Article [101(1)] and cannot be exempted from that prohibition pursuant to Article [101(3)], or

in the absence of a decision by the Commission under Article [105(2)] recording that such a concerted practice constitutes an infringement of Article [101(1)], a national court such as that which has referred these cases to the Court does not itself have jurisdiction to hold that the concerted action in question is incompatible with Article [101(1)].”

42. At the same time as judgment was handed down in *Asjes*, the ECJ was considering a similar issue in *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 838 (“*Ahmed Saeed*”). That case also concerned government approved tariffs being evaded by travel agents buying airline tickets between airports both outside Germany, with the passenger boarding the plane during a stopover at a German airport. It was alleged that this was unfair competition, because the prices at which they sold the tickets undercut approved tariffs being applied by competitors. The referring court referred, in particular, questions as to whether (i) agreements regarding tariffs applicable to flights to which at least one airline with its registered office in a Member State was a party were void under Article 101(2) for infringement of Article 101(1), even if there had been no determination under Article 104 or Article 105(2); and (ii) charging only such tariffs for those flights constituted an abuse of dominant position within the meaning of Article 102.

43. Between the first hearing in that case and subsequent hearings and judgment, Regulation 3975/87 came into force. Accordingly, at [21] of the judgment, the ECJ said:

“As has already been mentioned, the Community rules which have been adopted with regard to air transport apply only to international air transport services between Community airports. It must be inferred from this that domestic air transport and air transport to and from airports in non-member countries continue to be subject to the transitional provisions laid down in Articles [104] and [105], and that with respect to those air transport services the system described in the judgment of 30 April 1986 [*Asjes*] still applies.”

44. In relation to flights to and from third countries, with which we are concerned, the Court ruled at [29]:

“As far as the application of Article [101] of the Treaty is concerned, it must therefore be stated in reply to the national court that bilateral or multilateral agreements regarding airline tariffs applicable to scheduled flights are automatically void under Article [101(2)]:

(i) in the case of tariffs applicable to flights between airports in a given Member State or between such an airport and an airport in a non-member country: where either the authorities of the Member State in which the registered office of one of the airlines concerned is situated or the Commission, acting under Article

[104] and Article [105] respectively, have ruled or recorded that the agreement is incompatible with Article [101];”

45. The ECJ went on to consider Article 102. It recorded the argument of the Commission and the UK Government that the same distinction applied in relation to Article 102 between intra-EU flights covered by Regulation 3975/1987 and flights to and from third countries subject to the transitional regime. The ECJ rejected that argument at [32] and [33] in these terms:

“32 That argument cannot be upheld. The sole justification for the continued application of the transitional rules set out in Articles [104] and [105] is that the agreements, decisions and concerted practices covered by Article [101(1)] may qualify for exemption under Article [101(3)] and that it is through the decisions taken by the institutions which have been given jurisdiction, under the implementing rules adopted pursuant to Article [103], to grant or refuse such exemption that competition policy develops. In contrast, no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers.

33 It must therefore be concluded that the prohibition laid down in Article [102] of the Treaty is fully applicable to the whole of the air transport sector.”

The judge’s decision on jurisdiction and retrospectivity

46. At [41] to [52] of her judgment, the judge rejected the appellants’ then argument that the English High Court was one of the “national authorities” being referred to in Article 104. That argument has not been pursued on appeal, so I need say no more about it. The judge turned at [53] to consider the arguments advanced by the appellants as to the direct effect of Article 101. She recorded the submission by Mr Moser QC (repeated before this Court) that the distinction being drawn in *Ahmed Saeed* was not between Article 101 and Article 102, but between cases where there was a potential for the application of Article 101(3) and cases where there was no real possibility of Article 101(3) being satisfied.
47. The judge dealt with the arguments in support of that submission in so far as it is still being pursued on appeal, at [57] and following of her judgment. She rejected the submissions by Mr Moser QC that a hard-core price-fixing cartel such as in this case was very unlikely to benefit from exemption under Article 101(3), accepting the submissions on behalf of the airlines, that the ECJ had consistently held that there are no anti-competitive agreements which are excluded from the application of Article 101(3). She referred in that context to *Matra Hachette S.A. v Commission* [1994] ECR II-598.
48. She also accepted at [58] the argument on behalf of the airlines that, if it were the case that hard-core restrictions could be condemned by national courts applying a directly

effective Article 101(3), even in the absence of implementing measures under Article 101(3), both *Bosch* and *Asjes* would have been decided differently, essentially because both were cases of anti-competitive agreements where exemption was highly unlikely. The judge concluded at [59] that: “the decisions in *Bosch* and *Asjes* apply even in a case where there is very little possibility of the agreement or concerted practice in question benefiting from the application of Article 85(3). There is no suggestion to the contrary in those cases.”

49. At [60] to [62] the judge dealt with Mr Moser QC’s submission that the inapplicability of Article 101(3) was demonstrated by the 2010 and 2017 Decisions of the Commission. She referred to the Commission’s conclusion as to the inapplicability of Article 101(3) at [1040] and following (to which I have referred at [21] above). She concluded that this finding could not justify the Court departing from the ECJ’s ruling in *Bosch* and *Asjes*, as the Commission expressly said at [816], that its decision did not apply to flights between the EU and third countries prior to 1 May 2004. She rejected the submission that the finding of a single continuous infringement required the Court to assume the same answer under Article 101(3) would apply to flights between the EU and third countries before 1 May 2004. She noted that the *dispositif* (operative part) of the Decision gave the earliest start date for the infringement as regards flights between the EU and third countries as 1 May 2004.

