Neutral Citation Number: [2005] EWHC 1222 (Comm)

Case No: 2004 Folio 684

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th June 2005

Before :

MRS JUSTICE GLOSTER, DBE

- -

Between :

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

- -
- -

Mr Charles Hollander QC, Mr Mark Hoskins and Mr Colin West
(instructed by **Messrs Ross & Co**) for the **Claimant**
Mr David Vaughan QC and Ms Kassie Smith
(instructed by the **Legal Department, ITF**) for the **1st Defendant**
Ms Helen Davies
(instructed by **Messrs Hunton & Williams**) for the **2nd Defendant**

Hearing dates: 25th January 2005 - 27th January 2005, 31st January 2005 - 3rd February 2005, 7th February 2005 - 9th February 2005 and 14th February 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE GLOSTER, DBE

Mrs Justice Gloster, DBE:

Introduction and parties

Viking and its claim

1. This is the trial of an action in which the claimant, Viking Line ABP ("Viking"), a company incorporated and registered under the laws of Finland, seeks certain declaratory and injunctive relief against the first and second Defendants, respectively the International Transport Workers' Federation ("the ITF") and The Finnish Seamen's Union ("the FSU"). At the hearing Viking were represented by Mr Charles Hollander QC, Mr Mark Hoskins and Mr Colin West; the ITF by Mr David Vaughan QC and Ms Kassie Smith and the FSU by Ms Helen Davies.

2. Viking is the 13th largest passenger shipping company in the world . It is the registered owner of a passenger and cargo ferry, the *Rosella*, the subject of this action, ("the *Rosella*" or "the Vessel") which is currently a Finnish flagged vessel with a predominantly Finnish crew. Since 17 August 2003, the *Rosella* has traded on the route between Helsinki in Finland and Tallinn in Estonia. It owns and manages six other vessels, all on routes between Finland and the Nordic states of which one, the *Cinderella,* was reflagged to Sweden on 1 September 2003 after cooperation negotiations with the unions. Finland has been a member of the EU since 1995. Estonia became a member on 1 May 2004.

3. It is Viking's case that it has been unable to make any money on the Helsinki-Tallinn route and that the *Rosella* is loss-making. It contends that its principal competitors on the route man their vessels with Estonian crews, which are significantly cheaper than Finnish crews. Viking's stated position in the action is that it wishes to reflag the *Rosella* under the Estonian flag in order to man the vessel with an Estonian crew. Viking's stance is that it cannot continue with a position where the *Rosella* is loss-making and that, if it is not able to reflag, it will need to sell the *Rosella*. Its stated position is that, unless this Court grants the declarations and injunctions which Viking seeks in its Amended Particulars of Claim, it will not be able to reflag the *Rosella*, because of anticipated strike action by the FSU, and action by the ITF, effectively requiring ITF affiliates in other jurisdictions, which Viking vessels visit, to participate in concerted boycott and other industrial action against the *Rosella* and other Viking vessels. Viking contends that any such action by the FSU and the ITF would be contrary (a) to Article 43 of the Treaty establishing the European Community ("EC"), (the principle of the freedom of establishment); (b) to Article 39 EC, (the principle of the free movement of workers); or (c) Article 1 of Council Regulation 4055/86/EEC, (applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries).

4. Viking's case is that it wishes to take steps to permit it to reflag the *Rosella* as soon as practicable after 1 March 2005.

The FSU

5. The FSU is an autonomous Finnish trade union representing seamen. It currently has about 10,000 members. It is based in Helsinki, Finland and has a few other offices elsewhere in Finland. It is a member of the Central Organisation of Finnish Trade

Unions ("the SAK"). It has no assets or other physical presence in the U.K. Its only connection with the U.K. is that it is an autonomous national affiliate of the First Defendant, the ITF. It is similarly an affiliate of the European Transport Federation ("the ETF") which is based in Brussels and the Nordic Transport Workers Federation ("the NTF"). The activities of the FSU include negotiating terms of collective bargaining agreements with shipowners' associations in Finland, and also directly with individual shipowners with regard to pay and terms and conditions onboard vessels owned in Finland and/or that operate into or out of ports in Finland. In this context, the FSU frequently concludes such agreements for non-Finnish owned vessels, with non-Finnish employers and/or with non-Finnish crew, even though it does not have any members onboard the vessels. It has also in the past initiated industrial action in Finland against such non-Finnish owned or flagged vessels (including Estonian flagged vessels), for the purpose of securing acceptable collective agreements, and has been held by the Finnish Supreme Court to have been perfectly entitled to do so. By so doing, the FSU seeks to safeguard the level of terms and conditions of employment and the living standard of all seafarers working on vessels trading in the Baltic and Nordic area, regardless of their nationality, and also to safeguard the job opportunities of its members. Thus its activities are not confined to negotiating on behalf of its members with their respective or prospective employers, or confined to taking industrial action in cases in which only its members are directly involved.

The ITF

6. The ITF is a global federation of transport workers' unions with its Secretariat based in London. It has described its functions as, *inter alia*, co-ordinating industrial action on a worldwide basis. Its aims and activities were described by David Cockroft, the General Secretary of the ITF, who gave evidence before me. The ITF was created in 1896 following solidarity strike action between seafarers' and dockers' unions in Rotterdam. The early years of the ITF were dominated by seafarers and dockers until the turn of the century when the membership profile began to change. Today, seafarers and dockers constitute approximately 22 per cent of the ITF membership, the largest memberships being in road transport and in railways. The headquarters of the ITF have been in England since 1938, having previously moved from Berlin and Amsterdam in response to the growth of Nazism. Membership of the ITF is open to any independent and democratic trade union, federation or association of trade unions with members in the transport sector. Currently there are approximately 600 trade unions in more than 140 countries around the world affiliated to the ITF. Together these unions represent over 4.6 million transport workers. The membership of the ITF is divided up into eight industrial sections. Each section has its own network of specialist committees and conferences and has a high degree of autonomy in policy making. The eight industrial sections cover: (1) railways workers; (2) road transport workers; (3) inland navigation workers; (4) dockers; (5) seafarers; (6) fisheries; (7) civil aviation; and (8) tourism service workers. There is also a special department of the ITF known as the Special Seafarers' Department ("SSD"). Alongside the industrial sections, the ITF's membership is grouped into five distinct geographical regions: (1) Africa; (2) Asia-Pacific; (3) Europe; (4) Latin America and the Caribbean; and (5) North America.

7. The supreme authority of the ITF is its Congress which consists of representatives of the ITF's affiliates known as delegates. Congress meets once every four years and is the main policy making body of the ITF. Congress elects a President and five Vice-Presidents. Congress also elects the ITF's General Secretary who is responsible for the ITF's Secretariat.

8. Next in authority to Congress is the Executive Board which currently consists of 37 members elected by Congress plus the General Secretary. The ITF operates pursuant to its Constitution. The current terms of the ITF's Constitution are those approved by the 40th Congress held in Vancouver in August 2002. Congress alone has the authority to amend the ITF's Constitution. A description of the ITF is contained in the preamble to the Constitution which states that it is:

> "… a free trade union body, established to defend and further internationally the economic and social interests of transport workers of all kinds, and their trade unions. It stands for the defence of democracy and freedom and is opposed to colonialism, imperialism, totalitarianism and aggression in all their forms and to any discrimination based on gender, nationality, race or colour, age, sexual orientation, disability or beliefs."

9. The aims and objectives of the ITF are set out in rule I(2) of its Constitution. These are to promote respect for trade union and human rights worldwide; to work for peace based on social justice and economic progress; to help its affiliated unions defend the interests of their members; to provide research and information services to its affiliates; and to provide general assistance to transport workers in difficulty. Although the range of ITF activities is very wide, they can be divided into three categories: representation (in relation to employer and government organisations); information (provided to affiliates regarding international queries); and practical solidarity.

10. The methods by which the ITF seeks to achieve its aims are set out in rule I(3) of the Constitution. So far as these are relevant, these aims can be summarised as follows:

    i) establishing and promoting close relations amongst affiliates;

    ii) assisting affiliates in their drive to organise the unorganised;

    iii) promoting and co-ordinating schemes of mutual assistance amongst affiliates and supporting, by appropriate means, affiliates engaged in disputes;

    iv) disseminating information to affiliates and other interested parties through its publications or documentation and by initiating and co-ordinating activities on an international basis;

    v) assisting workers in the transport and allied industries by providing or helping to provide financial or material aid to such workers.

11. By rule II(3) of the ITF's Constitution, affiliates of the ITF are required, *inter alia*, to co-operate in carrying out decisions of its governing bodies, and to report to the ITF

on the action taken and its result, or the reasons why no action has been taken. Rule XIV of the Constitution makes provision for assistance in disputes. By Rule XIV(2), such assistance may consist of: (a) organised moral support of the affiliate and its stand on the issues involved and/or; (b) approaches to national governments and inter-governmental organisations; and/or (c) financial help; and/or (d) any other steps deemed appropriate in the circumstances. Rule II(4) of the ITF Constitution states that: "an organisation admitted to membership [of the ITF] shall retain its full autonomy". Affiliates participate in the work of the ITF primarily through a structure of committees and subcommittees that exist within each industrial section of the ITF. Exceptionally, a committee will incorporate the membership of more than one industrial section.

12. One of the ITF's campaigns is the Flags of Convenience ("FOC") campaign, which is directed by the Fair Practices Committee ("FPC"), a joint co-operation between members unions of the Seafarers' Section and the Dockers' Section of the ITF. According to Mr Cockroft, the phrase "flags of convenience" was coined by the ITF to refer to the growing practice after the second world war of ships flagging out to foreign registers, at that time mainly Panama, Liberia, Honduras and Costa Rica, thereby leaving crews with no social or labour protection. He told the Court 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 its owner and, second, to protect and enhance the conditions of seafarers serving on FOC ships; that this secondary aim has been successful over the years with ever increasing numbers of ships covered by ITF approved agreements, which has been achieved by the international solidarity network of transport trade unions which meet and set policies through the FPC; and that, to this extent, the FOC campaign is a unique example of international trade union solidarity.

13. The ITF's FOC policy is set out in a document entitled "Oslo to Delhi" which was adopted in November 1998 and is now the definitive statement of the FOC Campaign policies and procedures. Paragraph 235 of that document defines flags of convenience as:

> "Where the beneficial ownership and control of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying, the vessel is considered as sailing under a flag of convenience. In cases, however, where the identification of the beneficial owner is not clear, any vessel where there is no genuine link between the flag state and the person(s), or corporate entity, with effective control over the operation of the vessel shall be considered as sailing under an FOC."

14. Other passages of Oslo to Delhi, which show the purpose of the policy, and the reasons for its adoption, are also relevant for present purposes. Thus paragraphs 54, 55 and 60 state:

> "54. The target of the ITF's 50 year old campaign has always been those registries offering 'flag of convenience' facilities which the FPC has determined from time to time. In recent years, however, particularly in the Baltic region, affiliates have been

> increasingly keen to take action against bona fide national flag vessels and have pushed policy initiatives through the various ITF committees which sought to enable them to take legitimate action (in ITF policy terms) against national flag vessels which were in competition with domestic shipping. The so-called 'Athens Policy' on European Ferry Services is an example of a 'flag blind' policy which seeks to extend the ITF's influence into the national flag shipping arena. In reality, however, the ITF has for many years been intervening to assist seafarers on national flag vessels and, of course, non-domiciled seafarers on national flag vessels are also regularly assisted by the ITF. What is significant about the Athens Policy is that it also seeks to establish regional standards higher than ITF standards and so eradicate competition from cheaper national flags.
>
> 55. The Athens Policy is a significant departure for the ITF given that it has consistently argued that it supports the development of bona fide national flag shipping from wherever it originates. It would seem that today a significant number of ITF affiliates believe that the real issue is not only FOCs but also unfair competition from some national flag shipping. This is borne out by the resounding vote in favour of extending the campaign to cover all 'sub-standard' vessels revealed in the survey of affiliates.
>
> …
>
> 60. Unions in the country of beneficial ownership have the right to conclude agreements covering vessels beneficially owned in their countries. To take account of the ITF definition of flags of convenience in cases where beneficial ownership is not clear, unions in the country where effective control is exercised would have the negotiating rights, with the same rights as under current policy to transfer them to the labour supply union if they wish. If the country of effective control is also the flag state, the necessary condition for a genuine link would be met. The FPC would be the ultimate arbiter in any disputes over the location of effective control or over negotiating rights."

15. It was clear, therefore, that the ITF was concerned to ensure that the FOC policy should extend to cases where the vessel was owned by a company registered in the flag state, but where the entity having "effective control" of the vessel, was registered or otherwise located in another state. This was emphasized not only by paragraphs 56 and 57, but also by the "Statement of Objectives" in paragraph 227:

> "227. The ITF opposes the FOC system as a subterfuge and believes there should be a 'genuine link' between the flag a vessel flies and the place where it is beneficially owned and controlled. As a general rule FOC registers fail to enforce minimum social standards and/or trade union rights for seafarers and have demonstrated an unwillingness and an inability to abide by international standards. Such standards include international safety standards, international maritime labour standards and human and trade union rights. There is as a consequence, a lack of social control over vessels on such registers as exercised by democratic and independent trade unions."

The relief sought

16. The injunctive relief sought by Viking, as refined during the course of argument before me, is in the following terms:

> "**DRAFT ORDER FOR FINAL INJUNCTION**
>
> 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 they will not by reason of
>
> (a) the transfer of the registration of the Rosella to a Member State other than Finland ('the reflagging') or proposed reflagging
>
> (b) negotiating with a trade union in a member state other than Finland in relation to the Rosella
>
> (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
>
> This court orders and an injunction is granted as set out below.
>
> 1 The ITF shall by [date] 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 or any

other trade unions in the European Community are free to negotiate and enter into a CBA with Viking on any terms the two parties wish

2. The ITF shall 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

   (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

   (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 another 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. Liberty to apply to all parties."

17. The declaratory relief sought by Viking is in the following terms:

"Further, or alternatively, Viking asks this Honourable Court to declare that it is contrary to Article 1 of Council Regulation 4055/86, further or alternatively Article 39 EC, further or alternatively 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."

Summary of relevant facts

18. Before identifying the issues that arise for determination, it is necessary to summarise the salient facts. The following summary is based on the contemporaneous documents and the evidence given by the witnesses. Save in certain limited respects, or as to matters of emphasis, there was little real difference or contention between the parties as to what had occurred. The exposition below reflects my findings on the facts where there was any real dispute.

19. On 17 August 2003, as I have already mentioned, the *Rosella* was transferred to the Helsinki-Tallinn route. At that time, rather than agreeing a new manning agreement, the FSU and Viking agreed that the then existing manning agreement should remain in force for a period of three months (i.e. until 17 November 2003) and that before the end of that three month period they would enter into a new manning agreement. There was a dispute between the parties as to whether, in the absence of the conclusion of a new agreement within that period, the old agreement remained in force on a de facto basis (Viking's contention) or whether at the end of the three month period it automatically expired as a result of effluxion of time (the FSU's contention).

20. In the period 29 August 2003 to 16 October 2003, there was discussion at various meetings of Viking's Management Board and Main Board respectively as to the lack of competitiveness of the *Rosella*, and the possibility of reflagging her to the registry of another EU State. On 16 October 2003 Viking's main board decided to initiate co-operation negotiations (required under the Finnish Act on Co-Operation within Undertakings) in relation to the possible transfer of the *Rosella* to a foreign ships' register. As a matter of Finnish law, such co-operation negotiations must be undertaken with representatives of the crew before any decision to reflag is in fact taken. Mr Jan Hanses, Viking's General Legal Counsel, said in evidence that the negotiations were taken with a view to transferring the *Rosella* to a different ship's registry, although at that stage the nationality of that registry had not been finally determined. This was in the light of the Board's view that, in order to remain competitive, it was necessary to reflag to a foreign registry, so as to take advantage of lower crew manning costs if foreign crews were used. The principal alternative registries were Norway and Estonia, and, in either case, what was contemplated was using either an Estonian crew or a mixed Estonian/Finnish crew. As the co-operation proceedings required a period of 7½ months there was no prospect of the reflagging taking place prior to Estonia becoming a part of the EC on 1 May 2004; the board envisaged that the process should be finalised by end May/early June 2004, well before the peak season began.

21. A notice to the crew dated 21 October 2003 informed it of the proposed reflagging and of the initiation of co-operation proceedings on that date. The crew was specifically told that competing vessels operating under different national flags had "far more beneficial operating conditions than the *Rosella*" on the Tallinn route and that "sustaining traffic under this route applying the present operational conditions is not desirable from an economic point of view." The crew was informed that a change to a different registry would mean that the crew would be manned with crew of a different nationality, but the "emphasis during the cooperation negotiations shall be to investigate the possibilities of continuing the traffic with a Finnish crew", the clear implication of this being that the board were looking to some sort of solution that

might involve continuing with a partly Finnish crew, or phasing a Finnish crew out over time. On the same day Viking sent a formal negotiation request to Mr Donner, the trade union representative. The emphasis of Viking's proposal was that they were looking for constructive proposals in response. The notification identified jobs affected as 185, i.e. all the crew on the *Rosella*. It was put to Mr Hanses in cross-examination on a number of occasions by Mr Vaughan that the notification gave notice that all 185 crew were to be sacked, but Mr Hanses made it clear this was not the position, responding on each occasion that Finnish legal requirements necessitated this wording, that these were the jobs potentially affected, and that did not in any sense mean that all those employees would definitely lose their jobs, rather that they would either be offered jobs elsewhere in the Viking organisation or would be offered voluntary redundancy. Indeed, in evidence, he made clear, which I accept, that this fact would be known to the FSU, and that the procedure had been similar in the case of the reflagging of a sister ship, the *Cinderella*, where the early documents had been couched in similar terms but no compulsory redundancies had occurred. There is some difference between the parties as to whether there were inevitably going to be some involuntary redundancies; it appears to me from a reading of the contemporary documents, including, in particular, the board minute of 29 October 2003, which referred to Viking's consultation with employment agencies, that certainly some involuntary redundancies were regarded as inevitable, whether or not some crew members were going to be offered other jobs within the organisation, and thus that the FSU was clearly concerned to preserve its members' jobs.

