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Case No: CL-2018-000572

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2019

Before :

THE HONOURABLE MR JUSTICE BRYAN

Between :

DAIMLER AG

**Claimant/
Respondent**

and

- (1) ~~MOL (EUROPE AFRICA) LTD~~**
(2) ~~MITSUMI O.S.K. LINES, LTD.~~
**(3) WALLENIUSREDERIERNA
AKTIEBOLAG**
(4) WALLENIUS WILHELMSSEN ASA
(5) WALLENIUS LOGISTICS AB
**(6) WILHELMSSEN SHIPS HOLDING MALTA
LIMITED**
(7) WALLENIUS WILHELMSSEN OCEAN AS
(8) ~~KAWASAKI KISEN KAISHA, LTD.~~
(9) "K" LINE HOLDING (EUROPE) LIMITED
~~(10) NIPPON YUSEN KABUSHIKI KAISHA~~
(11) NYK GROUP EUROPE LIMITED
**(12) COMPAÑIA SUDAMERICANA DE
VAPORES SA**
(13) "K" LINE EUROPE LIMITED

**Defendant/
Applicants**

Brian Kennelly QC and Andrew Scott
(instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Josh Holmes QC and William Hooper
(instructed by **Travers Smith LLP**) for the **Third to Seventh Defendants**
Marie Demetriou QC and Daniel Piccinin
(instructed by **Stephoe & Johnson UK LLP**) for the **Eleventh Defendant**
Sarah Abram (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**)
for the **Twelfth Defendant**

Hearing dates: 14 and 15 November 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 61.1 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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THE HONOURABLE MR JUSTICE BRYAN

MR JUSTICE BRYAN:

A. INTRODUCTION

A.1 The Applications

1. This is the hearing of applications (“the Applications”) brought by the Third to Seventh Defendants (collectively, “WWL”), the Eleventh Defendant (“NYKE”); and the Twelfth Defendant (“CSAV”) against the Claimant (“Daimler”). The argument in support of the Applications was led by Ms Demetriou QC counsel for NYKE but I also received skeleton arguments and heard oral submissions from counsel for each of WWL (Mr Holmes QC) and CSAV (Ms Abram).
2. The Applications are in materially identical terms and seek:
 - (1) To strike out, or have summarily dismissed, that part of Daimler’s claim which is based on international maritime services provided by the Defendants exclusively between ports located outside the EEC/EC/EEA during the period prior to 18 October 2006; or alternatively
 - (2) to obtain a reference for a preliminary ruling to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union (“TFEU”).
3. Daimler opposes the Applications. It submits that it would be wrong summarily to determine what it characterises as a narrow and controversial point of EU law, and that to do so would risk injustice to Daimler and serve no useful purpose. It says that there is no justification for seeking a preliminary ruling from the CJEU because the main question that the Applicants want to have referred are already before the CJEU as a result of a reference from the Dutch courts, and guidance will be forthcoming from the CJEU in any event. It submits that were the Court minded to make a reference for a preliminary ruling from the CJEU there would be no good reason for a stay in the meantime, still less a stay of all the proceedings, given the limited application of the reference to the overall proceedings.

A.2 The Claim

4. Daimler claims damages to compensate it for loss that it alleges it has suffered as a result of the Defendants’ participation in what it says was a serious price-fixing and market-sharing cartel relating to the provision of roll-on, roll-off cargo services (“RoRo Services”), contrary to EU/EEA competition law and infringements of Article 101 TFEU and Article 53 EEA. The alleged infringements comprise agreements between the Defendants restricting competition to supply international shipping services for roll-on, roll-off cargo. Daimler alleges that these agreements were in place and caused it to suffer loss from at least February 1997 to at least 6 September 2012 (the “Relevant Period”).
5. Daimler alleges that the alleged infringements affected RoRo Services in various places around the world, including but not limited to the EU and EEA. A proportion of

Daimler's claim relates to RoRo Services between non-EEA ports (e.g. shipping cars from Tokyo to Sydney) ("non-EEA services").

6. In support of its Claim, Daimler relies on a decision of the European Commission ("EC") in Case AT.40009 – Maritime Car Carriers published on 21 February 2018 (the "EC Settlement Decision"), along with other decisions and actions of criminal and competition authorities around the world that it alleges establish or evidence the unlawful cartel conduct. The EC Settlement Decision found that a number of undertakings infringed Article 101(1) TFEU and Article 53(1) EEA. The EC Settlement Decision was addressed to various entities in the MOL, WWL, K-Line, NYK, and CSAV undertakings. Each of the addressees of the EC Settlement Decision (including NYKE's parent, NYKK and the K-Line Defendants' parent, KK) settled the investigation by admitting to having participated in unlawful cartel conduct amounting to a single and continuous infringement of EU/EEA law from 18 October 2006 to 6 September 2012.
7. As to the nature of the wrongdoing, the EC found (among other things) that "*the parties applied the rule of respect as a guiding principle for their practices*" on various routes worldwide, including the EEA; that there was an "*overall scheme pursuing a single anti-competitive object and single anti-competitive aim of restricting price competition*"; that this was "*structured around the "rule of respect" involving "a combination of multi-lateral and bi-lateral contacts"*"; and the parties "*knowingly substituted the risks of competition between them for practical co-operation*"; such "*behaviour [having] all the characteristics of an "agreement" and/or "concerted practice"*" within the meaning of Article 101(1) TFEU and Article 53(1) EEA. The fines imposed by the EC were substantial (EUR207,335,000 in the case of the WWL Defendants; EUR39,100,000 in the case of the K-Line Defendants' parent, EUR141,820,000 in the case of NYKE's parent; and EUR7,033,000 in the case of CSAV SA).
8. Daimler also relies on Foreign Regulatory Materials (as pleaded out in the Re-Amended Particulars of Claim "RAPOC"). For example, in the United States the Defendants or other entities in their corporate groups entered into plea agreements, pleaded guilty to criminal cartel offences, and accepted fines in excess of US\$167 million; and in the cases of the NYK and WWL/EUKOR undertakings, the admitted infringements dated back to (respectively) February 1997 and February 2000. In Australia, NYKE's parent admitted to similar criminal offences and was fined AUD25 million in the context of what was described as an "extremely longstanding global cartel".
9. One of the issues for trial is when the "Unlawful Arrangements" (and in particular the "Respect Agreement") first commenced. The 18 October 2006 date referred to in the EC Decision is a deemed start date, by which the EC limited its finding of liability as part of agreeing a settlement with the RoRo carriers. This was a reflection of the EC's assessment of its jurisdiction as part of a settlement process, rather than a factual finding as to when the cartel began (Daimler contends that the wrongdoing began much earlier and can be traced back to as early as February 1997 (as it says is reflected in the Foreign Regulatory Material).
10. As regards the EC's jurisdiction and the 18 October 2006 deemed start date for the infringement that it found, Recital (42) of the EC Decision states as follows:

“The rules for the implementation of competition law apply to all maritime transport services, including to cabotage and international tramp services since the entry into force of Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 on 18 October 2006. That date is the earliest date from which the Commission can exercise its jurisdiction to sanction the conduct of the parties. In order to reflect this jurisdictional change and for the purposes of the present decision, the conduct is deemed to have started for all parties on 18 October 2006”.

11. 18 October 2006 was taken for the purposes of the EC Settlement Decision to be the deemed start date, because it was the first date from which EU/EEA competition rules applied to “*all maritime services, including to... international tramp services*” (emphasis added). Prior to that date, tramp vessel services were expressly excluded from the scope of the EU/EEA competition rules (Regulation (EEC) 4056/86, Art. 1(2)). By choosing that start date, the EC did not need to examine whether the RoRo services covered by the EC Decision were tramp shipping services or not. An issue in the present action (which it is common ground is not suitable for summary determination) is whether the services were tramp shipping (which may turn on disclosure and factual and expert evidence).
12. Daimler’s primary head of loss is in respect of the alleged overcharges paid on RoRo Services purchased in respect of various routes worldwide during and following the Relevant Period. These are the “Overcharge Losses” which are particularised in the RAPOC. Daimler estimates the value of the affected commerce to be in excess of US\$1,943 million. Daimler states that the vast majority of that was in respect of routes to and/or from a port in the EEC/EEA. Daimler says that only a small minority was in respect of routes that are exclusively to/from a port outside the EEC/EEA. Daimler presently estimates its total Overcharges Losses amount to US\$214 million.
13. Daimler’s Claim was issued in August 2018, but the action has yet to progress to a CMC in circumstances where CSAV had to be served in Chile. Service has now been effected, with Defences and in some cases Amended Defences served. In the meantime issues of early disclosure of a confidential version of the EC Settlement Decision and documents on the EC’s investigatory file have been progressed and it has now been agreed that the same will be provided, as contained in a Consent Order I made in October 2019. It is said by Daimler that this early disclosure will enable Daimler to provide further and better particulars of its claim, to narrow the issues in dispute, and formulate targeted further disclosure requests at the first CMC.
14. The First Defendant (MOL (Europe Africa) Ltd (“MOL”)) has agreed to settle the Claim with Daimler, and immediately before the hearing I was informed that an agreement in principle has been reached with the Ninth and Thirteenth Defendants, but the Defendants making the present Applications have put Defences in and join issue with Daimler as to its Claim.
15. Daimler submits (but the Defendants deny) that the Applications are premature, in advance of the first CMC, as the Applications raise case management considerations which would have been better addressed at that CMC where it would be possible to have a fuller picture of the action including the issues that would arise in relation to disclosure and how they would be dealt with. The Defendants submit, however, that it is important

that the Applications were issued when they were, and are determined now, lest the Court considers that a reference to the CJEU should be made, and to maximise the chances of any such reference being heard together with a reference made by the Dutch courts.

