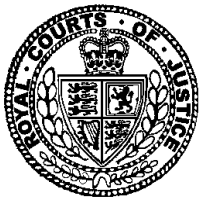

Neutral Citation Number: [2022] EWCA Civ 238

Case No: CA-2021-000452 (formerly A4/2021/0337)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERICIAL COURT (QBD)
MR JUSTICE BUTCHER
[2020] EWHC 3540 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2022

Before:
LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

- -

Between:

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED	**Appellant**
- and –	
THE KINGDOM OF SPAIN	**Respondent**
M/T "PRESTIGE" (No. 5)	

- -

Christopher Hancock QC, Charlotte Tan and **Alexander Thompson**
(instructed by **Ince Gordon Dadds LLP**) for the **Appellant**
Timothy Young QC (instructed by **Squire Patton Boggs (UK) LLP**) for the **Respondent**

Hearing dates: 30 November and 1 December 2021
- -

Approved Judgment

This judgment was handed down remotely at 2 pm on 1 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Phillips:

Introduction

1. On 21 December 2020, shortly before the end of the implementation period of the United Kingdom's exit from the European Union ("IP completion day")[1], Butcher J ("the Judge") referred three questions as to the proper interpretation of Regulation (EU) No 44/2001 ("the Brussels I Regulation") to the Court of Justice of the European Union ("the CJEU"). The reference was made pursuant to Article 267 of the Treaty on the Functioning of the European Union ("the TFEU") which provides, so far as relevant, as follows:

> "The [CJEU] shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> 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 to give a ruling thereon…"

2. The Judge had announced his decision to make the referral on 18 December 2020, the day closing oral arguments had concluded at the end of a seven-day trial of an appeal brought by the appellant ("the Club") against the registration of a judgment under the Brussels I Regulation, giving his reasons in a judgment delivered orally ("the Judgment"). The Judge did not, at that time, determine a further issue of English public policy in respect of which no reference was made and which, if decided in favour of the Club, would have determined the appeal in favour of the Club, regardless of the answers to the questions he referred to the CJEU.

3. The Club appeals that decision, with permission granted by Males LJ, on the ground that a ruling on the questions referred to the CJEU was not "necessary to enable [the Judge] to give judgment" within the meaning of Article 267. The Club contends that the referral was therefore outside the Judge's jurisdiction, wrong in principle and/or irrational when it was made. Although the Judge subsequently (on 12 May 2021) determined the further issue against the Club (so that a decision on the questions referred to the CJEU is, in the event, required), the power to make a referral to the CJEU would not then have been available, having ended on IP completion day[2]. The Club

[1] IP Completion Day was fixed as 31 December 2020 (at 23.00 GMT) by Article 126 of the Withdrawal Agreement, section 1A of the European Union (Withdrawal) Act 2018 and sub-sections 39(1)-(6) of the European Union (Withdrawal Agreement) Act 2020.

[2] Section 6(1)(b) of the European Union (Withdrawal) Act 2018, as amended by section 26(1)(a) of the European Union (Withdrawal Agreement) Act 2020.

contends that the Judge wrongly advanced the decision to make a referral to the CJEU (and the referral itself) in order to avoid that situation.

4. If the Club's challenge is well-founded, it is also necessary to consider the extent of the jurisdiction of this Court in respect of an appeal against the decision of a judge to refer questions to the CJEU. The parties were agreed that the appeal could be entertained, and a reasoned judgment delivered, but there was disagreement as to whether the Court has jurisdiction to allow the appeal and set aside the referral and/or to direct the Judge to withdraw it.

The background

The Spanish Proceedings and the Spanish Judgment

5. These proceedings concern the enforcement in England and Wales of an "execution order" issued by the Provincial Court of Coruña of the Kingdom of Spain on 1 March 2019, declaring that the Club (among others) was liable to numerous claimants, including the Respondent ("Spain") for circa €2.355 billion but, in the case of the Club, subject to a global limit of €855,493,575.65, the Euro equivalent of US$1 billion less the fund deposited with the Spanish Courts in respect of the Club's compulsory insurance liability under the International Convention on Civil Liability for Oil Pollution 1992 (see footnote 3 below) ("the Spanish Judgment").

6. The Spanish Judgment, reflecting decisions of the Spanish Supreme Court on both liability and quantum, related to the sinking of the MT Prestige ("the Vessel") off Cape Finisterre on 19 November 2002 and the extensive pollution and massive damage caused along the Atlantic coastline of northern Spain and southern France by the escape of its cargo of 70,000 tonnes of fuel oil.

7. The Club was the Protection and Indemnity (P&I) insurer of the Vessel at the time the Vessel sank pursuant to a contract of insurance concluded by a Certificate of Entry dated 20 February 2002 ("the Contract"). The Contract was subject to a maximum aggregate amount of US$1 billion for any one occurrence and incorporated the Club's Rules of Class 5 – Protection and Indemnity ("the Club's Rules"). The Rules contained a "pay to be paid" clause, provided that the Contract was governed by English law and contained a London arbitration clause, any arbitration being subject to English law and the Arbitration Act 1996 ("the 1996 Act").

8. The Spanish Judgment was obtained in respect of a direct civil claim against the Club under Article 117 of the Spanish Penal Code brought in June 2010 ("the Spanish Claim") in on-going criminal proceedings against (among others) the Master, Chief Officer and Chief Engineer of the Vessel ("the Spanish Proceedings"). The Club has at all times contended that that Spanish Claim was brought in breach of the arbitration clause in the Contract requiring Spain to bring claims against the Club by way of London arbitration[3].