22. On 23 October the FSU issued a press release, commenting adversely on the proposals and quoting Mr Simo Zitting, the chairman of the FSU, (who gave evidence before me) as saying that Viking was "not allowed to replace Union members with cheap labour" and referring to the "auctioning out" of the jobs of the Finnish seamen and replacing them by cheap labour. Negotiations began on 27 October when Mr Christer Donner, a FSU representative and Shop steward, said that the FSU could not approve any possible dismissals and that all permanent employees should be guaranteed employment. Although the FSU did not formally attend the negotiation meetings, Mr Donner reported their content to the FSU.

23. The next meeting took place on 4 November. Mr Donner and other trade union representatives were present. The crew representatives made it clear that salary conditions could not be changed nor could payroll conditions be changed. Mr Nils-Erik Eklund, the Viking Managing Director, stated that all vessels within the fleet had to produce a result and it was not acceptable that one vessel should be subsidised by others. At this meeting Mr Karlsson of Viking presented calculations in relation to manning costs for the *Rosella* under a Finnish flag and (according to the agreed minutes) "on the other hand under Estonian flag with 100% Estonian crew or with a combination of mixed crew and Finnish government grant". They showed current crew costs of €7.7m, crew costs with full EC grant implementation of €6.37m, and costs with an Estonian crew of €1.94m. Thus it must have been apparent to the crew representatives, from what had happened at the meeting, that Viking had in mind the real possibility of reflagging the *Rosella* to Estonia and employing an Estonian crew in place of the Finnish crew, or a mixed crew.

24. It was against this background that, on 4 November 2003 (after the co-operation negotiation meeting held on that date), the FSU sent an email to Mr Makarov of the

ITF and Mr Chagas of the European Transport Workers' Federation, informing them of the negotiations that had been commenced by Viking, requesting them to inform all affiliated unions about the matter and requesting them not to start any kind of negotiations with Viking. The email was sent to the ITF by a Mr Simo Nurmi, but Mr Zitting accepted it had been approved by him before sending. The email was in the following terms:

> "Silja Line and Viking Line are major passenger ferry and cruise line operators in the Northern Baltic area. Both companies are Finnish and they operate ferries that are under Swedish and Finnish flags. All ships are manned with Finnish and Swedish seafarers and ships are covered with national CBAs. Both companies have now started negotiations with their employees regarding outflagging of ships and reducing the number of Finnish seafarers on board their vessels. Silja Line has announced that they will flag out the famous gas turbine passenger ferry Finnjet (IMO 7359632) to unknown flag and at the same time sack Finnish seafarers (300). Viking Line has started the same kind of negotiations regarding the passenger ferry Rosella (IMO 7901265). Finnjet trades between Helsinki and Tallinn in Estonia and in the summertime also to Rostock in Germany whereas Rosella is trading between Helsinki and Tallinn.
>
> The vessels of these two companies are beneficially owned in Finland and effectively controlled by Finnish companies and we therefore have and keep the negotiations rights within FSU.
>
> You are kindly asked to inform all affiliated unions about the matter and request them not to start any kind of negotiations regarding the two above named vessels or any other vessel belonging to Silja or Viking.
>
> We would appreciate it if you could also ask affiliates to inform us immediately in case the companies contact them in order to cover their vessels elsewhere than in Finland.
>
> Thanks in advance and best regards
>
> Simo Nurmi on behalf of FSU/Simo Zitting".

25. Mr Hollander, on behalf of Viking, submits that the email, and in particular the third paragraph, has to be viewed in the light of ITF policy, and that it was clear that the ITF policy on flags of convenience was being invoked. In this regard, he relied upon the evidence of Mr Cockroft, who has led the ITF for 12 years as general secretary. I found him to be a straightforward, honest witness. Mr Cockroft was asked why Mr Makarov, in his witness statement, might have regarded this (and the subsequent ITF circular dated 6 November 2003, which followed it) as a "routine" matter:

> "Q: Would the reason that he might have thought it was a routine matter be that the email so clearly followed

> ITF policy that it was not really a matter of any doubt what he would do? A. Yes. I think that's exactly right…."

He then went on to explain this:

> "Q: I think it follows from your previous answer again when I asked you about the email, that this is effectively straight ITF policy. Because the vessels are beneficially owned in Finland, then the Finnish affiliates retain the negotiating rights and therefore no one else. A. Yes, that is ITF policy. We have no discretion over that whatsoever."

26. Mr Hollander submitted that it was clear why the third paragraph of the email was drafted in the way it was; that it referred to two matters which trigger ITF policy so clearly that the ITF became obliged to issue a circular with no discretion. He also submitted that it was equally obvious that the writer of the email was fully aware of this, since he said (having referred to the vessel being beneficially owned in Finland and effectively controlled by Finnish companies) "we *therefore* have and keep the negotiation rights within FSU." He also relied on the facts that the addressees of the email include Mr Cotton, who, as secretary of the ITF Special Seafarers' Department (SSD), was head of the ITF body which has responsibility for the practical implementation of the FOC campaign, and that the circular also makes clear there is no room for discretion here. In support of this submission (viz. that the email was invoking the ITF policy on flags of convenience), he also relied on the fact that Mr Nurmi and Mr Zitting were steeped in ITF policy: Mr Nurmi was an ITF co-ordinator who according to Mr Cockroft spends "virtually all of his time" on ITF matters, and to the extent that he does, his costs and his wages are reimbursed by the ITF to the FSU; that he and Mr Zitting work as a team; that Mr Zitting had been the Finnish representative on the ITF Fair Practices Committee since 2000, and also sits on other ITF working parties; that he was a member of the Fair Practices Committee at its meeting in Valencia in 2000 which led to the secretary of the SSD, Mr Cotton, writing to all ITF affiliates circulating the statement of the FSU as to its policy relating to cheap crews on Finnish vessels in the context of the Finnlines dispute, which Mr Cotton stated in the circular was adopted by the FPC. Mr Hollander commented that it is striking that, in a case where the claim is based on concerted action between the ITF and the FSU to the detriment of Viking's rights, Mr Zitting failed to mention anywhere in his statement that he had any connection with the ITF.

27. Mr Vaughan and Miss Davies, on the other hand, submitted that the formulation of this letter was not designed to tie in with the ITF's FOC policy, and that it was quite clear from Mr Zitting's evidence that he did not consider the issue in this way at the time; that, rather, he regarded the dispute in late 2003 as a national one between a Finnish union and a Finnish shipowner, in respect of which the FSU retained the negotiating rights, and in relation to which he wished other affiliates of the ITF to show solidarity. Moreover, as he explained, neither Finland nor Estonia have been declared by the Fair Practices Committee to be FOC registers, pursuant to paragraphs 236-240 of the ITF's Delhi policy. They said that it was also clear from Mr. Zitting's evidence, that he regards the ITF's definition of flag of convenience vessels or registers as being a different thing to the statement at paragraph 60 of the Oslo to

Delhi document relating to the right of unions in the country of beneficial ownership to conclude agreements in respect of vessels beneficially owned in their country. In any event, they submitted that this issue was not material, because Mr. Zitting made it clear that he considered that, as the union which has existing agreements with Viking, and whose members will be directly affected by the proposals, and because the *Rosella* is beneficially owned in Finland, the FSU retains the negotiating rights in respect of the vessel.

28. I prefer Mr Hollander's analysis of the evidence on this point. It seems to me to be clear that the email was intending directly to invoke the ITF FOC policy and that this is clear, not merely from the words of the email themselves, which reflect that policy, but also from Mr Cockroft's evidence. I do not accept Mr Zitting's evidence on this point, and found his explanation unconvincing. In this regard I found it somewhat surprising that, in a case where the claim is based on concerted action between ITF and FSU to the detriment of Viking's rights, Mr Zitting did not see fit to mention anywhere in his statement that he had any connection with the ITF, or what that connection was.

29. On 6 November 2003, in response to the email request from the FSU, Mr Makarov of the ITF sent a circular letter to all affiliates organising seafarers, inspectors and co-ordinators, informing them of the situation in Finland and asking them to refrain from negotiating with Viking ("the ITF Circular"). The ITF Circular was in the following terms:

> "Dear Friends
>
> **RE: FIN. ROSELLA & FIN. FINNJET**
>
> For your information, the above vessels are owned by Viking Line and Silja Line respectively, and are soon to be re-flagged from the Finnish register.
>
> Both companies have now started negotiations with their employees regarding re-flagging and the reduction of the numbers of Finnish crew on board their vessels.
>
> Both vessels trade between Helsinki and Tallinn. The Finnjet may also trade between Helsinki and Rostock in the summertime.
>
> 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. In addition, if either company contacts your union, please inform ITF London and the FSU immediately.
>
> Thanks for your solidarity.
>
> Yours fraternally,
>
> Konstantin Makarov

Head of Agreements Unit."

30. Viking were not aware at the time that the ITF Circular had been sent by the ITF. It only became aware of the fact when, on 24 November 2003, at a meeting with the union representing the masters, Mr Hanses had read out to him the terms of the ITF circular, although his request to be provided with a copy was not acceded to. Viking first received a copy of the letter on 5 December 2003. No communication was made direct by the FSU with any other union. The FSU preferred to deal through the ITF. Mr Cockroft explained why the email was sent to the ITF rather than by the FSU themselves to other unions:

> "Q: So can you offer any explanation as to why Mr Nurmi would write to the ITF rather than to the local unions?
>
> A: Yes, because the ITF's job is to communicate with the local unions in the countries concerned and it would certainly not have the same value if it came from Mr Nurmi himself."

Mr Cockroft also said that he expected that affiliates would comply with the ITF's requests:

> "Q: I think you said that you would expect in the normal course that affiliates would comply because that is effectively the principle of solidarity.
>
> A: Yes, that is why they are members of the ITF."

31. Also, according to Mr Cockroft, because it involved an essentially national dispute and did not involve a dispute of major importance, the ITF did not take formal action and offer assistance under Rule XIV of its Constitution; rather it simply offered support to its national affiliates by writing the letter to other affiliates notifying them of the dispute and asking them to show solidarity with the union involved. However, as he said in evidence, clearly the principle of solidarity amongst affiliates was underlined by the fact that the request came through the ITF. The ITF received no responses to the ITF Circular, either from its affiliated unions or from Viking itself, even once it saw a copy of the letter in December 2003. In fact, the ITF had no contact at all with Viking until it was served with these proceedings on 1 September 2004.

32. On 14 November, the FSU set out its first formal demands. It contended that the manning agreement for the *Rosella* expired on 17 November, the effect of the expiry of the manning agreement being that the obligation of industrial peace under Finnish law would be at an end and they would be at liberty to commence strike action. The FSU offered to renew the manning agreement on the following conditions: first, that the number of the crew for which the manning agreement provided should be increased by eight persons; second, that Viking should end the co-operation negotiations which it had started in relation to *Rosella*; third, that it should put an end to any plans to re-flag the Vessel; and fourth, that it should commit itself to continue trading under the Finnish flag. Viking argued that the manning agreement did not expire on 17 November but continued until terminated. This was an argument that

was subsequently raised by Viking in an action brought in the Finnish Labour Court, but the rights and wrongs of the respective contentions are not relevant to my decision. There was a further meeting as part of the co-operation negotiations on 14 November. Mr Donner, on behalf of the FSU, made clear that the FSU would not accept any dismissals and would presume that all *permanent* employees would be offered employment in the future. On (Friday) 17 November Viking wrote to the FSU accepting the proposed increase in crew numbers in the manning agreement. They set out a draft as to the way in which the increased crew number would be deployed under the new agreement, the FSU not having in their original proposal been precise as to deployment. In its response, Viking also indicated that it did not consider the co-operation negotiations (i.e. relating to the reflagging) had anything to do with the negotiations relating to the Manning Agreement, and that such negotiations would not be terminated. It also threatened that, if the FSU took action to force the cooperation proceedings to be terminated, it would be forced to "perform measures which would lead to dismissal".

33. On the same day (17 November 2003), Viking commenced proceedings before the Finnish Labour Court seeking a declaration that the then existing manning agreement remained in force after 18 November 2003, even if no new agreement had been reached before that. This was in an attempt to pre-empt the FSU from taking strike action. On 18 November Viking wrote to the crew explaining that they had written to the FSU conceding the FSU's request to increase by eight persons the manning level under the agreement, and that the FSU's attempt to link the manning agreement with the reflagging was unjustified. The FSU responded to Viking's draft manning agreement by letter dated 18 November 2003, under cover of which it provided a further revised draft manning agreement. In the letter, the FSU also indicated that there were two conditions to its agreement to renew the manning agreement as follows:

> "2. 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;
>
> 3. 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."

34. Because the negotiations in relation to a new manning agreement had not resulted in agreement and because in the FSU's view the previous manning agreement had by then terminated, by the same letter the FSU gave notice in accordance with the Finnish Act on Mediation in Labour Disputes that it intended to commence industrial action measures in relation to the *Rosella* at 19:00 hours on 2 December 2003.

35. It would have been obvious to the FSU (and I so find), when it wrote back proposing terms for the new manning agreement, and requiring Viking to follow Finnish law and conditions even if they reflagged, that this would not be acceptable to Viking, because

Viking would be committed to Finnish wage rates but without any government subsidies to mitigate their effect, and this would be obviously disadvantageous.

36. An FSU press notice on 18 November justified the call to strike by stating "it is now a matter of the jobs of the Finnish seamen.". On 20 November the Finnish Labour Court gave the parties notice to attend a preparatory meeting on 2 December. The preparatory meeting was originally scheduled for 25 November, but this date was said to be inconvenient to the FSU. The court could not make available any other date before 2 December despite Mr Hanses' efforts to persuade them of the urgency of the matter. It was thus apparent to Viking that it would not be able to obtain a judgment of the Labour Court (if it were in Viking's favour, confirming the continued existence of the manning agreement, and therefore the FSU's inability to call for strike action because of the continued obligation of "industrial peace") prior to the start of the FSU's threatened strike action.

37. On 21 November Viking and FSU met the state-appointed conciliator Mr Salonius. The conciliation was voluntary because in the light of the pending action in the Labour Court the legality of the proposed strike action was in issue. Mr Hanses made clear that Viking would have been ready as early as Friday (17th) to sign the manning agreement as proposed, but that the problem related to the other points in FSU's demand, namely, in the event of a change of flag of the *Rosella*, a Collective Bargaining Agreement ("CBA") on Finnish terms and Viking agreeing to making no changes to the employee's current terms of employment. There was thus in reality no dispute as to terms of the manning agreement of the vessel.

38. As I have already mentioned, on 24 November, at a meeting with the union representing the masters, Mr Hanses had read out to him the terms of the ITF circular. At a meeting with Mr Zitting on the same day Mr Hanses told Mr Zitting he knew the ITF had sent this letter and Mr Zitting did not deny it. In his evidence, Mr Hanses explained the effect of the ITF circular on Viking's thinking. Mr Vaughan suggested to him in cross-examination that the ITF circular had, in fact, had no effect at all on Viking's thinking. I accept Mr Hanses' evidence on this point. In essence his evidence was that reflagging needed to be achieved so that Estonian wage rates could be obtained in such a way that the FSU, who were threatening strike action, would not interfere. The potential advantage of reflagging to Norway was that the Norwegian unions were apparently strong enough to stand up to the FSU and to "keep them off the vessels." The recent experience of another ferry line, Nordic Jetline, had given Viking hope that it might thus be able to reflag to Norway with an Estonian crew, whereas relationships between the Estonian unions and Finnish unions and the strength of the FSU in respect of the Estonian unions suggested reflagging to Estonia might give rise to more problems with the FSU. Once, however, Mr Hanses knew that the ITF Circular had been sent, he knew this was not going to be possible because the Norwegian and Estonian unions would follow the ITF circular, and thus the only realistic possibility was to reach an agreement with the FSU. Thus, he said (and I accept), the most important consequence of his knowledge that the ITF circular had been sent was that it ruled out the Norwegian alternative:

> "… the ITF letter made it clear to us that the FSU was the only negotiating party that we had, so we needed to work out options that could be agreed with the FSU."

39. On 25 November 2003, Viking commenced proceedings in the Finnish District Court seeking an urgent interim injunction restraining the FSU from initiating the threatened industrial action against the *Rosella* plus a fine of €500,000 against the FSU. The grounds asserted for such relief included the allegation that the proposed industrial action was unlawful under Finnish law (based on the argument that the manning agreement was still in effect) and secondly that the threatened strike was a breach of Community law. The latter assertion was made specifically with reference to the right of free provision of shipping services under EC Regulation 4055/86 and to the right of freedom of establishment under Article 43 of the EC Treaty. These claims were all denied by the FSU. Viking made no reference to the ITF's Circular in its application to the Finnish District Court despite the fact that Viking had become aware of the ITF letter on 24 November.

40. On 26 November FSU sent strike instructions to the crew of the *Rosella*, warning them of the severe consequences of strike breaking and appealing to the crew on the basis that the aim of Viking was to replace "Finnish seamen" with a cheaper labour force.

