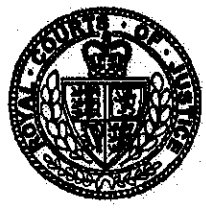


Neutral Citation Number: [2005] EWCA Civ 1299

Case No: A3/2005/1393(A) and 1393
and A3/2005/1394(A) and 1394

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Gloster
2004 Folio 684

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2005

Before :
LORD JUSTICE WALLER
LORD JUSTICE MUMMERY
and
LORD JUSTICE TUCKEY

Between :

(1)The International Transport Workers' Federation	**Appellants**
(2) The Finnish Seamen's Union	
- and -	
(1) Viking Line ABP	**Respondents**
(2) OU Viking Line Eesti	

Mark Brealey QC, Kassie Smith and **Marie Demetriou** (instructed by **the Legal Department of the ITF** for the **1st Appellant** and **Denton Wilde Sapte** for the **2nd Appellant**)

Charles Hollander QC, Mark Hoskins and Colin West (instructed by **Ross & Co**) for the **Respondents**

Hearing dates : 7th - 9th September 2005

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Waller LJ :

1. This is an appeal from the decision of Gloster J given in a reserved judgment handed down on 16th June 2005 following a trial lasting some 10 days in January and February of the same year. Viking Line ABP (Viking) a Finnish shipping line, were the successful claimants. Gloster J, in reliance on the free movement Articles, particularly Article 43 of the EC Treaty, by an order, a copy of which I append as a schedule to this judgment, granted Viking permanent injunctions restraining the Defendants, the Finnish Seamen's Union (the FSU) and the International Transport Workers' Federation (the ITF) from taking industrial action. The injunctions seek (1) to prevent the ITF and the FSU from taking industrial action to deter Viking from reflagging their ferry the *Rosella* from the Finnish flag to the Estonian flag, something they desire to do to take advantage of the cheaper labour costs of employing a crew from Estonia; and (2) to prevent ITF and the FSU from taking industrial action to persuade Viking that, even if it does reflag, it should continue to pay its crew at Finnish rates negotiated with the FSU. The industrial action and thus its threat would have been lawful under Finnish national law disregarding any impact of the EC Treaty. The judge held that the action threatened by the two trade unions imposed restrictions on the freedom of movement of establishment contrary to Article 43, (and indeed, in the alternative, the free movement of workers and the free provision of services contrary to Articles 39 and 49), and that it, and thus its threat, would be unlawful. The case accordingly raised and the appeal raises important issues relating to the interaction of the key provisions of the Treaty dealing with free movement and the fundamental rights of workers to take industrial action.

2. It is at first sight surprising that the English Commercial Court should be the forum in which a dispute between a Finnish company and a Finnish Trade Union and an international Trade Union concerned with a ferry running between Finland and Estonia should be litigated. But since the ITF's base is in London, jurisdiction was established pursuant to the Brussels Regulation (Regulation (EC) 44/2001), and Gloster J ruled (and I think rightly) that comity did not require the English court to stay the proceedings to allow the case to be tried in what might be thought its more natural forum, the Finnish courts.

3. Gloster J furthermore did not refer the questions of European law to the European Court. Among her reasons for not so doing were that a reference would involve a considerable delay, and that she was clear about the answers. She accepted Viking's submission that if the industrial action was not prevented the damage to Viking would be so severe that it was important to reach a final conclusion.

4. Despite the full and able argument before us, unlike the judge, I am not clear as to the answers on the points of European law. It furthermore seems to me that the points which arise are of such fundamental importance that a reference is essential sooner rather than later. I would add that it also seems to me that even if comity does not require this court to stay the proceedings in favour of the Finnish courts, where it is being argued that European law renders actions unlawful in Finland which would otherwise be lawful by Finnish national law, the court best placed to receive all relevant submissions including those that the Finnish Government might wish to make is the European Court. That there may be a delay as a result of the reference is unfortunate, but hopefully the European Court will accept that there is urgency in

dealing with the questions that arise, the points not only being important in the context of the parties to this case, but in the context of industrial relations generally.

5. The above points go to the making of the reference without any detailed consideration of the arguments, but, since Viking submit, as they did before Gloster J, that a reference should not be made without interim measures being granted in their favour, some consideration of the merits is necessary. Putting the matter broadly for the moment, they submit that it might take two years for the reference to be heard in the court in Luxembourg, and without interim measures granting injunctions in the form that Gloster J granted them, Viking will suffer irreversible damage – indeed they say that Viking might be forced to sell the *Rosella* and cease trading the ferry between Estonia and Finland, suffering serious losses, irrecoverable (they say) from the trade unions. Equally, of course, the FSU and ITF submit that with interim measures in place in the form that Gloster J made Viking will be able to carry out their intentions to reflag and employ a crew at rates negotiated with the Estonian trade union (the Transport Workers' Trade Unions' Federation), with the result that in two years' time it would be difficult to put the clock back, and in any event damages would never provide an adequate remedy.

6. Hopefully the two year delay will turn out to be a pessimistic assessment and the European Court will, in the exceptional circumstances of this case, give priority to it, but that there will be some delay cannot be denied.

7. The answer to the question as to how far this court should go in considering the merits of the case when contemplating whether interim measures should be granted is, as will be clear from the authorities to which I will turn, itself dependent on the answer to certain questions which I can put in this way:

   (1) If Viking were granted interim relief but turned out ultimately not to be entitled to it, would damages be an adequate remedy for the trade unions?

   (2) If Viking were refused interim relief at this stage and were ultimately held to be entitled to injunctive relief at the trial, would they be adequately compensated in damages by the trade unions?

8. If Viking were granted interim relief and ultimately held not to have been entitled to it, it seems to me that damages would not provide an adequate remedy. As set out in the Order of Gloster J, Viking have offered an undertaking not to terminate certain contracts. A similar undertaking has been offered in the form of order put in by Viking before us. But those undertakings do not require the renewal of short-term contracts with employees, nor do they prevent redeployment of employees to other jobs. Furthermore, once the present crew of the *Rosella* were replaced by a low-cost labour crew it would be difficult if not impossible to put the clock back. In any event, compensation to the defendant unions for jobs lost by individuals or for jobs no longer available to individuals would be difficult to calculate if recoverable at all.

