Judgment in *Secretary of State for Health v Servier Laboratories Ltd* [2020] UKSC 44

The Supreme Court has clarified the scope of a principle of EU law, called "*absolute res judicata*" or "*res judicata erga omnes*", under which a finding, made by an EU court in the course of annulling an act of an EU institution, can be given dispositive effect binding not simply on the parties to the decision, but on non-parties too. (The principle is, it should be noted, quite distinct from common law notions of *res judicata*.)

Servier argued that detailed findings of fact made by the General Court of the European Union in the course of resolving a dispute as to the application of article 102 of the TFEU (Case T-691/14 EU:T:2018:922) should be treated as binding in proceedings before the English High Court, notwithstanding the fact that the litigant Servier sought to bind, the Secretary of State, had not been a party to the proceedings before the General Court, and the fact that the High Court proceedings were concerned not with article 102 but with article 101 of the TFEU.

Indeed, Servier argued that that detailed findings of fact made by an EU court in the course of an annulling judgment could, under the *res judicata erga omnes* principle, have binding effect between parties completely different to those before the EU court, in disputes wholly unrelated to those before the EU court, so long as the dispute in

the later proceedings could be said to fall within the scope of EU law.

The Supreme Court was "*clear and unanimous*" in rejecting this argument, which it treated as ignoring the purpose of the principle of *res judicata erga omnes*. That purpose was, the court said, "firmly rooted" in the annulment by EU courts of acts of EU institutions under article 263 TFEU, and the duty under article 266 TFEU on the institution concerned to take the necessary measures to comply with the annulling judgment. The aim of the principle was to prevent the EU court's conclusions from being undermined, or its decision as to what needed to be done by the institution to secure compliance with EU law being contradicted.

It was critical, according to this analysis, that the General Court decision and the High Court proceedings were concerned with quite different legal subject matter. The former was concerned with market definition for the purposes of article 102, whereas no such issue arose in the High Court proceedings. It was illegitimate to "borrow" findings of fact from the former

context, and deploy them to binding effect in an entirely different context, when the High Court proceedings could not call into question or undermine the General Court's annulling judgment or its consequences.

The court noted ([61]) that the principle could, if freed from its proper limits, "operate in an arbitrary and unjust manner, binding strangers to the original dispute in a wholly different legal context in a manner which could not be reconciled with principles of a fair trial."

David Drake acts for the Claimants, instructed by Peters & Peters LLP. A link to the Judgment can be found here.

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