41. On the same day at a meeting with Mr Salonius Mr Hanses told Mr Zitting and the FSU that the reflagging would be effected without any redundancies. Mr Salonius proposed that the strike should be deferred but Mr Zitting, knowing by now that the Labour Court would only conduct the preparatory hearing on 2 December and thus no doubt appreciating that a delay could only give Viking a better chance of getting a court ruling, declined. By this time, Viking's position in the negotiations had clearly weakened and this was reflected in the terms which it was offering. At this meeting, Mr Hanses proposed three options for the *Rosella*:

    i) the vessel's flag be exchanged for another European flag that would accept Estonian wage levels (the Estonian flag being one such flag, although there were also others). The deck and engine crew, as well as the catering officers would remain Finnish. Some of the crew in the catering department would be replaced by Estonians. All current staff affected by the proposal would be guaranteed current terms and conditions and would be transferred to other vessels.

    ii) The vessel would continue to sail under the Finnish flag, but with the benefit of an agreement providing for Estonian wage levels for 38 crew members in certain occupational groups.

    iii) The vessel would be taken out of service.

42. Mr Zitting requested that these proposals be put in writing, which Viking did by its letter dated 27 November 2003. In this letter, Viking indicated that it accepted the FSU's revised draft manning agreement, but that it did not accept any of the FSU's other demands. In this letter, Viking also expressly undertook that in the event that the *Rosella* was re-registered to a ships register that permitted Estonian salaries and employment law to be employed:

> "the employment of Estonian crew will be limited to the catering department and that the personnel within Viking Line

> which is affected by shortage of work will not be made redundant or be dismissed."

43. Two further meetings with the National Conciliator took place on 28 November and 1 December 2003. At the first of these meetings, Mr Zitting re-iterated the FSU's position that Viking was entitled to change the flag of the *Rosella*, but that under Finnish law, the FSU nonetheless had the right to demand that the vessel comply with Finnish terms of employment and Finnish law, in so far as the latter were not in contradiction with the laws of the flag state. Mr Zitting declined a proposal for arbitration as "we will not allow any third party to decide matters that belong to us." A proposal was discussed at a private meeting between Mr Salonius and Mr Zitting which was then typed up by the FSU and presented to Viking. The final proposal was put to Viking on 1 December and accepted by it on 2 December, hours before the strike was due to start. The result was, in effect, a total capitulation by Viking. Under the terms of the settlement agreement, it agreed the FSU's terms as to manning, although the port cleaning of hotel and restaurant could be carried out by external labour provided this did not affect the jobs of the crew. It agreed to discontinue the actions in the Finnish Labour Court and the District Court. Most importantly, it agreed to restrain from reflagging the *Rosella* until 28 February 2005 and to notify the crew that all plans to change the flag were given up. The FSU's press statement said that the Finnish seamen would be able to keep their jobs and that the FSU were pleased with the agreement by which the jobs of the Finnish seamen on board the *Rosella* were safe. Also on 2 December 2003, and in accordance with the terms of the settlement agreement, the parties also entered into a revised Manning Agreement for the *Rosella*.

44. I accept the evidence of Mr Hanses and Mr Eklund, Viking's Managing Director, that Viking was forced to capitulate because of the threat of strike action. As Mr Eklund explained, the financial consequences of such a strike could not be sustained by the company, because, even if it had proceeded with its actions in the Finnish Courts to obtain declarations that the strike was illegal, in the meantime, whilst its vessels were blocked in port as a result of strike action or boycotts, it would have lost unacceptable amounts of money.

45. The Claim Form in these proceedings was issued, without any warning to either Defendant, on 18 August 2004. They were not served on either Defendant until 1 September 2004. The reason for no communication before action was, so I am informed by Mr Hollander, to ensure that no pre-emptive declaratory proceedings were started in the Finnish Courts by the Defendants.

46. The obligation under the settlement agreement not to reflag the *Rosella* expired on 28 February 2005. The evidence of the Viking representatives, which I accept, is that, up until 15 December 2004, they believed that, in a similar manner to November 2003, on 1 March 2005 the FSU would have used the termination of the settlement agreement as a basis for strike action: they were concerned that the FSU would argue that, after 28 February 2005, the obligation of industrial peace was at an end, and that unless Viking both gave up plans to reflag and undertook to discontinue this action, they would strike. Such action would be a mirror image of their conduct in November 2003. That position has now changed because, on 15 December 2004, the FSU, the FSA and the Åland Shipowners' Association (of which Viking is a member) ("the ÅR") reached an agreement that the 2003 CBA be renewed (subject to certain agreed

amendments), with effect from 16 February 2005. This renewed agreement ("the 2005 CBA") will expire on 29 February 2008. As part of the 2005 CBA, the FSU, the FSA and the ÅR further agreed that all current manning agreements such as the one applicable to the *Rosella* will also continue to be valid until 29 February 2008. It is common ground that this means that so long as the *Rosella* remains under the Finnish flag, and Viking has not announced any intention of re-flagging, the parties are subject to the obligation of industrial peace until 29 February 2008. It is also common ground that, once Viking has reflagged the *Rosella*, and the vessel is no longer under the Finnish flag, the FSU will not be restrained by the provisions of the 2005 CBA, the manning agreement, or the Settlement Agreement, from taking industrial action. It is a matter in issue between the parties as to whether the provisions of the 2005 CBA would prevent industrial action from being taken by the FSU, in the period between the date whenViking announced its intention to re-flag the *Rosella*, and the actual re-flagging, or whether the FSU would take such action during that period.

Viking's plans for the future

47. Viking's stated position in evidence before me is that it is its intention to commence reflagging procedures as soon as possible. Viking has made it clear that it will not make any workers redundant as a result of the proposed reflagging, and has indicated that, if required, it will give an undertaking to the court to that effect as a term of any injunction. Mr Hanses' evidence was that compulsory redundancies were generally contrary to the ethos of the company:

> "… we do not function in a way that we will try to achieve major dismissals. We try very hard to keep our employees and guarantee their work, so I do not think that Mr Zitting or ITF - they will have a very large difficulty in finding an occasion when Viking Line would have made anybody redundant due to economical reasons."

No such occasion was ever suggested.

48. It is clear on the evidence that the position remains that Viking has not yet formally taken the decision to reflag the *Rosella*. As Mr Hanses accepted, before that decision could finally be taken, it will be necessary for Viking to undertake a further round of co-operation negotiations in which it will be necessary for Viking to explore the alternatives available for the *Rosella* at that precise time and the arrangements that can be made to minimise the impact of any proposal on the existing workforce. It was common ground that, in accordance with the Finnish legal requirements, these co-operation negotiations will take a minimum of six weeks. In addition, Viking has indicated that it will then need some time in which to identify the measures to be taken to redeploy the existing permanent crew of the *Rosella*, which Mr Hanses accepted would be a "huge exercise". In light of the peak summer season, both Mr Hanses' and Mr Nystrom's evidence accordingly was that a decision actually to reflag the vessel was unlikely to be taken before September 2005. However, as there is no intention to make any employees redundant, the six month additional period which had been necessary in 2003 would not apply. Nevertheless, it was common ground that the practicalities of redeployment would mean that it would take some time to complete the process.

49. Viking does not believe that it will be possible to reflag the *Rosella* without the protection of the court by way of injunctive relief, given the previous history of the matter. It believes that, unless they are restrained by a Court order, the ITF and the FSU will take steps to prevent or restrict Viking from:

    i) reflagging the *Rosella* with the flag of a country other than Finland, including the flag of another Member State;

    ii) negotiating and entering into a collective bargaining agreement with a trade union based in a country other than Finland, including trade unions based in other Member States; and

    iii) employing non-Finnish nationals as crew, including nationals of other Member States.

50. Effectively, therefore, Viking's position is that, whether or not re-flagging takes place, is likely to depend on the attitude of this court in this action. Mr Eklund and Mr Hanses' evidence was that, if reflagging were not possible, the likelihood is that the vessel would be sold. Mr Eklund quite properly accepted that it was not appropriate for him, as a single director, to prejudge the decision of the board as to whether the vessel would be sold, but he, and other Viking witnesses, gave evidence to the effect that this would be the most likely course.

51. The ITF and the FSU contend that there are very considerable evidential uncertainties as to Viking's intentions with regard to reflagging and what it would do with the *Rosella*, in the event that it could not reflag. They contend that Viking has not established, on the balance of probabilities, any sufficient settled intention to reflag, such as requires the protection of a permanent *quia timet* injunction. Thus, the Defendants submit, no basis for relief has been made out. I address these arguments below, where I deal with the Defendants' factual arguments as to why no relief should be granted.

The issues

52. The ITF and the FSU contend that the case has always been put by Viking on the basis that what both of the Defendants are seeking to prevent is the reflagging of the *Rosella*. However, the Defendants say that, as they have made abundantly clear, they have no objection to the reflagging *per se*; rather, they say, their concern is, and remains, as to the terms and conditions of employment that will be applied on the vessel in the event that such reflagging of the *Rosella* occurs, and, so far as the FSU at least is concerned, as to the impact of the reflagging on the jobs of its members. Moreover, they say, these points are in fact amply demonstrated by reference to the reflagging of the *Cinderella*, when no action was taken either by the FSU or even requested of, let alone taken by, the ITF (even though a strict application of the definition of a flag of convenience contained in paragraph 235 of the Delhi policy would lead to the conclusion that the *Cinderella* was an FOC vessel). Mr Vaughan and Miss Davies submitted that, accordingly, what this case is really about is whether Viking can (by virtue of relief obtained from this Court) undertake the reflagging exercise safe in the knowledge that, once it has done so, it will not be subject to requests from the FSU, supported by the possibility of industrial action, for a CBA with the FSU on terms that are more onerous than Viking manages to obtain in

Estonia. They say, therefore, that the issue is whether the FSU can exercise its rights under Finnish law to insist that the replacement (Estonian) crew is paid at rates that are acceptable from the Finnish perspective.

53. Mr Hollander contends that this mischaracterises the issue, since the reality is that no re-flagging would take place if wages at Finnish rates had to be paid to the replacement crew, since economically there would be no point in so doing; not least because Finnish tax concessions or state grants would not be available in the event of reflagging. Factually, I accept this. However, it is important, when one comes to consider the points under the EC Treaty, to appreciate what precisely is the nature of the Defendants' opposition to the reflagging and whether it amounts to the type of conduct that is contrary to the freedom of movement rules.

54. The issues that arise may be summarised as follows, in the order in which I propose to determine them:

i) Should this Court refuse to entertain Viking's claim on the grounds of comity or analogous discretionary grounds? ("The comity issues").

ii) Does Viking on the balance of probabilities intend to reflag the *Rosella*?

iii) Are the anticipated future actions of the ITF and/or the FSU contrary to one of the Community rules on freedom of movement?

i) The comity issues

55. The Defendants submit, by way of a threshold point, that this Court should decline to act in this matter on the basis of 'comity' or on analogous discretionary grounds. Their submission, in effect, is that for the Court to entertain the Claimant's claim would amount to an unjustifiable interference in the internal affairs of a sovereign nation—Finland—and that it would involve the Court pronouncing on the legality of the acts of a foreign state, and, in particular, on the compatibility of Finnish constitutional law and legislation in the field of public law with Community law. The Defendants contend that, given that the areas of Finnish law involved are so sensitive, because they relate to labour relations (including minimum wages) and constitutional rights, it would be wholly inappropriate for the English court to rule upon the matters in dispute in this case. They say that it is made even more inappropriate to do so when this Court may have to investigate the legislative intent and objective justification of measures in the context of the situation as it exists in Finland; that this is not just a case of applying Finnish law (an exercise to which this Court is well accustomed) but of "dis-applying" Finnish law, to the extent that it is incompatible with Community law. Further, they submit that, even if comity principles are not engaged, it is inappropriate that this Court should determine, in relation to a Finnish vessel, Finnish crew, a Finnish employer and a Finnish union, whether or not industrial action can take place principally, albeit not exclusively, in Finland.

56. There was little dispute as to the correct articulation of the principle of comity. Comity is a principle of international law. As Diplock LJ explained in *Buck v Attorney-General* [1965] Ch 745, at p 770, the rules of comity comprise

> "the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself."

Comity is accordingly not a question of exercising restraint as a matter of discretion, but is rather a principle of public international law. As Lord Wilberforce said in *Buttes Gas and Oil (No 2 and No 3)* [1982] AC 888:-

> "So I think that the essential question is whether, apart from such particular rules as I have discussed … there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint or abstention. … In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."

Thus the general principles (subject to very limited exceptions in cases of extreme conduct or urgency or enemy states) are that the English court should refrain from exercising jurisdiction if to do so would involve an adjudication upon the legality of actions of foreign sovereign states. The application of the doctrine does not depend upon the identity of the parties to the action, but upon the subject matter of the issue. Thus, as Lord Diplock observed in *Buck v Attorney-General*, above, at p 770:

> "for the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of the state. That would be a breach of the rules of comity."

57. In *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 AC 418, at 499 Lord Oliver of Aylmerton referred to a similar principle, which he termed "*non-justiciability*", relating to the determination by a municipal court of obligations of international law arising under treaties:

> "The principle of non-justiciability. There is, as indeed there can be, little contest between the parties as to the general principles upon which that which has been referred to as the doctrine of non-justiciability rests, though they approach it in rather different ways. The contest lies not so much as to the principle as to the area of its operation. It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v. Sprigg* [1899]

> AC 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 13 Moo.P.C.C. 22, 75: 'The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.'"

58. In *Westland Helicopters Limited v Arab Organisation for Industrialisation* [1995] QB 282 Colman J stated:

> "it is not open to the English courts to determine issues of public international law the result of which determination is likely to affect foreign sovereign states. In particular, the adjudication of the question of the validity of the act of a foreign sovereign state measured by the principles of public international law is no more appropriate in the English courts than is adjudication of the validity of the acts within its own territory of a foreign sovereign state by reference to its own constitutional powers. The latter exercise has long been held to be contrary to the doctrines of sovereign immunity."

59. It follows from this principle that the English courts should not determine whether a foreign sovereign state is in breach of any international treaty obligations, even in an action between private parties: *Westland* at pp 292 – 294.

60. It was common ground before me, as a result of the experts' reports, that, under Finnish domestic law, without regard being paid to EU law, the FSU would *prima facie* have the right to initiate industrial action in Finland against Viking in the circumstances of this case. This right derives from Article 13 of the Finnish Constitution which enshrines the right to freedom of association, in the following terms:

> "…to participate in the activities of an association. The freedom to form trade unions and to organise for the protection of the interests of others is likewise guaranteed."

Although there is no express reference to the right to take industrial action in the Finnish Constitution, it was common ground that Finnish law has long regarded it as an inseparable part of the freedom of association, and as such a fundamental right of Finnish law. In the specific context of vessels trading in to or out of Finnish ports, it is also clear that Finnish domestic law confers a right upon Finnish unions, such as the FSU:

i) to seek to negotiate their own collective agreements on Finnish terms with vessels trading into Finnish ports, regardless of the shipowners' nationality, the ship's flag or indeed the fact that the union does not have any of its own members on board the vessels;

ii) in circumstances where such a collective agreement cannot be agreed, to initiate industrial action against the vessel in question and other vessels in the same fleet, for the purpose of securing a collective agreement on Finnish terms.

61. Thus, it is clear that, if Viking were to reflag the *Rosella* and to negotiate a CBA with an Estonian union (or simply employ a fresh crew on terms which were lower than the Finnish terms without such a CBA), then, as a matter of Finnish domestic law, looked at in isolation and without any regard being paid to EU law, the FSU would have the right to initiate industrial action against the *Rosella* and other vessels in the Viking fleet, in order to defend its interest in having its own collective agreement. Moreover, the FSU would have this right, whether or not Viking's proposals involved the loss of jobs for any FSU member on the *Rosella* or elsewhere in the Viking fleet. If the proposals did involve such job losses, this would constitute a further justification for industrial action, but it is not a necessary precondition to it. For this reason, Viking has, throughout this action, quite properly accepted that in order to obtain any relief in this case, it needs to win on Community law.

62. Further, it was common ground before me that, since Finland's accession to the EU in 1995, Community law obviously forms an integral part of the legal system of Finland, which the Finnish courts are bound to apply; see Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585 at 593. Moreover, by virtue of the doctrine of supremacy, directly effective or directly applicable provisions of Community law take precedence over any incompatible provisions or measures "of any kind whatever" of the domestic law of Finland. As the ECJ explained in Case 106/77 *Amministrazione delle Finanze dello Stato –v- Simmenthal SpA* [1990] ECR I-2344, it follows that every national court must:

> "apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.".

See also *The Queen v The Secretary of State for Transport, ex parte Factortame Limited & Others* [1990] 2 AC 85 (H.L.) [1990] ECR-I2433 (ECJ) and [1991] 1AC 603 (H.L.).