9. If Viking were not granted interim relief and ultimately held to be right in their arguments, it seems to me that the recoupment of any loss in relation to whatever action Viking had taken in the intervening period (i.e. whether it sold the ferry or whether it continued to run it at a loss) has major difficulty. Those representing Viking suggest that there are doubts as to whether such damages would be

recoverable in law at all submitting that there is no authority that holds that breaches of Article 43 give rise to a claim for damages. Those representing the unions acknowledge that lack of certainty, but, in my view, correctly suggest that the logic behind Lord Diplock's view, expressed in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 when dealing with contraventions of Article 86 (now Article 82), would apply. At p.144 between A and G he expressed the trenchant view that he regarded it as quite unarguable

> ". . . that if such a contravention of Article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention but only a remedy by way of injunction to prevent future loss being caused."

10. As he said:-

> "A cause of action to which an unlawful act by the defendant causing pecuniary loss to the plaintiff gives rise, if it possessed those characteristics as respects the remedies available, would be one which, so far as my understanding goes, is unknown in English private law, at any rate since 1875 when the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act passed to the High Court. I leave aside as irrelevant for present purposes injunctions granted in matrimonial causes or wardship proceedings which may have no connection with pecuniary loss. I likewise leave out of account injunctions obtainable as remedies in public law, whether upon application for Judicial Review or in an action brought by the Attorney General ex officio or ex relatione some private individual. It is private law, not public law, to which the company has had recourse. In its action it claims damages as well as an injunction. No reasons are to be found in any judgments of the Court of Appeal and none has been advanced at the hearing before your Lordships why in law in logic or in justice if contravention of Article 86 of the Treaty of Rome is capable of giving rise to a cause of action in English private law at all, there is any need to invent a cause of action with characteristics that are wholly novel as respects the remedies that it attracts, in order to deal with breaches of Articles of the Treaty of Rome, which have in the United Kingdom the same effect as statutes."

11. But, even if damages were recoverable in law, proof of damage and the question whether any award could be enforced against either trade union remains in my view highly speculative.

12. Thus, in my view, this case must be dealt with on the basis that damages will not be an adequate remedy for either party if they succeed at the trial but the decision on interim measures has been against them.

13. The situation has thus some similarities to that which existed in *R v Secretary of State for Transport ex parte Factortame Ltd and Others* [1991] 1 AC 603. In that case the House of Lords considered how the guidelines for the exercise of the court's jurisdiction to grant interim injunctions laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 should be applied where as in this case there was doubt as to the adequacy of any remedy in damages to either party, and where as here a reference to the European Court was being made which involved the effect of European law on a national law.

14. There is however an important distinction between the circumstances of *Factortame* and this case. In that case the validity of certain United Kingdom legislation was challenged on the basis that it contravened certain provisions of the EEC Treaty by depriving the applicants in that case of their Community rights, and an interlocutory injunction was sought against the Secretary of State to restrain enforcement of that law pending a reference. In the instant case the action is between private parties i.e. there is no element as there was in *Factortame* of seeking to prevent the authorities responsible for enforcement of the law, enforcing that law. Mr Brealey QC for the unions however submits that because the actions of the Unions would be lawful under Finnish national law, the position is somewhat analogous because Viking's case involves establishing that the provisions of the Treaty make the actions of the Unions unlawful.

15. In *Factortame* Lord Goff made clear that nothing he said was intended to qualify the guidelines laid down by Lord Diplock in *American Cyanamid.* Those guidelines made clear that where interlocutory relief is being claimed it is enough for a plaintiff or claimant to show there is a serious case to be tried. Once that threshold has been passed, the first stage is then to consider the adequacy of a remedy in damages to the claimant seeking the injunction, and to the defendant if an injunction is granted. So far as the claimant is concerned if there is an adequate remedy in damages that normally precludes the granting of an injunction. If the claimant is not so precluded then the court will consider the position of the defendant. If the defendant can be adequately compensated by the cross undertaking in damages that means there will be no reason not to grant the injunction on that ground. If damages are not an adequate remedy to either party, then when considering the balance of convenience, the court must consider all the circumstances of the case.

16. What was argued in *Factortame* was that because a challenge was being made to the validity of a United Kingdom national law, the test was no longer "serious case to be tried", but "strong prima facie case" but Lord Goff summarised his view of the position in this way :-

> "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of the law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and

> irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

17. He then analysed shortly the strength and weaknesses of the party's arguments and concluded at p.675:-

> "As to the final outcome on these issues after consideration by the court, your Lordships can of course express no opinion; but these two points alone led me to conclude that the applicants' challenge is, prima facie, a strong one."

18. He then referred to a questionnaire sent to the owners of 62 vessels during the hearing and stressed the damage they had suffered and would suffer. He weighed that against some damage that British fishing vessels would suffer, and concluded as had done in the Divisional Court that it was not sufficient to outweigh the obvious and immediate damage which would continue to be caused if no interim relief were granted.

19. Lords Brandon and Oliver agreed with the speech of Lord Goff.

20. Although it might be said that Lord Jauncey and Lord Bridge put the matter rather differently I see no purpose in going beyond that which was clearly the majority view.

21. In the Court of Appeal in *R v Secretary of State for Trade and Industry ex parte Trades Union Congress* (2000) IRLR 565, having referred to the passage in the speech of Lord Goff quoted above Lord Justice Buxton indicated at para 25 that:

> "I venture to draw from that latter passage that Lord Goff was recognising that there may be an unusual – I infer in Lord Goff's view it would be a very unusual case - where there was no strong prima facie case that the law was invalid, but where, nevertheless, it would be appropriate because of the weight of other factors to grant interim relief. But that case apart, Lord Goff in my judgment appears to regard the importance of not restraining a public authority by interim injunction except in a case such as that he refers to at the end of the passages I have cited as being, not a paramount factor, but an important threshold principle to which the court that is being asked to consider interim relief must direct its attention in the first instance."

22. It was undoubtedly of significance both to Lord Goff and to Buxton LJ that they were dealing with a public authority seeking to enforce a law and the challenge was to the enforcement of that law. Those representing Viking suggest that that is a key distinction and that it is important that this appeal is concerned with a dispute between private parties. Furthermore, they submit on a strict legal analysis, as is apparent from the summary of Finnish Law which will appear hereafter, the issue is not whether a national law can be enforced but what the national law is, having regard to the impact of European law. That said, however, there seems to me to be an analogy with the *Factortame* situation. The strict legal analysis is as true in *Factortame* as here. Here, the English court has evidence that by Finnish national law the activity of a defendant would be lawful, and the basis, and only basis that it has been suggested that it is unlawful, is the impact of Articles of the Treaty, and the English court should in my view be cautious about granting an injunction. Furthermore, even at this stage, it seems to me to be material that the activity which is accepted as lawful under Finnish national law involves leaving aside any impact of Community Law the fundamental rights of workers to take industrial action and the impact of European law is said to render that unlawful.