50. At [63] she set out her conclusion on the jurisdiction of the Court:

“I hold that the principle established by the European Court in *Bosch*, *Asjes* and *Ahmed Saeed* remains good law and that the doctrine of direct effect did not, before 1 May 2004, confer on a national court jurisdiction to rule on the compatibility of an agreement with Article [101(1)] in the absence of either implementing measures adopted under Article [103] or a prior decision taken under the transitional regime in Article [104] or [105]. The national court was not empowered by the doctrine of direct effect at that time to consider the application of Article [101(3)] because that function was conferred only on the Commission or on the relevant national authority. In the case of the United Kingdom the national authority was the Secretary of State and MMC under the UK 1996 Regulations and the Director General of Fair Trading under the UK 2001 Regulations.”

51. The judge then considered the appellants’ alternative case that the Court had jurisdiction by virtue of the retrospective effect of Regulation 1/2003. She referred to the statement of the “no retroactivity” principle of EU law by Lewison LJ in *O’Brien v Ministry of Justice* [2015] EWCA Civ 1000 at [5]: “that EU legislation does not have retroactive effect unless, exceptionally, it is clear from its terms or general scheme that the legislator intended such an effect, that the purpose to be achieved so requires and that the legitimate expectations of those concerned are duly respected.”

52. The judge referred at [66] to the distinction between how the no retroactivity principle applies to procedural rules on the one hand and substantive rules on the other, elucidated by the ECJ in *Salumi* [1981] ECR 2736 at [9]. She then dealt with the various arguments deployed by Mr Moser QC to support the appellants’ case that the relevant provisions of Regulation 1/2003 were procedural rather than substantive. It is not necessary to

repeat all her analysis here, but of particular significance for the issues on the appeal is the judge's answer to a point Mr Moser QC made about Article 101 being a legal norm that could not be abrogated by procedural provisions, as he put it, Article 101 was "fully switched on" from the day the EEC Treaty came into force and did not need to be switched on by any prior decision under Article 104 or Article 105.

53. The judge dealt with this argument at [70] to [72]:

"70 ...But it is not right to say that because Articles [101] and [102] were 'in force' from the date that the Treaty came into force, any regulations dealing with their implementation are enforcement mechanisms which do not create substantive rights.

71 The confusion arises because of the protean extent of the enforceability of Articles [101] and [102]. That is not an issue that generally arises in our domestic law. A prohibition may be enacted as a section in a UK statute but it has no effect at all until a commencement provision either in the statute itself or in a subsequent statutory instrument brings it into force, or switches it on, to adopt Mr Moser's metaphor. That will only happen once everything needed is in place for it to be enforceable. I agree that Articles [101] and [102] did not need to be switched on in the same way; they became effective on the day the Treaty of Rome came into force. But, to pursue the metaphor a little further, their enforceability is controlled not by a simple dolly switch but by a dimmer switch. The EU legislature has, over the years, enacted the legislation that I have described, thereby turning the dimmer switch so that the light of the competition rules has shone more brightly in some areas than in others. The European Court has in its careful jurisprudence explained what is illuminated and what remains in shadow at various times.

72 Those changes in the intensity of the beams of Articles [101] and [102] are substantive changes and not merely procedural changes. Regulation 1/2003 has the effect that, for the first time, the compatibility of agreements relating to flights between the EU and third countries with Article 101 can be determined in the national court, can be held to be invalid pursuant to Article 85(2) and can be the subject of claims for damages. I do not agree that the limitations on the temporal scope of the Commission's infringement decision were only a self-denying ordinance to reduce the number of controversial issues raised by the decision. Those limitations were a recognition that Regulation 1/2003 did not empower the Commission to condemn earlier agreements by sweeping away, retrospectively, the very different enforcement mechanism established by [Article 105]."

54. The judge concluded that the provisions of Regulation 1/2003 relied upon by the appellants were substantive not procedural and did not have retrospective effect, so as to confer on the High Court jurisdiction to condemn an infringement which it could not have condemned before 1 May 2004.

55. Finally the judge rejected the appellants' request for a reference to the Court of Justice of the European Union. She concluded that that Court had had an opportunity to examine the relationship between the transitional provisions of the Treaty and the powers of national authorities and national courts in the case law (in other words in *Bosch, Asjes* and *Ahmed Saeed*). She considered that nothing material had occurred since those cases to suggest that the Court would give a different answer if asked the same question again.

The grounds of appeal

56. The grounds of appeal are that:

- (1) The judge erred in law in concluding that the High Court had no jurisdiction to hear the appellants' claim for damages in respect of flights between the EU and third countries before 1 May 2004 (or 19 May 2005 in the case of the EEA). Article 101(1) did have direct effect giving the Court jurisdiction at all material times where, as here, there was no or no real prospect of exemption under Article 101(3).
- (2) The judge erred in law in concluding that the High Court had no jurisdiction deriving from Regulation 1/2003 to entertain the claim for damages prior to 1 May 2004 and 19 May 2005 respectively since, contrary to the judgment, this would involve no substantive retrospective change to the airlines' legal position.
- (3) The judge was wrong in law to conclude that she could reach the conclusions she did to the requisite degree of legal certainty and therefore without a reference to the Court of Justice of the European Union pursuant to Article 267 of the TFEU despite the absence of clear domestic or EU case law on the particular legal issues.