63. In support of their argument that I should decline to hear this case on grounds of comity, the Defendants submit as follows:

i) First, they submit that it is clear that Community law does not render the relevant rule of national law void or non-existent. Rather, the correct analysis is that due to the incompatibility with EC law, the national court is to the extent necessary "obliged to disapply" the relevant rule: Joined Cases C-10-22/97 *Ministero delle Finanze –v- IN.CO.GE. '90 Srl & Others* [1998] ECR I-6907, at paragraphs 20 to 21. In *Factortame* (above) the Merchant Shipping Act remained perfectly lawful and in force with regard to those fishermen without EU rights.

ii) Next it is submitted that the incompatibility or conflict that is here being referred to is, by definition, an incompatibility or conflict between the national

law of the Member State considered apart from Community law on the one hand, and directly effective rights conferred by Community law on the other. Were it otherwise, and consideration were merely being given to the law of the Member State including Community law, questions of incompatibility or conflict would never arise.

iii) Moreover, the same analysis applies whether the national law in question consists of a provision of domestic legislation or a right conferred by that national law, for example by its Constitution. It is true that many fundamental or Constitutional rights are, by their very nature, expressed in permissive, rather than mandatory terms. Indeed, the very rights upon which Viking relies to found its cause of action in this case (i.e. free movement of workers, freedom of establishment and freedom to provide services) are themselves permissive in nature. On the assumption (contrary to the Defendants' later submissions), that those Community law rights are held to be directly effective against parties such as the ITF and the FSU, the position is that both sets of rights form part of the legal order of Finland. The question is accordingly whether there is any inconsistency between them. If the relevant national law is incompatible with a directly effective or directly applicable provision of Community law, Community law will prevail and the national law will be rendered inapplicable or to that extent reduced. If it does not, it will not. However, the principle of comity requires the decision as to whether such incompatibility exists, to be taken by the Courts of Finland, and not by this Court.

iv) So far as the decision of the Finnish Supreme Court in the *Rakvere* case (KKO 2000:94, Journal No S99/1042 2.10.2000) is concerned, upon which Viking sought to rely, that merely correctly recognises the effect of the doctrine of supremacy. It does not decide which is the appropriate court to decide whether the relevant national law should be dis-applied in favour of Community law. Thus the Defendants submit that it is clear that this Court is effectively being asked to pronounce on the compatibility of Finnish constitutional law and legislation in the field of public law with Community law. For this reason, the Defendants contend that the nature of the dispute does indeed give rise to the issue of comity.

v) Further, it was contended that, even if the principle of comity was not strictly engaged, it was wholly inappropriate in the circumstances for this Court, as a matter of discretion, to entertain these applications for permanent injunctions given the Finnish subject of the dispute and the fact that Finnish labour law issues were involved.

vi) In support of these propositions the Defendants relied *inter alia* on *White Sea and Omega Shipping Company Ltd v ITF* [2001] 1 Lloyd's Rep 421 and *Patrick Stevedores v ITF* [1998] 2 Lloyd's Rep 523.

64. In my judgment neither the principle of comity, nor related discretionary principles, are engaged here so as to prevent me from deciding whether or not to grant permanent injunctions. My reasons, which are largely based upon the submissions advanced by Mr Hollander upon behalf of Viking, are as follows.

65. The provisions of Finnish law on which the Defendants rely are permissive rather than mandatory. They provide the FSU with a right to organise strike action, but do not require it to do so in the circumstances of the case. Finnish law thus accords a right to strike, but leaves it to the FSU to determine how to exercise that right. It is the way in which the FSU has exercised that right which, Viking alleges, has led to (or will lead to) illegality under Community law. The illegality thus attaches to the actions of the FSU and not to any provisions of Finnish law.

66. Moreover, it is plain from the primary Finnish legal materials before the Court that there is no inconsistency between Finnish law and Community law, in that Finnish law has expressly decided that the *prima facie* right to strike must be exercised in accordance with Community law. If that was not common ground at the start of the hearing, it became common ground. This is entirely as one would expect, because of course Community law is part of Finnish law. As the Finnish Supreme Court said in the *Rakvere* case (above)*:*

> "it would be possible to forbid the industrial action measures taken by the Seamen's Union primarily in a case where the use of such measures has been specifically restricted through national legislation or in European Community law in such a way as to allow reference to it when dealing with relations between private parties."

67. The Supreme Court recognised in that case that an injunction was a remedy which, in principle, was appropriate for the court to grant. It held that there were generally three sets of circumstances where the right to strike under Finnish law could not be invoked. Firstly, when the right to strike is ousted by a Finnish statute. Secondly, when the strike is *contra bonos mores.* The third case was where the strike is in breach of EC law directly applicable between the parties. When a complaint was made by the EC Commission as to whether in the *Rakvere* the Finnish courts had given proper effect to EC law, the Finnish government, in their response to the Commission contending that Finnish law complies with EC law, justified the decision in the *Rakvere* on precisely those grounds. It follows that for present purposes there is no dispute that Finnish law is wholly in accordance with EC law, and the Finnish law *prima facie* right to strike must be treated as subject to directly applicable EC law.

68. Thus no provision of Finnish law or any acts on the part of the Finnish state are contrary to Community law. A ruling by this Court in the Claimant's favour would not involve a finding that Finnish law, or some action on the part of the Finnish state, is contrary to European law. All it would involve is a finding, that, because Finnish law now incorporates Community law, the extensive rights to take industrial measures afforded under purely Finnish law, had been restricted. The Claimant's case under Community law is directed at the intended actions of the FSU and the ITF, and not at any provision of Finnish law or any acts of the Finnish state. It does not appear to me that a decision by me, in the circumstances of this case, that the wide right existing under Finnish domestic law prior to its entry to the EU, to take industrial measures has, as a matter of Finnish law (now incorporating Community law), to be restricted, because the exercise of that right by the FSU would otherwise be incompatible with Community law, involves any encroachment by me upon the principle of comity. The fact that in one sense I may be "obliged to disapply" the relevant rule under purely

Finnish domestic law, which confers the untrammelled right, does not persuade me that I am encroaching upon principles of comity.

69. Of course, I take into account the submissions made by the Defendants that the Finnish Government has considered very carefully the issues that arise in respect of the competitiveness of the Finnish merchant fleet as a result of the disparities between the higher labour costs of Finnish seafarers and the lower labour costs of the seafarers of its neighbouring states, including the Baltic States. In particular, since 2001, in response to extensive lobbying on the part of the Finnish unions, including the FSU, and the shipowners' associations, the Finnish Government has introduced various state aid packages, for the very purpose of tackling this issue. I also take into account that the evidence shows that the Finnish Government has apparently firmly rejected the idea that shipowners should be entitled to use mixed crews, and hence cheaper labour, on Finnish ships. I also take into account the evidence that the Finnish government has made its position clear to the EC Commission, that the provisions of Finnish law that would permit the FSU to initiate industrial action in this case are perfectly compatible with EC law, which could apparently still give rise to infringement proceedings against Finland before the Court of Justice for apparently the Commission has not closed its file. However, none of these reasons persuade me that, on comity grounds, I should not entertain this action.

70. The second reason why, in my judgment, the invocation of principles of comity, or analogous principles, is inappropriate is that this Court's jurisdiction, which is conceded by both Defendants, arises under the Brussels Regulation (Regulation 44/2001). Where jurisdiction is founded on the Brussels Regulation (or on its predecessor, the Brussels Convention) the Court has no power to decline to exercise that jurisdiction on the ground that it would be more suitable for the dispute between the parties to be litigated before the courts of another state. Jurisdiction against the ITF, which is domiciled in London, is based on Article 2 of the Regulation, which provides that:

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

Jurisdiction against the FSU is based on Article 6(1) of the Regulation, which provides:

> "A person domiciled in a Member State may also be sued:
>
> (1) Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ..."

71. The FSU originally stated that it intended to challenge the jurisdiction of the English court under Article 6(1), but later withdrew its jurisdictional challenge. The FSU therefore concedes that this Court has jurisdiction against it under the Regulation. Jurisdiction under the Regulation is mandatory. Where a Court has jurisdiction under the Regulation, it cannot refuse to exercise it on the ground that the Courts of another

contracting state - or, indeed of a non-contracting state - would be a more suitable forum for resolution of the dispute. The common law notion of *forum non conveniens* has no place in the Regulation, which is based rather on civil law principles which attribute paramount importance to the certainty and predictability of jurisdictional rules; see e.g. Recital 11. I accept Mr Hollander's submission that the Defendants are wrong to attempt to draw a distinction between jurisdiction and comity, as if those were entirely separate issues; in reality they are intimately bound up together. If I were to accede to the Defendants' submissions on comity, this Court would in effect be declining to exercise the jurisdiction accorded to it by the Brussels Regulation.

72. In the present case, jurisdiction as against the ITF is based on its domicile in England. If this Court were to decline to exercise jurisdiction in this case on comity grounds, the effect would be to defeat the Claimant's claim to jurisdiction not only against the FSU, which is domiciled in Finland, but also against the ITF. That would run clearly counter to the principle that jurisdiction based on the Defendant's domicile must "*always*" be available, save in well-defined situations mentioned in the Regulation, since no provision is made in the Regulation for declining jurisdiction on the grounds now put forward by the Defendants. Conflicts of jurisdiction can arise under the Regulation. In particular its provisions have the effect in certain cases of conferring jurisdiction on the Courts of more than one Member State. In the present case, for example, the proceedings could have been brought either in England or in Finland, in either case basing jurisdiction against the 'home' Defendant on its domicile (Article 2) and against the other Defendant on its being one of a number of Defendants to the same proceedings (Article 6(1)). The Regulation mechanism for resolving such conflicts is set out in Article 27. That Article provides:

> "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any courts other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the courts first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

73. The Regulation resolves these conflicts of jurisdiction, therefore, by asking which court was first seised. In the present case the English court is the only court which is 'seised'. Its jurisdiction has, furthermore, already been established. The effect of Article 27 in the present case is therefore that if this Court were to decline jurisdiction, the courts of Finland would have no power to hear the case. That would certainly be so if the English court were to stay the proceedings, since it would remain 'seised' of them. The position if the English court were to dismiss Viking's claim is less clear, although the position would appear to be that the order of the English court dismissing the claim would be enforceable as a judgment in Finland and would then have the force of *res judicata* between the parties. That would equally prevent the Finnish courts from considering the matter. But those are not matters which I need to resolve. As Mr Hollander submits, the fundamental point is however that the Regulation resolves conflicts of jurisdiction by according to the parties a choice of where to sue. In the usual course, it will be the Claimant's choice. The Regulation

therefore recognises the Claimant's choice, in cases where the Courts of more than one Member State have jurisdiction, to sue in the Court of his election. There is therefore no scope under the Regulation for the Claimant's choice of jurisdiction to be defeated by the Court, either of its own motion or on the application of the Defendant, by declining to exercise its jurisdiction on the ground that it considers that the Courts of the alternative jurisdiction would be more suitable to hear the claim. This is consistent, in my judgment, with the approach taken in cases before the European Court of Justice in which the issue of compatibility of the doctrine of *forum non conveniens* with the Regulation has arisen; see e.g. the opinion of Advocate General Léger in *Andrew Owusu v N.B. Jackson trading as "Villa Holidays Bal-Inn Villas" & Others* [2005] 2 WLR 942 and *Turner v Grovit & Others* (Case C-159/02, 27 April 2004). In the former case the A-G opined that the application of the doctrine of *forum non conveniens* is contrary to the Regulation in a case where the clash of jurisdiction is between a Member State court and the courts of a non-Member State; that view was upheld by the judgment of the Court of Justice handed down on 1 March 2005; see in particular paragraphs 37-46. Mr Hollander submitted that, *a fortiori*, that must be the case which involves the choice of jurisdiction between the courts of two Member States. I agree. In *Turner v Grovit* the Court of Justice held that it was incompatible with the Brussels Convention for the Courts of one Member State to issue an anti-suit injunction preventing a party to litigation before that Member State from proceeding with related litigation before the Courts of another Member State. Although the present case is not concerned with anti-suit injunctions, nevertheless, *Turner* demonstrates that it is not open to national Courts within the Community to seek to go behind the rules of jurisdiction in the Brussels Regulation. Rather than issuing anti-suit injunctions, the Courts in one Member State must leave it to the Courts of the other Member State before which the second litigation is proceeding to determine the scope of their own jurisdiction and to determine for themselves how to dispose of the litigation before them. At paragraph 24 of the judgment, the Court of Justice stated as follows:

> "At the outset, it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments."

Likewise, in a civil or commercial case over which the English court has jurisdiction, but which may touch upon Finnish matters, the Finnish courts must 'trust' the English court to exercise that jurisdiction, just as the English courts must 'trust' the Finnish courts in the converse case. *Turner v Grovit* also underlines the "*compulsory*" system of jurisdiction amongst Member States in the Community; that is to say, a system in which the Courts which are accorded jurisdiction under the Regulation must exercise that jurisdiction, except in those specific cases where the Regulation provides the contrary.

74. Both sides referred me to *White Sea and Omega v ITF* (above), which, I was told, was the only English authority in which this Court has declined to exercise its jurisdiction in a Brussels Convention (or Regulation) case in favour of the courts of another Member State. That case involved an application for an interim injunction against the ITF to restrain it from causing stevedores in the Danish port of Esbjerg from refusing, in breach of their contracts of employment, to unload the Claimant's vessels. It therefore has superficial similarities to the present case, although of course it was an interlocutory matter. *White Sea* is an *ex tempore* judgment by Tomlinson J which was given late in the day on the second day of a hearing which had been listed for half a day. Tomlinson J ruled that, in the light of a categorical denial by the ITF inspector in question that he had given any instructions to the stevedores to stop work, the Claimant did not satisfy the test of a real prospect of success. Secondly, however, at p429 he ruled that the relief sought by the Claimant would be more appropriately sought from the Danish courts:

> "I am satisfied that it is not an appropriate case in which the English Court should grant relief in relation to a dispute which, to my mind, has almost exclusively Danish features.
>
> Furthermore, while it may be that the Danish Court would, in any event, have jurisdiction over the ITF pursuant to the provisions of the Brussels Convention, in particular, Art 5.3 or possibly potentially under Art 6, Mr. Chambers, junior Counsel for the ITF in the absence of Mr. Jacobs, has given an unequivocal undertaking on behalf of the ITF that it will submit to the jurisdiction of the Danish Court in relation to any proceedings which may be brought by the owners whether claiming damages or claiming injunctive relief or relief in the nature of an injunction. And, furthermore, that the ITF would not, were such proceedings brought against them in Denmark, seek to suggest that the Danish Court should not exercise its own jurisdiction on the grounds that the shipowners, the claimants here, have already commenced proceedings before this jurisdiction."

75. A difficulty with this approach is that the Regulation (and before it the Convention) requires Courts other than the Court first seised of the matter to decline jurisdiction *of their own motion*. The undertakings offered by the Defendant would not therefore have avoided the difficulties concerning the jurisdiction of the Danish court. Furthermore, Tomlinson J did not consider at all in his judgment the question of the mandatory nature of jurisdiction under the Brussels Convention. I was referred to the transcript of a hearing before the Court of Appeal before which an appeal was lodged against Tomlinson J's refusal of an injunction. At that hearing, the Court of Appeal indicated that it was minded to order a speedy trial and sought a voluntary undertaking from the ITF. That undertaking was not initially forthcoming, whereupon the Court of Appeal expressed its preliminary view on the merits. As to the question of serious issue for trial, the Court of Appeal stated its view the judge had been "insufficiently cynical" in regard to the evidence of the ITF inspector that he had not instructed the stevedores to stop work. As regards jurisdiction the Court of Appeal said as follows:

> "As for the question of proceedings in Denmark, we think he [i.e. Tomlinson J] was probably wrong to say that the proceedings should be taken in Denmark – these are [Brussels] Convention arguments – bearing in mind the situation of the right to pursue the defendants in their place of domicile. There is the fact that it seems to us (leaving aside the interlocutory situations for the moment) that so far as any final order is concerned, jurisdiction could not be refused on that ground. The court would have to deal with the matter on the merits."

As Mr Hollander submitted, the remarks of the Court of Appeal in *White Sea* therefore are entirely consistent with the mandatory nature of jurisdiction under the Brussels Convention (and, now, the Regulation), as well as with the view of Advocate-General Léger on that subject in the *Owusu* case. Accordingly, in my judgment the decision of Tomlinson J in *White Sea* provides no assistance to the Defendants in this case nor any basis for me to decline to grant the relief sought merely on comity or *forum non conveniens* grounds.

76. The Defendants also sought to rely for the purposes of their comity submissions on the decision of Thomas J (as he then was) in *Patrick Stevedores v ITF* (above). The dispute in *Patrick Stevedores* arose out of Patrick's decision to use non-union labour in its stevedoring operations in Australia. As a result of that decision, the ITF announced that it would organise industrial action in ports around the world against any vessel which made use of Patrick's non-union facilities. The countries where such action was likely to be taken included Japan, Germany, the USA and the Netherlands. Patrick sought an interim injunction against the ITF in England, as the state of the ITF's domicile. Patrick contended that the ITF's actions were unlawful in amounting to (amongst other things) procurement of a breach of contract (in particular the employment contracts of the dock workers in those other countries whom the ITF were seeking to encourage not to service vessels which had made use of Patrick's non-union facilities). The application for an interim injunction was dismissed. The ground for the decision was that there was no evidence before the Court that the actions of the dock workers in those third countries would be unlawful under the laws of those countries, or that, if such action was not unlawful under the local law, the ITF's inducement of such behaviour could amount to the commission of a tort under Australian law. In the absence of such evidence, the Court would not grant an interim injunction. However, the salient point for present purposes is that the Court would have been prepared to grant such an injunction if it had had before it convincing evidence of unlawfulness under the local law, even though by granting such an injunction the English court would be involving itself in a labour dispute taking place in another sovereign state (i.e. Australia). Thomas J said:

> "I consider that clear evidence would be required in the particular circumstances of this application. This Court is being asked to use its injunctive powers on an interlocutory basis in connection with an industrial and political dispute in another sovereign state by requiring the ITF in this jurisdiction and throughout the world not to induce its affiliates to take industrial action which Patrick accept can be lawful in other sovereign states. It may well be that such action in relation to

> this political and industrial dispute in Australia might be entirely in accordance with the law as well as the social and political views prevalent in that state, though contrary to the law currently applicable in Australia and the policies being pursued by the federal government of Australia.
>
> Before exercising such powers in this unprecedented situation, the Court would need to have before it material that explains the precise basis on which such lawful action in one sovereign state is unlawful for the purposes of the tort of intimidation or inducing breach of contract in Australia … Such evidence is not before the Court.
>
> However, the ITF is subject to the jurisdiction of this Court; it is not subject to the effective jurisdiction of the Courts in Australia in so far as granting injunctive relief is concerned. An injunction granted in Australia is not enforceable in this jurisdiction under the Foreign Judgments (Reciprocal Enforcement) Act 1933. Patrick is therefore entitled to request this Court to grant it injunctive relief in the event of unlawful action by the ITF that is directed against it in Australia, but the Court as a first step needs to be persuaded of Patrick's case on the unlawful nature of the action which it is said is taking place in the ports of the world."