23. In my view, where as already indicated damages are not likely to be an adequate remedy for either party, and where the nature of the case is as I have described, it seems to me that in assessing the balance of convenience and the holding of the ring the merits and strengths of Viking's case has considerable relevance. As Lord Goff made clear there is no rule, even in a case similar to *Factortame,* that "a strong prima facie case" has to be made out. In that case he indicated that relief should not be available unless their arguments were "firmly based". Since he was not seeking to lay down rules even in that case, I would not seek to suggest any rule in this type of case other than that the strength of Viking's case will be material in conducting a balancing exercise, and the English court should be cautious as I have already indicated. Viking's case will thus need to be assessed in a little detail as a factor to be put in the scales. If they have serious arguments, they must then be placed in the scales with the likely damage that Viking will suffer if an injunction is not granted and weighed against the damage that may be incurred if an injunction is granted. It is at this stage, furthermore, that other factors may need to be considered, e.g. possible delay alleged by the unions against Viking; what precisely is the status quo to which the court should have regard; and the question whether an injunction would impact on the freedom of expression of the FSU and the ITF.

The Facts

24. The facts are conveniently summarised in the skeleton arguments of Mr Mark Brealey QC who represented the unions and Mr Hollander QC who represented Viking. I have taken Mr Hollander's summary as the basis for my summary but I hope accurately included aspects on which Mr Brealey wished to place emphasis.

    i) Viking is a Finnish company and one of the largest passenger ferry operators in the world. It operates seven vessels, including "*Rosella*", which operates under the Finnish flag on the Tallinn-Helsinki route between Estonia and Finland.

    ii) FSU is a national union representing seamen. It is based in Helsinki and has about 10,000 members. The crew of "*Rosella*" are members of the FSU. FSU is a

Finnish affiliate of the ITF which is a federation of transport workers' unions, with its headquarters in London. There are 600 affiliated unions in 140 countries. One of the principal ITF policies is its "Flag of Convenience" ("FOC") policy now set out in a document entitled "Oslo to Delhi". Mr Cockroft of the ITF told the judge and it seems she accepted [see paragraph 12] that "the primary objectives of the FOC campaign are first, to eliminate flags of convenience and to establish a genuine link between the flag of the ship and the nationality of the owner and second, to protect and enhance the conditions of seafarers serving on FOC ships". The "Oslo to Delhi" definition treats the vessel as sailing under a flag of convenience "where the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag" and provides that "Unions in the country of beneficial ownership have the right to conclude agreements covering vessels beneficially owned in their countries". The FOC campaign is enforced by boycotts and other solidarity actions.

iii) So long as "*Rosella*" is under the Finnish flag, Viking are obliged by Finnish law and by the terms of a Collective Bargaining Agreement ("CBA") to pay the crew wages at Finnish levels. Estonian crew wages are lower than Finnish crew wages. "*Rosella*" was loss-making, being in competition with vessels on the same route which paid lower Estonian wages. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it to a different registry, at that stage either Norway or Estonia, with a view to Viking entering into a CBA with an Estonian or Norwegian union and employing either an Estonian crew or a mixed Estonian/Finnish crew.

iv) Viking gave notice of its proposals to the FSU and to the crew in accordance with Finnish law. A number of meetings occurred in the course of which the FSU made clear that it was opposed to the proposal.

v) On 4 November 2003 FSU sent an email to ITF ("the FSU email") referring to Viking's plan to outflag "*Rosella*" and to reduce "the number of Finnish seafarers on board" stating that "*Rosella*" was "beneficially owned in Finland and effectively controlled by Finnish companies and we therefore have and keep the negotiation rights within FSU". FSU asked ITF to inform all affiliated unions about the matter and to request them not to negotiate with Viking.

vi) On 6 November 2003 ITF did as requested and sent a circular ("the ITF circular") to all affiliates organising seafarers, inspectors and coordinators informing them of the situation in Finland and asking them to refrain from negotiating with Viking: "Please be advised that since the vessels are still beneficially owned in Finland, our Finnish affiliates still retain negotiating rights. Please refrain from entering into negotiations with either company".

vii) The effect of the FSU e-mail was that ITF had no discretion but was as a matter of policy obliged to issue the ITF circular. Both the FSU e-mail and the ITF circular were sent consistent with, and pursuant to, the ITF's FOC policy.

viii) FSU approached the ITF because an appeal to other unions from the ITF would have greater value than an appeal from FSU direct. Affiliated unions would be

expected to comply because of the principle of solidarity. Failure to comply could lead to sanctions being taken.

ix) FSU claimed that the manning agreement for the "*Rosella*" expired on 17 November 2003 and that in consequence they were no longer under an obligation of industrial peace under Finnish law, and gave notice of a strike requiring (1) the manning on the "*Rosella*" to be increased by eight and (2) Viking to give up plans to reflag "*Rosella*". Viking conceded the extra eight crew but refused to give up its plans to reflag. It disputed that the manning agreement was at an end. Although their manning demands had been met in full, FSU would not agree a renewal of the manning agreement unless Viking also gave up plans to reflag. By letter of 18th November FSU indicated there were two conditions to its agreement to renew the manning agreement:-

a) Viking Line Abp commit themselves to continue to follow Finnish law, [the CBA], the general agreement and the manning agreement...on *MS Rosella*, regardless of a possible change of flag;

b) The possible change of flag of the vessel must not lead to employees, on the vessel or on other Finnish flag vessels belonging to the shipping company, being made redundant or laid off, or changes in the terms and conditions of employment being made without the consent of the employees.

x) FSU issued press statements which referred to the need to protect Finnish jobs.

xi) Viking started proceedings in the Labour Court on 17 November for a declaration that the manning agreement remained in force. FSU on the basis of their view that the manning agreement was at an end, gave notice in accordance with the Finnish Act on Mediation in Labour Disputes that it intended to commence industrial action in relation to *Rosella* at 19.00 hours on 2 December 2003. Viking started proceedings in the District Court on 25 November for an injunction to restrain that strike action. However, neither court was able to hear Viking in time; the Labour Court set a preparatory hearing date for 2 December.

xii) Viking were not initially aware of the sending of the ITF circular. On 24 November Viking learnt of its sending. This was important because it effectively precluded any possibility of Viking circumventing FSU and dealing directly with a Norwegian or an Estonian union, because ITF affiliate unions would not go against the ITF circular.

