

Supreme Court: EU law principle of absolute *res judicata* declared acte clair

Secretary of State for Health and Others (Respondents) v Servier Laboratories Ltd and others (Appellants) [2020] UKSC 44

Khatija Hafesji, Barrister, Monckton Chambers

Jon Turner QC and Philip Woolfe acted for the Secretary of State for Health and Anor

Daniel Beard QC, Julian Gregory and Alexandra Littlewood acted for the Scottish Ministers and ors

Laura Elizabeth John acted for the Welsh Ministers and ors.

*In the proceedings below, in the Court of Appeal **Robert Palmer QC** also acted for the English, Welsh, Scottish and Northern Ireland health authorities, and at first instance **Josh Holmes QC** acted for the Welsh health authorities.*

In this important and unanimous judgment, the Supreme Court provides guidance on the EU law principle of absolute *res judicata*, namely the circumstances in which a European judicial decision is given dispositive effect which is binding not simply on the parties to the decision but on the world.

Background to appeal

The appellant, Servier, is a pharmaceutical company which developed and manufactured a medicinal product called Perindopril that is used to treat cardiovascular diseases [2]. The appeal arises out of a long-running set of proceedings presently before the High Court, which concern whether Servier breached articles 101 and 102 TFEU / Chapter 1 and Chapter 2 of the Competition Act 1998 [4]. By these claims, the respondents (who are the claimants in the proceedings before the court) claim that Servier's breaches of competition law delayed the entry of generic Perindopril onto the UK market which in turn caused the price of Perindopril to be higher than it would otherwise have been, and caused them financial loss [6].

Related to these domestic proceedings are a set of proceedings in the EU courts. These arise out of a Commission Decision in 2014 which found that Servier contravened, amongst other things, article 102 TFEU. The Commission Decision was appealed to the General Court. In 2018, the General Court annulled the finding that Servier had infringed article 102 on the basis that the relevant market at the relevant time was wider than the Commission had found, and the finding that Servier was dominant therefore could not stand. The Commission appealed that finding of the General Court to the CJEU.

Meanwhile, in the domestic proceedings, in 2018 the court listed a hearing of preliminary issues in relation to Servier's argument that the respondents/claimants failed to take all reasonable steps to mitigate their loss by switching to generic alternatives [15]. Servier sought to rely upon a number of factual findings made by the General Court in the EU proceedings and claimed that these findings would be binding on the High Court in the trial of the preliminary issues [18] because *inter alia*: the EU law principle of *res judicata* renders findings of fact and law constituting the ratio of an annulling judgment of the General Court binding on all, with absolute effect [20]. The respondents/claimants denied that the principle of *res judicata* conferred the binding effect which Servier claimed [21].

At first instance, Roth J held that none of the findings of fact constituted *res judicata* for the purposes of the preliminary issues trial, but granted permission to appeal to the Court of Appeal [23-24]. The Court of Appeal unanimously dismissed the appeal [25]. The Supreme Court granted permission to appeal solely on the basis that the application involved a point of law which was not *acte clair* [26].

The principle of absolute *res judicata*

In the judgment of Lord Lloyd-Jones (with whom the rest agreed), and in response to Servier's request for a preliminary reference to the CJEU, the court identified a neat shortcut to deciding the appeal – namely, that as there was an outstanding appeal of the General Court's findings, the General Court's findings were not "definitive" and therefore not binding on the parties [31-32]. However, in view of the general importance of the issues raised in the appeal and the fact that the court had come to a clear and unanimous view, the court nevertheless set out its conclusions as if the General Court's findings were definitive.

The court identified *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* (Joined Cases C-442/03P and C-471/03P) [2006] ECR I-4845 as the leading case on the principle of absolute *res judicata* [33-37]. This case held that where a Commission decision has been annulled on substantive rather than procedural grounds, the judgment itself has the force of *res judicata* and it is the substance of the decision itself which becomes binding

on all (and not just the parties) [38]. The outcome of judgments of the EU courts are usually set out in a brief final paragraph, known as the operative part, with the reasons for that outcome buried within the text of the judgment itself. Where an act of an EU institution has been annulled, and the principle of absolute *res judicata* applies, it is not only the outcome of the judgment which is binding but also the findings within the judgment which provide the necessary support for the operative part of the annulling judgment [39].

Identifying which of the findings provide necessary support for the outcome of a judgment and which do not is not an easy task. The court's answer is to keep in mind the purpose of the principle of absolute *res judicata* when identifying which parts of an annulling decision are binding on all [42]. It is only those aspects of the judgment which either (a) must be respected in order to prevent the court's conclusions being undermined, or (b) are needed to ensure that an EU institution complies with the court's direction as to what needs to be done in order to comply with EU law. Once this is understood, it follows that the *ratio decidendi* extends only to those aspects of the judgment which explain the meaning of the annulment decision, because those are the aspects which must be respected in order to prevent the annulment judgment from being called into question in subsequent proceedings.

Court's conclusions

Applying this principle to the facts of this case, the operative part of the General Court's judgment annuls the finding that there has been an infringement of Article 102 TFEU, without more. The remainder of the judgment explains that this is because the Commission erred in defining the market too narrowly, and makes a number of factual findings in this regard. If and to the extent that it could be shown that these findings were the essential basis of the General Court's ruling as to the relevant product market, those findings would form part of the *ratio decidendi* and it would not be possible to challenge them for the purpose of challenging the General Court's conclusion as to the relevant product market in the context of Article 102 [46].

However, that is not what Servier is seeking to do in the domestic proceedings. The domestic proceedings concern an entirely different context, namely causation, remoteness and mitigation of loss in the arena of article 101 TFEU [47- 48]. In this very different context from that in the proceedings before the General Court, the findings upon which Servier relies have no significance independent of the annulling judgment. It is not, therefore, necessary to treat those findings as binding in order to preserve the authority of the annulling judgment [48]. The position is *acte clair*.

Comment

The judgment confirms that the principle of absolute res judicata is to be interpreted narrowly and provides a clear and useful litmus test for determining the ratio decidendi in such cases. General Court and CJEU judgments delivered before the end of this year remain binding on UK courts, those delivered from 1 January 2021 are (with some exceptions) no longer binding but the court will nevertheless have regard to them. The judgment also helpfully endorses the observation of the CAT in the recent case of *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7, that the principle of res judicata is not engaged where the issue concerns a decision of the Commission as opposed to that of an EU court. Determining whether Commission decisions are binding involves different considerations, including policy considerations within a legislative framework which promotes uniform application of competition rules across the union.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

(all references in the form [x] are to paragraphs within the judgment)