Summary of the parties' submissions

57. In his oral submissions before this Court, Mr Moser QC (whose submissions were adopted by Mr Randolph QC) focused in particular in relation to Ground 1 on an argument that the EU cases relied upon by the airlines (*Bosch, Asjes* and *Ahmed Saeed*) were all distinguishable, because they were concerned with whether the national court had jurisdiction in relation to Article 101(2) to declare the agreement or decision automatically void, not with whether the court had jurisdiction under Article 101(1) to award damages. He submitted that the present case by definition was not an Article 101(2) case, because it concerned concerted practices not covered by Article 101(2). Accordingly, Mr Moser QC submitted that the principle stated in those cases, that the national court had no jurisdiction unless and until there had been a determination of infringement by the national competition authority or the Commission, had no application. He submitted that the Court did have jurisdiction to find that the behaviour of the airlines in relation to flights between the EU and third countries prior to 1 May 2004 infringed Article 101(1) and to award damages.
58. Mr Moser QC also relied upon the cases where the ECJ has recognised that, in order for Article 101 to be fully effective, the national courts should have jurisdiction to award damages for loss caused by an anti-competitive agreement or conduct liable to restrict or distort competition: see *Courage Ltd v Crehan* [2001] ECR I-06297 at [26]-[27] and *Manfredi v Lloyd Adriatico* [2006] I-066619 at [60]-[61] and [90].

59. The other principal argument upon which Mr Moser QC relied in support of Ground 1 was the same argument as was advanced by the appellants before the judge, namely that, under the transitional regime, the national court only lacked jurisdiction to find an infringement of Article 101(1) if there was a real prospect of an exemption under Article 101(3). Whilst he accepted that, at a high level of abstraction, *Matra-Hachette* established that Article 101(3) was always applicable in relation to any anti-competitive agreement, decision or practice, he submitted that was not the position here. He disputed that he had made the submission attributed to him by the judge at [57] of her judgment that an exemption in this case was “very unlikely”, as opposed to submitting that such an exemption was inconceivable.
60. He relied upon the fact that this was a hard-core price-fixing cartel, in relation to which the airlines had never sought in the present proceedings to justify their conduct by reference to Article 101(3). It was contended that this was a recognition of the reality, that the same behaviour had been found by the Commission in its 2010 and 2017 Decisions to be a single continuous infringement, irrespective of whether it related to flights within the EU or flights between the EU and third countries. Both Mr Moser QC and Mr Randolph QC referred this Court to a number of findings in the Decisions about this behaviour, including e-mails, telephone calls and conversations. They made the point that the behaviour did not make geographical distinctions. They submitted that, although the Decisions had expressly not dealt with anti-competitive conduct applicable to flights between the EU and third countries before 1 May 2004, there could be no doubt what conclusion the Commission would have reached about such conduct, given its conclusion about the same behaviour in relation to the flights it was considering. They submitted that the Commission would have concluded such conduct infringed Article 101(1) and was not entitled to exemption under Article 101(3).
61. Both Mr Moser QC and Mr Randolph QC submitted that the critical difference in EU law was not between cases concerned with the transitional regime and those concerned with Regulation 17/1962, but between cases where Article 101(3) was potentially in play and those where it was not. This was an application of the legal certainty rule. They placed particular reliance on [32] of *Ahmed Saeed* cited at [45] above and the reference to the “sole justification” for the continued application of the transitional regime in Article 101 cases being the possibility of qualifying for exemption under Article 101(3). They submitted that where, as here, there was no possibility of such exemption, Article 101 could have direct effect prior to 1 May 2004, in the same way as Article 102.
62. In relation to Ground 2, it was argued on behalf of the appellants that, if they were wrong in their submission that, in the present case, Article 101 would have had direct effect in the transitional regime, Articles 1 and 6 of Regulation 1/2003 had retrospective effect, so as to give the High Court jurisdiction over the appellants’ claim for damages in respect of flights between the EU and third countries prior to 1 May 2004. In the appellants’ skeleton arguments and at the first hearing on 17 October 2018, the basis for this construction of the relevant Articles of Regulation 1/2003 was said to be that they were procedural not substantive. At the resumed hearing on 15 January 2019, the appellants advanced an alternative argument, founded on the recent judgment dated 7 November 2018 of the Court of Justice of the European Union in *O’Brien v Ministry of Justice* (Case C-432/17), that even if the relevant provisions of Regulation 1/2003 were substantive, they had retrospective effect.

63. In support of the primary argument that Articles 1 and 6 were procedural rather than substantive, it was argued on behalf of the appellants that, as recital (4) to Regulation 1/2003 demonstrated, the effect of the Regulation was to bring a directly applicable system of exemption within the jurisdiction of the national courts where previously, under the transitional regime, whilst the national court could not make such an exemption decision, the national competition authority could. All that the Regulation entailed was a change in the procedure for obtaining such an exemption.
64. Likewise, under the transitional regime, the national competition authorities or the Commission could have made a finding of infringement of Article 101(1) although the national courts could not and it was submitted on behalf of the appellants that all that had been changed by the Regulation was that the procedure by which a finding of infringement could be obtained had been changed.
65. It was also submitted by Mr Randolph QC that Article 6 of Regulation 1/2003 was similar to Article 11(6) under which, once the Commission initiated proceedings under Articles 7 to 10, the national competition authorities were relieved of their competence to apply Articles 101 and 102 and, if a national competition authority was already acting, the Commission will only initiate proceedings after consulting the authority. He relied upon the fact that in *Toshiba* [2012] EUECJ C-17/10, the ECJ had determined at [70] of its judgment that this was a procedural rule and hence applicable from 1 May 2004 to all cartel proceedings including those relating to situations arising before that date. Mr Randolph QC submitted that the judge had failed to have regard to this paragraph and, had she done so, she should have concluded that Article 6 was also a procedural rule which had retroactive effect.
66. Turning to the appellants' new argument based upon the recent decision of the Court of Justice of the European Union in *O'Brien v Ministry of Justice*, it is necessary (since the case was decided after the judgment under appeal and thus is not touched on by the judge) to consider the facts of and background to the case in a little detail to put the parties' arguments in context. The case concerns the application of Council Directive 97/81 on part-time working which was given effect in the United Kingdom by Regulations which came into force on 1 July 2000 to the case of Mr Dermot O'Brien QC who sat as a part-time Recorder in the Crown Court from March 1978 until he retired in March 2005. The Employment Tribunal held that, in calculating his entitlement to a judicial pension, account had to be taken of all his 27 years of service, not simply of the period of five years since the deadline for transposing the directive into UK law had expired. That decision was reversed by the Employment Tribunal, whose decision was upheld by the Court of Appeal.
67. Mr O'Brien appealed to the Supreme Court, which decided to seek a preliminary ruling from the Court of Justice on the question whether the Directive requires that periods of service prior to the deadline for transposing it should be taken into account when calculating the amount of a retirement pension of a part-time worker if they would be taken into account in calculating the pension of a comparable full-time worker.
68. Having set out the facts and background, at [25] of its judgment the Court of Justice noted that the relevant judicial pension scheme was a final salary scheme under which the pension entitlement of any judge (i.e. whether full-time or part-time) is calculated as a percentage of the final year's pensionable pay by reference to the number of years served by the retirement date.