xiii) FSU's demands had initially required Viking to give up their reflagging plans. The modification quoted in subparagraph (ix) above required that in the event of any reflagging the crew must be employed subsequent to the reflagging under Finnish law and conditions. FSU knew that this would render the reflagging pointless because: (1) the whole purpose of the reflagging was to enable Viking to enter into a CBA with a union in Estonia (or another European country) which would enable Viking to pay cheaper crew wages than those Viking were required to pay so long as the vessel was Finnish flagged and in consequence Viking was bound by the Finnish CBA; (2) Viking would in fact be much worse off, because

if "*Rosella*" reflagged to Estonia, Viking would not be able to claim state aid payments which the Finnish government offered to Finnish flag vessels.

xiv) Conciliation took place under the auspices of a state-appointed conciliator. Viking undertook that the reflagging would not involve any redundancies. FSU refused to defer the strike. On 2 December Viking settled the dispute because of the threat of strike action. The judge described this settlement as "a total capitulation" by Viking. In addition to agreeing the extra manning, they agreed not to commence reflagging prior to 28 February 2005, and to discontinue the proceedings in both the Labour Court and the District Court.

xv) On 1 May 2004, Estonia became a member of the EU.

xvi) "*Rosella*" continued to make losses, and Viking continued to wish to reflag the vessel to Estonia. The ITF circular remained in force and was never withdrawn by ITF. It followed that the request to affiliated unions from the ITF in relation to "*Rosella*" remained in effect.

xvii) Viking anticipated that any warning to the FSU or ITF would precipitate actions in the Finnish courts by the unions. Viking therefore commenced the action in the Commercial Court in London on 18 August 2004, seeking declaratory and injunctive relief which required withdrawal of the ITF circular and requiring FSU not to interfere with Viking's EC free movement rights in relation to the reflagging of "*Rosella*".

xviii) The obligation of industrial peace under Finnish law which derived from the 2 December 2003 agreement ended on 28 February 2005. Viking were concerned, having commenced this action, that unless an order had been made by the court by that date, they would face strike action and a requirement that these proceedings be discontinued as per FSU's terms. They sought expedition of the trial. At a hearing before Langley J on 26 October 2004, FSU and ITF opposed an order for expedition. Langley J nevertheless ordered an expedited trial.

xix) In December 2004, the Åland Shipowners' Association renewed the then current CBA and the "*Rosella*" manning agreement until 2008, so the date of 28 February 2005 ceased to be of critical importance. However, Viking continued to make substantial losses on the "*Rosella*" and it remained important that the position was resolved speedily. The expedited trial thus took place in January and February 2005; the judge gave her judgment on 16th June 2005.

xx) She granted final injunctions on an undertaking being given by Viking not to make any employees redundant as a result of any reflagging in the terms attached hereto.

25. The judge gave permission to appeal save in relation to her findings of fact. The appeal was expedited and was heard in the vacation during the first week of September 2005.

B: Findings of the judge as to Finnish law

26. Ultimately, there was no material dispute between the parties as to Finnish law, and Mr Brealey did not dispute as I understand it Mr Hollander's summary in the Viking's skeleton argument which was in the following terms. As a result of the decision of the Finnish Supreme Court in *Rakvere* (KKO:2000:94) Finnish law provides as follows:

    i) *Prima facie*, FSU would have the right to initiate industrial action in Finland against Viking in the circumstances of this case, by virtue of the right to freedom of association protected by Article 13 of the Finnish constitution.

    ii) Those provisions are permissive rather than mandatory; they provide a right to strike action but do not require it. To that extent they are to be distinguished from legal requirements which *require* persons to do something.

    iii) Since the accession of Finland to the EU in 1995, Community law forms an integral part of Finnish law which the Finnish courts are bound to apply.

    iv) The *prima facie* right to strike is subject to three sets of circumstances where it cannot be invoked:

        a) where the right to strike is ousted by a Finnish statute;

        b) where the strike is *contra bonos mores*; or

        c) where the strike is in breach of EC law directly applicable between the parties.

Consideration of Viking's case under European law

27. Viking's primary case is that any industrial action aimed at preventing Viking reflagging the *Rosella* or aimed at persuading Viking to give up the Estonian flag and return to the Finnish flag imposes a restriction on their right to establish themselves in Estonia under Article 43. In the alternative their case before the judge was that the actions of the Trade Unions would impose a restriction on Viking providing services from Finland to Estonia in breach of Article 49. Their case was that if the unions' actions were successful the *Rosella* would be uncompetitive with other ferries on the same route thereby restricting the services Viking could supply from Finland to Estonia. In the Court of Appeal Viking sought leave to amend. By this stage they had made up their mind that the *Rosella* was to be transferred to Viking's Estonian subsidiary, OU Viking Line Eesti. They wished therefore to add a claim by their Estonian subsidiary in place of their Article 49 claim by Viking, but in the alternative to Viking's establishment claim, asserting that the actions of the unions would place a restriction on services from Estonia to Finland if the Estonian subsidiary was compelled to pay rates of pay negotiated with the FSU as opposed to those negotiated with the Estonian trade union. We gave leave to amend so that any point of law relating to Article 49 could be canvassed, but made clear that any question as to whether Viking and its Estonian subsidiary were in reality separate entities must be left open to be tried out if that issue ever arose.

28. Viking in the court below also argued that Article 39 'the free movement of workers' would be infringed by the activities of the Unions, and the judge so found but without giving reasons. That aspect of the judgment was not supported by any argument from Mr Hollander or Mr Hoskins in the Court of Appeal. It is thus possible to concentrate on Article 43 but with some reference to Article 49.

29. Although Mr Hoskins who argued the European law aspect on behalf of Viking posed questions in the order recorded by the judge at paragraph 93 of her judgment, it seems to me that the most important questions arising under the Treaty and logically the first questions, are whether Article 43 (or 49) apply to the activities of the unions at all or have direct affect so as to confer rights on Viking directly against entities such as the FSU and ITF.

30. There is no authority of the European court directly dealing with these important issues.

Do Articles 43 or 49 apply at all?

31. Viking's argument is that Articles 43 and 49, being part of Title III of the EC Treaty, are fundamental tenets on which the treaty is founded. They provide as follows:-

> "*Article 43*
>
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches of subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.
>
> *Article 49*
>
> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.
>
> The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to

> nationals of a third country who provide services and who are established within the Community."

32. The free movement of establishment and the free movement of services are what the Treaty is concerned to guarantee. It is common ground that *Factortame* established that Member States could not pass laws to restrict the reflagging of the *Rosella* and the creation of an establishment in Estonia. Viking argued that trade union activity which seeks to prevent the same should also fall within those Articles and be prohibited by them.