77. On analysis, therefore, neither does this case assist the Defendants. Indeed it demonstrates, that, if Viking were able to establish that that the Defendants' intended actions are illegal under Community law, it would indeed be open to this Court to grant the relief sought.

78. Related to the Defendants' comity arguments was the argument that I should not grant relief as a matter of discretion, because any such order, they submitted, would not be recognised or enforced in Finland. However, the expert evidence before me, in particular that of Professor Bruun, certainly did not go anywhere near establishing that, if I were to find in favour of Viking and grant injunctions or declarations, the Finnish Court would either decline to enforce any such order, or would in fact be entitled to do so under the Regulation. There is, of course, a mechanism within the Regulation by which concerns of purely national public policy may be accommodated. Article 34.1 provides as follows:

> "A judgment shall not be recognised:
>
> 1. If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought."

Thus, if the judgment of the Courts of one state on a civil or commercial matter did indeed raise issues involving the public policy of another Member State, that latter state could refuse to recognise enforce the judgment of the courts of the first State. However, there is no parallel provision in the jurisdiction section of the Regulation which enables the Court of the first State to refuse to exercise its jurisdiction simply on the ground that

the case raises issues of public policy in the second Member State. Further, although the Courts of the state of enforcement can review the compatibility of the substance of the judgment with their own public policy, in no circumstances can they review the jurisdiction of the adjudicating Court. Article 35(3) of the Regulation states that:

> "The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction."

79. Thus, the mere fact that the case was brought in a particular Member State can never provide a ground for refusing to enforce the judgment in another Member State. Likewise, in the circumstances of this case, my provisional view (although it is not something which I have to decide) is that the Finnish courts would be obliged by Community law to recognise and enforce any judgment of the English court without first making a reference to the ECJ. In short, whilst a court called upon to recognise or enforce a judgment may refuse to so, if that would be manifestly contrary to public policy in the Member State in which recognition or enforcement is sought (Article 34(1)), under no circumstances may a foreign judgment be reviewed as to its substance. Moreover *Renault SA –v- Maxicar SpA & Another* (Case C-38/98) [2000] ECR I-2973 paragraphs 26-34 establishes that a court that is called upon to enforce a judgment may not rely on the public policy exception in Article 34(1) of Regulation 44/2001 to refuse recognition of a decision emanating from another Contracting State on the ground that it considers that national or Community law was misapplied in that decision.

80. In the present case, it is common ground that, as demonstrated by the *Rakvere*, the right to strike in Finnish law is subject to directly effective Community law rights. The English court is being expressly invited to take account of EC law as applied in the Finnish legal system to the right to strike. Refusal and enforcement of such a judgment could therefore not be opposed in Finland on the ground that the English court had misapplied Finnish or Community law in reaching its decision. There would therefore be no basis for a preliminary reference to be made by the Finnish court concerning the substance of the English court's judgment.

81. Article 34.1 can only apply, therefore, where the substance of the judgment is considered to be contrary to public policy in the Member State where enforcement is sought. But, in my judgment, it is not for me to second guess the possible attitude of the Finnish Courts in this respect. If I were to hold that, in present circumstances, the right under Finnish law to bring industrial action had indeed been restricted by Community law, then it is difficult to see what scope there would be for the invocation before the Finnish Courts of Article 34.1. Accordingly, with the greatest respect and deference to the Finnish Courts, I do not regard the fact that there is a possibility that the Finnish Courts may not enforce any judgment of mine as a reason that can or should affect my determination of the issue as to whether I should entertain this claim.

82. It follows that I decide against the Defendants on their threshold arguments in relation to comity and associated discretionary matters.

Does Viking on the balance of probabilities intend to reflag the Rosella?

83. As I have already mentioned, the ITF and the FSU contend that there are very considerable evidential uncertainties as to Viking's future intentions with regard to reflagging. They contend that Viking has not established, on the balance of probabilities, any sufficient settled intention to reflag, such as provides any basis for the relief which it seeks. They submit that, on any view, there are very considerable uncertainties as to what Viking might do after 2 March 2005, and that it is not even certain on the evidence that when Viking comes to make its final decision in September 2005, it will actually decide to proceed with the proposed re-flagging. Thus, they submit that Viking has failed to provide sufficient proof that it will indeed "establish" itself in Estonia for the purposes of Article 43 EC.

84. First, the Defendants pleaded that, at a meeting on 17 September 2004, Mr Hanses and a Mr Winter had told crew members that Viking did not intend to reflag at all. This positive pleaded case was never supported by a first-hand witness statement. A Mr Lummejoki's evidence (written only) was that what Mr Hanses had said was that Viking had made "no positive decision to reflag". This was put to Mr Hanses in cross-examination, who explained that it was not correct. I accept Mr Hanses' evidence in this respect.

85. Then the Defendants led expert evidence from a chartered accountant, Mr Philip Kabraji, with a view to showing that, whilst Viking made (on any view) a significant loss on the *Rosella* in the year from November 2003 to October 2004, its management forecasts for 2005 were too prudent and the vessel was capable of returning a small profit over that year. Various detailed reports and financial projections, involving various business assumptions, were put forward by Mr Kabraji to support the Defendants' initial proposition that the *Rosella* would indeed remain profitable if it retained its Finnish flag and Finnish crew. However, on the other hand, the Defendants sought, in cross-examination of Mr Nystrom to establish precisely the contrary proposition; namely that, if things were indeed as bad as Viking claimed, and its management projections proved correct, then Viking would still be making a loss on the *Rosella*, even if it were to reflag to Estonia; thus, it was suggested, that Viking was unlikely, when it came to make the final decision in September 2005, to decide to reflag at all.

86. Detailed factual submissions were made by the Defendants as to whether a transfer to Estonian crew rates would solve the problem so far as the *Rosella* is concerned and it was suggested that the figures demonstrated quite clearly that it would not. It was said that, were Viking's current pessimistic management forecasts as to the *Rosella*'s financial performance to prove accurate, moving to an Estonian crew at the rates that have been put forward by Viking as representing the true cost of an Estonian crew would mean that the *Rosella* would, at best, only just be covering its direct operating costs and the proportion of indirect VLM expenses that Viking considers to be attributable to the vessel. No contribution would be made to Group overheads nor to the suggested necessary return on capital. Moreover, it was submitted, that these calculations take no account of the additional ongoing costs that are likely to be incurred by Viking by reason of its proposals, in particular the shorter term increases in costs that Viking's witnesses accepted will inevitably be incurred in the event of a reflagging, such as the costs of the "huge exercise" of redeploying the existing crew of the *Rosella*. Nor, it was submitted, do Viking's calculations take any account of

the impact on the *Rosella*'s trading position of the fact that a competitor is proposing to introduce a new larger build on the route in the Spring of 2006 which might take passengers from the *Rosella*, or the potential that by reason of a change to a Finnish flag, the numbers of Finns travelling on the vessel could decrease, with the consequent decrease in per passenger spend that Viking have already seen to be the result from increasing volumes of Estonian passengers.

87. Similar criticisms were levelled at the current uncertainties as to the manner in which, and the means by which, an Estonian crew would be retained. It was submitted that there was real uncertainty about Viking's stated intentions to have the crew on the *Rosella* covered by an Estonian CBA with an Estonian union affiliated to the ITF and that this assertion was not borne out by any of the available evidence. Further the Defendants submitted that the evidence showed that, even if Viking do decide to proceed with reflagging to Estonia, it has plainly not yet decided on what steps it will take in respect of crew management to achieve the transfer to an Estonian crew. Whilst in his first and third statements, produced in October and November 2003 respectively, Mr Hanses appeared to be suggesting that the route Viking would go down would be one of a bareboat charter to its Estonian subsidiary, which would then become the employer of the crew, during the course of the trial that position changed. It was said that it could be inferred that this change in stance reflected the points that had been made by both Defendants in their skeleton arguments, to the effect that using the existing subsidiary would not involve any further establishment in Estonia as well as the point that if the Estonian crew were to be employed by an Estonian company, the EC Treaty provisions on free movement of workers would not be engaged. Reference was made to the fact that, in his fifth statement served on 25 January, Mr Hanses identified three further possible options open to Viking, as follows:

i) the use of a management agreement between Viking and its existing subsidiary, rather than a bareboat charter, under which the crew would be employed either by Viking direct or by the subsidiary for the benefit of Viking;

ii) the registration of a new 100% owned subsidiary in Estonia, for the purposes of dealing solely with the management and manning of the *Rosella*. This subsidiary would then itself follow one of the two options identified for Viking's existing subsidiary, i.e. either a bareboat charter of the *Rosella* or a management agreement with Viking;

iii) the opening of a branch of Viking Line Abp, the Finnish company, in Estonia. If this route were to be adopted, Viking Line Abp would itself employ the crew.

88. The Defendants submitted that, as Viking's position now is that it does not know which of these options it will decide upon, and that the outcome of that decision will depend on an analysis of the consequences, including tax consequences, which has not yet been undertaken, such uncertainties create very real obstacles to the Court when being asked to consider the possible future application of the free movement provisions of the EC Treaty.

89. I accept the evidence given by the Viking witnesses in relation to Viking's intentions. They all gave their evidence in a patently honest and straightforward fashion. Mr Eklund pointed out that Viking had been following the Estonian market for ten years, and, if given protection from the English court so as to enable them to reflag, it was their intention to do so as resolved by the board at meetings in 2002, 2003 and 2004; he did not anticipate that Viking's 2005 results would lead to a different conclusion. Likewise Mr Nystrom's forecasts are the projections or forecasts of Viking's management. He has discussed them with other members of management including Mr Eklund. They have the benefit of long experience in the ferry business, and knowledge of Viking's business. Mr Kabraji, on the other hand, has no experience of the business. He does, as a chartered accountant, of course, have experience of appraising businesses and projections. But his only direct experience of the ferry business is one long-form report which he produced some fifteen years ago. He is entitled to take the view, as a forensic accountant, with considerable financial experience in that capacity, that the Viking forecasts and projections are pessimistic. However he necessarily has not had the opportunity to speak to management or discuss the forecasts with them. Nor are his views based on what others, knowledgeable in the business, have told him.

90. In the end result, none of his criticisms of Viking's projections, or the assumptions upon which they were based, lead me to the conclusion that the views of the Viking management were unreasonable or outside the bounds of what a diligent board of directors might properly conclude as a matter of business judgment. It is not for the Court to substitute its view for the commercial views of directors; see *Re Smith & Fawcett Limited* [1942] Ch 304 CA at 306 per Lord Greene MR. Nor did any of the points made by Mr Kabraji go any way towards undermining the credibility of the evidence given by the Viking witnesses as to Viking's intentions, such that I could not accept their evidence as to what Viking intended to do with the Vessel, either in the event that injunctions were granted, or in the event that they were refused.

91. Accordingly, I find the following as facts:

i) Viking treats each vessel as a separate business unit for the purpose of its forecasts. It has seven vessels and therefore seven business units. The *Rosella* is a separate unit. Each unit has to be profitable on a free standing basis and also make a contribution to overheads of the company as a whole.

ii) Although no final decision had yet been made, it is the directors' settled intention, provided that the position in relation to the Defendants' threats of industrial action could be addressed, whether by relief granted by this court, or otherwise, to re-flag the *Rosella* to Estonia so as to reduce manning costs and to put the Rosella in a competitive position on the Tallinn route. It was accepted by the Defendants (in a witness statement of Mr Zitting) that an Estonian crew would cost less than a Finnish crew, and that the only dispute was to the extent of the saving. That issue is not material, since it does not undermine Viking's evidence as to its intentions.

iii) If re-flagging were not possible, the real likelihood is that the vessel would be sold, because it could not continue to run on a profitable basis.

iv) Although Viking had, for the purposes of comparison, obtained a costings quotation from Hanseatic, a manning agency (which proceeded on the basis that Hanseatic would provide all management services for the crew), Viking would in fact, it if re-flagged the Rosella wish to employ a crew itself, rather than through a crewing agency. Mr Hanses told me that the use of a manning agency as an employer was not Viking company style. It would prefer to be the employer itself. The intention was to use an Estonian crew with an Estonian CBA entered into itself, thereby expecting to improve significantly upon the terms offered by Hanseatic. As Mr Hanses made clear

> "All of the options would however involve the employees of the *Rosella* being covered by an Estonian CBA with an Estonian union affiliated to the ITF".

v) Viking has not yet decided what would be the precise method of conducting the *Rosella*'s business, or on what steps it would take in respect of crew management to achieve the transfer to an Estonian crew, if the vessel were re-flagged. One possibility initially envisaged was a bareboat charter to its existing Estonian subsidiary, which would then become the employer of the crew. Further possibilities referred to in evidence included (a) the use of a management agreement between Viking and its existing subsidiary, rather than a bareboat charter, under which the crew would be employed either by Viking direct or by the subsidiary for the benefit of Viking; (b) the registration of a new 100% owned subsidiary in Estonia, for the purposes of dealing solely with the management and manning of the Rosella; this subsidiary would then itself follow one of the two options identified for Viking's existing subsidiary, i.e. either a bareboat charter of the Rosella or a management agreement with Viking ; (c) the opening of a branch of Viking Line Abp, the Finnish company, in Estonia; if this route were to be adopted, Viking Line Abp would itself employ the crew. As Mr Hanses explained, Viking's position is that it does not know which of these options it will decide upon, and that the outcome of that decision will depend on an analysis of the consequences, including tax consequences, which has not yet been undertaken.

92. Accordingly, it follows that I am against the Defendants on their submission that there is too much uncertainty about Viking's intentions to form the basis of relief for the grant of injunctions. I am satisfied that Viking has proved that it does indeed intend to re-flag the *Rosella* in Estonia.

Are the anticipated future actions of the ITF and/or the FSU contrary to one of the Community rules on freedom of movement?

93. As Mr Mark Hoskins, junior counsel on behalf of Viking, submitted, in his helpful written and oral submissions to the Court, in order to determine whether an act or a threatened act is contrary to one of the free movement rules, it is necessary to ask the following series of questions: (see Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda & Others –v- Commissariaat voor de Media* [1991] ECR I-6839 paragraphs s 9-16:

i) Is there a restriction on free movement?

ii) If so, does the particular article relied upon give a direct remedy to Viking, as being an article which applies as between private parties? In other words, does the article have horizontal direct effect?

iii) Is the restriction directly discriminatory?

iv) If so, is it justified by a public policy, public safety or public health objective?

v) If the restriction is not directly discriminatory, but is indirectly discriminatory or indistinctly applicable:

a) Is it objectively justified by a public interest requirement?

b) Is that public interest already protected in another relevant Member State (mutual recognition)?

c) If not, are the measures taken appropriate to achieve the intended objective?

d) If so, are the measures taken proportionate, i.e. limited to what is necessary to achieve that objective?

Restriction upon the freedom of establishment

94. Viking submits that it is most appropriate to categorise the restrictions which it contends that the Defendants threaten to impose on it as restrictions on its freedom of establishment which are contrary to Article 43 of the Consolidated Version of the Treaty establishing the European Community ("EC"). However, it continues to rely in the alternative on the free movement of workers and freedom to provide services if necessary.

95. Article 43 EC provides as follows:

> "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, or 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".

Viking's pleaded case under Article 43 EC is found at paragraph 20(c) of its Particulars of Claim. Viking pleads that the acts of the Defendants that "*would prevent or restrict*

[it] from being able to re -flag the Rosella in another Member State" are in breach of Article 43 EC.

Will the Defendants' anticipated future acts amount to a restriction on Viking's freedom of establishment?

96. The Defendants contend that their anticipated actions against which complaint is made do not constitute an impediment to or restriction of Viking's exercise of its freedom of establishment under Article 43 EC.

97. The Defendants submit that this case is not about rights of establishment under Article 43 EC at all and that there is no risk of any apprehended action on their part amounting to a restriction on Viking's freedom of establishment. Moreover, certainly at one stage of the argument, they submitted that an injunction was inappropriate because it was unclear precisely what the actions of the Defendants would be if Viking sought to reflag in 2005; thus, they submitted, that there was not, therefore, the necessary risk of harm to justify a *quia timet* injunction, as the Defendants would have to consider the position as it then arose.