[3] The Club did not dispute the jurisdiction of the Spanish Court in respect of Spain's claim under the International Convention on Civil Liability for Oil Pollution Damage 1992. In 2003 the Club deposited a fund of approximately €22,777,986 with the Spanish Court in respect of its own and the Vessel's owner's liability under that Convention.

The arbitration and proceedings to enforce the award

9. In January 2012 the Club commenced arbitration proceedings against Spain. On 13 February 2013 the arbitrator, Alistair Schaff QC, made an award declaring that (1) Spain is bound by the arbitration clause contained in the Club's Rules and its claims must be referred to arbitration in London and (2) pursuant to the "pay to be paid" clause in the Club's Rules, the Club is not liable to Spain in respect of such claims in the absence of any prior payment.

10. Spain challenged the award pursuant to sections 67 and 72 of the 1996 Act on the ground that there was no arbitrable dispute and Mr Schaff had no jurisdiction, but that challenge was dismissed by Hamblen J on 22 October 2013. At the same time Hamblen J granted the Club permission to enforce the award pursuant to section 66(1) and entered judgment in terms of the award pursuant to section 66(2) of the 1996 Act, holding that Spain did not have state immunity because it was taken to have agreed in writing to arbitrate within section 9 of the State Immunity Act 1978: *The Prestige (No. 2)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309. The Court of Appeal dismissed Spain's appeal: [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33, holding that Spain had also waived state immunity by making its applications under sections 67 and 72 of the 1996 Act.[4]

Registration of Spanish Judgment

11. On 26 March 2019 Spain made an application for the registration of the Spanish Judgment as a judgment of the High Court pursuant to Article 33 of the Brussels I Regulation. Following standard practice, the application was made without notice to the Club. On 28 May 2019 Master Cook made a registration order on the papers.

These proceedings: the Club's appeal against the registration order

12. On 26 June 2019 the Club appealed the registration order pursuant to Article 43 of the Brussels I Regulation and the former CPR 74.8(2). The Club contended that the Spanish Judgment should not be recognised:

    i) under Article 34(3) of the Brussels I Regulation, because the Spanish judgment was irreconcilable with the prior judgment entered by Hamblen J dated 22 October 2013, enforcing an arbitration award which declared that the Club was not liable to Spain;

    ii) under Article 34(1) of the Brussels I Regulation, because recognition was manifestly contrary to English public policy in respect of (a) the rule of res judicata (applicable by virtue of the arbitration award and/or the judgment entered by Hamblen J); or (b) human and fundamental rights, the Club contending that the proceedings in Spain breached the rights of the Master to a fair trial, and therefore those of the Club.

13. The appeal was fixed for a two-week trial from 2 December 2020 to determine (i) as a matter of law, whether the judgment entered by Hamblen J constituted a judgment within the meaning of Article 34(3) and, if not, whether that judgment and the

[4] A parallel arbitration claim and subsequent proceedings under the 1996 Act were brought against France in respect of France's claim in the Spanish proceedings.

arbitration award (and the res judicata to which they give rise as a matter of English law) could be relied upon and (ii) as a matter of fact and law, whether the Spanish Proceedings had breached the human rights of the defendants, including the Club. There was no application, or order, for any of the issues raised by the Club's appeal to be determined as a preliminary issue. The trial was intended to determine all the issues in a single hearing. In respect of the human rights issues the parties exchanged witness statements and expert reports.

14. On 3 November 2020 Spain made an application seeking the reference of six questions to the CJEU (later adding a seventh). Spain invited Butcher J to determine that application at the hearing of the appeal in order to be in a position to lodge any request with the CJEU before "the Brexit cut off". It is unnecessary to list the questions proposed by Spain; it suffices to record that they included the questions which the Judge ultimately considered suitable for a reference, as reduced and refined by him, as follows:

> "(1) Given the nature of the issues which the national court is required to determine in deciding whether to enter judgment in the terms of an award under Section 66 of the Arbitration Act 1996, is a judgment granted pursuant to that provision capable of constituting a relevant "*judgment*" of the Member State in which recognition is sought for the purposes of Article 34(3) of EC Regulation No 44/2001?
>
> (2) Given that a judgment entered in the terms of an award, such as a judgment under Section 66 of the Arbitration Act 1996, is a judgment falling outside the material scope of Regulation No 44/2001 by reason of the Article 1(2)(d) arbitration exception, is such a judgment capable of constituting a relevant "*judgment*" of the Member State in which recognition is sought for the purposes of Article 34(3) of the Regulation?
>
> (3) On the hypothesis that Article 34(3) of Regulation No 44/2001 does not apply, if recognition and enforcement of a judgment of another Member State would be contrary to domestic public policy on the grounds that it would violate the principle of *res judicata* by reason of a prior domestic arbitration award or a prior judgment entered in the terms of the award granted by the court of the Member State in which recognition is sought, is it permissible to rely on 34(1) of Regulation No 44/2001 as a ground of refusing recognition or enforcement or do Articles 34(3) and (4) of the Regulation provide the exhaustive grounds by which *res judicata* and/or irreconcilability can prevent recognition and enforcement of a Regulation judgment?"

15. The trial lasted for seven days, the first five of which were devoted mainly to witness evidence and the last two days to closing submissions, including argument as to whether a reference should be made to the CJEU and, if so, in what terms. Further written submissions were to be made by the parties on the human rights issue. As prefaced above, the Judge nevertheless proceeded the next day to deliver judgment on the question of whether to make a reference.