33. FSU and ITF's argument is that the right of trade unions to take action to preserve jobs is a fundamental right recognised by Title XI of the EC Treatyand in particular Article 136 which provides as follows:-

> "The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18th October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."

34. The reference in Article 136 to the European Social Charter and the 1989 Community Charter incorporates so argued Mr Brealey a reference to the right to strike recognised by those instruments.

35. He argues that if within a member state whether it be Finland or the United Kingdom, an employing company wished to move establishment so as to take advantage of lower rates of pay, it would not be unlawful for the trade union to take industrial action to seek to persuade the employer not to move. He poses the question whether it is intended by the Treaty to make it unlawful if the trade union action is aimed at preventing the movement of establishment from one member state to another where the employer is seeking to take advantage of lower rates of pay.

36. Mr Brealey suggests that any genuine trade union activity even if it restricts movement of establishment, or restricts the provision of services, is simply not intended to be covered by Title III and the free movement Articles. He submits that an analogy can be drawn between the rulings of the European Court in Case C-67/96 *Albany* [1999] ECR I-5751, Case C-180/98 *Pavlov* [2000] ECR I-6497, and Case C-222/98 *Van der Woude* [2000] ECR I-7129, where the court recognised the primacy of the social rights over the prohibition concerning competition rules under Title VI. He submits that Community Institutions have applied this principle of non-interference to the free movement rules. He relies on Regulation 2679/98 adopted to clarify the obligations of member states to intervene when the free movement of goods was obstructed by individuals but by Article 2 provided that the Regulation "may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member states, including the right or freedom to strike."

37. Mr Hoskins submits (1) that there is no reason why the social policies should be treated any differently to other policies e.g. those on environment; the rule he submits should be that any restriction based on a social policy should be objectively justified and proportionate; (2) he suggests that secondary legislation, Council Regulation 1612/68/EEC Article 7(4), expressly recognises that collective bargaining agreements are subject to the free movement rules. That regulation makes void any collective agreement concerning eligibility of employment which lays down discriminatory conditions in respect of workers who are nationals of the other member states; (3) he submits that he is supported by cases such as Case C-112/00 *Schmidberger* [2003] ECR I-1577 where an environmental group organised a demonstration that blocked a motorway affecting the free movement of goods. The ECJ did not hold that since the fundamental right of assembly was in issue it followed that the free movement rules were ousted; it held that the freedom of assembly was in principle capable of justifying a restriction on free movement, and that was answered by reference to the question whether the restriction was justifiable and proportionate; (4) he submits that since the ECJ ruled that a French law which provided that a proportion of the crew of a French flagged vessel must be French nationals, was contrary to the rules relating to the free movement of workers (see Case 167/73 *Commision v France* [1974] ECR 359), it would be illogical if a trade union could lawfully strike in order to compel a proportion of a crew to be of a particular nationality.

38. Mr Brealey had to accept that his case could not involve saying that any activity of a trade union must fall within Title XI. He accepted for example that a clause in a collective bargain agreement that discriminated against workers on the grounds of nationality would fall to be considered under Regulation 1612/68. He accepted that a clause which required more pay for men than women would not meet the social objectives contained in Title XI. So that in the alternative to the case that all the activities of the FSU and the ITF in this case fall outside Articles 43 and 49 he submitted that even if action taken to prevent reflagging i.e. with the sole purpose of preventing the movement of establishment, might fall within Article 43 as not being consistent with the social objectives of Title XI, action taken to force Viking to maintain the Finnish wages would fall within Title XI and it would do so even if the threat of such action might have the effect of making the reflagging exercise not worthwhile and lead to Viking abandoning it.

39. This last point Mr Brealey would submit has not been appreciated by the judge and has lead to her granting the injunction in paragraph 5.

40. The arguments on this narrower alternative (directed particularly at paragraph 5 of the injunction) can I think be summarised in this way. Mr Brealey would argue that industrial action taken against Viking or its Estonian subsidiary if in the future it chose to trade into Finland, to keep wages at the Finnish level would be lawful under Finnish law and recognised as lawful under European law. Therefore he would submit, a threat to take such action cannot be unlawful. He relied on the posted worker line of authorities to which I shall refer in more detail when dealing with justification under paragraph 54 below. Mr Hoskins would however submit that such action would not be lawful once the *Rosella* is flagged in Estonia because the posted worker authorities should not apply to seafarers, an argument which I again address in more detail below. This more narrow argument is similar to that which arises if Articles 43 and 49 are applicable and when justification of any restriction is being

considered, and it is for that reason that I can deal more fully with the authorities at that stage. But I understand the point to be a distinct point at this stage in the sense that Mr Brealey would say that even if some aspect of the Trade Union activities could be said to fall outside Title XI, some activities clearly fall within it and in so far as they fall within it Articles 43 and 49 do not apply, and thus the submission of Mr Hoskins that the action would have the effect of persuading Viking to give up its establishment in Estonia and its threat has the effect of placing restrictions on establishing in Estonia is not to the point.

41. I shall deal with Direct Effect before making any comment on the above arguments.

Direct Effect

42. Viking's arguments accepted by the judge were threefold. First that the ECJ had accepted that the free movement rules applied not only to Member States and public authorities, but also applied "to rules of any other nature aimed at regulating gainful employment in a collective manner" (reliance being placed on Case 36/74 *Walrave* [1974] ECR 1405, Case 415/93 *Bosman* [1995] ECR-I4921 and Case C-309/99 *Wouters* [2002] ECR I-1577); second and for a rather similar reason because the free movement principles apply to "obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law" (see *Bosman* paras 82-84); and thirdly because in Case C-281/98 *Angonese* [2000] ECR I-4139the ECJ had held that Article 39 had direct effect in relation to the free movement of workers applying *Walrave, Bosman* and *Wouters.*

43. The response to the above arguments from Mr Brealey was first that the FSU and indeed any trade union would not have the requisite degree of normative power to be viewed as a regulatory body; he submits that the FSU is not concerned with the self employed as was *Walrave, Bosman, and Wouters*; he submits that *Angonese* was not dealing with Article 43 (or 49) and in any event did not impose any obligation on a worker or workers.

My views on the arguments so far

44. I hope I have caught the essence of the arguments on these aspects. I assess them together because they are concerned with the root question whether Articles 43 or 49 provide employers with any remedy directly against trade unions. I can see the force of Viking's position that there should not be a blanket exclusion for the activities of trade unions from the free movement articles. But there is also force in the view that the control mechanism should be the application of Title XI i.e. if an activity plainly does not pursue a social object within Title XI the free movement Articles will apply, whereas if it does they should not, so that the extent to which any industrial action which had the effect of creating a restriction within the free movement Articles would have to be the subject of scrutiny by reference to those Articles would be limited. It is difficult to think that it was contemplated that all industrial action which had the effect of placing a restriction on free movement would have to be justified by individual trade unions ultimately before the ECJ.