98. The Defendants accept that neither the ITF nor the FSU can lawfully prevent Viking from re-flagging the *Rosella* to Estonia or to any other Member State. Viking has the right to re-flag within the EU under Regulation 789/2004. The Regulation applies to the *Rosella* as from the effective date of the Regulation (May 2004) under Article 3.1(b)(ii) as a ship built before 1 July 1988, but certified by Finland as complying with all relevant requirements. The Defendants also accept that they cannot lawfully prevent Viking from setting up a subsidiary or branch in Estonia. The Defendants submit that Viking's real concern is not to re-flag to Estonia or to set up a subsidiary or branch in that country, but to introduce Estonian wage levels on the *Rosella*; and that Viking's case is that if, because of threatened industrial action, it is unable to introduce such wage levels (which are likely to lead to the replacement of the present crew with an Estonian crew who can live on such wages), then it is not going to bother re-flagging the *Rosella*. So, the Defendants submit, any industrial action in Finland (or any other anticipated action by the Defendants) would not prevent or in any way hinder the reflagging of the *Rosella*. The Defendants do not have any control over the shipping registries of any Member State, and accordingly, submit the Defendants, Viking will be able to take whatever steps it chooses to effect such reflagging whatever the future conduct of either the ITF or FSU. As the FSU has maintained throughout, its concerns relate solely to the terms and conditions of employment of the *Rosella*'s crew. It has not threatened industrial action solely because of the proposed reflagging, and there is no basis for concluding that it might threaten such action in the future. Indeed, in 2003, the Viking vessel the *Cinderella* was transferred from the Finnish to the Swedish flag and to a Swedish collective agreement, without any threat of industrial action, in circumstances where the terms and conditions of employment under the CBA were at about the same level as the Finnish CBA and there were few job losses. Accordingly, the Defendants submit, the reality of this dispute is that it is not concerned with the proposed reflagging of the *Rosella.* Rather it is concerned with the separate proposal also to take the step of terminating the existing Finnish CBA and reducing the terms and conditions of employment on board the vessel. The Defendants submit that, on any view, the provisions of the EC Treaty on freedom of establishment are not engaged by that latter proposal.

99. I reject these submissions. In my judgment, the Defendants' actions in 2003, and the implementation of the ITF's FOC policy at that time, would, if repeated after any future announcement by Viking of its intention to reflag to Estonia, amount to a restriction on Viking's freedom of establishment under Article 43. Further, on the evidence which I have heard, I conclude that it is overwhelmingly likely that, even if Viking were to give the undertaking which it has offered this Court not to make any existing permanent employees on the Rosella redundant, the same or a similar course of action would be pursued by the Defendants. On the evidence which I heard, I do not regard it as uncertain what action the Defendants are likely to take.

100. My reasons are as follows. The ITF's FOC campaign is directed at preventing/restricting reflagging. The primary objective of the FOC campaign is to prevent shipowners from flagging vessels in a country which is different from the nationality of the beneficial owners of the vessels. The basic principle applied is that the unions in the country of beneficial ownership of a vessel own the negotiating rights in respect of that vessel, regardless of where it is flagged. The ITF has no discretion in the application of this rule. The FOC campaign is enforced by boycotts and other solidarity actions. ITF affiliates are expected to comply with requests for solidarity. Failure to comply will lead to sanctions being taken. So far as the role of the ITF in the present dispute in relation to the *Rosella* is concerned, it was clear that both the e-mail sent by Mr Nurmi to Mr Makarov dated 4 November 2003 and the ITF circular were sent consistent with, and pursuant to, the ITF's FOC policy. That was clear from Mr Cockroft's evidence. I did not find Mr Zitting's assertions to the contrary convincing. Mr Cockroft agreed that a circular from the ITF advising its affiliates not to negotiate with Viking would carry much more weight than an individual request from the FSU. When Mr Hanses became aware of the ITF circular on 24 November 2003, he realised that it would be futile for Viking to seek to negotiate with Norwegian or Estonian unions. In spite of the alleged understanding between the FSU and one of the Estonian unions, ESIA, Viking had anticipated that it could negotiate with one of the two other unions. Once Mr Hanses became aware of the ITF circular to all its affiliates, however, Viking realised that it would not be possible to negotiate with any union other than the FSU. That remained the position even after Viking indicated that it would not be making any permanent staff redundant if it re-flagged. That remains the position for so long as the ITF circular remains in force, as was accepted by Mr Cockroft in his evidence. Thus he accepted that the Circular had not been countermanded; he accepted that, for so long as the Circular remained in force, there was no possibility of Viking entering into any agreement with ITF related Estonian unions; he accepted that, if the problem were to arise again, the circular would still be in force, and that, for that reason, there would be no possibility of Viking entering into a CBA with an Estonian union that was related to the ITF.

101. Moreover, the evidence made it clear that the ITF is not maintaining its stance merely because, at the time when the FSU called on the ITF for assistance, there was a possible threat to the jobs of the crew of the *Rosella.* That is clear from the fact that, as Mr Cockroft accepted, the application of the ITF's FOC policy is not dependent on a threat of redundancies. It is triggered wherever a ship is beneficially owned in one country and flagged in another. Whenever this condition is fulfilled, the ITF has no discretion on this issue. It is also self-evident that the ITF has maintained, and intends to maintain, its circular in force despite the fact that Viking has indicated that it is

prepared to give an undertaking that there will be no involuntary redundancies as a result of the re-flagging of the *Rosella*.

102. Nor do I accept the assertion made by the Defendants that Viking would be prevented from negotiating a CBA with any Estonian union, not as a result of the ITF's circular, but rather as a result of the relationship between one of the Estonian unions, namely the ESIU, and the FSU (and therefore nothing to do with the conduct relied upon as the basis for the grant of injunctive relief). Mrs Vask (a representative of ESIU) explained in her evidence that the ESIU's compliance with the ITF's FOC policy is one of the reasons why the ESIU would not negotiate with Viking without first consulting the FSU. Furthermore, there are two other Estonian unions which Viking could negotiate with were it not for the ITF circular.

103. Likewise I find the FSU's contentions that it has no objection to the actual reflagging, and, therefore, that its acts have not and will not hinder or restrict Viking's freedom of establishment, as having a total air of unreality about them. The ITF circular was procured by the FSU pursuant to the ITF's FOC policy and within the scope of that policy. It will only be countermanded either by court injunction or if the FSU asks for it to be countermanded. The FSU's attitude is manifest both from its press releases and from its attitude in the dispute in October/November 2003. First, it was clear from Mr Zitting's evidence that the FSU regards itself as having sole negotiating rights on vessels beneficially owned in Finland. Secondly, the FSU has shown itself fundamentally opposed to the use of "cheap labour" on Finnish flagged vessels. It has made this clear both in its press releases and from its conduct in October/November 2003. Third, it insisted that Viking desist from reflagging *Rosella* and its aim in the negotiations was achieved in the terms of the settlement agreement. Fourth, in its proposal dated 18 November 2003, the FSU asked Viking to commit to applying Finnish law and terms and conditions on the *Rosella* regardless of a possible change of flag. However, as Mr Hanses said, and as I accept, the FSU must have been well aware that requiring Viking to apply Finnish law would render reflagging pointless. The object and effect of this proposal was the same as a direct demand not to reflag. As Mr Hollander correctly submitted, the evidence shows that one of the FSU's specific objectives was to prevent or restrict the reflagging of the *Rosella* or, alternatively, at the very least, that the necessary effect of the FSU's acts, if successful, would be to render any reflagging of the *Rosella* pointless.

104. It follows that I also reject the Defendants' arguments:

i) that there was no need for an injunction prior to the *actual* re-flagging, because the 2005 CBA provided for a continued obligation of industrial peace, and that therefore there was no possibility of strike action merely as a result of any announcement by Viking of an intention to re-flag; and

ii) that this demonstrated that there was no interference with the freedom of establishment, because the re-flagging, and thus the establishment, could and would take place, free from any threatened action, during the period of industrial peace.

As I have already said, in my judgment these submissions have an air of unreality about them. First, there was no intention to withdraw the ITF circular, notwithstanding the continued industrial peace. Second, as Mr Hollander submitted, it is clearly arguable,

on the wording of clause 8.8. of the CBA, which requires the parties to "refrain from any hostile action directed against the collective agreement as a whole or against any provisions thereof", that any industrial action directed against re-flagging was not "hostile action directed against the collective agreement" and therefore not in breach of the 2005 CBA. That is not a question of construction that I need to decide. However, in my judgment, the evidence as to the past conduct of the FSU clearly shows that, whatever the strict interpretation of the CBA, the overwhelming likelihood is that, once Viking were to announce an intention to re-flag the Vessel, the FSU would not consider that it was under any continued obligation of industrial peace. That view is supported by the arguments of the FSU in its case before the Finnish District Court in November 2003, when it contended that if, contrary to its primary arguments, there had been a breach of the CBA, its action was not "against our legal order". Therefore, the FSU contended, no injunction against it was justified; its breach, if any, but merely attracted a fine.

105. Any measure which is liable to hamper or to render less attractive the exercise by a national of a Member State of the freedom of establishment, is an obstacle to that fundamental freedom guaranteed by the Treaty: Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano* [1995] ECR I-4165 paragraph 37; Case 249/81 *Commission v Ireland* [1982] ECR 4005 paragraphs 1-3, 21-28. Any measure which places an additional financial burden on a person so as to make the exercise of a free movement right more difficult constitutes a restriction on that free movement right; Case C-272/94 *Michel Guiot* [1996] ECR I-1905 paragraphs 14-15; Case C-435/00 *Geha Naftiliaki EPE & Others v NPDD Limeniko Tamio Dodekanisou* judgment of 14.11.02, paragraphs 2, 4, 6, 12, 19-20 and 24.

106. It is clear on authority that Viking's intention to re-flag the *Rosella* to Estonia will, if implemented, amount to a further establishment of Viking in a Member State. The concept of establishment is a broad one which covers any participation, on a stable and continuous basis, in the economic life of a Member State other than that of origin; see *Gebhard* (above) at paragraphs 23-25. Re-flagging of a vessel in a Member State clearly involves the exercise of an establishment right. Thus in Case C-221/89 *Factortame* [1991] ECR I-3905 paragraphs 19-23, the ECJ held that:

> "…where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment."

In the present case, the *Rosella* is already used to pursue an economic activity which involves a fixed establishment in Estonia, by way of Viking's existing Estonian subsidiary. The registration of the *Rosella* in Estonia would constitute an additional act of establishment. Moreover, as I have already held, it is likely that, in order to manage the re-flagged Rosella, and a part-Estonian crew, Viking will need to do one of the following things: expand the scope of activities of the existing subsidiary, establish a further subsidiary, and/or establish a branch, of Viking itself, each of which would result in a greater degree of "establishment" than is currently the case.

107. In opening, the ITF submitted that there would be no relevant establishment because Viking's existing Estonian subsidiary and any future Estonian subsidiary would be

100% owned and controlled by Viking. I reject this submission. The express wording of Article 43 EC makes clear that the setting up of any agency, branch or subsidiary is an act of establishment, regardless of the degree of control and ownership by the parent.

108. Accordingly, in my judgment, the anticipated future actions of the Defendants would indeed amount to a restriction on Viking's right to freedom of establishment within the scope of Article 43 EC and Viking has indeed proved that it intends to establish itself in Estonia within the meaning of that Article.

Does Article 43 give a direct remedy to Viking, as being an article which applies as between private parties? Or, in other words, does the article have horizontal direct effect?

109. The Defendants accept that Article 43 is "directly effective" in that it confers rights on individuals and can therefore be invoked and enforced *by* individuals in national courts; see paragraph 148 of their closing submissions and Case 26/62 *Van Gend en Loos v Netherlands* [1963] ECR 1. However, the Defendants contend that the question at issue is *against* whom, and in respect of what, can these free movement provisions be enforced. They submit that Article 43 EC does not have direct effect so as to confer on individuals such as Viking rights which are enforceable against private entities such as the Defendants or against their anticipated actions in this case.

110. The Defendants submit as follows:

i) Article 43 EC must be distinguished from Article 39 EC. Article 39 EC refers simply to "free movement of workers shall be secured within the Community" and requires that "such freedom of movement shall entail the abolition of *any* discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". By contrast, the drafters of Article 43 EC clearly had in mind restrictions imposed by Member States *either under legislation or under administrative procedures and practice*. The second paragraph of Article 43 refers to "the right to take up and pursue activities as self-employed persons …" etc. "under the conditions laid down for its own nationals *by the law of the country* where such establishment is effected". Article 44(2)(c) requires that "administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment" be abolished.

ii) The ECJ has extended the application of Article 43 EC from Member States *simpliciter* to regulatory measures adopted by quasi-public, regulatory bodies, but no further. In Case C-309/99 *J C J Wouters & Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR II-2823 concerning partnerships between barristers and accountants the ECJ applied Article 43 EC to a regulatory measure adopted by the Netherlands Bar Council:

> "It should be observed at the outset that compliance with [Article 43 and 49] of the Treaty is also required in the case of rules which are not public in nature but which are designed to

> regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law". See paragraph 120 of the judgment.

iii) The ECJ has *not* extended the application of Article 43 EC to purely individual private conduct. As the law presently stands, therefore, Article 43 EC is not fully horizontally applicable in the sense of imposing legal obligations on *all* individuals, but only imposes them on States and collective actors such as sporting organisations and professional bodies that are effectively self-regulating and possess quasi-legislative powers akin to public law (e.g. the Bar Council, the Law Society or the Football Association).

iv) The ITF is not such a body. It is a trade union and trade unions are the representative bodies of individual workers. It is not akin to a sporting organisation or professional body that possess quasi-legislative powers akin to public law. Even if it can be so characterised generally, by engaging in the actions of which Viking complains, it is clearly not applying "*rules … which are designed to regulate, collectively, self-employment and the provision of services*".

111. Mr Hollander and Mr Hoskins put forward three reasons why Article 43 has full horizontal direct effect.

112. First they submit case-law of the ECJ establishes that the free movement rules apply not only to the action of public authorities but also to "rules of any other nature aimed at regulating gainful employment in a collective manner"; see Case C-415/93 *Union Royale Belge des Société de Football Association ASBL & Others v Jean-Marc Bosman & Others* [1995] ECR I-4921 paragraphs 49, 82-84 applied to Article 43 in Case C-309/99 *Wouters* (above) at paragraph 120. They further submit that the ITF's Delhi policy, applied by the ITF and invoked by the FSU, constitutes a set of "rules" enforced by sanctions; and the FSU performs a quasi-public function in regulating employment terms and conditions in accordance with Finnish legislation, which was supported by the evidence of Dr Bruun.

113. In my judgment this submission is well-founded. The fact that the ITF and the FSU are organisations protecting the interests of workers, and in that sense regulating the terms of employment of their members, by stipulating rules as to their engagement, does not preclude them from falling within the definition contained in *Wouters.*

114. But even if I am wrong in that conclusion, and Mr Vaughan and Miss Davies are correct to submit that there is a distinction because they are not organisations governing the conduct of ship-owning concerns, I accept Viking's second, alternative submission under this head that 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 Case C-415/93 *Bosman* (above) paragraphs 82-84. It is clear that the application of the free movement rules is not limited to "rules" as such; the principle also applies to acts or omissions. The free movement rules

therefore must apply to industrial action ("obstacles") adopted by trade unions ("organisations with legal autonomy"). The ECJ has applied the free movement rules to transfer rules applied by football governing bodies to football clubs (*Bosman*), which is a situation that does not have any "public law" dimension. I accept the submission that it is therefore logical that the ECJ would also apply the free movement rules to the activities of trade union organisations such as the ITF and FSU.

115. A third, and further alternative, submission put forward by Viking under this head, was that, according to established case-law, Article 39 EC (formerly Article 48 of the EC Treaty) and Article 43 EC (formerly Article 52 of the EC Treaty) pursue the same objective, i.e. the free movement of persons: see Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 paragraph 29. Thus the ECJ has consistently applied the same case law on horizontal application to workers, establishment and services; see, for example, Case 36/74 *B N O Walrave & Another –v- Association Union Cycliste & Others* [1974] ECR 1405 (a workers and services case); Case C-415/93 *Bosman* (above) paragraphs 82-84 (a workers case); Case C-309/99 *Wouters* (above) (an establishment case). In Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139 paragraphs 1-2, 5-10 and 28-36, the ECJ held that Article 39 EC (freedom of movement of workers) applies as between private parties. The dispute there was between a private individual and a private bank in relation to a recruitment condition imposed by the bank that candidates for admission possess a specified certificate of competence in German and Italian. Thus, it was submitted, that since, in the context of Article 39, the ECJ had held that the Article was enforceable between private parties, it logically followed that Article 43 EC must also apply as between private parties, although this issue has not yet been decided by the ECJ. The Defendants contend that the facts of the present case are distinguishable from *Angonese* and that the latter case is worker specific. I do not agree. *Angonese* itself invokes the principles recognised in *Walrave* and *Bosman*; see, in particular, paragraphs 30 – 36. If the principle is that Articles 39 and 43 pursue the same objective, then I see no reason in principle why the decision encapsulated in paragraph 36 of the judgment in *Angonese*, namely that "the prohibition of discrimination on grounds of nationality … must be regarded as applying to private persons as well", should not equally apply to a freedom of establishment claim under Article 43. The Defendants sought to argue that there was a fundamental difference in principle between an Article that governed the freedom "of the labour market" and one that governed the freedom of an entity to establish itself, or for individuals to be self-employed, anywhere in the Community. I do not consider that such distinction, if any, provides any rational explanation for the non-application of the relevant article between private persons. The freedom of establishment likewise impacts directly on the labour market. Accordingly, in my judgment, Viking can invoke Article 43 in this case.

Are the anticipated acts of the Defendants directly discriminatory restrictions?

116. The next question arise is whether the anticipated acts of the Defendants are directly discriminatory. A directly discriminatory restriction may be defined as one which is applicable on the basis of a person's origin or nationality (see *Gouda* above). For example, in Case 167/73 *Commission v French Republic* [1974] ECR 359, the ECJ confirmed that provisions of the French Maritime Code that required that a certain

proportion of the crew of a ship to be of French nationality were contrary to Article 39. Similarly, in Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 631, the ECJ held that Article 43 caught professional rules that refused admission to the Belgian Bar to a Dutch national who had received his legal education in Belgium solely on the basis that he was not a Belgian national.