The Judgment

16. At paragraph 16 of the Judgment the Judge identified that the relevant jurisdictional threshold for referring a question under Article 267 was that there is an issue of interpretation or validity which it is necessary for the national court to decide in order for it (i.e. the national court) to give judgment, not that a decision of the CJEU is necessary for the national court to give judgment. At paragraph 21 the Judge cited a passage from the judgment of Chadwick LJ in *Trent Taverns Limited v Sykes* [1999] EU LR 492 in support of that conclusion, ending with the explanation that "Once it is clear that the question has to be decided by this court, whether or not to seek the assistance of the Court of Justice is a matter of discretion".

17. Having identified that threshold, the Judge foreshadowed his decision at paragraph 24 of the Judgment as follows:

> "The issues on which I consider that there may be a case for a reference, which have been canvassed with the parties over the last two days and which I will shortly identify, are, in my judgment, all questions which it is necessary for me to decide in order to give judgment. By that, I mean that each of those questions is one which is in issue between the parties, which has been debated before me, and which I will have to decide as part of the process of giving a properly reasoned judgment on this appeal. Furthermore, they are certainly not points where it is quite obvious that those questions bear no relation to the actual nature of the case or the subject matter of the action. Accordingly I consider that the jurisdictional threshold of Article 267 is met."

18. The Judge recorded (at paragraph 28) the Club's submission that, given that the court was not in a position to say that the Club would not succeed in its human rights argument under Article 34(1), it was impossible to say that it was necessary to answer the questions the Judge proposed to refer to the CJEU. The Judge rejected that argument in the following terms:

> "31. The question appears to me to be whether the question, or questions, is or are critical for the purposes of my giving judgment on the issues before me. I am in no doubt that the three questions in issue are critical to that process. The two issues in relation to Article 34(3) would, if decided against The Club, determine that issue against it. A decision on those points would be a necessary step in a decision against Spain in relation to Article 34(3).
>
> 32. While it is true that The Club could win only by reference to the human rights aspect of Article 34(1), a point which I have not yet decided and I am not today in a position to decide, it is quite clear to me now that, even if that were the decision I reached on that aspect of the Article 34(1) point, I will have to decide and give judgment on the Article 34(3) point. It has been fully argued and is relied on by The Club as an independent basis on which it says it should succeed.
>
> 33. Furthermore, if I were to decide the case in The Club's favour on the basis of the Article 34(1) point as to human rights, there would

> almost inevitably be an appeal by Spain. As part of that appeal, The Club would wish to raise, by way of respondent's notice, the Article 34(3) point as an additional or alternative ground on which the appeal should fail. That seems to me to be a further factor indicating that the point should be regarded by me now as critical to my making a proper decision."

19. As for the imminence of Brexit, the Judge referred at paragraph 9 of the Judgment to the submission by Spain that the end of the implementation period (and the inability to make a reference thereafter) was a relevant consideration in the timing of the argument. The Judge stated that he would consider later in the Judgment what relevance, if any, the ending of the implementation period had to the decision he was going to make. The Judge did not, however, go on to explain why he considered it appropriate to accelerate the decision to make a reference (if indeed he considered that he was doing so), nor to indicate why he was making the decision prior to determining the human rights issue. The further consideration of the relevance of the end of the implementation period in the Judgment was limited to the following:

    i) In paragraph 46 the Judge rejected the Club's submission that the fact that the United Kingdom would cease to be a Member State at the end of the year meant that the question of whether a judgment under section 66 of the 1996 Act could be invoked to prevent the enforcement of a judgment from a Member State would not be important. The Judge stated that similar issues could arise in relation to the legal system of a continuing Member State and would remain germane for parties to the Lugano Convention if the UK accedes to it in its own right.

    ii) In paragraph 52 the Judge stated that he had not taken into account as being in favour of making a reference that, unless he made a reference, no appellate court would be able to do so because of the imminent end of the implementation period. Nevertheless, the Judge added the following:

> "There is…authority which indicates that that is a factor which counts in favour of making a reference at this stage. That is Eli Lilly v Genentech Inc. [2019] EWHC 388 (Pat), where Arnold J. notwithstanding that he had found all claims of the patent defended by Genentech to be invalid, made a reference to the CJEU of two questions relating to the supplementary certificate regulation which would have arisen had the patent been valid. Arnold J accepted that it was a factor in favour of his making a reference that, if there were a successful appeal against his patent judgment, the issues in relation to the supplementary certificate regulation would no longer be academic but that, at that stage, the Court of Appeal would not be able to make a reference. If that approach is right, it is an additional factor indicating that it is appropriate for me to make a reference now."

Whether the reference was necessary to enable the Judge to give judgment

The law

20. The Court of Appeal first considered (and gave guidance as to) the making of a reference to the CJEU under Article 267 (then Article 177 of the Treaty of Rome) in *H.P Bulmer Ltd v J. Bollinger SA* [1974] Ch 401. Lord Denning MR explained (at 421D) that, before making a reference to the CJEU, there was a condition precedent to be fulfilled, namely, that the English court (as opposed to the CJEU) considers it necessary, emphasising that if the English judge considers it *necessary* to refer the matter, no one can gainsay it save the Court of Appeal. As for whether a decision is necessary, Lord Denning stated at 422D as follows:

> "The English court has to consider whether "a decision on the question is *necessary* to enable it to give *judgment*." That means judgment in the very case which is before the court. The judge must have got to the stage when he says to himself: "This clause of the Treaty is capable of two or more meanings. If it means *this* I give judgment for the plaintiff. If it means *that* I give judgment for the defendant." In short, the point must be such that, whichever way the point it decided, it is conclusive of the case. Nothing more remains but to give judgment."