A.3 The Subject Matter of the Applications and their Context

16. The Defendants' applications raise a point of law concerning the temporal scope of the Court's jurisdiction to enforce EU/EEA competition law. Daimler submits that:-
 - (1) It is a narrow point (which is common ground) and that its resolution at this stage would have limited practical utility (which is not common ground); and
 - (2) It is a controversial point as to the temporal scope of the Court's jurisdiction to enforce UE/EEA competition law.
17. The legal issue is whether the High Court has jurisdiction to determine a claim brought under EU/EEA competition law in respect of international maritime services between ports outside the EEC (as it then was) prior to 18 October 2006. The Defendants say that the Court has no jurisdiction to find that conduct in respect of maritime transport services relating exclusively to non-EEC ports infringed EU/EEA competition law prior to 11 October 2006 ("Non-EEC Services Pre-2006").
18. It is common ground that the point is a narrow one, because it only arises in respect of the provision of RoRo Services between embarking and disembarking ports that are non-EEA and only in the period prior to 11 October 2006. The point turns on a consideration of the effect of substantive EU/EEA competition law and the legislation enacted to implement it in that prior period; as well as the CJEU authorities that have considered these issues and associated English Court of Appeal authority.
19. To put the point in context in relation to the action as a whole, Daimler's Overcharge Losses for this period are estimated by it at US\$5.8 – 9.5 million, out of the US\$214 million in Overcharge Losses being claimed (plus a substantial sum of compound interest). Accordingly, if the Defendants are correct in their arguments regarding it (and Daimler say that they are not) the point would only affect a small percentage of the Claim by value, which Daimler puts at in the range of 3-4% of the claimed damages. The Defendants do not accept Daimler's figures but submit that, even on Daimler's estimates, in absolute terms the amount in issue is substantial.
20. Daimler submits that the point is not only narrow, but that the resolution of it at this stage would also have limited practical utility, as it says that the temporal scope of the Claim overall will remain the same, as will the geographical scope of the claim and that regardless of the determination of the Applications, the disclosure that will be needed for a fair trial of the liability and quantum issues in this case will be much the same. Such points are not accepted by the Defendants and they are very much in issue.
21. The point of law is characterised by Daimler as controversial because the English Court of Appeal and the Amsterdam District Court (a court of first instance) have reached differing conclusions regarding the CJEU authorities that underlie it, with the Dutch court making a reference for a preliminary ruling to the CJEU in September 2019.

22. More specifically, the Defendants rely on a recent English Court of Appeal authority, namely *La Gaitana Farms SA & Ors v British Airways plc* [2019] 1 WLR 3793 (CA) (“*La Gaitana*”), in which the English Court of Appeal held, in the context of air transport services, that the effect of these CJEU authorities is that national courts have no jurisdiction to apply EU/EEA competition law to conduct during the period covered by a “transitional scheme”, that period being up to 1 May 2004 in the case of air transport services.
23. It is said that the same analysis applies, by analogy, to the RoRo Services in these proceedings, with the consequence that the Court has no jurisdiction to determine the part of the Claim that relates to the provision of such services on routes that involve exclusively non-EEA ports in the period prior to 11 October 2006. The Defendants submit that the existing EU authorities on the subject are clear, that the Court of Appeal’s analysis of the applicable EU/EEA provisions and previous CJEU authorities is impeccable, that there is no prospect of the CJEU departing from its previous reasoning or reaching a different conclusion to that in previous analogous cases, and in such circumstances that the relevant claims should be struck out.
24. Daimler maintains that *La Gaitana* was wrongly decided as a matter of EU law. It relies on the different analysis of the underlying EU legislation and CJEU authorities in the Amsterdam District Court’s decision in *Stichting Cartel Compensation v KLM & others* (1 May 2019) (“*Stichting*”). That Court expressly considered the approach in *La Gaitana* to be wrong as a matter of EU law, and asked the CJEU for a definitive ruling (Case C-819/19).
25. In a letter dated 4 November 2019 Daimler’s solicitors set out Daimler’s position. At paragraph 2 thereof three reasons are set out as to why Daimler submits that the Applications should be dismissed:-
 - “a) The decision in the Court of Appeal in *La Gaitana*... is wrong. **As matters currently stand, this judgment is binding on the High Court and Daimler would need to take the issue back to the Court of Appeal to have it reconsider the decision in *La Gaitana*.** However, should the Court of Justice of the European Union (“CJEU” determine that as a matter of EU law, the decision of the Court of Appeal in *La Gaitana* is wrong, then the High Court would be required to apply the law as determined by the CJEU). For that reason the applications are premature and should be dismissed.
 - b) The legal issues raised by the Applications are now before the CJEU following the preliminary reference...of the District Court of Amsterdam in *Stichting*... (the “Dutch Reference”)... The remaining Defendants can renew their Applications following the outcome of the Dutch Reference, although should the CJEU determine that the decision of the Court of Appeal in *La Gaitana* is correct, Daimler will likely amend its claim in respect of the Claim period pre-2004.
 - c) The Commercial Court should not make an order for a preliminary ruling from the CJEU under Article 267 TFEU. The Dutch Reference is already with the CJEU and it will determine the relevant legal issues. That is agreed as between the parties. There is no good reason for an additional preliminary reference to be made on the same issues.

The remaining Defendants have not presented any evidence to support an argument that, if a preliminary reference were made, it would be heard together with the Dutch Reference.” (emphasis added)

26. It will be seen that Daimler (rightly) accepts in paragraph 2 a), as quoted above, that this Court is bound, as a matter of precedent, by the decision of the Court of Appeal in *La Gaitana* (and would be required to apply the same at trial). Daimler also envisages that if this Court were to accede to the Applications and strike out the Claims or grant reverse summary judgment then “it would need to take the issue back to the Court of Appeal to have it reconsider the decision in *La Gaitana*”. However the Defendants submit that it would not, in fact, be open to the Court of Appeal to reconsider the point (on the assumption that the matter came before the Court of Appeal before the CJEU had ruled on the point). This would, prima facie, appear to be correct (as a matter of *stare decisis*) with the result that Daimler would need to seek permission to raise the point before the Supreme Court in that eventuality.
27. This would all, says Daimler, be a complete waste of time and costs given that in the fullness of time, and in all probability before the trial of this action, the CJEU will have definitively determined the point once and for all, and without the delay, multiplicity of proceedings (due to aspects of the present case proceeding at first instance and at appellate levels) and increased costs and use of limited court resources, all in circumstance where Daimler says that the point has limited practical utility for the reasons it identifies.
28. In contrast, the WWL Defendants submit in their Skeleton Argument that the reference in *Stichting* is “of no relevance to the question of whether there is – at present and as the Applications must be judged – a substantive basis for opposing the pre-1 May 2004 component of the Applications” (emphasis added). CSAV submits the reference in *Stichting* is irrelevant based on the doctrine of precedent. For its part NYKE says that the question is whether “this Court has some doubt about the Court of Appeal’s analysis” and invites the Court to say that the Dutch Court’s judgment is erroneous based on Flaux LJ’s analysis in *La Gaitana* (or at least that is how Daimler characterises NYKE’s submission, it being submitted that NYKE is thereby asking the Commercial Court to opine on both the Court of Appeal’s analysis and indeed rule on the very issue referred to the CJEU in *Stichting*).
29. Daimler submits that all these approaches proceed on the mistaken premise that this is a trial and the Court is being asked to apply the law informed by the doctrine of precedent whereas what the Court is in fact being asked to do is (as a matter of the exercise of discretion) to strike out/grant summary judgment now, notwithstanding the fact that there is a pending reference before the CJEU, and as such (so it submits) there is a more than merely fanciful prospect that Daimler’s case would (and will) succeed based on the arguments to be considered, and ruled upon, by the CJEU in *Stichting*. In contrast, the Defendants submit that this is all a smokescreen on Daimler’s part and not only is this Court bound by the decision in *La Gaitana*, but it can clearly be seen that the reasoning of the Court of Appeal is impeccable, and from a consideration of the relevant EU authorities and *La Gaitana* there is no real prospect that the CJEU will reach any conclusion different to that reached in previous cases (and applied by the English Court of Appeal in *La Gaitana*).

30. It is true that in their Skeleton Arguments the Defendants did not address, still less grapple with, the applicable principles in relation to strike out and summary judgment (which, as addressed in due course below, show that the Court has a discretion as to whether to strike out or grant summary judgment) nor did they address existing case law that touches upon the approach of the Court where the Court of Appeal's decision is to be tested in a pending appeal, or indeed where there is an extant reference to the CJEU. However, in the event, all the Defendants accepted, at the outset of the oral hearing before me, that the matter is indeed one of discretion that gives rise to case management considerations in the context of the reference to the CJEU, the issues in play in the litigation, and the furtherance of the overriding objective.
31. I address in due course below the applicable principles on strike out and summary judgment, and also the associated case management issues that arise when (before trial) it is apparent that a point of law is already before an appellate court (or has been referred to the CJEU).
32. In order to consider those principles in context, and to apply them in the circumstances of the present case, it is first necessary to set out in some detail the legislative history of the application of EU competition law to the transport sector and to the maritime sector in particular, and to address the applicable EU authorities, the Court of Appeal's decision in *La Gaitana* and the Dutch court's reference to the CJEU in *Stichting*.

B. The Legislative History

B.1 Articles 101 and 103

33. Articles 101 and 103 TFEU provide as follows (for ease of reference the current provisions of the TFEU are used, the predecessors in materially identical terms being Article 85 EEC and Article 81 EC). Article 101 TFEU provides:-

“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market ...

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of [any agreement/concerted practice/decision of association of undertakings] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

34. Article 103 TFEU provides as follows:

“1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.”

35. Regulations made under Article 103 TFEU are referred to as implementing legislation, or measures, because they provide for the detailed implementation of Articles 101 and 102 TFEU.

B.2 The transitional scheme

36. Article 104 TFEU (and its materially identical predecessors Article 87 EEC and Article 83 EC) provides as follows:

*“Until the entry into force of the provisions adopted in pursuance of Article 103, **the authorities** in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.”* (emphasis added)

37. The “authorities” are the competition authorities (as opposed to the courts) of the Member States. An issue which has arisen (and was determined in *La Gaitana* as a matter of English law) is the extent to which national courts (as opposed to national

“authorities”) may apply EU competition rules to conduct which took place during the transitional scheme (i.e. until appropriate regulations or directives were adopted).

38. Article 105 TFEU (and its materially identical predecessors Article 88 EEC and Article 84 EC) provides:

“1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).”

39. Articles 104 and 105 TFEU are referred to as the “transitional regime”, or measures, because they were the means by which Article 101 TFEU was applied in the transitional period before implementing legislation was enacted pursuant to Article 103 TFEU.

B.3 Regulation 17/62

40. The first piece of legislation made under Article 103 TFEU was Regulation 17/62. Article 1 of that Regulation provided that “[w]ithout prejudice to Articles 6, 7 and 23 of this Regulation, agreements ... of the kind described in [Article 101(1) TFEU] ... shall be prohibited, no prior decision to that effect being required”. Articles 5 and 6 provided a mechanism for parties to notify their agreements to the Commission, who could then decide to exempt them from the prohibition in Article 101(1) if they satisfied the criteria in Article 101(3).

B.4 Regulation 141/62

41. On its terms, Regulation 17/62 appeared to apply to all anticompetitive agreements in all sectors of the economy. However, in fact, its scope was more limited. In this regard Regulation 141/62, which took effect from the same date, excluded the transport sector from its field of application altogether. Article 1 of Regulation 141/62 provided:

“Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of

transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market.”

42. The recitals to Regulation 17/62 explained that this was because “*account being taken of the distinctive features of the transport sector, it may prove necessary to lay down rules governing competition different from those laid down or to be laid down for other sectors of the economy*”.

B.5 Regulation 4056/86

43. Regulation 4056/86 established, with effect from 1 July 1987, rules for the application of Article 101 to maritime transport services. By Articles 2 and 3 thereof it exempted certain categories of agreements (“*technical agreements*” and “*liner conference*” agreements: see Articles 2 and 3). It also provided a procedure and set of rules for the application of Article 101(3) by the Commission more broadly – see Article 12.