69. The Court then set out at [26] the principles applicable to procedural as opposed to substantive rules, in these terms:

“It should be recalled that, according to settled case-law, procedural rules are generally taken to apply from the date on which they enter into force (judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45), unlike substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, their objectives or their general scheme that such an effect must be given to them (see, to that effect, judgments of 12 November 1981, *Meridionale Industria Salumi and Others*, 212/80 to 217/80, EU:C:1981:270, paragraph 9, and of 23 February 2006, *Molenbergnatie*, C-201/04, EU:C:2006:136, paragraph 31).”

70. The Court continued at [27]:

“It must be added that a new legal rule applies from the entry into force of the act introducing it, and that, while it does not apply to legal situations that arose and became definitive prior to that entry into force, it does apply immediately to the future effects of a situation which arose under the old law, and to new legal situations. The position is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (see, to that effect, judgment of 26 March 2015, *Commission v Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 32 and the case-law cited).”

71. Relevant for present purposes is the analysis by the Court thereafter that the fact that a right to a pension was definitively acquired at the end of a period of service did not mean that the legal situation of the worker must be considered definitive. The Court said at [35]:

“...with regard to the argument of the United Kingdom Government that the calculation of the period of service required to qualify for a retirement pension should be distinguished from the rights to a pension, it must be noted that it cannot be concluded from the fact that a right to a pension is definitively acquired at the end of a corresponding period of service that the legal situation of the worker must be considered definitive. It should be noted in this respect that it is only subsequently and by taking into account relevant periods of service that the worker can effectively avail himself of that right with a view to payment of his retirement pension.”

72. The Court concluded at [36] to [38] that periods of service both before and after the deadline for transposing the Directive had to be taken into account in calculating the pension:

“36 Consequently, in a situation such as that in the main proceedings, in which the accrual of pension entitlement extends over periods both prior to and after the deadline for transposition of Directive 97/81, it should be considered that the calculation of those rights is governed by the provisions of that directive, including with regard to the periods of service prior to its entry into force.

37 Such a situation is, in that regard, to be distinguished from the situation, invoked by the United Kingdom Government in support of its arguments, of the colleagues of the appellant in the main proceedings who retired before expiry of the period for transposition of Directive 97/81.

38 In the light of the foregoing, the answer to the question posed is that Directive 97/81 must be interpreted as meaning that, in a case such as that at issue in the main proceedings, periods of service prior to the deadline for transposing that directive must be taken into account for the purpose of calculating the retirement pension entitlement.”

73. Mr Randolph QC submitted that the “future effects” principle referred to by the Court of Justice at [27] was not a separate principle but an aspect of a more general principle that, in cases such as the present, where the infringement of which the appellants complained caused loss in periods both before and after the coming into force of the relevant Regulation, a provision in the Regulation, even if substantive, should have retrospective effect. He submitted that *Moravia Gas Storage* to which the Court of Justice had referred showed that this “future effects” principle was part of a wider, more general principle of retrospectivity of substantive provisions in order to give them full effect.
74. He relied in particular upon [33] of the judgment in *Moravia Gas Storage*, the paragraph after the one referred to by the Court of Justice in *O’Brien*. The two paragraphs read:

“32 A new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (judgment in *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 22 and the case-law cited).

33 In particular, according to settled case-law, procedural rules are generally taken to apply from the date on which they enter into force (judgment in *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited), as opposed to substantive rules, which are usually interpreted as applying to situations existing before their entry into force only

in so far as it clearly follows from their terms, their objectives or their general scheme that such an effect must be given to them (see judgments in *Meridionale Industria Salumi and Others*, 212/80 to 217/80, EU:C:1981:270, paragraph 9; *Molenbergnatie*, C-201/04, EU:C:2006:136, paragraph 31; and *Commission v Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 44).”