21. In further guidance at 423C, Lord Denning emphasised that, as a rule, it was best to decide the facts of the case before making a reference:

> "It is to be noticed too, that the word is "necessary". This is much stronger than "desirable" or "convenient". There are some cases where the point, if decided one way, would shorten the trial greatly. But, if decided the other way, it would mean that the trial would have to go to its full length. In such a case it might be "convenient" or desirable to take it as a preliminary point because it might save much time and expense. But it would not be necessary at that stage. When the facts were investigated, it might turn out to have been quite unnecessary. The case would be determined on another ground altogether. As a rule you cannot tell whether it is necessary to decide a point until all the facts are ascertained. So in general it is best to decide the facts first.

22. Stephenson LJ (with whom Stamp LJ agreed) explained the test of necessity at 428C as follows:

> The only question which the courts of a member-State can… refer to the European Court are questions of law within Article 177(1) on which decisions are necessary to enable them to give judgment. If they consider that they can give judgment in the dispute in which the question is raised without deciding the question, they need not and indeed must not trouble the European Court by requesting a ruling or bringing the matter before it.

23. Applying that principle to the case before the court, Stephenson LJ upheld Whitford J's decision not to accede to a request to refer at a preliminary stage a question to the CJEU which might not require determination after hearing the evidence, explaining at 428G as follows:

> "It is too early to say whether it will become necessary and whether he should request a ruling upon it later. When he has heard the evidence he may reject the respondents' claim. He may find that the appellants have a right to restrain the respondents from using the expressions "Champagne Cider" and "Champagne Perry", and from supplying beverages so described, without recourse to European Law or becoming involved in any law but the law of England as it was before the adherence of the United Kingdom to the European Economic Community added anything to it. If so, it will not be necessary for him to decide any question concerning the interpretation of the Community's Regulations. It was argued for the appellants that a decision of Question A might shorten proceedings and enable the judge to give judgment without going into evidence of passing off or acquiescence. But Article 177 does not provide for a court considering that a decision on the question is expedient or convenient, or necessary to enable it to give judgment shortly, or more shortly, or more cheaply and conveniently, but necessary to enable it to give it—justly of course but with no other implication or qualification."

24. Because Stamp LJ agreed with the judgment of Stephenson LJ without expressing agreement (or for that matter disagreement) with the judgment of Lord Denning MR, it is the judgment of Stephenson LJ which must be taken as authoritative. However, there is no disagreement between them so far as the passages set out above are concerned and those passages of Lord Denning's judgment have been followed in later cases.

25. In *Polydor Ltd v Harlequin Record Shops Ltd* [1980] 2 CMLR 413, this Court allowed an appeal from the grant of an injunction to restrain the importation of records of a particular song from Portugal in alleged breach of the plaintiffs' copyright; and at the same time made a reference to the European Court of Justice of the question whether European law precluded any infringement (which the Court held it clearly did). The plaintiffs advanced an argument, relying on Lord Denning MR's judgment in *Bulmer*, that the test of necessity was not fulfilled on the grounds that (i) there were other defences advanced, unrelated to the European law point, which might render it academic, and (ii) there was a factual issue which also remained to be resolved in relation to the importation of the records of the particular song which formed the subject matter of the action. Both members of the Court rejected the first ground on the basis that the defendants had abandoned all other defences. Templeman LJ rejected the second on the basis that the factual issue was precluded by the evidence. Ormrod LJ rejected it on the basis that it was "peripheral". He observed that the European law issue was of enormous importance to the record industry and was the "broad issue" on which they should deal with the case, being the issue on which all parties wanted a decision; in those circumstances the sooner the European Court gave a definitive ruling the better. In that context he said at [70]:

> "I would not for my part be inhibited by any nice questions of necessity, and would regard the word "necessary" as meaning "reasonably necessary" in ordinary English and not "unavoidable".

26. In my view this dictum of Ormrod LJ, when viewed in its context, is not inconsistent with Lord Denning MR's test in *Bulmer*, that the answer to a question referred must be "conclusive". The factual issue in relation to the one record which was the subject matter of the existing proceedings was essentially irrelevant to the "broad issue" between the parties, which was as to the legality of importation into the United Kingdom of records manufactured in Portugal more generally. On the broad issue, the European law question was conclusive.

27. *Bulmer* and *Polydor* were considered by the Divisional Court (Lord Lane CJ, Woolf J) in *R v Plymouth Justices ex pte Rogers* [1982] 1 QB 863. In that case the master of a Spanish trawler was prosecuted for breaching regulations restricting access of Spanish fishermen to UK waters. On a submission of no case to answer at the conclusion of the prosecution case, the magistrates referred to the European Court of Justice the question whether the regulations were invalid. On the appeal by way of judicial review, the Divisional Court considered an argument that a reference was not necessary on the grounds that the defence had intimated an issue of fact which would afford a defence if the regulations were lawful, upon which the magistrates had not yet heard evidence, and that therefore a decision on the validity of the regulations was not necessarily determinative of the outcome of the case. In rejecting the argument, Lord Lane CJ treated it as tantamount to a submission that there could never be a reference before the facts had been found, and said that such an approach was inconsistent with the general approach articulated by the European Court to Article 177, citing *Rheinmuhlen-Dusseldorf v Einfur- und Vorratsstelle fur Getreide und Futtermittel* (Case 166/73) [1974] ECR 33 at 38. He went on to refer to the "more generous interpretation" given to Article 177 in *Polydor*, citing the dictum of Ormrod LJ in that case. The reasoning of this decision, too, is consistent with the approach of Lord Denning MR in *Bulmer*, in recognising a distinction between the outcome of the issue which the court is being called on to decide, and the outcome of the case or dispute between the parties as a whole. The Divisional Court held at 870B-C that the submission of no case to answer required the magistrates to decide whether the regulations were valid; if they were, the outcome of the submission would be that the case would continue, and the factual issue would arise; if the regulations were invalid, the outcome of the submission would be a verdict of not guilty. Therefore the validity of the regulations was determinative of the outcome of the application the magistrates were deciding (i.e. whether there was a case to answer), albeit not necessarily determinative of the outcome of the case as a whole. In this sense the referred issue was conclusive. The Court went on at 870E-F to treat the factual issue as one on which the defendant was almost bound to fail so that there was no real distinction between the position at the close of the prosecution case and that which would have obtained after the defence case; and to emphasise that although the magistrates had jurisdiction to make a reference on a submission of no case to answer, it would not usually be a proper exercise of their discretion to do so.