44. It was divided into Section I (Articles 1 to 9), and Section II (entitled “Rules of Procedure”) – Section I, in contrast, was concerned with procedural matters.

45. Article 1(2) made clear that the scope of Regulation 4056/86 was limited. Article 1 provided:-

“1. This Regulation lays down detailed rules for the application of Articles [101 and 102 TFEU] to maritime transport services.

2. It shall apply only to international maritime transport services **from or to one or more Community ports**, other than tramp vessel services”

(emphasis added).

The definition of “*tramp*” vessel services was given in Article 1(3)(a). Whilst this does not affect the Applications, the Defendants submit in the action that all of the RoRo Services that are the subject of the claim were tramp services, and therefore excluded from the application of Article 101 TFEU for the period prior to 18 October 2006.

46. The recitals explained the rationale for the scope in the following terms:

“Whereas this Regulation should define the scope of the provisions of Articles [101 and 102 TFEU], taking into account the distinctive characteristics of maritime transport; whereas trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports; whereas such restrictive practices or abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market.”

47. It is said, therefore, that the legislator deliberately established the territorial boundaries of the application of EU competition law to international maritime transport by reference to whether an EU port was either the origin or destination of the service in question. Non-EEA services were intentionally excluded.
48. The Defendants submit that the thinking behind that position can be seen from the Commission's 10th report on Competition policy from 1980 (in which the Commission discussed the legislation it had considered proposing to the Council in that year, which ultimately became Regulation 4056/86). Thus, it was said on p 20 "*As regards its field of application, the preliminary draft Regulation only covered international sea transport from or to one or a number of Community ports. It thus already restricted to a certain extent the scope of the 'effect theory' flowing from the Treaty: Articles [101 and 102] apply to all agreements and practices that have economic consequences within the Community by affecting competition and trade, whatever the nationality or location of some or all of the parties.*"
49. The Commission's reference to the "*effect theory*" was to a theory of public international law that was at that time controversial in the EU legal order, namely that a jurisdiction could apply its law (such as competition law) to conduct taking place wholly outside the territorial scope of its jurisdiction if the conduct had effects within the jurisdiction. One version of that theory has since been endorsed by the CJEU in Case C-413/14 P *Intel v Commission* para 46, and it is now understood that EU competition law can, as a matter of public international law, be applied wherever conduct has "*substantial, immediate and foreseeable effects*" within the EU. It is said that back in the 1980s the Commission did not allow for the possibility of applying the effects test to non-EEA services, and those services were excluded from the scope of the implementing legislation under Article 103 TFEU.

B.6 The Modernisation Regulation – Regulation 1/2003

50. The next development for competition law in the marine transport sector was the enactment of what has been called the "*Modernisation Regulation*", Regulation 1/2003, which took effect from 1 May 2004 (see Article 45). The Modernisation Regulation repealed both Regulation 17/62 and Regulation 141/62 (Article 43). It also substantially amended Regulation 4056/86, removing the special procedures for Commission investigations in this sector set out therein.
51. The Modernisation Regulation replaced the old Regulation 17 system with a broad new statement in Article 1(1) that:

"1. Agreements, decisions and concerted practices caught by [Article 101(1) TFEU] which do not satisfy the conditions of [Article 101(3) TFEU] shall be prohibited, no prior decision to that effect being required."
52. At the same time, Article 1(2) provided that:

“2. Agreements, decisions and concerted practices caught by [Article 101(1) TFEU] which satisfy the conditions of [Article 101(3) TFEU] shall not be prohibited, no prior decision to that effect being required”.

53. In relation to national courts Recital (7) provided as follows:-

“National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles [101 and 102 TFEU] in full.”

54. Article 6 (under the heading *“Powers of the national courts”*) empowered the national courts to apply both Articles 101 and 102 TFEU, providing, *“National courts shall have the power to apply Articles [101 and 102 TFEU]”*. It is Daimler’s case (denied by the Defendants) that Article 6 confirmed the powers that national courts already had as a corollary of their obligation to give effect to those Treaty provisions, including to accord them direct effect in proceedings between private parties.

55. Article 32 limited the scope of the Regulation. As enacted, it stated that the Regulation did not apply to:

“(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.”

56. Prior to coming into force on 1 May 2004, Article 32(c) was deleted by Regulation 411/2004 which came into force the same day as Regulation 1/2003, so that the Regulation became applicable to all conduct in the international air transport sector. No amendment was made to Articles 32(a) and (b) at that time.

57. The Modernisation Regulation repealed most of the special procedures for applying competition law to the maritime transport sector that were set out in Regulation 4056/86. However it left in place the exemptions for technical and liner conference agreements, as well as a procedure to enable the Commission to seek to reconcile conflicts between EU competition law and the law of third countries with which it might conflict (Article 9). It also left in place the basic definition of the scope of the Regulation, as being limited to *“international maritime transport services from or to one or more Community ports, other than tramp services”*.

58. An issue that arises between Daimler and the Defendants is whether Regulation 1/2003 had the effect of bringing non-EEA maritime transport within the scope of application of EU competition law (the “Effect of Regulation 1/2003 Issue”). I address this issue in due course below. The issue arises in circumstances where Article 1(2) of Regulation 4056/86 contained a positive definition of those maritime transport services that fell within its scope (materially, services from one or more Community ports) whereas Article 32(a) and (b) of Regulation 1/2003 was an express provision that specified that certain services were excluded (tramp services and services within a single Member State).
59. Daimler contends that this difference in wording had the effect of bringing non-EEA maritime transport services within the scope of application of EU competition law, and that Regulation 1/2003 is to be construed as applying generally subject only (so far as material) to the express exceptions in Article 32. The Defendants submit that that is not the case, and that it was not intended by Regulation 1/2003 to create any different scope of application of that regulation compared to Regulation 4056/86.
60. The battle ground in relation to the Effect of Regulation 1/2003 Issue, therefore, is that even if *La Gaitana* is correct, Daimler submits that this Court has jurisdiction to apply the prohibition to non-EEA services insofar as they were provided after Regulation 1/2003 entered into force, i.e. after 1 May 2004, whereas the Defendants say that such services remained outwith the regime until Regulation 1419/2006 took effect in October 2006 (see Section B.7 below).

B.7 Regulation 1419/2006

61. The final development in the relevant legislative history came in the form of Regulation 1419/2006, which repealed Regulation 4056/86 and deleted Article 32 of Regulation 1/2003 with effect from 18 October 2006. After Regulation 1419/2006 took effect, there were no statutory limitations on the scope of application of the procedures set out in Article 1/2003, and in particular the territorial scope of application in the maritime sector was left to the basic limitations on the scope of EU law inherent in the treaties (i.e. the limitation to agreements that affect trade between Member States and comply with public international law norms on territoriality). As will appear below, each of the parties rely on the Recitals to Regulation 1419/2006 in relation to their submissions on the Effect of Regulation 1/2003 Issue.

C. The EU and English Authorities

C.1 Joined Cases 209 to 213/84 *Asjes*

62. In *Asjes* [1986] ECR 1457, one of the questions referred to (what was then) the European Court of Justice (“ECJ”) asked if a national court had jurisdiction to rule on whether concerted tariff practices between airlines in respect of the prices of air tickets breached what is now Article 101 (then Article 85 EEC). At the relevant time, air transport services were, like maritime transport services, exempted from the application of Regulation 17/62 by Regulation 141/62, and no other implementing rules had been adopted in this field. Air transport therefore remained subject to what are now Articles 104 and 105 TFEU (then Articles 88 and 89 EEC), and neither the relevant national authorities nor

the Commission had taken any decision in respect of the airlines' concerted tariff practices.

63. The ECJ ruled that, in those circumstances, the national court did not have jurisdiction to consider whether the airlines' practices breached Article 85(1) EEC (now 101(1) TFEU), stating at [68]:

“It must therefore be concluded that in the absence of a decision taken under Article 88 [104] by the competent national authorities ruling that a given concerted action on tariffs taken by airlines is prohibited by Article 85(1) [101(1)] and cannot be exempted from that prohibition pursuant to Article 85(3) [101(3)], or in the absence of a decision by the Commission under Article 89(2) [105(2)] recording that such a concerted practice constitutes an infringement of Article 85(1) [101(1)], a national court such as that which has referred these cases to the Court does not itself have jurisdiction to hold that the concerted action in question is incompatible with Article 85(1) [101(1)].”

C.2 Case 66/86 Ahmed Saeed

64. *Ahmed Saeed* [1986] ECR 1457 also concerned agreements between airlines fixing the tariffs for scheduled flights on specified routes. The ECJ considered that such agreements were anti-competitive, contrary to Article 85(1) EEC (101(1) TFEU). After the hearing in *Ahmed Saeed*, the Council had adopted measures implementing the EEC competition law rules in the air transport sector. These implementing rules only applied, however, to services between airports in different Member States.
65. In such circumstances the Court ruled (at [21]) that “*domestic air transport and air transport to and from airports in non-member countries continue to be subject to the transitional provisions laid down in Articles 88 and 89 [104 and 105], and that with respect to those air transport services the system described in the judgment of 30 April 1986 [i.e. the judgment in Asjes] still applies*”.
66. *Asjes* and *Ahmed Saeed* therefore established that, where an activity is expressly excluded from the rules implementing EU competition law, a national court does not have jurisdiction to rule on whether conduct breaches Article 101 without a pre-existing determination of an infringement by a national competition authority or the Commission.
67. These cases pre-date the regime in place with effect from 18 October 2006 brought in by Regulation 1419/2006 (in a maritime context). They do not address whether the position is, or might be, different at a time when there can be no question of a determination by a national competition authority or the Commission – that question was, however, addressed by the Court of Appeal in *La Gaitana* and by the Dutch court in *Stichting* and indeed this aspect (and the difference of the view of the Dutch court compared to that of the first instance judge and Court of Appeal in *La Gaitana*) was at the heart of the reasoning as to why the Dutch court made a reference to the CJEU, as addressed below.