45. It is convenient to consider the question whether if Articles 43 and 49 have direct effect, the activities of the trade unions could be justified before assessing the strength of Viking's case that their activities do not fall within Title XI.

If Articles 43 and 49 apply, and have direct effect, by what criteria is the balance between the employer's free movement rights and the social rights of the trade union and its members to be struck?

46. Under this question consideration needs to be given to the bases on which any restrictions under Article 43 and 49 may be justified, and issues arise as to the interpretation of the judge's findings of fact. If the restriction were directly discriminatory, the Trade Unions submit that the restrictions are objectively justifiable on the basis of public policy pursuant to (a) the fundamental rights of freedom of association and to take collective action and (b) the protection of workers. If the restriction was not directly discriminatory, but was indirectly discriminatory or restrictive in a non-discriminatory way (sometimes referred to as "indistinctly applicable"), the Trade Unions submit again that the restrictions are objectively justified by public policy. Viking dispute any public policy argument, and submit that any direct discrimination cannot be justified. In relation to indirect discrimination or non discriminatory restrictions they submit that public interest is already protected in Estonia by the trade union protecting the rights of seamen recruited there; they submit that the actions of the ITF are not appropriate to achieve the legitimate objective of protecting the rights of Estonian seamen; and further submit that the actions are disproportionate.

Direct Discrimination

47. The judge found that there was direct discrimination on two bases. First she found that the ITF's policy, invoked by the FSU, was directly discriminatory because it applied by reference to the nationality of the shipowner, not by reference to the protection of seafarers' rights and interests. Second she found that FSU's threatened action was directly discriminatory because it was intended to protect the jobs of Finnish seamen. Mr Hoskins for Viking submits that she was right so to find pointing out that so far as the FOC policy is concerned that even if its avowed intention was social protection, its manner of application was not dependant on any need for such protection. The FOC policy would apply so as to require a shipowner not to reflag from a low wage country to a high wage country. On the nationality of workers he and Mr Hollander pointed to press announcements and to the finding of the judge of "naked protectionism".

48. Mr Brealey's response was that on the nationality of workers aspect, the judge had misapplied the test for direct discrimination. He submitted she had applied a subjective test and not an objective test, and thus should not have relied on any stated intention of the ITF or FSU. He submitted that if motive was relevant at all it could only go to support indirect discrimination. He submitted that the judge's construction of the words used i.e. "Finnish sailors" as denoting sailors of Finnish nationality was an inaccurate characterisation in that what the FSU were seeking to do was to protect the crew of the *Rosella* not all of whom were Finns even if they were resident in Finland i.e. they were not simply protecting those of Finnish nationality.

49. In relation to the FOC policy Mr Brealey submitted that the criteria was beneficial ownership and not nationality, and for there to be direct discrimination the requirement was unequal treatment by reference to nationality.

50. If there was direct discrimination Mr Hoskins submitted that only public policy could justify it. But he pointed out that if what ITF and FSU rely on is the fundamental right recognised by the European Convention on Human Rights, that convention also prohibits, by Article 14, discrimination. He submitted that direct discrimination could not be justified by reliance on fundamental rights, and indeed that Mr Brealey had made no real attempt to justify direct discrimination.

51. The arguments involve both findings of fact and the legal characterisation of those facts. It will be a matter for the ECJ as to how the facts are to be characterised. In assessing the strength of Viking's case it would seem to me that if there was direct discrimination, FSU and ITF would be unlikely to be able to justify any restriction. FSU and ITF do however have a reasonable argument that any discrimination was indirect on the basis that the FOC policy could be said to be only concerned with beneficial ownership and not nationality, and so far as the workers are concerned, despite the use of language such as "Finnish sailors", the objective aim was to protect the jobs of the crew and persons resident in Finland as opposed to only those of Finnish nationality. But that said the case for indirect discrimination seems strong. In any event even if indirect discrimination were not established, some restriction is clearly established and, if the Articles have direct effect, justification would be the key issue.

Justification

52. It seemed to be common ground that whether indirect discrimination were established, or non-discriminatory restrictions, the justification would be considered under the same heads. But, that said, justification would have to be considered by reference to the restrictions that Viking can establish, and the question whether they involve indirect discrimination will be a relevant factor.

53. The FSU and the ITF would seek to justify on the basis that the FSU must be free to take action to persuade Viking or its subsidiary to apply Finnish rates of pay to the crew of the *Rosella* while it continues to operate precisely the same service in and out of Helsinki even if under an Estonian flag, and to support the request by the ITF and the FSU that Viking and its subsidiary respect the negotiating rights of the FSU under the ITF "FOC policy".

54. Mr Brealey again relied on the authorities relating to "posted workers". As he submitted, it is well established that Community Law does not in principle preclude member states from applying their legislation or collective labour agreements relating to minimum wages to any person who is employed, even temporarily, in its territory [see Joined Case 62 and 63/81 *Seco* [1982] ECR 223; Case C at para 14, Case C-113/89 *Rush Portuguesa* [1990] ECR I-3905 at para 18 and Joined Cases C-369 96 and C-376/96 *Arblade* [1999] ECR I-8453 at paras 41-44].

55. He relied on the objectives highlighted by AG Mischo in Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831 where at paragraphs 37 – 53 he highlighted the objectives of applying such legislation

to such foreign temporary workers. AG Mischo identifies twin objectives – first the improvement in the employment conditions of foreign workers and second to the prevention of a downward spiralling or depression of wages in the host member state. Mr Brealey distinguished Case C-165/98 *Mazzoleni/ISA* [2001] ECR I-2159. That was a case in which a French company, ISA provided security services in France and employed a small number of workers as security officers at a shopping mall in Belgium. ISA challenged the obligation to pay minimum wages as required by Belgian law and the European Court held that since the thirteen workers enjoyed comparable overall protection in the home Member State and there was thus no obligation to pay the minimum wage. Mr Brealey submitted the position was summarised in the judgment of the ECJ in *Mazzoleni*, para 28 in the following terms:-

> "[28] as regards more specifically national provisions relating to minimum wages such as those at issue in the main proceedings, it is clear from the case law of the court that community law does not preclude member states from extending their legislation or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established."