28. Lord Denning MR's test in *Bulmer* was referred to in *Customs and Excise Commissioners v ApS Samex* [1983] 1 All ER 1042, where Bingham J identified two questions to be answered:

> "From the language of the article it is, I think, clear that, so far as the court of first instance is concerned, there are two questions to be answered: first, whether a decision on the question of Community law is necessary to enable it to give judgment, and, if it is so necessary, whether the court should in the exercise of its discretion order that a reference be made."

29. At 1054G Bingham J regarded the necessity test as satisfied where an answer to the question unfavourably to one party would have been the end of its case, whereas a favourable answer would have been "substantially, if not totally, determinative of this litigation". In *R (ex parte Else) v International Stock Exchange* [1993] QB 534 Sir Thomas Bingham MR, again referencing *Bulmer*, stated at 545D that the correct approach was quite clear, namely that a reference may be made: "if the facts have been found and the Community law issue is critical to the court's final decision…".

30. In *Trent Taverns* the question arose as to whether a reference should be made by the Court of Appeal hearing an appeal from an interlocutory order striking out an amendment to the defence and counterclaim of a lessee of a tied public house. The amendment added an Article 85 Community law ground, which was additional to domestic law grounds for rescission for misrepresentation which were already pleaded. Chadwick LJ stated that the test of necessity was met because a decision on the question of Community Law was necessary to enable the court to give judgment on the appeal. However, even in those circumstances the court declined to make a reference as a matter of discretion as the point might become academic following the trial, Chadwick LJ explaining at 499E as follows:

> "…It cannot be sensible to refer questions to the Court of Justice which may turn out to wholly academic. There is to be a trial, within the next two weeks, of the question whether the lease which contains the beer tie has been rescinded. It will be a matter for consideration what the position will be as to the claims under Art. 85 if the defendant succeeds in his contention that the lease was procured by misrepresentation and has been rescinded. It is, in my view, more sensible for the question whether a reference should be made to be considered in the light of that decision by the court of trial, and that can be done by the House of Lords in due course."

31. In *Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2003] 1 WLR 2295, [2003] EWCA Civ 327 Chadwick LJ again recognised that the test of necessity was met in relation to the jurisdictional issues which arose on appeal from a decision on a strike out application, but declined to make a reference as the matter would proceed to trial in any event, explaining as follows:

> "50…. But in exercising the power to refer the national court must observe some measure of self-restraint; lest the Court of Justice become overwhelmed. In particular, the national court should be cautious when asked to make a reference for a preliminary ruling in a case where it may turn out, after the facts have been established, that the point does not, in the event, arise.

> 51. In my view we should decline to direct a reference at this stage in the present case. My reasons are as these. Whatever the decision on the jurisdictional points raised on this appeal, the action will proceed to trial on the 1974 contract issue. If Prudential (UK) succeeds on that issue, the question whether it could succeed on the claim for infringement of its trade marks will become moot…"

32. It is apparent that the decisions in *Trent Taverns* and *Prudential* do not lessen or detract from the approach established in *Bulmer,* and consistently applied thereafter, if the test of necessity is applied to the decision the court is being invited to reach, rather than to the outcome of the dispute as a whole. In both cases the strict test of necessity was met in relation to the appeal before the court (that is to say, a decision on the question was necessary for the court to give judgment on the appeal), because the issue in each case arose on a strike out application and the European law question was critical to the determination of that application. The further question posed by Chadwick LJ in each case was whether, even then and as a matter of discretion, a referral should be made where the question, although conclusive of the appeal, might become academic to the outcome of the dispute between the parties. That explains why that further consideration was expressed in discretionary terms rather than in the language of a "condition precedent" as established by Lord Denning MR in *Bulmer.*

33. The strict approach to necessity was again apparent and applied in *R (Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR, [2019] EWCA Civ 22, where a reference was sought of questions arising in relation to the first of three grounds of appeal. In rejecting the request, Lindblom LJ stated at [63] as follows:

> "First, the appeal does not stand or fall on that ground. It fails because the second and third grounds must be rejected. A decision on the questions in the reference would therefore not be necessary to enable [this court] to give judgment" as article 267 FEU requires".

34. It is also established that the court considering making a reference can only do so where a decision on the question to be referred is necessary for that court to give judgment, not for another court (such as an appeal court) to do so: see the judgment of the CJEU in *Pardini v Ministero del Commercio Con L'Estero* (Case C-338/85) at [10].