C.3 The Court of Appeal's decision in La Gaitana

68. The underlying facts in relation to *La Gaitana* ([2019] 1 W.L.R. 3793) were that the Commission had adopted a Decision finding that there had been a cartel between certain air cargo carriers, between 2001 and 2006 for intra-EU/EEA routes and from 1 May 2004 until 2006 for routes to and from third countries. The claimants brought a claim for damages allegedly caused by the cartel. The claim related to cargo carried on flights between 2001 and 2006, both within the EU and between airports in the EU and airports in third countries.
69. At [6]-[19] Flaux LJ (with whom Bean LJ and Sir Terence Etherton MR agreed) set out the relevant legislative history for the application of competition law in transport, up to and including the coming into force of Regulation 1/2003 on 1 May 2004. This was similar but not identical to that set out for maritime transport that I have identified above, namely:-
- (1) Air transport, like maritime transport, was excluded from Regulation 17/62 by Regulation 141/62 ([13]).
 - (2) Regulation 3975/87 provided a special regime for applying competition law to the air transport sector ([14]). As with Regulation 4056/86 for maritime transport, it enabled the Commission to grant exemptions under Article 101(3) TFEU. Unlike the position with maritime transport, however, the Regulation was limited to intra-EU flights, which was a point of significance for the *La Gaitana* claims.
70. Regulation 1/2003 applied to all agreements in the air transport sector from the day it came into force (1 May 2004) ([18]) (as identified above that is different from the position for maritime transport as Article 32 continued to exclude some maritime transport services from the scope of the Regulation until 18 October 2006).
71. At [26] and following Flaux LJ examined the case-law of the CJEU on the operation of those legislative provisions. He first addressed the decision in *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH* (Case 13/61) [1962] ECR 43 (“*Bosch*”). He noted that the judgment in *Bosch* was inconsistent with the national courts having some form of parallel jurisdiction with the national competition authorities or the Commission to make a determination of infringement under Article 101(1).
72. Then at [30] he referred to the fact that the question whether Articles 101 and 102 had direct effect came before the Court of Justice in the *Belgische Radio* case [1974] ECR 51. After referring to that case, the first instance judgment of Rose J in *La Gaitana*, and the case of *Delimitis v Henninger Brau AG* (Case C-234/89) [1991] ECR I-935, he referred to the argument of Mr Moser QC (for *La Gaitana*) that even under the transitional regime, in a case where there could be no question of the Commission granting an exemption under article 101(3) the national court would have jurisdiction to award damages for an infringement of Article 101(1). At paragraphs [35]-[36] Flaux LJ stated:-
- “35. In my judgment, neither SABAM nor the *Delimitis* line of cases, all of which are concerned with the regime under Regulation 17 are of any assistance in determining whether the national courts would have had jurisdiction under the transitional regime (before the enactment of Regulation 17 or, in the present case, Regulation 1/2003), where there had been no determination under either Article 104 or Article 105, to find an infringement of Article 101 and award damages. In any event, even if the second

sentence of [50] of *Delimitis* were applicable to cases under the transitional regime, this is not a case where it can be said that the relevant agreements and practices “may on no account be the subject of an exemption decision under [Article 101(3)]”, for reasons elaborated later in this judgment.

36. On the other hand, the judge’s second question, as to how the doctrine of direct effect operated under the transitional regime, is addressed in the two subsequent decisions of the ECJ which she considered...”

The reference to the two subsequent cases are to *Asjes* and *Ahmed Saeed* which Flaux LJ proceeded to consider.

73. At [56] he identified the grounds of appeal that were being advanced, namely :-

“(1) The judge erred in law in concluding that the High Court had no jurisdiction to hear the appellants’ claim for damages in respect of flights between the EU and third countries before 1 May 2004 (or 19 May 2005 in the case of the EEA). Article 101(1) did have direct effect giving the Court jurisdiction at all material times where, as here, there was no or no real prospect of exemption under Article 101(3).

(2) The judge erred in law in concluding that the High Court had no jurisdiction deriving from Regulation 1/2003 to entertain the claim for damages prior to 1 May 2004 and 19 May 2005 respectively since, contrary to the judgment, this would involve no substantive retrospective change to the airlines’ legal position.

(3) The judge was wrong in law to conclude that she could reach the conclusions she did to the requisite degree of legal certainty and therefore without a reference to the Court of Justice of the European Union pursuant to Article 267 of the TFEU despite the absence of clear domestic or EU case law on the particular legal issues.”

74. At paragraphs [85]-[100] Flaux LJ addressed and rejected Ground 1. In this regard at paragraphs [85] and [86] he stated as follows:-

“85. Ingenious though Mr Moser QC’s attempt to distinguish the EU case law as all concerned with Article 101(2) was, I consider his argument to be fallacious. Before an agreement or decision can be automatically void under Article 101(2) , there must have been a determination that there was an infringement of Article 101(1) . This is clear from the wording of the Article itself: “Any agreements or decisions prohibited pursuant to this Article shall be automatically void”. An agreement or decision will only be prohibited under Article 101(1) and thus automatically void under Article 101(2) , if there has been a determination to that effect by an entity with the power to make such a determination: see [63] to [65] of the judgment of the ECJ in *Asjes* . Under the transitional regime, this was only a national competition authority under what is now Article 104 or the Commission under what is now Article 105: see the passage in the judgment in *Bosch* which I have cited at [28] above.

86. Under the transitional regime, unless and until either the national competition authority or the Commission had made such a determination, the national court does not have jurisdiction to hold that there has been an infringement of Article 101(1) . This principle is stated quite categorically by the ECJ at [68] of its judgment in *Asjes* cited

at [41] above. The application of the principle was reconsidered by the ECJ in *Ahmed Saeed*. As Mr Beard QC put it, in *Ahmed Saeed* they “marked their own homework in *Asjes*“ and reiterated the principle enunciated in *Asjes* at [29(i)] of their judgment in *Ahmed Saeed* (cited at [45] above). Nothing in the reasoning in either of those cases even begins to suggest that the principle stated is only applicable where there is an issue of automatic voidness under Article 101(2) . Quite the contrary, the principle is being stated as one of general application where the transitional regime still applies.”

75. In relation to the claimants’ case that Rose J erred in not concluding that the court did have jurisdiction over the claimants’ damages claim, because there was no or no real prospect of any exemption under Article 101(3), Flaux LJ considered that the claim failed for two principal reasons. The first reason was that it could not be inferred from the findings which were made by the Commission in its 2010 and 2017 Decisions that there could be no question of their ever being able to satisfy the requirements of Article 101(3) in relation to flights between the EU/EEA and third countries before the EU competition rules as now enacted in Regulation 1/2003 had any application to agreements or practices in relation to such flights ([89]). He concluded in relation to the first reason at [96]:

“...All that can be said is that, however likely or unlikely it may be that such an exemption would be granted, it remains the case that the agreements and practices may qualify for exemption. Even on the appellants’ interpretation of [32] of *Ahmed Saeed*, the Court would have no jurisdiction in those circumstances”.

76. He identified his second reason at [97]:

“Even if, contrary to the conclusions I have reached, the appellants were correct that there was no or no real prospect of the airlines establishing that an exemption under Article 101(3) would be available, I consider that the appellants’ submission that, in those circumstances, the court has jurisdiction because Article 101(1) would have direct effect, is misconceived. Specifically [32] of the judgment in *Ahmed Saeed* will not bear the interpretation which the appellants seek to put upon it, that if no question of Article 101(3) exemption arises, Article 101 is directly applicable in the same way as Article 102.”

77. At [98] Flaux LJ rejected the argument that the courts could apply Article 101(1) TFEU in cases where there was no plausible defence under Article 101(3) TFEU. In this regard he stated:-

“Once the provisions of the transitional regime apply, they apply to all Article 101(1) cases, not simply to those where there is some prospect of an Article 101(3) exemption being available. As Mr Beard QC put it, the appellants’ argument confuses the rationale for the application of the transitional provisions to Article 101, namely the generic or abstract possibility of an Article 101(3) exemption being available, with the scope or ambit of the transitional provisions. The transitional provisions apply to all Article 101 cases, not just those where there is, on the facts, a possibility of an exemption being available. There is no warrant either in the transitional provisions themselves or in the EU case law for dis-applying the transitional provisions in certain Article 101 cases

78. His overall conclusion on Ground 1 was set out at [100]:

“None of the appellants’ arguments in relation to ground 1 can overcome the very clear principle stated in [68] of *Asjes* and confirmed by the ECJ in *Ahmed Saeed* that, under the transitional regime, the national courts have no jurisdiction in a case such as the present where there has been no determination under either Article 104 or Article 105 by the national competition authority or the Commission respectively.”

79. At [101]-[111] Flaux LJ also rejected Ground 2 and the argument that Articles 1 and 6 of the Modernisation Regulation (which conferred power on national courts to apply Article 101 TFEU) had retrospective effect. He concluded that those provisions are substantive in nature, rather than procedural, because they removed what had previously been an essential ingredient of a claim. Prior to the Modernisation Regulation, a claimant in an air transport case needed to show that infringement had already been found by a decision under the transitional provisions, whereas after the Modernisation Regulation, a claimant in an air transport case did not need to show that any such decision had already been issued [104]. Those provisions of the Modernisation Regulation could not therefore have retrospective effect [104].

80. As for Ground 3, he found at [112] as follows:-

“I agree with the submissions on behalf of the airlines that the trio of cases *Bosch*, *Asjes* and *Ahmed Saeed* clearly establish the relevant legal principles as to the jurisdiction (or lack of it) of national courts under the transitional regime. Contrary to Mr Moser QC’s submissions, there is not some undecided question in relation to the right to claim damages. The cases clearly establish that unless there has been a determination by the national competition authority under Article 104 or the Commission under Article 105, the national court has no jurisdiction. Likewise, the “no retroactivity” and “future effects” principles are both well-established by existing EU case law. It follows that, in my judgment, there is no point raised by the appellants on either of the first two grounds of appeal in relation to which any clarification from the Court of Justice is required. Like the judge, I do not consider that there is any basis for the suggestion that the Court of Justice might reach a different conclusion on these issues than the one it has already reached. I also agree with the airlines that this Court should not delay judgment to await the decision of the Dutch court.”

81. It is apparent from [112] that Flaux LJ did not consider that there was any point raised on either of Grounds 1 or 2 in relation to which any clarification was required or that there was any basis for the suggestion that the Court of Justice might reach a different conclusion on these issues than the one it had already reached. It is apparent from what was stated at [77] in the judgment that Flaux LJ was aware that the Dutch court was soon to deliver its judgment including as to whether to make a reference, but Flaux LJ did not consider it appropriate to delay the judgment to await the decision of the Dutch court. Accordingly, when the Court of Appeal gave its judgment the decision of the Dutch court was not known, nor was it known whether the Dutch court would make a reference.

82. Thus, as will be apparent, *La Gaitana* (and indeed *Stichting* as addressed below) concerned the temporal scope of the national court’s jurisdiction to apply the prohibition under what is now Article 101 TFEU to air transport services between airports in the EEC/EEA and third countries; and specifically, whether the prohibition could be applied to the provision of those services prior to 1 May 2004 (when Regulation 1/2003 came into force and the exemption in Article 32(c) was deleted).
83. In summary, and as appears above, Rose J, affirmed by the Court of Appeal, held that the English Court had no jurisdiction to apply the prohibition to such services prior to 1 May 2004, with Flaux LJ concluding:-
- (1) Article 101 TFEU did not have full direct effect so as to confer jurisdiction on the High Court in respect of the relevant claims: under the transitional scheme, national courts had no jurisdiction to hold that the prohibition had been infringed until there had been a determination to that effect by the relevant “authorities in the Member States” or the EC, and
 - (2) Regulation 1/2003 was not to be construed to have retrospective effect so as to confer such jurisdiction in respect of conduct prior to its entry into force on 1 May 2004.