117. The Defendants deny that any anticipated actions on their part are directly discriminatory on grounds of nationality. So far as the ITF is concerned, the Defendants submit that the FOC campaign came into effect in order to prevent shipowners from misusing the flag system as a means of avoiding social and legal controls. Thus, it is said, the essence of the flag of convenience campaign is therefore the protection of seafarers' interests and rights, and not discrimination on the grounds of nationality. The problem about this argument is that, as I have already stated, the FOC policy *is* applied by reference to the nationality of the shipowner, and not by reference to the protection of seafarers' rights and interests. As paragraph 235 of the Delhi policy makes clear, the policy is triggered whenever the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag the vessel is flying. In that event the ITF's campaign will seek to require the owner to flag its ship in the country of ownership and control and only the unions in the country of beneficial ownership and control will have the right to conclude a CBA in respect of that ship. The Defendants argue that the FOC policy is not discriminatory because it does not favour one country over another; any company in any other Member State would be treated in the same way; for example, the policy does not say that all ships must be registered in Finland. However, in my judgment, this masks the reality. The simple fact is that the policy prevents the owner of a Finnish vessel from re-flagging so as to employ a crew of another Member State, and compels the owner to retain its Finnish crew. If I am wrong on this, the policy is clearly indirectly discriminatory, but I deal with this alternative way of putting the case below.

118. So far as the FSU is concerned, the Defendants deny that the FSU's actions will directly discriminate in favour of Finnish seaman or against Estonians on the grounds of their nationality. They contend that the FSU's position in late 2003, was (and remains) that, if the vessel were to be reflagged, it should nonetheless be covered by a CBA on Finnish terms and that none of the existing crew should lose their jobs as a result of Viking's proposals; that there was, and never has been, any demand that Viking should refrain from employing Estonian seafarers; that, although Viking's position is that there would be no point in it employing Estonian seafarers on Finnish terms, because it would be more costly for it to do so, that is a consequence of the Commission's guidance on State Aid and the manner in which that guidance has been implemented in Finland; it is not a requirement of the FSU; that the FSU's activities are not and have never been in any way restricted either to the protection of its members alone, or for that matter Finnish nationals alone, or to vessels that are beneficially owned or controlled in Finland; it frequently seeks to conclude and concludes CBAs for foreign vessels with entirely non-member (and non-Finnish) crew trading into Finland and there are examples of numerous occasions on which the FSU has taken action to protect crews of various different nationalities. In short, the Defendants submit that the nationality of the seafarers whose pay and conditions the FSU seek to protect is of no interest to the FSU; its concern is pay and conditions for seafarers on vessels trading into and out of Finnish ports. Further, it is submitted, the FSU's motivation in this case is not limited to the protection of the jobs of the existing

crew of the Rosella; they rely upon Mr. Zitting, who repeatedly explained that the FSU is opposed to social dumping, i.e. movements by Finnish shipowners to lower working conditions.

119. In my judgment, based upon the evidence which I have heard, the reality is very different. Mr Zitting's evidence clearly showed that the FSU took action against Viking because the *Rosella* was beneficially owned and effectively controlled in Finland and that the intention of the FSU was that that should remain the position, so as to protect Finnish jobs. The email dated 4 November 2003 clearly demonstrates that, pursuant to the ITF's Delhi policy, the FSU was claiming to retain the negotiating rights because the *Rosella* was beneficially owned and effectively controlled by a Finnish company. The evidence also made it clear that the FSU took action against Viking to protect the jobs of Finnish seamen. This is stated expressly in the public pronouncements of the FSU throughout the relevant period in 2003, such as its press releases and information notices to crew of the *Rosella.* Although Mr Zitting repeatedly stated in his oral evidence that

> "this is a fight against social dumping and it was only a matter of fact that on Finnish passenger ferries there were Finnish seamen",

I did not find his explanation as to the FSU's purported motivation of its actions convincing and I reject it. His evidence was wholly at odds with the actions of the FSU and the clear wording and intent of the FSU documents. The latter do not talk about the protection of FSU members or protecting the wage levels of seafarers in the Baltic generally; they talk about protecting Finnish jobs. Moreover, as Mr Hollander on behalf of Viking submitted, the fact that the FSU has, in the past, also taken action against non-Finnish vessels does not detract from the fact that, so far as its actions in relation to the *Rosella* is concerned, the FSU's actions are to be characterised as discriminatory. It is perfectly possible for the FSU to pursue two objectives at the same time; namely (i) protecting Finnish jobs on Finnish vessels and (ii) taking action against foreign vessels to improve the terms and conditions of their foreign crew. They are not mutually exclusive. I find proved that, in relation to the *Rosella*, the FSU's principal purpose was and is to protect Finnish jobs. In my judgment that is directly discriminatory. Any purpose that the FSU may have had to protect the interests of Baltic seafarers generally, if indeed it had such a purpose, I hold to be a secondary and very much a subservient purpose.

120. Accordingly, I conclude that, based upon what occurred in 2003, and the evidence which I have heard, that the anticipated conduct of the Defendants would be directly discriminatory.

Is the directly discriminatory restriction justified by a public policy, public safety or public health objective?

121. The Defendants contend in the alternative to their submission that there was no relevant restriction, that any impediment or restriction of Viking's exercise of its freedom of establishment under Article 43 EC caused by the Defendants' actions is justified. They submit that their actions are justified on two grounds:

i) their actions involve the exercise of fundamental rights of freedom of expression and of freedom of association and to take collective action and therefore are justified by reasons of public policy; and

ii) their actions pursue a legitimate public interest aim, i.e. the protection of workers.

122. A directly discriminatory act may only be justified pursuant to an express exemption in the EC Treaty (see Case C-288/89 *Gouda* (above) paragraph 11). Article 46 EC provides an exemption for:

> "provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

123. The Defendants argue that, because freedom of association and freedom of expression are recognised as fundamental rights under Community law, merely by invoking those fundamental rights, any restrictions imposed by the ITF or the FSU would be justified. It is clear that the exercise of fundamental rights may fall within the scope of the public policy justification; see Case C-159/90 *Society for the Protection of Unborn Children Ireland Limited v Stephen Grogan & Others* [1991] ECR 6982. The right to take industrial action can, for present purposes, be characterised as part of the fundamental right of freedom of expression and of freedom of association and to take collective action. For the purposes of this hearing, Viking accepts that the right to take industrial action is a fundamental right in EC law (although it reserves its right to argue to the contrary if this case goes further).

124. However the ECJ has held that the power to invoke the public policy exception must be appraised by reference to fundamental rights, in particular as articulated in the ECHR: see Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Etaria Pliroforissis & Another* ("*ERT*") [1991] ECR I-2925 and Case C-112/00 *Eugen Schmidberger v Austria* [2003] ECR I-5659 which underline that the ECJ will pay special attention to the European Convention on Human Rights, and that measures that are incompatible with the observance of rights there recognised are not acceptable in the Community. In my judgment, however, it cannot be the case that the exercise of fundamental rights of freedom of association or expression, or to take industrial action, (whether enshrined in Articles 10 and 11 of the ECHR, or Article 13(2) of the Finnish Constitution or elsewhere), can, without more, authorise or justify discrimination on grounds of nationality or, to take the example used in argument, discrimination on the grounds of sex. Nor does it follow from *Grogan* or Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgmeisterin der Bundesstadt Bonn* (judgment of 14 October 1994), which was also cited to me by Mr Vaughan, that "public policy" is synonymous with "the exercise of fundamental rights" or that the so-called exercise of a fundamental right can justify a discriminatory restriction.

125. Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured *without discrimination on any ground such as* sex, race, colour, language, religion, political or

> other opinion, *national* or social *origin*, association with a national minority, property, birth or other status."

126. In my judgment, it cannot, compatible with Article 14, be said, for example, that workers have a fundamental right to strike to prevent women being employed on ferry boats. Likewise, if, as I have held, the anticipated actions of the FSU and the ITF are indeed directly discriminatory on grounds of nationality, I do not see how the exercise or enjoyment of the right to take industrial action to prevent the re-flagging can possibly be characterised as a "fundamental right" recognised by Community law or characterised for the purposes of Article 46 as a "provision[s] laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy". Put another way, if the exercise of the right to take industrial action, is done in a discriminatory fashion, in a manner that is incompatible with Article 14, it cannot, without more, be elevated into, or characterised as, a "fundamental right" that can be equated with "public policy". In order for Article 46 to be engaged, one has to find some feature of public policy beyond the mere "right to strike", "freedom of association" etc., justifying the "special measure"; i.e. the action discriminating on nationality grounds. Accordingly I accept Viking's submission that in this context so-called fundamental rights cannot be invoked to justify discrimination on grounds of nationality.

127. Mr Vaughan and Miss Davies had a separate argument under this head. They submit that "public policy" in Article 46 includes the protection of workers. They submit that the purpose of the ITF's and the FSU's anticipated actions is to protect the interests of the current crew of the *Rosella* and the interests of seafarers in the Baltic generally, by ensuring that Viking employs seamen aboard the *Rosella* on the more commercially advantageous Finnish CBA terms, as opposed to on the lower Estonian terms; thus exercising the right to strike in implementation of this social purpose can be regarded as a public policy justification. However, as Mr Hoskins submitted, the protection of workers *per se*, whether Finnish or of a wider geographical area, does not come within the definition of "public policy" such as to justify a directly discriminatory restriction under Article 46. Such a purpose may fall within the category of "*public interest*" justifications for *indirectly* discriminatory restrictions, but, in the light of my findings on the evidence that the Defendants' anticipated actions will be directly discriminatory, that is not a relevant consideration here. Authority for this proposition is to be found by comparing paragraph 11 of the judgment in *Gouda* with paragraphs 12-14. The point is that the latter deals with the protection of workers as a recognised "public interest" exception simply in relation to indirectly discriminatory or indistinctly applicable restrictions. Protection of workers does not fall within the category of public policy exemptions applicable to directly discriminatory restrictions. Mr Vaughan and Miss Davies, in argument, appeared to go some way towards accepting this.

128. If I am right on the above points, (namely that the ITF and the FSU have acted, and threatened to act, in a directly discriminatory manner, that they may not rely on any purported fundamental right so as to justify that conduct, and that the protection of workers does not fall within the ambit of public policy under Article 46 such as to justify a directly discriminatory restriction), it follows that the Defendants' anticipated actions will be in breach of Article 43 EC.

Objective justification /Indirectly discriminatory/indistinctly applicable restrictions

129. If, contrary to my conclusions as summarised in the preceding paragraph, the position were either:

i) that, although the restrictions were directly discriminatory, the so-called fundamental rights to strike etc. may be invoked to justify direct discrimination on grounds of nationality: or

ii) that the restrictions were not directly discriminatory but were nonetheless indirectly discriminatory or indistinctly applicable:

then the further issue would arise as to whether the restrictions were objectively justified. This in turn can be divided into the following sub-issues:

a) Are they objectively justified by a public interest requirement?

b) Is that public interest already protected in another relevant Member State (mutual recognition)?

c) If not, are the measures taken appropriate to achieve the intended objective?

d) If so, are the measures taken proportionate, i.e. limited to what is necessary to achieve that objective?

In case this matter goes further, I consider that I should express my conclusions in relation to these issues.

130. If I were wrong in my conclusion that the anticipated acts of the ITF and the FSU are directly discriminatory, then in my judgment they would be indirectly discriminatory. Mr Zitting accepted that most of the crew on Finnish vessels were Finnish seamen and that, in relation to the *Rosella*, out of a crew list of 227, only seven are non-Finns (all of whom are domiciled and resident in Finland). The actions of the FSU, when combined with those of the ITF, would therefore, in practice, have the effect of protecting Finnish seamen as opposed to other nationalities. Moreover, even if (contrary to this conclusion) the acts of the FSU and ITF were not directly or indirectly discriminatory, they would nonetheless constitute a restriction on the freedom of establishment as they would hinder the freedom of Viking to reflag the *Rosella* to the registry of another Member State. Any measure which, although applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by a national of a Member State of the freedom of establishment, is an obstacle to that fundamental freedom guaranteed by the Treaty (Case C-55/94 *Gebhard* above). Any measure which places an additional financial burden on a person so as to make the exercise of a free movement right more difficult constitutes a restriction on that free movement right (see *Guiot* (above) paras 14-15 and *Geha Naftiliaki* (above) paras 2, 4, 6, 12, 17-20 and 24).

131. I turn then to consider the issue of objective justification. The Defendants likewise under this head, as under the previous head, advance two justifications for their anticipated actions:

i) the fundamental rights of freedom of association and to take collective action, and of freedom of expression; and

ii) the protection of workers.

It was common ground that the protection of workers is an acceptable public interest objective; see *Gouda* above, paragraph 14 and Case C-79/01 *Payroll Data Services (Italy) and Others* [2002] ECR I-8923 at para. 31:

> "It is true that the protection of workers is among the overriding requirements relating to the public interest which have been recognised by the Court as justifying a restriction on the fundamental freedoms guaranteed by the Treaty"."

132. I have already dealt with (and rejected) the Defendants' arguments, that merely by invoking a so-called fundamental right, a restriction can be justified. The same riposte can be made in relation to any assertion of an unfettered public interest to "protect workers"; an indirect discriminatory restriction – for example to put pressure on an employer not to employ women or workers of a particular nationality – cannot be justified by the mere invocation of the public interest in the protection of an existing (male) workforce. Neither the freedom of expression nor the freedom of assembly/association are absolute. They must be viewed in relation to their social purpose; see Case C-112/00 *Schmidberger* above paras 77-82. As I have already stated above, the Defendants have put forward two different social purposes as justification for their actions, namely safeguarding the job opportunities of the FSU's members (i.e. the current crew members of the *Rosella)*; and safeguarding the level of terms and conditions of employment and the living standard of all seafarers working on vessels trading in the Baltic and Nordic area, regardless of their nationality.

133. As to the first purpose, namely safeguarding the job opportunities of the FSU's members (i.e. the current crew members of the *Rosella*), I accept Viking's submission that the evidence as to Viking's intentions, and the undertakings that have been offered to the Court, show that the Defendants cannot realistically rely on this as an objective justification for their anticipated actions.

134. Both the oral and written evidence at trial clearly showed that, during negotiations with the FSU in 2003, Viking indicated that, if it were to reflag the *Rosella*, it would undertake not to make any of the existing crew redundant, but would transfer them to other vessels in the Viking group on Finnish terms. Moreover, Viking is prepared to give an appropriate undertaking to this effect as a condition of any relief granted to it. In *Unison v United Kingdom* [2002] IRLR 497, the ECtHR, held that an interim injunction granted by the Court of Appeal restraining a strike was compatible with Article 11 of the Convention because:

> "the impact of the restriction on the applicant's ability to take strike action has not been shown to place its members at any real or immediate risk of detriment or being left defenceless against future attempts to downgrade pay or conditions. When, and if, its members are transferred, it may continue to act on their behalf as a recognised union and negotiate with the new

> employer in ongoing collective bargaining machinery. What it cannot claim under the Convention is a requirement that an employer enter into, or remain in, any particular collective bargaining arrangement or accede to its requests on behalf of its members. The Court therefore does not find that the respondent State has exceeded the margin of appreciation accorded to it in regulating trade union action".

Applying that reasoning to the present case:

i) Viking's plans for the *Rosella* will not lead to any redundancies anywhere within the group. Employees with existing contracts will be transferred elsewhere within the group.

ii) The FSU will be able to continue to represent those employees' interests.

iii) But, nonetheless, the FSU is seeking to require Viking to remain in or enter into a particular CBA with it. But, as *Unison* makes clear, it has no "fundamental right" to require Viking to enter into any particular collective bargaining arrangement or accede to its requests on behalf of its members.

135. In relation to short term employees, their contracts will be honoured, but it was accepted by Mr Hanses that certain short term employees may not have their contracts renewed as a result of the reflagging of the *Rosella*. I accept Viking's submissions, as set out in its closing submissions that any industrial action by the Defendants to require the renewal of short term contracts would not be objectively justified for the reasons there stated; namely, the purpose of short term contracts is to permit flexibility for both the employer and the employee; Finnish law recognises the distinction between employees on permanent and short term contracts and only affords limited protection to them; para 4.4 of the CBA applicable to Viking also recognises the legitimacy of short term contracts; striking to require short term contracts to be renewed would be effectively striking to require Viking to create new jobs, not to prevent them from terminating existing jobs.

136. I turn now to the second alleged purpose, namely safeguarding the level of terms and conditions of employment and the living standard of all seafarers working on vessels trading in the Baltic and Nordic area, regardless of their nationality. In Case 63/81 *Seco SA & Others v Établissement d'Assurance contre la Vieillesse et l'Invalidité* [1982] ECR 223 and Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417, the ECJ held that Member States retained the right to apply their collective labour agreements relating to minimum wages to service providers established in another Member State who were providing services in its territory. In such a situation, it was held that there would be no infringement of Article 49 (freedom to provide services) even though the application of those national laws and agreements might entail greater cost for the employer and could be seen as a disincentive to supply services in the Member State concerned.

137. The Defendants relied upon *Rush Portuguesa* and other cases in that line of authorities, such as *Seco*, *Guiot* (above) at para 12; and Joined Cases C-369 & 376/96 *Arblade & Others v Belgium* [1999] ECR I-08453. *Rush Portuguesa* concerned a Portuguese construction company, Rush Portuguesa, which had entered into a

subcontract with a French undertaking for the carrying out of works for the construction of a railway line in France. In order to carry out those works, Rush Portuguesa had brought its Portuguese employees from Portugal. The employees were to return to Portugal after completion of the works. In the course of its judgment, the ECJ stated (at para 18) that,

> "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is ***employed***, even temporarily, ***within their territory***, no matter in which country the employer is established;…" (emphasis added).

The Defendants submitted that this authority meant that a Member State is not required to accept "social dumping", which Mr Zitting defined as

> "the idea is that you replace an employee with a cheaper one coming from somewhere else".