56. The judgment recognised that the question was one of proportionality and that in ascertaining whether the application of the host member state's minimum wage legislation was disproportionate, the national court must "evaluate all relevant factors" [para 27]. He submitted that the FSU's case was stronger when it was considered that Finnish constitutional law confers on the union the right to take industrial action. He stressed the importance which the ECJ attached to the exercise of fundamental rights. He relied on the case C-112/00 *Schmidberger* in which a haulage company sued the Austrian government for authorising a demonstration by an environmental group. The group was protesting against pollution and had blockaded the Brenner motorway for a period, thereby preventing the free movement of goods. The Austrian government justified the protests by reference to the right to free assembly. The ECJ accepted that the failure by the government to ban the demonstrators constituted a restriction on the free movement of goods within the meaning of Article 28. However the court further held that the restriction was justified by the fundamental rights guaranteed by the ECHR and the Austrian constitution, but held that the exercise of fundamental rights such as the freedom of assembly was not unlimited. It would need to be justified by a social need and would need to be proportionate. In this respect the court held that a member state retained a wide margin of discretion.

57. Thus, the submission on behalf of the trade unions was:

a) the application of Finnish rates of pay to Viking operating in and out of Helsinki (on the same route) is consistent with the objectively defined legitimate objective of protecting the workers. It improves the employment conditions of the new crew and prevents a depression and avoidance of Finnish minimum wages.

b) the proportionality of the FSU's right to require compliance with Finnish rates of pay must reflect the fact that this right is a fundamental constitutional right afforded to it by Section 13 of the Finnish Constitution. Finland has a wide margin of discretion in this respect.

c) the FSU is entitled to take collective action to guarantee foreign workers the Finnish level of pay.

d) even if an effect of the collective action is to prevent the loss of jobs in Finland and to prevent them being replaced with cheap labour, this is a legitimate objective.

58. Mr Hoskins response to the submissions on justification was as follows. He submitted that the authorities relating to posted workers did not apply to seafarers. First he relied on Directive 1996/71, which concerned posted workers and adopted specific rules intended to give effect to the ECJ's case law. He pointed out that that Directive, by Article 1(2), provided that the Directive does not apply to "merchant navy undertakings as regards sea-going personnel". He suggested it would be absurd for vessels to have to modify their manning conditions mid-voyage to reflect the labour conditions applicable in each port that they visited. He further relied on the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of the ship (including employment terms and conditions) (relying on McCulloch 372 US 10 (1963) and International Longshoremen's Association 397 US 195 (1970)).

59. He submitted that the defendant's submission that they were entitled to take industrial action to require Viking Estonia to enter into a CBA with the FSU went too far. He submitted that *Unison v United Kingdom* [2002] IRLR 497 established that the freedom of association under Article 11 of the ECHR did not include a right for a union to require "that an employer enter into or remain in any collective bargaining arrangement".

60. As regards proportionality he relied on *Mazzoleni*.

61. He further made points such as the fact that in so far as it was suggested Estonian seafarers were being protected by the defendant's actions, those seafarers were already protected by an Estonian trade union. I have not set out all the points taken but have set out sufficient to satisfy myself that if the Articles were directly applicable there are serious issues to be tried on justification.

Overall assessment

62. I am satisfied that there are serious issues to be resolved by the ECJ and that Viking has a serious case to be tried. But my inclination is to feel, contrary to the view taken by the judge, that Viking will not get over the hurdle of showing that the trade union activities fall outside Title XI. If the activities were found by the ECJ to be directly discriminatory (as found by the judge) in my view Viking would be likely to surmount that hurdle, and the trade unions would then be unlikely to be able to justify. But in my view, despite the findings of the judge, Viking have an uphill struggle to establish "direct" discrimination.

Balancing Exercise

63. There are then other matters to consider. First, there is the point taken by the trade unions in relation to their freedom of expression. In my view this point is very limited so far as this case is concerned. Second, there is a point taken by the trade unions as to the delay by Viking. I doubt whether there has been such a delay as should have any impact on the question whether an injunction should be granted. Third, there is the question as to what the status quo ante should be and in that regard there is a CBA which seemed to be effective until February 2008 but that may not be long enough if there is considerable delay in the court hearing this case.

64. But to grant the injunction sought by Viking would as I see it be close to giving Viking the remedy which should only be available to it after a full trial of the action, including answers to the questions posed. That does not seem to me to be the situation so far as the trade unions are concerned if interim measures were refused. If interim measures are refused the trade union will have to make up its mind what is in the best interest of its members. Viking are suggesting that they will sell the vessel but do not put it totally out of consideration that they may continue to run the ferry but at a serious loss. In that situation the trade union has to consider how far to go in the interests of its members. There is, one would have thought, a reasonable chance of the two parties negotiating a sensible arrangement. In the light of my assessment of the strengths of Viking's case the balancing exercise in my view points to refusal to grant interim measures.

Conclusion

65. I would set aside Gloster J's decision, adjourn this appeal and stay the proceedings so that a preliminary ruling can be obtained in relation to certain questions from the ECJ. I would refuse interim measures in the meanwhile.

66. The questions which I would refer for a preliminary ruling by the ECJ are appended hereto. The parties agreed those questions subject to one or two areas of dispute. They indicated where there was disagreement by putting certain words in brackets in the draft they provided. Having discussed that draft with My Lords (who have indicated their agreement with this judgment) and having discussed the parties' submissions on the disputed aspects of the draft provided, we have produced a final form of the questions which we would refer as appended hereto.

67. As indicated already, this case raises questions of some importance. We would hope that the President of the ECJ will feel able, pursuant to Article 55 of the Rules of Procedure of the European Court of Justice, to order that the case be given priority.

Lord Justice Mummery : I agree

Lord Justice Tuckey : I also agree

APPENDIX 1

VIKING LINE v ITF AND FSU

QUESTIONS TO BE REFERRED TO THE ECJ

Scope of the free movement provisions

1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in Case C-67/96 *Albany* [1996] ECR I-5751, paras 52-64?

Horizontal direct effect

2) Do Article 43 of the EC Treaty and/or Regulation 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

Existence of restrictions on free movement

3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 of the EC Treaty and/or Regulation 4055/86?

4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86?

5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

Establishment/ Services

6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company:

   a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

   b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation 4055/86 in respect of the provision of services by it from Member State B to Member State A?

Justification

Direct discrimination

7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 of the EC Treaty on the basis that:

   a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

   b) the protection of workers?

ITF policy: objective justification

8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

9) Where:
   - a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;
   - the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;
   - the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;

- it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;
- the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;
- the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;
- a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

10) Would it make any difference to the answer to 9) if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?