C.4 The decision of the Amsterdam District Court in *Stichting*

84. In *Stichting* the Amsterdam District Court considered the same EU legislation and CJEU case law, and reached the opposite conclusion on the first issue. It gave two relevant judgments, one in May 2019 indicating that it intended to make a preliminary reference and one in September 2019 in which it set out the question to be referred. The heart of its reasoning can be seen from paragraph 6.12 of the latter (paragraph references hereafter are to this judgment):-

“As has been considered above, it appears from CJEU case law that Article 101 TFEU applies to the air transport sector, also in the period before 1 May 2004, that Article 101 TFEU has direct horizontal effect in relations between private individuals and that the national court has autonomous jurisdiction as an EU judge in disputes between private individuals. This would mean that the latter cannot refuse to apply the provisions of European competition law, but that it must adhere to the procedural rules governing the competencies between the various EU bodies at the time. At the time of the transitional regime, the national court could then only take decisions regarding Article 101(3) TFEU as long as there was still the possibility that the Commission or a national authority could grant an exemption. As soon as this possibility no longer existed, or as soon as there was a decision of the European Commission or a national authority, the national court had to take this into account on application of Article 101 TFEU in proceedings between private individuals. In the opinion of the District Court, this means that during the period that the transitional regime was still applicable, the national civil court did not have the power to take a decision based on Article 101 TFEU as long as there was still the possibility that a national authority or the Commission could grant an exception. The limitation of the role of the national court therefore lay in the fact that there was still an exemption option, not because the national court could not apply the rule materially. After all, the horizontal direct effect of Article 101 TFEU was not

excluded for Article 101(3) TFEU, but there was a procedural limitation on its application by the national court for the sake of legal certainty.”

(emphasis added)

85. It will be seen that the District Court emphasised the nature of Article 101 TFEU and its predecessors as substantive law with horizontal direct effect and contrasted these with the transitional regime and subsequent legislation, which was characterised as procedural.

86. The District Court noted that its opinion differed from that of Rose J and the Court of Appeal in *La Gaitana*, and concluded (in what Daimler says is an impeccable application of the principles as to when a reference to the CJEU is appropriate) that, “In view of the objective of the TFEU to ensure uniform application of the TFEU, in this state of affairs the District Court considers it necessary to refer questions to the CJEU for a preliminary ruling in order to render its judgment.” The question referred was in the following terms (paragraph 8.1):-

“In a dispute between injured parties (in this case the shippers, recipients of airfreight services) and airlines, does the national court have jurisdiction - either because of the direct effect of Article 101 TFEU, at least Article 53 EEA, or based on the immediate effect of Article 6 Regulation 1/2003 - to apply in full Article 101 TFEU, at least Article 53 of the EEA Agreement in respect of agreements/concerted practices on the part of the airlines in respect of airfreight services on flights operated before 1 May 2004 on routes between airports within the EU and airports outside the EEA, and before 19 May 2005 on routes between Iceland, Liechtenstein, Norway and airports outside the EEA, or on flights operated before 1 June 2002 between airports within the EU and Switzerland respectively, also in respect of the period during which the transitional regime laid down in Articles 104 and 105 TFEU applied, or is precluded by the transitional regime?”

87. Daimler emphasises the following aspects of the reasoning of the District Court:-

(1) It took as its starting point the CJEU’s decision in *Belgian Radio en Televisie v SV SABAM*, Case 127/73 [1974] ECR 51. It interpreted this as showing that “*by its nature, Article 101(1) TFEU has a direct horizontal effect in relations between private individuals. The power of the national court to apply these provisions of EU law to a dispute between individuals arises from the direct effect of those provisions*”.

(2) It concluded that the Treaty confers independent jurisdiction upon the national courts to apply competition rules in disputes between individuals, which exists alongside the jurisdiction of national competition authorities and the EC. The District Court referred in this regard to *Belgian Radio*, *Asjes* and *Ahmed Saeed*. It considered that this concurrent jurisdiction gave rise to a risk of conflict because only the EC (not the national court) had the power to grant an exemption under Article 101(3) TFEU for infringing conduct under Article 101(1).

- (3) It found that these CJEU judgments explained how this potential for conflict could be resolved in a manner which allowed national courts to give effect to the directly effective rights under Article 101(1) during the transitional period:

“6.9. Both administrative enforcement and civil enforcement are possible under Articles 104 and 105 TFEU [ex-Article 87 and 88 EEC], which in principle entails a risk of conflicting decisions. However, there is no question of a priority relationship between administrative enforcement and civil enforcement. This risk has been acknowledged by the CJEU. As considered above, in the *Asjes* and *Ahmed Saeed* rulings, the District Court reads that the CJEU has only accepted a limitation of the jurisdiction of the national civil court if an exemption under Article 101(3) TFEU is still possible, on which exemption the authorities declared competent decide pursuant to implementing provisions. The CJEU ruled that it would be contrary to the principle of legal certainty if a national court were to establish an infringement, with the far-reaching consequence of nullity by operation of law, while under the transitional regime the competent authorities could still grant exemption (in the *Asjes* case with retroactive effect). This line was confirmed by the CJEU in the *Ahmed Saeed* ruling. In line with this, in the same judgment the CJEU did not attach any significance to the transitional regime for the application of Article 102 TFEU (which does not provide for the possibility of an exemption and therefore legal certainty is not at stake). The prohibition in Article 102 TFEU applied without restriction to the entire aviation sector and could therefore be applied directly by the national court.”

Accordingly the District Court concluded that “*the national court can and must review agreements or conduct against Article 101 TFEU when there is no longer any discussion about the applicability of Article 101(3) TFEU*” (and in the case before it, the airlines had not requested an exemption and it was now too late to do so).

- (4) It rejected the argument that the effect of the transitional regime is that the prohibition did not substantively apply to the relevant flights in the period prior to 1 May 2004. It regarded the CJEU case law as providing no support for the argument because it was concerned with the procedural issues regarding the risk of conflicting decisions.
- (5) It recognised that its analysis and conclusion differed from that of Rose J and of the Court of Appeal in *La Gaitana*; and in the light of that fact, it decided to make a reference to the CJEU. Given its finding on this issue, it did not need to address the second issue that was raised before it (corresponding to the second issue in *La Gaitana*) regarding the extent to which Regulation 1/2003 has retroactive effect and so expressed no conclusion regarding it. It nonetheless decided to refer a question to the CJEU regarding that second issue as well for reasons of procedural economy.
88. For their part the Defendants submit that Dutch Court’s analysis is wrong, and for the reasons given in Flaux LJ’s judgment at [101]-[104]. They submit that the rule preventing national courts from applying Article 101 TFEU to the period in which the transitional regime applied was and remains substantive and not procedural. For the period in which the rule was in effect, a claimant in a national court needed to prove that a finding of

infringement had already been made under Article 104 or 105 TFEU, as an essential element of its claim. The removal of an essential element of a cause of action is a substantive change, not a mere change in procedure.

89. The Defendants submitted that what they characterised as the error in the Dutch Court’s analysis, can be seen from the way in which the CJEU analysed this issue in *Asjes*. The end of the transitional regime did not merely change the procedure by which Article 101 TFEU was enforced; it changed the extent to which that prohibition was effective. Article 101 TFEU was not “fully effective” in respect of the transitional period. National courts could only give it effect in respect of that period to the extent that a decision had already been taken under the transitional regime. For those reasons, NYKE submits that the Dutch Court’s analysis casts no doubt on the correctness of the decision of the Court of Appeal in *La Gaitana*.
90. Daimler submits that in order to reach such a conclusion it would be necessary for this Court to express views on the reasoning of the Dutch court and ultimately opine on whether the Dutch court has wrongly applied EU law. It is also said that the Defendants’ approach is effectively to invite the Court to pre-empt the decision of the CJEU and conclude (in the words of Ms Demetriou) that there is, “no real prospect that the CJEU will uphold the Dutch Court’s analysis and reject the English courts’ analysis”.
91. Daimler submits that such an approach would not only be to disregard judicial comity and cooperation in a way that would bring no credit to this Court as an arbiter of cross border disputes, it would also be contrary to EU law. As to the latter point Mr Kennelly QC refers to Article 4 of the Treaty on the European Union (TEU), and Articles 4.2 and 4.3 thereof, which provide:

“2. The Union shall respect the equality of Member States before the Treaties...

3. Pursuant to the principle of sincere cooperation, the Union and Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”
92. Mr Kennelly points out that these provisions and the principle of sincere cooperation and mutual respect that underlie them are absolutely fundamental to the EU legal order. The principle underlies the preliminary reference process because it explains why the CJEU will in general trust Member States to determine when a reference is necessary to reach judgment, and explains why one Member State cannot, save in exceptional circumstances, pass any judgment on whether another Member State has correctly applied EU law. Mr Kennelly gives as examples the fact that a Member State cannot form a view as to whether another Member State does or does not have jurisdiction under the common EU rules set out in the Brussels Recast Regulation (one of the reasons why the CJEU held that anti-suit injunctions in the EU are incompatible with the mutual trust that underlies EU in that field – see the *West Tankers* case C/185/07, [2009] 1 A.C. 1138) and as another example the fact that a Member State cannot decline to recognise the judgment of another Member State on the ground that it fails properly to apply substantive EU law.

93. By way of riposte, Ms Demetriou submits that a finding that the Court of Appeal's reasoning was correct and that the Dutch court's decision does not provide sufficient reason to consider that there is a real prospect of the CJEU reaching a different view would not breach any principle of mutual trust as it would not entail any finding that the Dutch court has failed to comply with EU law or misapplied EU law. It is said that the Dutch court was perfectly entitled to make a reference but that does not mean that every other court in the EU then has to stop applying the consequences of the judgments of its superior courts pending the reference. It is also pointed out that matters such as anti-suit injunctions are very different, as such injunctions would interfere with the judicial process in another Member State.
94. Ms Demetriou also refers to the work *Preliminary References to the European Court of Justice* 2nd Edn. and the views of its authors in the context of what is, and is not, a case of *acte clair*, at para 3.4.2.4:

“The test laid down in CILFIT does not merely relate to whether other national courts share the view of the court that is to decide on the *act éclair* question. Rather...the test is that, in order to hold the construction to be *act éclair*, the court of last instance's construction of the EU rule must be 'obvious' to those other courts. It could therefore be argued that the fact that another national court has referred a preliminary question to the Court of Justice regarding the interpretation of the very same EU rule as the one at issue before our court of last instance indicates that at least one other national court does not find the matter to be obvious so that the situation is not one of *acte clair*.