35. As the Judge noted in his Judgment, the question of whether a different approach could be taken to the test of necessity in the lead up to Brexit was considered in *Eli Lilly v Gentech.* The Judge correctly recorded that Arnold J had referred a question to the CJEU, even though it did not arise based on his decision, because the Court of Appeal, on an appeal against his decision, might not be able to make a reference following Brexit. However, the Judge was not informed that, by the time of the Judgment, the CJEU had already ruled, in a reasoned order dated 5 September 2019, that Arnold J's request for a preliminary ruling was "manifestly inadmissible" because the test of necessity was not met. The Court explained as follows:

> "16. …it is for the Court to examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part

to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 41 and the case-law cited).

17. Thus, the justification for a reference for a preliminary ruling is not that it enables such opinions to be delivered but rather that it is necessary for the effective resolution of a dispute concerning EU law (judgment of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraph 50 and the case-law cited).

18. In this case, as is apparent from the information provided by the referring court set out in paragraph 9 of this order, that court held that the claims of the basic patent were invalid, which was liable to render the SPC application based on that patent invalid. Whilst acknowledging, in those circumstances, the hypothetical nature of this request for a preliminary ruling, that court nonetheless considers that the request is necessary.

19. First, it is submitted that it is likely that Genentech will appeal against the decision of the referring court before the Court of Appeal (England & Wales) (United Kingdom). However, because of the notification by the United Kingdom of Great Britain and Northern Ireland of its intention to withdraw from the European Union pursuant to Article 50 TEU, it is highly probable that the Court of Appeal will cease to have jurisdiction to refer a question for a preliminary ruling to the Court of Justice, so that it is necessary that the referring court refer such a question now.

…..

22. It must be held that those grounds are not capable of justifying that this request for a preliminary ruling, notwithstanding its hypothetical nature, be declared admissible.

23. In the first place, the need for an answer to this request cannot be justified by the eventuality that the Court of Appeal (England & Wales) will be deprived of the possibility of referring a question for a preliminary ruling to the Court because of the notification by the United Kingdom of its intention to withdraw from the European Union pursuant to Article 50 TEU.

….

26. The circumstance, which is moreover purely hypothetical at this stage, that such a court might subsequently lose its jurisdiction to refer such a question because of that withdrawal, when that withdrawal takes effect, is not, in that regard, capable of justifying another court, such as the referring court, being able to refer that question pre-emptively, notwithstanding its hypothetical nature.

> 27. In the second place, the existence of disputes in other Member States of the European Union or of previous disputes clearly does not support the conclusion that the interpretation of EU law that is sought is necessary for the resolution of the dispute which the court is called upon to resolve.
>
> 28. It must therefore be held that the question referred is hypothetical for the purposes of the dispute in the main proceedings."

36. Provided that the condition precedent of necessity is satisfied, the timing of any reference to the CJEU is a matter for the national court, as emphasised by the CJEU itself in *Irish Creamery Milk Suppliers Association v Government of Ireland* [1981] 2 CMLR 455, pointing out at [8] that the decision must be dictated by considerations of procedural organisation and efficiency to be weighed by that national court. The ability of national courts to achieve procedural efficiency is not compromised by a strict test of necessity once it is recognised that the test falls to be applied to the outcome of the issue which the court is called on to decide, not the outcome of the dispute between the parties. So in both *Trent Taverns* and *Prudential*, the necessity test was satisfied because the issue before the court arose on a strike out application, notwithstanding that the issue might prove to be academic to the outcome of the dispute between the parties. So too in *ex pte Rogers*, the European law issue was determinative of the application to dismiss, albeit not necessarily determinative of the outcome of the prosecution as a whole. It is open to a national court, if it considers it appropriate in the interests of procedural efficiency, to isolate for separate determination the question upon which European law is determinative, even if that involves a question which will not necessarily be determinative of the outcome of the dispute between the parties because, for example, that outcome will depend upon subsequent fact-finding, the delay and expense of which will be avoided if (but only if) the issue is resolved in one way. Sometimes a decision on a question of EU law may be necessary to enable a national court to give judgment even though the proceedings will continue however the question of EU law is decided. An example is the *Factortame* litigation, where a question of EU law as to the court's power to grant interim relief was referred to the Luxembourg court (see [1990] 2 AC 85). An answer to the question referred was critical to whether an injunction should be granted. But whatever the answer, the proceedings would continue.

37. Providing the European law question is conclusive of the issue which the national court has to decide on a particular occasion in accordance with its national procedure, the necessity test will be fulfilled. Under our domestic procedure, an order for the determination of a preliminary issue is one obvious means of achieving that result. Applying the test of necessity in this way is not, therefore, tantamount to saying that there can never be a reference before determination of the facts, and is not inconsistent with the European Court approach articulated in *Rheinmuhlen* and *Irish Creamery*. In the present case, however, there was no order that a preliminary issue to be determined and accordingly the question which the Judge had to decide was whether to dismiss the Club's appeal or to allow it and set aside the order for registration of the Spanish Judgment.

38. The timing at which to get a ruling was one of the matters addressed by Lord Denning MR in the guidelines he established in *Bulmer*, referring in particular to the delay which may be caused in the progress of the case by a reference to the CJEU. The same point

was addressed by Stephenson LJ, who said at 430C that "the basic requirement" is "that the decision of the question raised must be necessary at the time the reference is requested…"

Application of the law in the present case

39. In my judgment it is entirely clear that a decision on the questions referred to the CJEU in the present case was not *necessary* for the Judge to give judgment on the appeal before him as that term has been interpreted in the authorities referred to above. Unless and until the Judge had determined the human rights public policy issue against the Club, the questions referred could not be said to be *conclusive* or even *substantially determinative* of the appeal and it remained entirely possible that the questions referred would, in the end, be academic: the questions could have been resolved entirely in Spain's favour, yet the Club could have won on the human rights issue. In paragraph 32 of the Judgment the Judge expressly recognised that the Club could win solely by reference to the human rights issue, a point he was not in a position to decide at that time (and, indeed, in respect of which he was yet to receive further submissions from the parties).