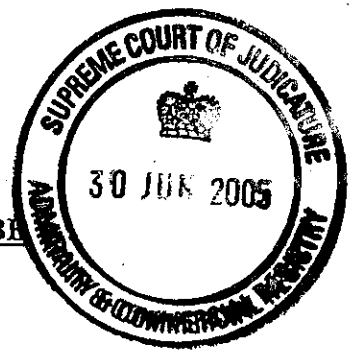
APPENDIX 2

VIKING LINE v ITWF AND FSU

Order of Mrs Justice Gloster DBE dated 16 June 2005

Case No: 2004 Folio 684

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT



Before :

MRS JUSTICE GLOSTER, DBE

Between :

	Viking Line Abp	**Claimant**
	- and -	
(1)	**The International Transport Workers' Federation**	**Defendants**
(2)	**The Finnish Seamen's Union**	

PENAL NOTICE

If you, the within named International Transport Workers' Federation (ITF) neglect to obey this judgment by the time stated, or if you disobey this judgment, you may be held to be in contempt of Court and liable to sequestration of your assets.

If you, the within named Finnish Seamen's Union (FSU) disobey this judgment, you may be held to be in contempt of Court and liable to sequestration of your assets.

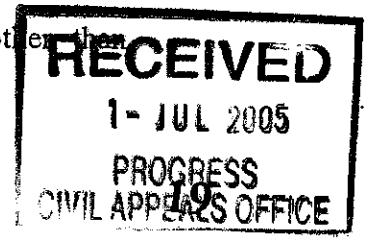
UPON the hearing of the trial of the action

AND UPON Viking Line Abp undertaking to this court on its own behalf and on behalf of all companies within the Viking Group of companies ('Viking') that Viking will not by reason of

(a) the transfer of the registration of the Rosella to a Member State other than Finland ("the reflagging") or the proposed reflagging

(b) negotiating with a trade union in a Member State other than Finland in relation to the Rosella or

(c) employing nationals of Member States other than Finland as crew on board the Rosella



terminate the employment of any person employed by Viking as at the date of this order, whether on shore or offshore

For the avoidance of doubt nothing in this undertaking shall

(1) require Viking to renew any fixed term contract of employment

(2) prevent Viking from redeploying any employee on equivalent terms and conditions to those enjoyed by the employee as at the date of this order

This court orders as follows.

Injunction

A permanent injunction is granted as set out below.

1 The ITF shall by 4pm on 28 June 2005 inform its affiliate unions and any other addressees of its letter of 6 November 2003 ('the circular') that the circular is revoked and its affiliate unions in the European Community are free to negotiate and enter into a CBA with Viking in relation to the Rosella on any terms the two parties may agree

2. The ITF shall by 4pm on 28 June 2005 issue a press release or statement on its website confirming 1 above

3. The ITF shall not prior to the reflagging

(1) institute or cause others to institute any boycott or other industrial action against the Rosella or any other vessel or asset of Viking or

(2) cause encourage or incite others to refuse to negotiate, contract, or otherwise deal with Viking

for the purpose of requiring Viking:

(a) not to effect the reflagging or

(b) to apply employment conditions contained in a Finnish Collective Bargaining Agreement or equivalent terms and conditions to crew on board the Rosella where such terms and conditions are to be applied to crew on board the Rosella after the reflagging or

(c) to continue to employ Finnish crew on board the Rosella after the reflagging

4. The FSU shall not prior to the reflagging

(1) institute or cause others to institute any boycott or other industrial action against the Rosella or any other vessel or asset of Viking or

(2) cause encourage or incite others to refuse to negotiate, contract, or otherwise deal with Viking

for the purpose of requiring Viking:

(a) not to effect the reflagging or

(b) to apply employment conditions contained in a Finnish Collective Bargaining Agreement or equivalent terms and conditions to crew on board the Rosella where such terms and conditions are to be applied to crew on board the Rosella after the reflagging or

(c) to continue to employ Finnish crew on board the Rosella after the reflagging

5. Each of the FSU and ITF shall not after the reflagging

(1) institute or cause others to institute any boycott or other industrial action against the Rosella or any other vessel or asset of Viking or

(2) cause encourage or incite others to refuse to negotiate, contract, or otherwise deal with Viking

for the purpose of requiring Viking

(a) to retransfer the Rosella to the Finnish registry

(b) to apply employment conditions contained in a Finnish Collective Bargaining Agreement or equivalent terms and conditions to crew on board the Rosella where such terms and conditions are to be applied to crew on board the Rosella or

(c) to continue to employ Finnish crew on board the Rosella

6. **Effect of this order.** A Defendant which is ordered not to do something must not do it itself or by its officers, employees, agents, members or others acting on its behalf or with its instructions or encouragement or in any other way.

7. Liberty to apply to all parties.

Declaration

This court declares as follows:

It is contrary to Article 43 EC, for the ITF and the FSU (or either of them) to take action with the purpose or effect of preventing or restricting the ability of Viking to

(a) transfer the registration of the Rosella to a Member State other than Finland;

(b) negotiate with a trade union in a Member State other than Finland in relation to the Rosella;

(c) employ nationals of Member States other than Finland as crew on board the Rosella.

Appeal

1. The Defendants have permission to appeal on points of law only. Provided that:

   (i) The term 'points of law' should be understood as including inferences of law from findings of fact and legal characterisations of findings of fact, but not findings of fact themselves.

   (ii) Permission to appeal is subject to the Claimant's right to argue with regard to any particular point that that point is not open to the Defendants in the Court of Appeal because it was not argued at the trial (or that the Court of Appeal should on the same grounds refuse in its discretion to hear argument on that point).

2. It is hereby indicated that in the view of the Court, the facts and circumstances of this case justify any appeal being heard as soon as reasonably possible,

albeit that the complexities of the issues raised must be borne in mind for listing purposes.

Costs

1. The ITF and the FSU shall pay Viking's costs of the action, to be subject to detailed assessment if not agreed. For the purposes of this order, the liability of the ITF and the FSU shall be joint and several. The Court hereby expresses its opinion for the purposes of paragraph 8.7(2) of the Practice Direction to CPR Part 44 (costs) that the case was suitable for the attendance of three counsel for the Claimant, but without prejudice to the discretion of the costs judge to hold with regard to any particular piece of work which was done by three counsel, that the use of three counsel was not reasonable with regard to that particular piece of work. Costs of hearing on 16 June 2005 to be costs in the action.

2. Interest shall accrue on those costs from the date on which the relevant invoice was paid by Viking, at 5% per annum .

3. The ITF and the FSU shall make an interim payment on account of costs in the sum of £360,000.

Dated 16 June 2005