In our opinion, this line of argumentation overlooks the fact that a national court may make a preliminary reference even if it considers the answer to the preliminary reference question to be obvious. For that reason alone, the fact that another national court has made a preliminary reference regarding the interpretation of the very same EU rule does not exclude the possibility that the matter is *acte clair*. Indeed, even in those very frequent cases where another national court has expressed doubts as to the correct interpretation of the EU rule in question, it would go too far to exclude completely a finding of *act éclair*. Sometimes it is difficult not to have the impression that a national court has made a reference that could have been avoided had it sufficiently studied the relevant legal sources. In our opinion, this should not imply that another national court that has carried out such a study shall be barred from finding that the matter does not give rise to any doubt.”

95. Ms Demetriou submits that such sentiments are not only right but *a fortiori* when one is looking at a court which is not a court of last resort that has a discretion to refer, and that it cannot be a breach of the principle of mutual trust for a lower court, or even a court of last resort, to decide the point itself in circumstances where a court of a Member State has made a reference.
96. I address the exercise of my discretion in due course below, but I am satisfied that what the respective submissions of the parties, and the principles they refer to demonstrate, is that the mere fact of a reference should not, in and of itself, determine (or be any bar) as to whether to strike out, and that it is necessary to examine the basis on which the reference is made, and to consider whether or not (in the present case) there is any reasonable prospect of the CJEU upholding the Dutch Court's analysis and rejecting the

English courts' analysis (to use the Defendants' shorthand). In this regard I also agree that this is not to reach any conclusion as whether the Dutch court is right or wrong and it would not involve any breach of the principle of mutual trust. However equally, I consider that the fact that a court of another Member State has not only seen fit to make a reference but has clearly regarded the point as more than merely arguable (as it did in the present case) can itself be taken into account in the exercise of discretion in deciding whether to strike out, all the more so if the particular point has not been expressly dealt with by the CJEU before.

D. Applicable Principles on Strike Out and Summary Judgment

97. In relation to the striking out of a statement of case, CPR r. 3.4(2) provides, amongst other matters, as follows:-

“The court **may** strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim”

(emphasis added)

98. Equally in relation to summary judgment and reverse summary judgment, CPR r. 24.2 provides, amongst other matters, as follows:

“The court **may** give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that (i) the claimant has no real prospect of succeeding on the claim or issue... and

(b) **there is no other compelling reason why the case or issue should be disposed of at a trial**”

(emphasis added)

99. So far as a reference to the CJEU is concerned, CPR r. 68.5 provides, amongst other matters as follows:-

“Where an order is made [for a reference to the CJEU under Article 267 TFEU], **unless the court orders otherwise**, the proceedings will be stayed until the European Court has given a preliminary ruling on the question referred to it”

(emphasis added).

100. The use of the words “may” and the reference to “unless the court orders otherwise” make clear (as was common ground), that assuming that the requirements for the making of such orders are satisfied, the Court has a discretion as to whether or not to make the order sought. In exercising that discretion, as with all exercises of discretion under the CPR, the Court will have regard to the overriding objective in accordance with CPR r. 1.2. In cases such as the present, and as was ultimately common ground, this engages the Court's case management powers.

101. In terms of the applicable principles in relation to strike out and summary judgment these are well known, and uncontroversial. Thus in relation to the way in which the test for summary judgment should be applied (and it is not suggested that the applicable principles on strike out are any different), guidance is given in the judgment of Floyd LJ in *TFL Management Services Ltd v Lloyd's Bank Plc* [2013] EWCA Civ 1415 at paragraph [26], where he cites with approval the words of Lewison J (as he then was) in *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch):

“26 The judge referred to *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) as setting out the approach under CPR 3.4(2)(a) and 24.2. In that case Lewison J (as he was then) said:

“... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 .

27 Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg* [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing roadblocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see *Partco* at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson and others and HM Treasury and another* [2003] EWCA Civ 1612.”

(emphasis added)

102. The Defendants submit that the present case is one that involves a short point of law on which there is binding precedent in the form of *La Gaitana* and that the Court should indeed “grasp the nettle” and grant summary judgment/strike out. In contrast Daimler submits that the point is both controversial and difficult, and it cannot be said at this time that the trajectory of the law will never on any view afford Daimler a remedy in respect of the issues, and period of time, in question. On the contrary, matters are, to an extent, in a state of flux given the reference in *Stichting* to the CJEU and the possibility that *La Gaitana* may, in time, and indeed before the trial of this action, prove not to represent the position under English law (on the basis of a binding CJEU decision to the contrary).

D.1 Appeals and references to the CJEU

103. A situation such as the present is not one that arises in uncharted waters. On the contrary similar situations have arisen in the past involving possible changes in the law or appeals to higher courts. Associated authorities are referred to in the *White Book, Civil Procedure* Volume 2 at para 9A-182 at p 2513 including the following:-

“In *Sparks v Harland* [1997] 1 W.L.R. 143, the plaintiff’s action was brought outside the limitation period and the defendant applied to have them dismissed on that ground. There was a prospect (depending on the likely response of the legislature to the outcome of other proceedings pending in the European Court of Human Rights) of retrospective legislation being enacted which would have the effect of removing the time bar from the plaintiff’s claim. It was held that, in the circumstances, the plaintiff’s action should not be struck out, but should be stayed.

It is conceivable that, in the course of the hearing of a case, it may become apparent that issues of law arising in the proceedings have arisen in other cases and are presently subject to appellate proceedings or references to the E.C.J. in those cases in which it is expected that the issues of law will be authoritatively determined. In those circumstances it may be argued that the hearing should be adjourned pending the outcome of the appeal or the reference (see *Re Yates’ Settlement Trusts* [1954] 1 All E.R. 619, CA; *Sprote v Commissioner of Police of the Metropolis*, The Times, 6 August 1991, EAT; *Green v Skandia Life Assurance Co Ltd* [2006] EWHC 1626 (Ch), (Mr. Edward Nugee QC)). An adjournment of a hearing is not the same as a stay of proceedings.

The question whether proceedings which have not reached the point of trial should be stayed (whether by consent or otherwise) where it has become apparent that issues of law arising in the proceedings have arisen in other cases which are presently subject to appellate proceedings or references to the E.C.J. raises different considerations. At trial a first instance judge is bound by the doctrine of precedent to apply the law as laid down in a decision of the Court of Appeal, even if there is a possibility that that decision may be reversed. But the same is not necessarily the case where a judge is dealing with an application to strike out a claim or to give summary judgment before a trial. Then the judge can take into account the possibility that the Court of Appeal’s decision may be reversed on appeal and may dispose of the application by refusing to strike it out or to give summary judgment accordingly, especially where it is known that in other proceedings the Court of Appeal’s decision is to be tested in a pending appeal to the House of Lords (*Derby v Weldon (No.5)* [1989] 1 W.L.R. 1244). But in such circumstances it may be a more proportionate use of the parties’ and the court’s resources to stay the application pending the determination of the appeal instead of dismissing it (*Green v Skandia Life Assurance Co Ltd*, op. cit.).

In *Johns v Solent SD Ltd* [2008] EWCA Civ 790, the facts were that a particular regulation included in UK Regulations implementing an EU Directive provided the defendant employers with a complete defence to an age discrimination claim brought against them in an employment tribunal by a former employee. On the ground that in reference proceedings pending in the ECJ, and arising in another jurisdiction, the validity of a similar provision was being tested, the EAT ordered that the employee’s claim should not be struck out but should be stayed pending the outcome of that

reference. The Court of Appeal held that the balance of prejudice weighed heavily in favour of staying the claim and dismissed the employers' appeal.”

(emphasis added)

104. I am satisfied that the passage highlighted above, in particular, accurately summarises the distinction between a trial and an application to dispose of an issue by summary judgment or strike out at an earlier stage when there is either a pending appeal in another case or reference to CJEU, which in either case may well result in (binding) authority being reversed and which gives rise to a consideration of whether, in the exercise of the court's discretion, summary judgment or strike out should be granted or the same should be refused with the issue either being stayed, or being allowed to proceed to trial together with other issues in the case.
105. It is obvious that each case will turn on its own facts, and has to be considered as such, when considering the overriding objective, and how the case is best to be dealt with in all the circumstances pertaining. It is equally obvious that the mere fact that there is a pending appeal or a pending reference does not in and of itself mean that it is inappropriate to grant summary judgment or strike out a claim.
106. An example of a case where it was considered inappropriate to strike out a claim is *Derby v Weldon*. Claims were brought for conspiracy to defraud. Shortly after service of the amended statement of claim, the Court of Appeal held in *Metall und Rohstoff AG v Donaldson* [1989] 3 WLR 563 that, in order to make out that tort, it was necessary to establish that the predominant purpose of the tortfeasor was to injure the claimant. However, the Court of Appeal had granted leave to appeal. That appeal was likely to be heard before the claimants' action in *Derby v Weldon* was ready for trial. The defendants' strike out application was refused.
107. Vinelott J concluded that the decision for him was a discretionary one rather than a matter of applying the Court of Appeal's decision under the doctrine of precedent (see pp, 1250, 1252) and there were two main reasons why it was appropriate to decline to grant the strike out application: (i) there was a need for the law to be authoritatively stated by the House of Lords given inconsistencies in the authorities and disputes about the scope of *Metall und Rohstoff*; and (ii) the claimants in *Derby v Weldon* had additional claims, the viability of which was unaffected by the point based upon which strike out was sought.
108. As to the former of these points Vinelott J stated at 1253G:-

“As I have said, the Court of Appeal in the *Metall und Rohstoff* case [1989] 3 W.L.R. 563 clearly thought the effect of the decision of the House of Lord in *Lonrho Ltd. v Shell Petroleum Co. Ltd. (No.2)* [1982] A.C. 173 and in the *Buttes Gas* case [1982] A.C. 888 required clarification. They gave the plaintiff leave to appeal. The appeal is likely to be heard before this case is ready for trial. It would be absurd if the claims for conspiracy were now struck out and had to be reinstated if the decision of the Court of

Appeal in the *Metall und Rohstoff* case is reversed in the House of Lords or limited in a way which does not bar the plaintiff in the present case.”

109. Mr Kennelly submits that there is a direct analogy in the present case with the Dutch court’s reference to the CJEU. In response Ms Demetriou points out that it is entirely a matter for the national court as to whether it chooses to make a reference and that there is no relevant “filter” imposed (as there is with permission to appeal to the Supreme Court having to be granted by the Court of Appeal or the Supreme Court). Whilst this is true so far as it goes (and even this submission is subject to the principle of mutual trust), it is plain in the present case that the Dutch Court did very much put their mind to the merits, and considered their interpretation to be not only an arguable construction but in their opinion the correct one, and considered the point appropriate to be referred to the CJEU (not least in the context that its opinion in its interim judgment differed from that of Rose J and the Court of Appeal in *La Gaitana* (see [7.1]) so the present case is very much one where the Dutch court put their mind to the matter).