40. It follows that the Judge recognised that a decision on the questions referred was not necessary in the sense described above. It is apparent from paragraphs 24 and 31-33 of the Judgment that the Judge instead relied (i) on the fact that a decision on the questions referred was necessary for him to give "judgment on the issues before him" and (ii) on the fact that, even if the Club were to win on the human rights issue, the questions would arise for decision on an appeal, meaning that the points should be regarded as critical to making a proper decision.

41. With respect to the Judge, that approach was flawed and failed to take into account the applicable legal principles and authorities:

    i) In referring to giving "judgment on the issues" the Judge meant his reasons delivered on the issues, being the justification of the order he would ultimately make. However, the term "judgment" in Article 267 is not referring to the giving of reasons, but to the order or determination resulting from those reasons. It is also clear that the authorities discussed above had in mind that meaning of "judgment" in formulating the test of necessity: see for example Lord Denning MR's explanation that a decision being necessary to give judgment meant that the judge must have got to the stage where he could enter judgment for one party or the other based on the outcome.

    ii) The Judge therefore considered that a decision was "necessary" on a question, even if a decision on the relevant point was ultimately not strictly required, so that his reasoning in that regard would be *obiter*. That approach falls foul of the approach established in *Bulmer* and applied consistently by the Court of Appeal up to and including *Shirley*. Even in cases where a decision on an issue was strictly necessary at an interlocutory stage, the court has exercised its discretion not to refer the question if it may ultimately be academic.

    iii) Taking into account the possibility that a point may need to be decided in a different court is impermissible and cannot, on a proper application of the test

of necessity, make a decision on a question "critical" when it would not otherwise properly be so regarded.

42. Mr Young QC, on behalf of Spain, whilst accepting that the authorities laid down a "materiality test" for making references to the CJEU, argued that that test was not one of jurisdiction, but was a matter relevant to the Judge's discretion. He argued that the test in Article 267 focused on the perception of the Judge as to what was necessary and that he was best placed to make that assessment in the context of the appeal he was hearing. The Judge had looked at the matter broadly and judged it by appropriately wide criteria: it could not be said that he had "rushed to make a reference" when it was being made at the conclusion of a trial. In summary, Mr Young argued that the Judge exercised his discretion on the right principles and did not act irrationally, seeking help from the CJEU on relevant issues at the right time.

43. I do not accept those submissions for the following reasons:

i) A decision to make a reference under Article 267 is not a purely discretionary matter, there being a legal test of necessity that must first be satisfied. The Judge himself referred to the necessity test as being one of "jurisdiction". Lord Denning MR described it in *Bulmer* as a condition precedent, arising before the exercise of discretion.

ii) Whilst consideration of whether that test is satisfied is a matter for the English judge in the first place (rather than the CJEU), it is not a purely discretionary exercise and may be reviewed by the Court of Appeal (per Lord Denning MR in *Bulmer*) and may be overturned by the CJEU (as in *Eli Lilly*).

iii) The judge's discretion as to whether to make a reference only arises once the test of necessity has been satisfied. The cases referred to above where the Court of Appeal exercised a discretion not to refer were ones in which it was recognised that the necessity test had been met (*Trent Taverns* and *Prudential*).

iv) In any event, the Judge applied the wrong test in considering the issue of necessity.

44. Mr Young next argued that the Judge was effectively treating the issues which gave rise to the questions referred as preliminary issues which he wished to decide, therefore justifying a reference as the answers to the questions were necessary for him to do so. I recognise, of course, that a court may need to decide matters on a preliminary or interlocutory basis which will justify a reference. That, however, was not the situation in the present case. The Judge had heard all of the issues on the appeal together and was proposing to give judgment on them all together. There is no doubt (as he recognised) that his determination of the human rights issues might render the answers to the questions unnecessary in a strict sense, relevant only on an appeal.

45. Mr Young further argued that the test of necessity cannot be applied too rigidly, as to do so would sometimes prevent the reference of multiple questions even if cumulatively decisive, as would have been the case here but for the human rights issue. If each question had to be decisive, he argued, none of the questions in the present case could properly be referred. Again, I see no merit in that point. The reference to the singular "question" in Article 267 must include the plural, and I see no difficulty with the

necessity test if the answers to all the questions referred will cumulatively be conclusive of the case before the referring judge.

46. It follows that I am satisfied that the test of necessity under Article 267 was not met on 21 December 2020, with the result that the Judge did not have a discretion to make a reference to the CJEU on that date. Unless and until the Judge had decided that the Club would not succeed on its human rights ground, the time to consider referring the questions of EU law had not arrived.

Conclusion on the merits of the appeal

47. It follows that I consider that the Judge was wrong to make the reference to the CJEU. In the ordinary course I would allow the appeal, but in this case it is necessary to go on to consider the jurisdiction of the Court in that regard.

Jurisdiction of the Court of Appeal

48. The Court of Appeal has consistently exercised jurisdiction to entertain appeals from decisions to make (or not to make) a reference under Article 267 (or its predecessors), including *Bulmer*, cited above. In both *Else* and *R (A) v Secretary of State for the Home Department* [2002] 3 CMLR 14 the Court of Appeal set aside references made at first instance on the ground that the question referred was *acte claire*.