They contend, by analogy with *Rush Portuguesa* and the other cases that they are entitled to strike and take other industrial action to procure that Finnish CBA terms are maintained for all workers on board the *Rosella*, even though the vessel is re-flagged in Estonia.

138. In my judgment, *Rush Portuguesa* and the other cases do not support the proposition that, in the particular circumstances of the present case, such activity would be objectively justified. My reasons are as follows:

i) First, as I have already held, I do not regard the alleged purpose of safeguarding the level of terms and conditions of employment and the living standard of all seafarers working on vessels trading in the Baltic and Nordic area, as the primary purpose of the FSU's anticipated actions nor of the ITF's supporting action. I have held that any purpose that the FSU may have had to protect the interests of Baltic seafarers generally, to be a secondary and very much a subservient purpose to the primary purpose of protecting Finnish jobs. It is against that background that one has to consider the issue of objective justification.

ii) *Rush Portuguesa* is a case about foreign construction workers coming to France to carry out construction works there. Construction workers are very different from seafarers. As a matter of common sense, it is difficult to apply the principle recognised in *Rush Portuguesa*, which applied to workers who actually performed their activities on French territory over a period of time, to the crew of any foreign flagged vessel that calls into a Finnish port. As Mr Hoskins submitted, it would seem absurd for vessels to have to modify their manning conditions mid-voyage to reflect the labour conditions applicable in each port that they visited.

iii) Although the ECJ has acknowledged that the principle can apply to undertakings established in a frontier region, some of whose employees may, for the purposes of the provision of services by the undertaking, be required on

a part time basis and for brief periods, to carry out part of their work in the adjacent territory of a Member State other than that in which the undertaking is established (see Case C-165/98 *Mazzoleni v Belgium* [2001] ECR I-2189), the ECJ has also indicated that this principle is not rigid or inviolable, and that there well may be circumstances in which the application of the host state rules would not be proportionate to the objective pursued, namely the protection of the workers concerned: *Mazzoleni*, above, at para 30. In this respect, the ECJ has indicated that the relevant factors (although by no means the decisive factors) include the duration of the provision of the services in question, their predictability and whether the employees in question have actually been sent to work in the host Member State or continue to be attached to the operational base of their employer in the Member State in which it is established: *Mazzoleni*, para 38. The application of those criteria in the present case do not suggest to me that it would be proportionate to invoke the *Rush Portuguesa* principle here. As to duration, the evidence showed that the crew of the *Rosella* in fact provide minimal services on Finnish land territory. Much more time is spent either in Estonia or at sea. Mr Eklund's evidence was that each day the *Rosella* spends approximately 2 ¾ hours in Helsinki, 9 3/4 hours in Tallinn and 11 ½ hours at sea. As to predictability, the service provided is regular and time-tabled. As to the final criterion, if the re-flagging takes place, the evidence showed that the Estonian crew will be attached to the Estonian operation base.

iv) The case of *Guiot* (above) shows that that, even in the context of the *Rush Portuguesa* principle, regard must be had to the principle of mutual recognition. What the FSU and ITF are seeking to justify is the ability to take industrial action in order to require a shipowner to enter into a CBA with the FSU in respect of a vessel that trades into Finnish ports even where the vessel is flagged in a Member State other than Finland, the crew are nationals of a Member State other than Finland, none of the crew are members of the FSU and the crew are covered by a CBA negotiated with an ITF affiliated trade union in a Member State other than Finland. Those actions conflict with the principle of mutual recognition established by the case-law of the ECJ, whereby restrictions in the public interest imposed by one Member State are not permissible if that interest is already protected by the rules in another Member State; see for example *Gouda* above para 13. The evidence showed that the interests of the crew on board an Estonian-flagged *Rosella* would, if the re-flagging took place, be likely to be protected by an ITF affiliated Estonian trade union and an Estonian CBA. If due regard is given to the principle of mutual recognition, it does not seem proportionate that the FSU and ITF should be entitled to insist that the interests of workers on board the *Rosella* must be protected by the FSU, as opposed to an ITF affiliated trade union established in another Member State.

v) Directive 1996/71/EC concerning the posting of workers in the framework of the provision of services lays down specific rules intended to give effect to the ECJ's case law on posted workers, including the application of the host State's law on minimum rates of pay, as provided in Article 3(1)(c). Whilst recitals 12-14 in the Preamble reflect the case-law of the ECJ, such as *Rush Portuguesa*, Article 1(2) expressly provides that the Directive does not apply

to "merchant navy undertakings as regards seagoing personnel". I accept Viking's submission that this demonstrates that the special position of ship crews is expressly recognised, because it is not appropriate to apply the case-law on posted workers (which generally concerns workers in industries such as construction) to the crew of ships.

vi) There is a well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship (including employment terms and conditions); see *McCulloch v Sociedad Nacional de Marineros de Honduras* 372 U.S. 10 (1963) and *International Longshoremen's Association v Ariadne Shipping Co Ltd & Others* 397 U.S. 195 (1970). In the latter case, the U.S. Supreme Court relied on the principle to rule that the local domestic statute should not be interpreted so as to permit an American trade union to take industrial action to protest against the level of crew wages on foreign registered ships. In my judgment, it would be strange if Community law were to disregard this international law principle in circumstances such as the present case; namely, where a union in one Member State was seeking to take industrial action, because it objected to the wages and conditions of the crew of a vessel flagged in another Member State, who were operating under a CBA concluded with a union in that other Member State.

139. Accordingly, in my judgment, if, contrary to my primary holdings in relation to directly discriminatory restrictions, the question of objective justification arises, I conclude that the Defendants' anticipated actions would not be objectively justified, or appropriate or proportionate to secure the Defendants' purpose.

Conclusion

140. In my judgment, the Defendants' anticipated actions will involve an unlawful restriction on Viking's freedom of establishment, which this Court is entitled to restrain by the grant of injunctive relief.

Alternative free movement provisions

141. If I were wrong in my conclusion that Viking can rely on the freedom of establishment (because it does not have horizontal direct effect or because the freedom of establishment is not engaged), I would conclude, somewhat hesitantly, that the freedom of movement of workers was engaged, or, if that were wrong, that the freedom of the provision of services was engaged. However, in the light of my decision in relation to establishment, it is not necessary to burden this already lengthy judgment with the reasons for those views.

Discretion and reference to the ECJ

142. Having decided the comity issues adversely to the Defendants, and subject to one point, I do not consider that there are other factors that would, in the exercise of my discretion, dissuade me from exercising my discretion to grant a permanent injunction. That one point is this: if I were of the view that I should refer the questions of EC law to the ECJ in order to obtain a preliminary ruling, then I would decline to make a permanent injunction and would have to give consideration as to

whether I should grant interim relief pending the reference. Accordingly, it is to the question of reference that I now turn.

143. This Court is given jurisdiction to refer questions to the ECJ by Article 234 of the EC Treaty, which provides as follows:

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
>
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice".

144. A distinction is therefore drawn in Article 234 between courts of last instance, which must make a reference to the ECJ unless the EC law issues are *acte clair*, i.e. the correct application of EC law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved, and courts other than those of last instance which have a discretion as to whether or not to refer questions to the ECJ.

145. The High Court's discretion to make a reference cannot be fettered by any rule of national law or judicial decision of a higher court. In Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, the ECJ held (at para 4):

> "It follows that national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of Community law, necessitating a decision on their part."

146. The unfettered discretion enjoyed by national courts was recognised by the Court of Appeal in *Bulmer v Bollinger* [1974] Ch 401. Lord Denning MR held (at 420):

> "In England the trial judge has complete discretion. If a question arises on the interpretation of the treaty, an English judge can decide it for himself. He need not refer it to the court

> at Luxembourg unless he wishes. He can say: 'It will be too costly', or 'It will take too long to get an answer', or 'I am well able to decide it myself'."

In relation to the time required to get a ruling from the ECJ, Lord Denning MR said:

> "The length of time which may elapse before a ruling can be obtained from the European court. This may take months and months. The lawyers have to prepare their briefs; the advocate-general has to prepare his submissions; the case has to be argued; the court has to give its decision. The average length of time at present seems to be between six and nine months. Meanwhile, the whole action in the English court is stayed until the ruling is obtained. This may be very unfortunate, especially in a case where an injunction is sought or there are other reasons for expedition. This was very much in the mind of the German Court of Appeal of Frankfurt in *Re Export of Oat Flakes*. It said that it was important 'to prevent undue protraction of both the proceedings before the European Court and trial before the national courts'. On that ground it decided a point of interpretation itself, rather than submit it to the European Court."

147. According to a recent Annual Report of the Court of Justice, the time taken to obtain a judgment in a preliminary ruling case has been growing in recent years, as follows:

Time taken for judgment in preliminary ruling case (months)

1999	**2000**	**2001**	**2002**	**2003**
21.2	21.6	22.7	24.1	25.5

Source: Statistics concerning the judicial activity of the Court of Justice

148. It was common ground that the time taken to obtain a reference is likely to increase as a result of the accession of ten new Member States in May 2004. Obviously, the detrimental effect of any delay may be mitigated, in appropriate cases, by the grant of interim relief. In *References to the European Court* (2nd ed, Sweet & Maxwell), Anderson and Demetriou state (at §5-041):

> "The grant of interim relief by the referring court may, in some cases, mitigate the effects or any delay. There is, however, no reason why the likely delay caused by a preliminary reference should not be a factor taken into account by the national judge in deciding whether to refer, particularly in those cases in which the long period of uncertainty caused by a reference would be likely to cause irreparable damage or frustrate the purpose of the litigation."

149. Moreover, in relation to the need not to overload the ECJ, Lord Denning MR said, citing the Court of Appeal, Frankfurt:

> "The European Court must not be overwhelmed by requests for rulings …. Courts should exercise their rights sparingly. A reference to the European Court must not become an automatic reaction and ought only to be made if serious difficulties of interpretation arise."

In relation to the difficulty and importance of the legal issue, Lord Denning MR said:

> "Unless the point is really difficult and important, it would seem better for the English judge to decide it himself. For in so doing, much delay and expense will be saved."

In relation to the wishes of the parties, Lord Denning MR stated,

> "if both parties want the point to be referred to the European Court, the English court should have regard to their wishes, but it should not give them undue weight. The English court should hesitate before making a reference against the wishes of one of the parties, seeing the expense and delay which it involves."

150. In *Bulmer*, the Court of Appeal dismissed the appeal against the refusal to make of a reference, observing (at 427), "It is, no doubt, an important point, but not a difficult one to decide."

151. In subsequent cases, however, the Court of Appeal has adopted a somewhat different approach and demonstrated a greater tendency to refer. In particular, in *R v International Stock Exchange ex parte Else* [1993] QB 534, Lord Bingham MR gave the following guidance on the reference of questions to the ECJ:

> "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, *the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself.* In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, for the need for uniform interpretation throughout the Community and of the great advantage enjoyed by the Court of Justice in construing the Community instruments. *If the national court has any real doubt it should ordinarily refer*".

152. The *Else* test has been consistently applied in numerous cases by the Court of Appeal and courts of first instance. The *Else* test has been refined in recent cases, but never

overturned. In *Trinity Mirror* [2001] EWCA Civ 65, Chadwick LJ applied the *Else* test (at paragraph 51 of his judgment), but said that it was necessary to have regard also to the observations of Advocate General Jacobs in Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR-I 6495. In *Wiener*, the Advocate General had warned against overloading the ECJ with references. His views were summarized by Chadwick LJ as follows:

> "Where the national court is not a court of last resort, a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case law which could readily be transposed to the facts of the specific instance case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Between those two extremes there is a wide spectrum of possibilities".

153. In *R v Commissioners of Inland Revenue ex parte Professional Contractors' Group & Others* [2002] EuLR 3296, Robert Walker LJ said:

> "The principles stated by Sir Thomas Bingham MR in *Queen v International Stock Exchange ex parte Else* [1993] QB 534 still hold good. But in applying them the court must also take account of the guidance given by the court (following European authority) in *Trinity Mirror plc v Commissioners of Customs & Excise* [2000] 2 CMLR 759, 783-5".

The *Else* test was most recently approved by Ward LJ in *R (on the application of Federation of Technological Industries and others) v Customs and Excise Commissioners & Another* [2004] EWCA Civ 1020. He held at paragraph 88 that the Else formulation was "the test which I have to apply". However, I must nonetheless have regard to the fact that my discretion, as Rheinmühlen-Düsseldorf makes clear, is an extremely wide one.

154. I have decided, in the exercise of my discretion, and not without some hesitation, that it is not appropriate for this Court to order a reference to the ECJ. My reasons for this conclusion may be summarised as follows:

i) This is a case where the court has been required to adjudicate on disputed issues of fact after a trial with witnesses and much oral and documentary evidence. What has been critical to the court's determination, and indeed as to the identification and resolution of the legal issues that arise, has been its view of the facts and the evidence. In other words, this is a highly fact-dependent case.

ii) As Chadwick LJ said in *Trinity Mirror*, there is, in the area of law to which this case gives rise, an established body of Community case law which can readily, or, at least, fairly readily, be transposed to the facts of the instant case. That suggests that a reference is not necessarily appropriate. Put another way,

in my view, the critical issue here was the application of Community law principles to the facts, rather than the ascertainment of those legal principles. Although, obviously, there was considerable debate before me about various aspects of Community law, in the ultimate analysis, what I have had to decide has not been highly complex points of Community law, but rather which principles of EC law should be applied to the particular facts of this case and in what manner.

iii) Thus, although, no doubt, points of law characterised as being points of law relating to "the interpretation of this Treaty" could be formulated for the purposes of a reference, the parties' draft formulation of possible questions for the subject of a reference demonstrates how critically fact dependent such questions are. Thus, for example, whilst a point of law that has arisen is the question whether fundamental rights can be relied upon in a manner which is directly discriminatory, in the event, because such fundamental rights are not absolute (see *Schmidberger* paras 80-82; *Omega*, judgment of 14.10.04, paras 34-36), even if that issue were decided by the ECJ on a reference adversely to Viking, the Court would still have to assess the exercise of such rights in relation to the social purpose that they pursue on the facts of this particular case. This I have done on an alternate basis already.

iv) On the other hand, the issue of delay, in my judgment, is crucial. Whilst the ECJ does have power to expedite particular preliminary references under Article 104a of its Rules of Procedure, it was common ground that this is an exceptional power, only to be exercised in cases of "exceptional urgency". It was also common ground that the present case will almost certainly not be considered by the ECJ to be one of exceptional urgency. Thus, although both parties would be willing to take whatever steps are necessary to have any reference determined as quickly as possible, I was invited to proceed on the basis that it is almost certain that it will take more than two years for the ECJ to give judgment on any preliminary ruling.

v) Even though interim relief could be granted pending a reference (and, if I had thought it appropriate to refer, I would indeed have granted interim relief in favour of Viking), the long period of uncertainty caused by a reference would in my judgment be likely to cause irreparable damage to Viking or frustrate the purpose of the litigation. Commercial life requires certainty. Markets and conditions change rapidly. The whole purpose of these proceedings was to achieve a speedy and certain result. If a reference were to be made, the inevitable result would be that there would be serious question marks hanging over the future conduct of Viking's business in relation to the *Rosella;* that uncertainty would necessarily impact upon the future conduct of Viking's business, and its relations with its workforce.

vi) The Defendants submit that there should be a reference, but only in the event that they lose on their arguments that, as a matter of judicial restraint and/or comity, the English court should refrain from dealing with what is essentially a Finnish case, and that the court should reject Viking's case on the facts and on the substantive EC law. In other words, if they win, even on the substantive EC law issues, they do not consider that any reference is necessary. However, they submit that, if the Court were to find for Viking, it "would in effect be

ruling that Finnish constitutional law (protecting the right to take industrial action) was in conflict with EC law" and should therefore seek a preliminary ruling from the ECJ. I reject that submission. First of all, as a matter of Finnish law, as I have already said, there is no dispute that the right to strike is not absolute. It is a right which the Finnish Supreme Court has held is expressly subject (inter alia) to directly effective Community law. Secondly, my decision that industrial action against Viking is not objectively justifiable in the circumstances of this case is, in effect, a finding on the particular facts of this case as to the scope of the right to strike in Community (and therefore Finnish) law. I have not made a finding that Finnish law conflicts with Community law.

vii) I have given serious consideration to whether it would be appropriate to make a reference so as to give the Finnish Government an opportunity to intervene. As indicated by Bingham J in *Commissioners of Customs & Excise v Samex ApS* [1983] 1 All ER 1042 at 1055, the opportunity for other Member States to intervene is a relevant factor. However, for the reasons stated, I do not accept the Defendants' submission that this court has effectively been asked to "disapply Constitutional provisions of Finland, Finnish legislation and caselaw on the fundamental right to take industrial action", or that I am taking "a definitive view to the legality of a [Finnish] law"; see *Bacardi Martini v Newcastle United FC* [2001] EuLR 45 at paragraph 80. Nor do I consider that the fact that the Commission made a complaint to the Finnish Government following the *Rakvere* case (which apparently remains an open matter) justifies a reference in this case.

155. Accordingly, in the exercise of my discretion I decline to make a reference.

Conclusion

156. It follows that I will make permanent injunctions and declarations substantially in the form sought by Mr Hollander on behalf of Viking, with appropriate amendments to reflect the terms of this judgment. I will require Viking to give the undertakings offered as to its current permanent employees on the *Rosella.* I will hear further argument as to the precise terms of the order.

157. Finally, I should like to express my particular gratitude to all counsel for the very helpful, and detailed, written and oral submissions in this case. The fact that I have not, in this judgment, addressed all the many points that were made during the course of argument does not mean that I have not carefully considered them in reaching my conclusions.