110. As to the latter point, Vinelott J stated at [1255A] that:

“[t]he same, or substantially the same, facts will have to be investigated in relation to the other heads of claim. There will, therefore, be no substantial saving of time or costs at the hearing and no reduction in the range of discovery if the claims for conspiracy are struck out...”

Daimler submits that such sentiments are apposite in the present case.

111. Where there is not such an overlap, authorities such as those cited above show that an appropriate exercise of discretion can include the refusal of summary judgment or strike out but the staying of the proceedings or the relevant part thereof pending the outcome of an appeal rather than dismissing the application for summary determination – for example see *Green v Skandia Life Assurance Co Ltd* [2006] EWHC 1626 (Ch) (a case where success on a summary judgment application would have made “the shape of any trial...and the preparation for it...radically different” per Christopher Nugee QC (sitting as a Deputy Judge of the High Court): [67]).

112. The Learned Judge in that case also expressed the view at [67]:-

“Nor do I think that I ought to try and predict what the House of Lords might do; the very fact that leave to appeal has been granted shows that the point is arguable and it would be invidious for me to express my own views on what the law is likely to turn out to be.”

113. Such sentiments also militate against this Court expressing views as to whether or not the Court of Appeal in *La Gaitana*, or the Dutch courts in *Stichting* are right in the conclusions that they reached. Rather, I consider it is appropriate to confine myself to considering whether, in the exercise of my discretion, it is appropriate to strike out the claims/grant summary judgment in the light of the case management issues that arise, and in that regard to consider the question (together with all other relevant circumstances in relation to the exercise of my discretion) whether the CJEU may well reach a different

conclusion to that of the Court of Appeal in *La Gaitana* so that in such circumstances Daimler's claim would have a reasonable prospect of success.

114. There are cases in which it may be appropriate for the Court to proceed summarily to determine the point by reference to existing law notwithstanding the potential for a change in the law on a pending appeal: see, for example, *Magdeev v Tsvetkov* [2019] EWHC 1557 (Comm) (in that case there were particular factors to justify such a course in circumstances where the parties and the Court were agreed that a stay was unattractive given that it would have resulted in separate trials of the same allegations against co-conspirators).
115. In the context of references to the CJEU, *Johns v Solent SD Ltd* [2008] EWCA Civ 790 was a case where a particular regulation included in UK Regulations implementing an EU Directive provided the defendant employers (Solent) with a complete defence to an age discrimination claim brought against them in an employment tribunal by a former employee (Mrs Johns). Solent applied for her claims to be struck out on the basis that they had no reasonable prospect of success. Mrs Johns representative sought to persuade the Employment Tribunal Chairman that her claims should be stayed rather than struck out because there was pending before the ECJ a case referred to that court by Davis J sitting in the Administrative Court called *Age Concern v Secretary of State for Business, Enterprise C0/5485/2006* (a case generally known as the "*Heyday*" case) and it was submitted that if the *Heyday* claim succeeded her claims in the Employment Tribunal would or might succeed.
116. The Chairman acceded to Solent's submission that the *Heyday* case was unlikely to succeed by reference to a case in the ECJ called *Palacios de la Villa v Cortefiel Servicios SA, C-411/05* which the ECJ had not yet delivered a ruling on but the Attorney General had delivered an opinion favourable to the Spanish Government. Mrs Johns successfully appealed to the Employment Appeal Tribunal. Nelson J was of the view that the Chairman had been wrong to prejudge the likely outcome of the *Heyday* case on the basis of the Attorney General's opinion in *Palacios*. By the time of his judgment Nelson J had the benefit of the judgment of the ECJ in *Palacios*.
117. He considered that the Chairman "*should have stuck to what was known rather than speculate about the unknown*". In Nelson J's view, the fact that the Chairman had speculated about the unknown was in itself enough to justify him in considering the question for himself. He was also of the view that the Chairman had not applied the correct legal test when considering whether to strike out the claims. In the end, Nelson J substituted his own view of the matter, which was that the claims should not be struck out but should be stayed. He noted that it was known that *Heyday* raised the same issue as Mrs Johns' case. He observed that Davis J was clearly of the view that the claimant's case — that is, *Age Concern's* case in *Heyday* — was at least arguable and that the position as to what the outcome was going to be was not clear; otherwise, the questions would not have been referred to the European Court. He considered that if the claimant did succeed in *Heyday*, Mrs Johns' claims may succeed; putting that another way round as Smith LJ did in the Court of Appeal) he was holding that if the claimant succeeds in *Heyday*, Mrs Johns would have reasonable prospects of success and that therefore her claims should not be struck out.

118. Nelson J considered the issues of prejudice, acknowledging that there would be some prejudice to Solent, who would have a claim outstanding against it for a substantial period of time. However, he was of the view that the issues of prejudice must be resolved in favour of staying the claims because Mrs Johns' claims would be snuffed out if they were not stayed and there would be very real prejudice to her in that event. Nelson J granted permission to appeal.
119. The Court of Appeal dismissed the appeal and concluded that there really was no contest about what should happen and the balance of prejudice weighed heavily in favour of staying the claims rather striking them out.
120. At [15] Smith LJ stated as follows:-

“I for my part am content to accept that the Chairman directed himself properly as to the test, even though I might have some doubt about it. But the point is, even if he did, that does not, in my view, avail the appellant. Even if he applied the correct test, the Chairman's conclusion was, in my view, clearly perverse because he based his reasoning on unwarranted speculation about the outcome of the *Heyday* case. He concluded that the claimant would almost certainly fail in *Heyday* and that Regulation 30 would be held to be valid; therefore Mrs Johns' claims have no reasonable prospects of success. But in my judgment he did not have sufficient material on which to base that conclusion about *Heyday*.”

121. She also made clear (as had Nelson J before her) that it was not appropriate for the court to form any view about the likely outcome of an aspect of the reference in the *Heyday* case (objective justification), stating at [20]:-

“It seems to me that Nelson J was right when he said that it was not appropriate for him or the Chairman — and I would add, or indeed for this court — to form any view about the likely outcome of the justification issue in the *Heyday* case. It does, however, seem to me that Nelson J was entirely justified in reaching the conclusion that, on the basis of what is known about the *Heyday* case, it may succeed. Ms Russell accepts that if the claimant succeeds in *Heyday* and Regulation 30 is struck down as unjustifiable and incompatible with the Directive, Mrs Johns' claim will have real prospects of success; indeed, so far as I understand it, she accepts that the employers will have no defence to her claim. It follows that because *Heyday* might succeed, Mrs Johns' case has reasonable prospects of success. It cannot be struck out.”

E. Discussion

122. For the reasons identified below I do not consider that it would be appropriate to strike out the claims or grant summary judgment on the Defendants' Applications.
123. First, in the present case, and although there is the existing (binding) Court of Appeal authority of *La Gaitana*, the point of law is undoubtedly a difficult one, and I do not consider that it can be said at this time that the trajectory of the law will never on any view afford Daimler a remedy in respect of the issues, and period of time, in question. On the contrary, matters (so far as the position in EU law is concerned) are, to an extent, in a state of flux given the reference in *Stichting* to the CJEU and the possibility that *La*

Gaitana may, in time, and indeed before the trial of this action, prove not to represent the position under English law, on the basis of a binding CJEU decision to the contrary if that is the outcome in *Stichting*. This is a strong case management factor militating against striking the claims out/granting summary judgment where the applicable legal position may well change before trial.

124. Secondly, and whilst it would be inappropriate to express any concluded view on the outcome of the *Stichting* reference or the decision of the CJEU, I consider that there is a real prospect that the CJEU may adopt the analysis in *Stichting*. In that context there has been a reasoned reference to the CJEU in circumstances where the Dutch court clearly considered the point to be more than arguable (indeed reached the contrary conclusion to the English Court of Appeal). There is no doctrine of binding precedent in EU law and the CJEU has not previously addressed the point expressly (whatever may be taken from *Asjes* and *Ahmed Saeed* as to its possible approach based on its historic approach in those cases). I consider that there is a real prospect that the CJEU may hold that a national court does have jurisdiction in the context of the horizontal direct effect of Article 101 at a time when no exemption is possible. Undoubtedly that point is well arguable. Clearly if the CJEU reaches such a conclusion Daimler's case will have a reasonable prospect of success (indeed the Defendants' point would itself be wrong in law and the suggestion that this national court did not have jurisdiction in relation to the applicable claims of Daimler would itself not be sustainable). Beyond that I do not consider it would be appropriate for me to express any concluded view – to do so would inevitably involve me expressing views on the correctness or otherwise of the reasoning of the Court of Appeal and/or involve a critique of the reasoning of the Dutch court as well as speculation as to the likely outcome before the CJEU in circumstances where the point in issue has not been expressly dealt with by the CJEU to date and it cannot be said that the Dutch court's approach is not reasonably arguable still less that the outcome can be predicted with anything approaching certainty (contrary to the Defendants' submissions). I address separately below whether in the circumstances pertaining it is necessary and appropriate that a reference be made to the CJEU in the present case.
125. Thirdly, I consider that there are strong case management reasons why it would not be appropriate in the exercise of discretion, to strike out the claims or grant summary judgment. In this regard:-
 - (1) Whilst the Defendants will suffer some prejudice in the sense of the issues remaining in play in the action with the consequent costs and management time etc that will be incurred (subject to any question of stay as addressed below) the real gravamen of any such prejudice if matters are not stayed, will be in costs and it cannot possibly be suggested (and it is not suggested) that Daimler are anything other than good for any such costs liability (whilst recognising, of course, that some loss would still arise in terms of the difference between solicitor and own client and inter partes costs). In contrast, the prejudice to Daimler if its claims are struck out would be very considerable and potentially irremediable. Substantial damages claims would have been struck out and Daimler's only recourse (if permission to appeal was granted by this Court of the Court of Appeal) would be through the appeal route, which itself would (for the reasons identified) be likely to require an appeal to the Supreme Court (assuming permission was granted by the Court of Appeal or the Supreme Court). Quite apart from the uncertainties this would bring,

as well as increased costs, this would result in a multiplicity of proceedings and the use of further finite court resources which is undesirable unless truly necessitated (see further (2) below). The balance of prejudice weighs heavily in favour of not striking out the claims.