75. Mr Randolph QC submitted that the words “In particular” at the beginning of [33] demonstrated that the Court of Justice considered the “future effects” principle to be an aspect of a more general principle of retrospectivity. He submitted that, because the unlawful hard-core cartel conduct of the airlines was from 2001 to 2006, it straddled the period before and after Regulation 1/2003 came into force so that this case was on all fours with *O’Brien*. On the basis of that case, he submitted that this Court should conclude that even if the relevant provisions in Regulation 1/2003 are substantive, Article 6 should be given retrospective effect.
76. Mr Moser QC and Mr Randolph QC submitted that if this Court could not resolve with confidence the issues raised on this appeal, we should make a reference to the Court of Justice of the European Union. Mr Moser QC in particular submitted that the situation here of a claimant bringing a damages claim under the transitional regime had not arisen at all.
77. Our attention was drawn to the fact that in parallel proceedings before a court of first instance in Amsterdam, different claimants are pursuing a claim for damages against the airlines for infringement of Article 101 in respect of the same air cargo cartel. The airlines have raised the same contention as in the present case that the national court has no jurisdiction in respect of conduct relating to flights between the EU and third countries in the period prior to 1 May 2004. The Dutch court has indicated that judgment will be given on 27 February 2019, which will include a ruling on whether to make a reference to the Court of Justice. In those circumstances, we were invited to defer handing down our judgments until the decision of the Dutch court on that issue of whether to make a reference is known.
78. On behalf of Air Canada and the other Part 20 respondents, Mr Daniel Beard QC (who made the leading submissions on Ground 1 on behalf of the airlines) described as “remarkable” Mr Moser QC’s submission that the EU case law to the effect that, under the transitional regime, the national court had no jurisdiction before a determination under either Article 104 or Article 105, was all distinguishable because those cases were all concerned with Article 101(2). Mr Beard QC pointed out that an agreement or decision would only be “automatically void” under Article 101(2) if there was a finding of infringement of Article 101(1) which, under the transitional regime, could only be made either by the national competition authority under Article 104 or the Commission under Article 105. The principle established by the trio of ECJ cases, *Bosch*, *Asjes* and *Ahmed Saeed*, as to the position under the transitional regime was of general application and not limited to cases where issues of automatic voidness under Article 101(2) arose.
79. Mr Beard QC and Mr Jon Turner QC (acting for the respondent, British Airways), submitted that the applicability of the transitional regime in Article 101 cases was not dependent upon whether, on the facts of any given case, an exemption under Article 101(3) was or might be available. Mr Beard QC submitted in particular that the

appellants' reliance on [32] of the judgment in *Ahmed Saeed* confused the rationale for the transitional regime with its scope and ambit. There was nothing in the judgments in the trio of cases *Bosch*, *Asjes* and *Ahmed Saeed* that suggested that the relevant principle, that the national court had no jurisdiction unless and until there was a determination under Article 104 or Article 105, was limited to cases where an Article 101(3) exemption was or might be available.

80. They also submitted that, in any event, the appellants' argument that, because of the findings of the Commission in its 2010 and 2017 Decisions, it was inevitable that there could be no exemption under Article 101(3) in respect of conduct in relation to flights between the EU and third countries before 1 May 2004, was misconceived. Mr Turner QC in particular drew attention to the incremental approach adopted by the EU institutions to the implementation of the competition rules to the air transport sector, recognising that because of international arrangements and state influence on the setting of tariffs, airlines would need time to adapt to a more competitive environment. Accordingly, special considerations applied to international flights under the transitional regime. This Court could not and should not simply infer that, in relation to those flights before 1 May 2004, the Commission would inevitably conclude that there could be no exemption under Article 101(3). The Court should proceed on the basis that such an exemption might be available.
81. Mr Beard QC went somewhat further and submitted that the findings of the Commission in its Decisions about the behaviour of the airlines could not be relied upon, since only the operative part of those Decisions was binding. Since the operative part (to which I have referred at [24] above) did not relate to conduct in relation to flights between the EU and third countries prior to 1 May 2004, the findings of the Commission on which the appellants relied would not be binding on the airlines in relation to such conduct. He relied upon the decision of the European Court of First Instance in *Pergan v Commission* [2007] ECR I-5225 as interpreted by this Court in relation to disclosure issues at an earlier stage of the present proceedings: *Emerald Supplies and others v British Airways* [2015] EWCAS Civ 1024; [2016] Bus LR 145, particularly at [14] to [20]. He submitted that the findings in the 2010 and 2017 Decisions could not be relied upon against the airlines in relation to the flights the subject of the present appeal.
82. In relation to Ground 2, it was submitted on behalf of the airlines that the relevant provisions of Regulation 1/2003, Articles 1 and 6, conferred for the first time a right to claim damages through an action in national courts without there being any prior infringement decision by the national competition authority or the Commission. This was undoubtedly a new right to sue which was substantive not procedural. The contrary argument that it was procedural was misconceived. A right to claim damages based on proof of certain facts was given by the Regulation where proof of those facts would previously have been insufficient to found a claim. Previously, under the transitional regime, a claim could only be made on the back of a decision by the relevant regulatory body or the Commission. The legal rights of action were different under the Regulation from what they were under the transitional regime and the change was a substantive one.
83. On the basis that the provisions were substantive, there was nothing in their terms or in the purpose or overall scheme of the Regulation to suggest that they had retrospective effect. Accordingly, it was submitted that Ground 2 should be dismissed. Mr Turner

QC submitted that, contrary to the appellants' arguments, there was nothing in *O'Brien* to suggest that it was establishing some new principle of law. [26] of the judgment restated and approved the settled case law. He submitted that the "future effects" principle stated at [27] and applied in that case was not an aspect of retrospectivity but a different, albeit complementary principle. The principle applied there because the pension rights did not crystallise until the end of Mr O'Brien's period of service, by which time the United Kingdom had transposed the Directive into national law. That principle does not apply here because there is no question of the relevant rights of the appellants in relation to conduct prior to 1 May 2004 not accruing until some later date.

84. In relation to Ground 3, the issue as to whether to make a reference, it was submitted on behalf of the airlines that this was not a case where a reference was merited. The relevant legal principles as to the lack of jurisdiction of national courts in the transitional regime are well-established by *Bosch*, *Asjes* and *Ahmed Saeed* and did not need further elucidation by the Court of Justice. Likewise the principles in relation to non-retroactivity and future effects are well-established and do not require clarification. It was submitted that it would be wrong for this Court to await the decision of the Dutch court.