49. Spain contends that approach cannot be followed in the light of the decision of the CJEU in *Cartesio Oktato es Szolgaltato bt* (Case 210/06) [2009] Ch 354 (considering Article 234 EC, the predecessor to Article 267), a decision which remains binding in this jurisdiction by virtue of sections 4 and 6 of the European Union (Withdrawal) Act 2018. The CJEU, referring to itself as "the Court", explained as follows:

> "89. It is…clear from the case-law of the Court that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law. Nevertheless, in the interests of clarity and legal certainty, the Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked (Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139, paragraph 3).
>
> …….
>
> 92. It is clear from the order for reference that, under Hungarian law, a separate appeal may be brought against a decision making a reference to the Court for a preliminary ruling, although the main proceedings remain pending in their entirety before the referring court, proceedings being stayed until the Court gives a ruling. The appellate court thus seised has, under Hungarian law, power to vary that decision, to set aside the reference for a preliminary ruling and to order the first court to resume the domestic law proceedings.

93. As is clear from the case-law…concerning a national court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude a decision of such a court, making a reference to the Court, from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.

94. It should be pointed out, moreover, that the Court has already held that, in a situation where a case is pending, for the second time, before a court sitting at first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court (Case 146/73 *Rheinmühlen-Düsseldorf*).

95. Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article 234 EC confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.

96. In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

97. It follows that, in a situation such as that in the case before the referring court, the Court must – also in the interests of clarity and legal certainty – abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision.

> 98. In the light of the foregoing, the answer to the third question must be that, where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings."

50. Spain contended[5] that the meaning and effect of *Cartesio* is that, whilst an appellate court can entertain an appeal and can deliver an "advisory" judgment (if that is possible as a matter of English law, which it disputed), such a court cannot set aside or vary the order making the reference below.

51. I do not agree that the judgment in *Cartesio* is to be read in that way. The CJEU stated expressly in each of paragraphs 89 and 93 that Article 267 does not preclude a decision to make a reference for a preliminary ruling from being subject to the remedies available on appeal under national law. It is also clear that the remedies the Court had in mind included setting aside the reference (see in particular paragraph 92). It could not be clearer, in my judgment, that as a matter of national law a reference can be set aside on appeal.

52. The qualification is that, even if an order is made by the national appellate court to set aside the order, the reference will continue because the Court (that is to say, the CJEU) will continue to abide by the decision of the referring court to make the reference and it will have full effect unless and until withdrawn by the referring court (see paragraph 97). Whilst as a matter national law and procedure the decision to refer may have been set aside, as a matter of EU law the reference is considered to have been validly made unless withdrawn.

53. The position is further clarified by the reference in paragraph 96 to the need for the referring court "to draw the proper inferences from a judgment delivered on an appeal against its decision to refer": this cannot be read as being limited to an "advisory" judgment as the CJEU has made plain throughout this section of its judgment that it has in mind an appeal seeking the usual remedies available in the national court.

54. I therefore conclude that this Court has all of its usual powers on this appeal and that it may, if appropriate, set aside the Judge's order. Making such an order would not stop the CJEU from entertaining the reference, which has been lodged and (we were informed) has been allocated a hearing date. The CJEU will continue to regard the reference as having been made within the Judge's jurisdiction (subject to itself ruling it manifestly inadmissible as in *Eli Lilly*) and would only cease to do so if the Judge, on consideration of this Court's judgment, decided to withdraw the reference himself

[5] Referring to *Preliminary References to the European Court of Justice* 2nd ed at pp. 329-330.

(having considered this Court's judgment). This Court also has the power, without setting aside the decision to remit the matter to the Judge to consider whether to withdraw the reference in the light of the Court's judgment.

55. I should add that we were referred to *IS v Hungary* (Case C-564/109), a decision of the CJEU which post-dates IP Completion Day and therefore is not binding on us, but to which we can have regard. The decision concludes at [82] that Article 267 precludes the supreme court of a Member State from declaring, following an appeal, that a request for a preliminary ruling by a lower court is unlawful on the grounds that the questions referred are not relevant and necessary and that the principle of the primacy of EU law requires that lower court to disregard such a decision. On its face, that decision appears to be inconsistent with *Cartesio* in a number of respects, and is perhaps explicable by the extreme facts, the Hungarian supreme court adopting the position that conformity of Hungarian law with EU law could not be the subject of a reference for a preliminary ruling. In my judgment it should not change the approach of this Court informed by the decision in *Cartesio*.

Conclusion as to the disposal of the appeal

56. For the reasons set out above I would allow the appeal and, being satisfied that the Court has its usual powers and that there is no good reason to refrain from exercising them, would set aside the Judge's order referring the questions to the CJEU. Consistently with the approach referred to in paragraph 96 of *Cartesio*, I would also refer to the Judge, pursuant to CPR 52.20(2)(b), the question of whether, in the light of this Court's judgment, the reference he made to the CJEU on 21 December 2020 should be withdrawn by him.

57. Following the circulation of the draft of this judgment, the parties informed the Court that the reference was heard by the CJEU on 31 January 2022 and that the opinion of the Advocate General is expected on 5 May 2022, with the judgment of the CJEU to be delivered at any time thereafter. The Club applied for an order that the determination of the question I propose be referred to the Judge should be expedited to ensure that any decision to withdraw is communicated as soon as possible and in any event prior to the judgment of the CJEU (withdrawal being permitted and effective at any time until notice of the date of delivery of judgment has been served). For my part, I consider that it is sufficient for this Court to indicate that the hearing before Butcher J should take place as soon as possible, and in any event in time for any decision to withdraw the reference to be effective.

Lord Justice Popplewell:

58. I agree.

Lord Justice Males:

59. I also agree.