Discussion: Ground 1

85. Ingenious though Mr Moser QC's attempt to distinguish the EU case law as all concerned with Article 101(2) was, I consider his argument to be fallacious. Before an agreement or decision can be automatically void under Article 101(2), there must have been a determination that there was an infringement of Article 101(1). This is clear from the wording of the Article itself: "Any agreements or decisions prohibited pursuant to this Article shall be automatically void". An agreement or decision will only be prohibited under Article 101(1) and thus automatically void under Article 101(2), if there has been a determination to that effect by an entity with the power to make such a determination: see [63] to [65] of the judgment of the ECJ in *Asjes*. Under the transitional regime, this was only a national competition authority under what is now Article 104 or the Commission under what is now Article 105: see the passage in the judgment in *Bosch* which I have cited at [28] above.
86. Under the transitional regime, unless and until either the national competition authority or the Commission had made such a determination, the national court does not have jurisdiction to hold that there has been an infringement of Article 101(1). This principle is stated quite categorically by the ECJ at [68] of its judgment in *Asjes* cited at [41] above. The application of the principle was reconsidered by the ECJ in *Ahmed Saeed*. As Mr Beard QC put it, in *Ahmed Saeed* they "marked their own homework in *Asjes*" and reiterated the principle enunciated in *Asjes* at [29(i)] of their judgment in *Ahmed Saeed* (cited at [45] above). Nothing in the reasoning in either of those cases even begins to suggest that the principle stated is only applicable where there is an issue of automatic voidness under Article 101(2). Quite the contrary, the principle is being stated as one of general application where the transitional regime still applies.
87. I agree with counsel for the airlines that this attempt to create a separate category of Article 101(2) cases distinguishable from the present case is entirely artificial. The reason why Article 101(2) does not refer to concerted practices is that, unlike agreements or decisions, they do not need to be declared void. However, Article 101 is to be regarded as an indivisible whole, without cases where a declaration of automatic

voidness under Article 101(2) was made or could be made falling into some separate category. The reference to “concerted practices” in Article 101(1) is there because the intention of EU competition law is to prohibit any form of non-competitive coordination, whether formal or informal.

88. In any event, the appellants’ attempt to distinguish this case from the EU case law on the basis that, because it is concerned with concerted practices, Article 101(2) does not arise, is factually incorrect. As is clear from the operative part of the 2010 and 2017 Decisions, the Commission found in Article 1 that the infringement in respect of flights within the EEA comprised both agreements and concerted practices from 22 January 2001 to 14 February 2006. Given that it is the same behaviour by the airlines upon which the appellants rely in the present case in relation to flights between EU/EEA countries and third countries, it must follow that any infringement of Article 101(1) will involve the same agreements and concerted practices. So far as any agreements are concerned, this would be an Article 101(2) case in which, if an infringement were found, the agreements would be automatically void under Article 101(2).
89. In relation to the appellants’ case that the judge erred in not concluding that the Court did have jurisdiction over the appellants’ damages claim, because there was no or no real prospect of any exemption under Article 101(3), I consider that argument fails for two principal reasons. First, I agree with the airlines that it cannot simply be inferred from the findings which were made by the Commission in its 2010 and 2017 Decisions that there could be no question of their ever being able to satisfy the requirements of Article 101(3) in relation to flights between the EU/EEA and third countries before the EU competition rules as now enacted in Regulation 1/2003 had any application to agreements or practices in relation to such flights.
90. The Commission makes it clear expressly in [816]-[817] of its 2010 Decision that it is simply not dealing with any anti-competitive agreements or practices in relation to flights between the EU and third countries prior to 1 May 2004. It must follow that the findings of the Commission at [1040] to [1045] as to the non-applicability of Article 101(3) relate only to intra-EU/EEA flights from 22 January 2001 to 14 February 2006 and to flights between the EU/EEA and third countries from 1 May 2004 or 19 May 2005 to 14 February 2006. This is confirmed by the dispositive or operative part of the Decision Articles 1 to 3 of which find infringement in relation to those flights for those periods alone.
91. I have well in mind that the same conduct, whether emails, conversations or other matters, in the period 22 January 2001 to 1 May 2004 (in relation to which both Mr Moser QC and Mr Randolph QC referred us to the detailed findings made in the 2010 and 2017 Decisions) which the Commission concluded was a single and continuous infringement, is relied upon by the appellants in relation to the flights between the EU and third countries prior to 1 May 2004. I accept that the conduct is not in some way divided up geographically depending on the destination of the flights. I also accept that, contrary to Mr Beard QC’s submissions, it cannot be contended that the findings of the Commission are somehow inadmissible or cannot be relied upon against the airlines in relation to flights between the EU and third countries before 1 May 2004.
92. However, although those findings of the Commission would obviously be relevant to any determination by the Court or the Commission as to whether exemption under Article 101(3) is available in respect of the cartel, in so far as it relates to flights between

the EU and third countries in the period prior to 1 May 2004, there has not been any such determination. I do not consider that it can simply be assumed that, on the basis of those findings, the inevitable conclusion is that, in relation to those flights for that period, exemption under Article 101(3) would not be available.

93. I see considerable force in the point made by Mr Turner QC that the approach of the EU institutions to the implementation of EU competition rules in the air transport sector has been incremental, the “dimmer switch” approach to which the judge alluded at [71] of her judgment. In the transitional regime in which international flights between the EU and third countries were left by the EU institutions from 1962 until 1 May 2004, the legislative approach and framework was different from that adopted in Regulation 17/62 and, in due course, Regulation 1/2003. The assessment of whether behaviour was anti-competitive was deliberately left to institutions other than the civil courts.
94. Special considerations did apply in the transitional period, given for example international tariff agreements and state influence on tariffs overcharging. The international rules on air transport were recognised and summarised by the ECJ in *Asjes* at [18] to [25]. In the light of those international arrangements, the EU institutions recognised that airlines needed time to adapt to a more competitive environment. See, for example: (i) the Commission 1980 Report on Competition Policy referred to at [13] above; (ii) the recitals to Regulation 3975/1987 referred to at [14] above and (iii) [14] of the judgment of the ECJ in *Ahmed Saeed* which states, referring to those recitals:
- “...the regulation is based on the idea that the air transport sector has to date been governed by a network of international agreements, bilateral agreements between States and bilateral and multilateral agreements between air carriers and that the changes required to that system to ensure increased competition should be effected gradually so as to provide time for the air transport sector to adapt.”
95. As Mr Turner QC pointed out, the complexities of this international network are likely to have been greatest in relation to agreements between Member States and third countries, as such countries may not have had the same approach to competition. This is no doubt why flights between the EU and such third countries were left in the transitional regime for so long and not brought within EU competition rules until Regulations 1/2003 and 411/2004 came into force. Mr Turner QC drew our attention to the references in the Defence of British Airways to foreign regulators, for example in Hong Kong and Japan, compelling or encouraging the price-fixing of charges on international airfreight.
96. Against that background, I do not consider that it can simply be assumed that no exemption under Article 101(3) would ever be available in respect of agreements or practices on international flights between the EU and third countries prior to 1 May 2004. This Court is not in a position to say that such an exemption would not have been granted by the Commission, which has never considered the detail of the position in relation to such flights during that period for the reasons given at [816] of its 2010 Decision. Furthermore, no determination as to the applicability of Article 101(3) to agreements or practices in relation to such flights has been made by the United Kingdom competition authority as contemplated by Article 104. All that can be said is that, however likely or unlikely it may be that such an exemption would be granted, it

remains the case that the agreements and practices may qualify for exemption. Even on the appellants' interpretation of [32] of *Ahmed Saeed*, the Court would have no jurisdiction in those circumstances.

97. Even if, contrary to the conclusions I have reached, the appellants were correct that there was no or no real prospect of the airlines establishing that an exemption under Article 101(3) would be available, I consider that the appellants' submission that, in those circumstances, the court has jurisdiction because Article 101(1) would have direct effect, is misconceived. Specifically [32] of the judgment in *Ahmed Saeed* will not bear the interpretation which the appellants seek to put upon it, that if no question of Article 101(3) exemption arises, Article 101 is directly applicable in the same way as Article 102.
98. [32] and [33] of the judgment are explaining why there is a distinction between Article 101 and Article 102 and why the transitional regime (pursuant to which the national courts do not have jurisdiction under Article 101 unless and until there has been a determination under Article 104 or Article 105) applies to Article 101, whereas Article 102 is fully applicable. As the ECJ says, the sole justification for Article 101 being subject to the transitional rules is that agreements, decisions or practices covered by Article 101(1) may be subject to exemption under Article 101(3). This is a generic explanation, not one dependent on the facts of a particular case, with which the ECJ would not be concerned. Once the provisions of the transitional regime apply, they apply to all Article 101(1) cases, not simply to those where there is some prospect of an Article 101(3) exemption being available. As Mr Beard QC put it, the appellants' argument confuses the rationale for the application of the transitional provisions to Article 101, namely the generic or abstract possibility of an Article 101(3) exemption being available, with the scope or ambit of the transitional provisions. The transitional provisions apply to all Article 101 cases, not just those where there is, on the facts, a possibility of an exemption being available. There is no warrant either in the transitional provisions themselves or in the EU case law for dis-applying the transitional provisions in certain Article 101 cases.
99. The appellants gain no assistance from the cases in which the ECJ has recognised that there is a right in any affected party to claim damages for infringement of Article 101. Neither of the cases relied upon is dealing with the transitional regime. Both *Courage v Crehan* and *Manfredi* are cases, like *Delimitis*, covered by EU competition rules pursuant to Regulation 17/62. They provide no support for the argument that Article 101 should have full and direct effect under the transitional regime applicable to international air transport or that the national courts should have jurisdiction to award damages where the pre-condition of a determination under either Article 104 or Article 105 has not been satisfied.
100. None of the appellants' arguments in relation to ground 1 can overcome the very clear principle stated in [68] of *Asjes* and confirmed by the ECJ in *Ahmed Saeed* that, under the transitional regime, the national courts have no jurisdiction in a case such as the present where there has been no determination under either Article 104 or Article 105 by the national competition authority or the Commission respectively.

Discussion: Ground 2

101. I consider that Articles 1 and 6 of Regulation 1/2003 are substantive, not procedural, essentially for the same reasons as given by the judge in her judgment. The submission advanced on behalf of the appellants that all that was entailed was a change in the procedure as to the entity which can make a finding of infringement under Article 101(1) or grant an exemption under Article 101(3) only deals with part of the overall change effected by the Regulation. This case concerns a claim by the appellants for damages for infringement by the airlines of Article 101(1). Prior to the enactment of the Regulation, there was simply no right to bring such a claim before the national courts. On any view the Regulation creates a new right to sue before the national courts.
102. Prior to the enactment of the Regulation, the national courts could not have entertained any claim for infringement unless and until there had been a determination by the national competition authority under Article 104 or by the Commission under Article 105. It was thus an essential ingredient of any cause of action before the English courts that there was such a prior determination: compare per Mance J in *HJ Banks & Co Ltd v British Coal Corporation* [1997] EuLR 597 at 604H. That was a substantive not simply a procedural bar. Following the enactment of Regulation 1/2003, agreements decisions or practices which do not satisfy the conditions for exemption under Article 101(3) are prohibited pursuant to Article 1 without any prior decision to that effect being required. The national courts have full jurisdiction under Article 6 to make a finding of infringement of Article 101(1) and award damages.
103. I agree with the airlines that the removal of what was previously an essential ingredient of any cause of action (namely the requirement of a prior decision by the national competition authority or the Commission) is a substantive change, not a procedural change. The legal right which the Regulation now gives is different from and more extensive than the limited right which existed under the transitional regime and the change in the right available is a substantive one. Furthermore, in my judgment, by parity of reasoning with the decision of the ECJ in *Toshiba* [2012] EUECJ C-17/10, the provisions of Article 1 and Article 6 are substantive rather than procedural. That case concerned Article 3(1) of Regulation 1/2003 which contains provisions as to assessments by competition authorities under Article 101 which were held to be substantive not procedural: see [49] to [52] of the judgment. I consider the same reasoning would apply to Articles 1 and 6. The short answer to the point made by Mr Randolph QC about [70] of *Toshiba* is that, whilst Article 11(6) may be procedural, Articles 1 and 6 are fundamentally different in character and effect substantive changes to the relevant EU law, for the reasons I have given.
104. Since those provisions are substantive not procedural, pursuant to well-established EU case law, substantive rules do not have retroactive effect unless it is clear from their terms, objectives or general scheme that they are intended to have such effect: see *Salumi* [1981] ECR 2736 at [9]. Nothing in the wording, purpose or general scheme of Article 101, Regulation 1/2003 or Articles 1 and 6 themselves suggests that these substantive rules were intended to have retrospective effect: see *Toshiba* at [52].
105. Contrary to the submissions advanced on behalf of the appellants, there is nothing in the recent decision of the Court of Justice of the European Union in *O'Brien v Ministry of Justice* which supports any erosion of that well-established principle that substantive rules do not have retroactive effect. I agree with Mr Turner QC that the “future effects” principle is not in some way an erosion of the principle that substantive rules or provisions do not have retroactive effect, save where their wording or purpose is to the

contrary. It is complementary to the “no retroactivity” principle but not in conflict with it: see the analysis of the interaction between the two principles in the judgment of Lewison LJ in this Court in *O’Brien* at [5] to [9]. Although the effect of the decision of the Court of Justice will presumably be that the decision of the Court of Appeal is reversed, nothing in the judgment of the Court of Justice challenges the correctness of that analysis.

106. That the “future effects” principle is a separate complementary principle and does not derogate from the well-established principle that substantive provisions do not have retrospective effect is also clear from the Opinion of Advocate-General Kokott in *Moravia Gas Storage* at [26] to [30]. At [30] she summarises the principles as follows:

“In summary, it may be deduced from those principles recognised in settled case-law that new law is not to apply to *definitively established situations* save where otherwise provided by way of exception. By contrast, *on-going cases* in which legal situations have not yet arisen and become definitive under the old law must be assessed under the new law as soon as that new law enters into force.”

107. In my judgment there is nothing to the contrary in the judgment of the Court of Justice in that case. [33] of the judgment restates very clearly the well-settled case law that, whilst procedural rules are generally taken to apply from the date on which they enter into force, substantive rules only apply to situations existing before their entry into force, if such retrospective effect clearly follows from their terms, objectives or general scheme. The point taken by Mr Randolph QC about “In particular” at the beginning of the paragraph is a false point. Reading the two paragraphs [32] and [33] together, it is clear that [33] is intended to be an elaboration of the principle of non-retroactivity referred to in the second sentence of [32].

108. Thus, it is the first sentence of [32] which sets out the “future effects principle”:

“A new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations.”

109. The second sentence qualifies the first (“It is otherwise”) making it clear that the position may be different as regards a new rule, if it contains special provisions specifically laying down conditions as to its temporal application, subject always to the principle of non-retroactivity of legal acts. How that principle does not apply to procedural rules but does apply to substantive rules is then elaborated in [33].

110. The Court of Justice considered that the “future effects” principle applied in *O’Brien* because Mr O’Brien’s pension rights did not become definite and crystallised until he retired, at which point the assessment of his pension entitlement took place. By that stage, in 2005, the relevant new law, in the form of the Regulations giving effect to the Directive, was in force. Not to give effect to the “future effects” principle in that case would be to deprive the Directive of its intended full effect, not least because Mr O’Brien was entitled under the Directive to be treated no less favourably pro rata than a salaried judge retiring on the same day. The relevant comparator would be a full-time

judge who had served for 27 years (or at least for 20 years entitling him or her to the maximum pension) not a full-time judge who had only served 5 years.

111. The “future effects” principle has no application to the present case, since there is no question of the relevant rights of the appellants not having accrued until some date after Regulation 1/2003 came into force. The claim presently being considered relates to the airlines’ conduct prior to 1 May 2004, the effect of which is said to be alleged overcharges in the period from 22 January 2001 to 1 May 2004. The relevant cause of action in relation to that claim was complete by the time the Regulation came into force and there was no question of any future effects occurring in relation to the conduct complained of up to that date. In other words, this case is an example of what is described in the first sentence of [32] of the judgment of the Court of Justice in *Moravia Gas Storage*, the relevant legal situation had arisen and become definitive under the transitional regime.

Discussion: Ground 3

112. I agree with the submissions on behalf of the airlines that the trio of cases *Bosch*, *Asjes* and *Ahmed Saeed* clearly establish the relevant legal principles as to the jurisdiction (or lack of it) of national courts under the transitional regime. Contrary to Mr Moser QC’s submissions, there is not some undecided question in relation to the right to claim damages. The cases clearly establish that unless there has been a determination by the national competition authority under Article 104 or the Commission under Article 105, the national court has no jurisdiction. Likewise, the “no retroactivity” and “future effects” principles are both well-established by existing EU case law. It follows that, in my judgment, there is no point raised by the appellants on either of the first two grounds of appeal in relation to which any clarification from the Court of Justice is required. Like the judge, I do not consider that there is any basis for the suggestion that the Court of Justice might reach a different conclusion on these issues than the one it has already reached. I also agree with the airlines that this Court should not delay judgment to await the decision of the Dutch court.

Conclusion

113. For all the reasons I have given, I consider that the appeal should be dismissed.

Lord Justice Bean

114. I agree.

The Master of the Rolls

115. I also agree.