- (2) The evidence before me suggests that the CJEU is likely to reach its decision on the existing reference within a period of around 16 months (and it is possible that the same might be true if a further reference is made and heard together or soon thereafter). It is apparent from the pleadings that this is a major piece of competition litigation. The disclosure exercise will be large and complex, with substantial disclosure over a long period of time, being inevitable, and it is already apparent that the parties will not be *ad idem* as to the scope of disclosure (whether the claims in issue proceed or not). There will also be extensive factual and expert evidence, and the trial itself will be lengthy. These, and no doubt other, case management considerations will be explored at the first CMC, and it is quite possible that further CMCs may well be required. Even with active case management, and without in any way binding the judge on the CMC, I consider that a trial is likely to be at least two years away (if not more). The likelihood is therefore that the decision of the CJEU will be known in advance of, and probably well in advance of, the trial of the action.
- (3) If the CJEU decision results in the claims continuing, the requisite disclosure and steps towards trial will undoubtedly already have been completed, and so multiple trials and increased costs will not be necessitated if the claims are allowed to proceed. Equally if the CJEU decision goes against Daimler it has already indicated that it will amend the claims. In contrast, were the claims to be struck out only to be reinstated (for example at an appellate level following the CJEU's decision) not only would there already have been a multiplicity of proceedings, but it is unlikely that the claims would be able, from a standing start, to catch up, with the result that two trials with all the associated cost and inconvenience of witnesses and experts having to give evidence twice (with, also the spectre of the risk of inconsistent findings) would arise. This further militates against striking the claims out at this stage.
- (4) Issues arise as to the temporal and geographical scope of the Claimant's claim and the disclosure that would be required for the fair determination of the trial whether or not the claims are struck out. I have received some witness evidence in this regard from both Daimler and the Defendants but it is accepted to be at a very high level. These are matters that will be at the forefront of the issues arising on the CMC in relation to which the judge hearing the CMC will need to make decisions in relation to disclosure and other aspects of trial management. As such I do not consider that it would be appropriate to address such matters in great detail at this stage, and nothing I say is intended to bind the judge on the CMC in terms of the scope of disclosure and the like. However, and for the reasons addressed below, I consider that the temporal and geographical scope of the Claimant's claim is likely to be the same or very similar, and that the extent of the claims is unlikely to be determinative of what disclosure is appropriate. In such circumstances, this further weighs in favour of not striking out the claims, not least because there would be neither a costs or timing saving. In this regard:-

- (a) I consider that regardless of the determination of the Applications, the temporal scope of the Claim overall will largely remain the same in circumstances where it is not suggested that the point raised by the Applications affects the Court's jurisdiction in respect of RoRo Services to/from ports in the EEC/EEA throughout the Relevant Period. Whatever the outcome of this application, it is likely that it will still be necessary to investigate the Defendants' alleged wrongdoing from the beginning of the Relevant Period in February 1997. This can be seen from the RAPOC itself. The Relevant Period commences in February 1997 (and indeed it is possible that disclosure may be required prior to this in the context of the expert evidence and the need for "clean" data prior to the alleged anti-competitive behaviour). There are also numerous references in the foreign regulatory actions (as pleaded out in the RAPOC) in relation to the period from 1997 onwards, and the so-called "Respect Agreement" has been said to have been on-foot since February 1997.
- (b) Equally, I consider it likely that regardless of the determination of the Applications, the geographic scope of the Claim overall will remain the same. Daimler's evidence is that based on the information presently available to it there are no non-EEA routes that were used in the period prior to 18 October 2006 but not thereafter. In such circumstances it seems likely that all routes would remain in play even if the Applications were acceded to. Daimler's plea that the wrongdoing also included the adoption of the so-called "Rule of Respect" to divide up the market for RoRo Services (a finding made by the EC and a number of the other competition authorities that have investigated the cartel) means that it may be necessary to consider the existence and implementation of that unlawful practice on routes worldwide (though again, such matters will need to be considered by the judge on the CMC).
- (c) Daimler submits that the disclosure that will be needed for a fair trial of the liability and quantum issues in this case will be much the same. This point is highly contentious and will need to be examined in detail by the judge on the CMC. It is said that so far as liability is concerned, that is a consequence of the fact that regardless of the Applications, the temporal and geographic scope of the Claim overall will remain the same. So far as quantum is concerned, Daimler submits that its economic expert will require historic pricing data, including before the cartel began, so as to facilitate regression analyses to assist in determining Daimler's Overcharge Losses. It is pointed out that the Defendants do not contend that the conduct in question began on 18 October 2006. I consider that the scope of disclosure is not likely to be greatly different whether or not the claims are in play, in the context of the pleaded issues, but ultimately this is a matter that will be examined by the judge on the CMC. To the extent that a trial of all issues will require more extensive disclosure (which is not immediately apparent) any increased cost could be compensated in costs (should it ultimately prove that particular disclosure was not necessary).
- (5) In some cases it may be appropriate to determine a point even though the outcome may be different following a pending appeal or reference, for example if the point is determinative of all the issues in the action, as to do so may allow the parties to know where they are and facilitate settlement. However that is not this case. The claims, whilst involving not insubstantial sums (estimated by Daimler at

US\$5.8million to US\$9.5 million, out of the US\$214 million in Overcharge Losses being claimed) represent only a very small percentage by value of the pleaded damages claims, and it is unlikely (even in the case of liner operators with less involvement than others) that striking out the claims will facilitate the parties to resolve their disputes.

126. In the above circumstances, and in the exercise of my discretion, I do not consider it appropriate to strike out the claims or grant reverse summary judgment in respect of them. I am satisfied that in such circumstances the claims stand a realistic prospect of success, and that there are in any event powerful case management reasons why such claims should proceed. Accordingly the Defendants' first Application is dismissed. I address below the alternative application for a reference, and the question as to whether the particular claims should be stayed (either pending the *Stichting* reference or any further reference).

F. References to the CJEU

127. Under Article 267 TFEU, a national court has a discretion to refer a question to the CJEU on the interpretation of a rule of EU law if it considers it necessary to do so in order to resolve the dispute before it (see the discussion in *UEFA v Euroview Sport Limited* 16 April 2010, Kitchin J (“*UEFA*”) at [33], and at [46]-[51] in terms of the application of the principles and the exercise of discretion). Further guidance as to the proper approach to making such a reference was provided in *Bulmer v Bollinger* [1974] Ch 401, *R v. International Stock Exchange of the UK and the Republic of Ireland Ltd, ex parte Else* [1993] QB 534 and *Trinity Mirror plc v. Commissioners of Customs and Excise* [2001] EWCA 65 at [52].
128. Two questions arise, (1) is a reference necessary to enable the court to give judgment in these proceedings and (2) whether, in the exercise of discretion, a reference should be made?
129. In *Trinity Mirror* at [18]-[20], Chadwick LJ reviewing the domestic and CJEU authorities held that “*a...measure of self-restraint*” should be applied by national courts in making a reference and that “[*w*]here 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 instant case...”.
130. Daimler resists the Defendants' application for a reference. Although it accepts that the question is one of general importance, it submits that a reference in the present proceedings is not likely to promote the uniform application of EU law. It does so not because it suggests that a definitive ruling from the CJEU is not necessary for this court to give judgment (it clearly is on its case - on its case *La Gaitana* is wrong and it submits that the CJEU would reach the same conclusion as the preliminary opinion of the Court in *Stichting*) but because it says that the relevant principles will be determined by the existing reference in the *Stichting* case, and that although there is not yet a definitive ruling from the CJEU, which it says could readily be transposed to the facts of the instant case, that will be so when the CJEU delivers its ruling in *Stichting*. One immediate

potential difficulty with that submission is that the *Stichting* proceedings may settle so that the CJEU may never make a decision.

131. In its Skeleton Argument NYKE identified two reasons why this Court should refer the matter to the CJEU for consideration alongside the *Stichting* case:-

“First, most importantly, Court is to await the CJEU’s ruling on the issues considered in *La Gaitana*, NYKE should have the opportunity to make submissions to the CJEU on those issues as well, alongside the parties in the Dutch proceedings. In *Bronfentrinker* 8 [1/11] §23, *Daimler* suggests that a reference might not achieve that objective, because the CJEU could simply stay this second reference. As to that, while the CJEU is of course master of its own procedure, it would be surprising if the CJEU took that approach, and the theoretical possibility that it might is no reason to decline to give the CJEU the opportunity to hear the two cases together. The CJEU has that power under Article 77 of its Rules and often chooses to exercise it: *Whiddington* 2 [1/14] §23. It is difficult to see why it would not do so in this case, particularly given that the underlying issue is one that has been the subject of detailed analysis in the courts of this country in the *La Gaitana* litigation.

Second, if the Court were to have doubts about the interpretation of Article 32 of Regulation 1/2003 as well, it would be sensible and efficient for those issues to be resolved by the CJEU at the same time.”

132. The submissions as to the reasons why it would be appropriate to make a reference in the exercise of the Court’s discretion expanded substantially during the course of argument, led by Mr Holmes QC on behalf of the WWL Defendants (but supported by all of the Defendants). Mr Holmes made nine points in this regard:-

- (1) A reference will not lead to any delay in the proceedings. That is clearly right whether the proceedings proceed in parallel (given the likelihood of when a trial will take place as already addressed) or if the claims were stayed.
- (2) There is no question of needing to be reluctant to overburden the CJEU given that the core issues are already being referred to the CJEU, and the additional issues will not overburden the CJEU and will allow it to address all associated issues. Again that is clearly right.
- (3) The Defendants should, in fairness, be given the opportunity to argue the point before the CJEU, not only because the *Stichting* may settle, but also on the basis that it is somewhat unattractive for *Daimler* to submit that *La Gaitana* is wrongly decided whilst submitting against the Defendants being given an opportunity to argue in support of its correctness in the forum where the issue will be determined. I agree with the sentiments expressed by the Defendants and address the point further at (5) below.
- (4) Regulation 4056/86 excluded tramp services, and the Defendants have pleaded that the services supplied were tramp services. If the Defendants are right about that, the issue then arises as to whether the court can apply Article 101 to tramp services during the transitional regime is exactly the same issue as arises in *La*

Gaitana so potentially at stake for the Defendants is the viability of the whole claim before 2006 (Article 32 of Regulation 1/2003 explicitly excluded tramp services). I agree that this is a relevant consideration.

- (5) One of the very reasons motivating the Dutch court making a reference is the deviation of its judgment from that of *Rose J* (and the Court of Appeal). It has been recognised that it is appropriate for particular entities to argue their perspective on the point - here the English authorities – a matter that *Kitchen J* recognised in the *UEFA* case at [48] (“*UEFA is able to offer a perspective on the questions I have referred which is different from that of the original parties to those proceeding*”). I consider that this sentiment is also apt in this case. Whilst the Dutch legal representatives will no doubt refer to the English authorities (as occurred before the Dutch court) it does not necessarily follow that they will offer the same perspective. Mr Kennelly points out that in *UEFA* both parties supported a reference and also that there were different perspectives whereas the issues in *Stichting* are really all from the same perspective and all the arguments are already before the CJEU. Nevertheless I consider that the CJEU would benefit from the Defendants’ perspective.
- (6) The Dutch reference is still at a very early stage, and the Defendants submit that there is a good chance that any reference will be managed together with the *Stichting* reference on the basis that this is the frequent practice of the CJEU in relation to parallel references, and the CJEU has an array of tools in terms of case management including hearing matters together, giving joint or separate judgments and hearing one after the other. The referring court can also draw the CJEU’s attention to the parallel reference in *Stichting*. Mr Kennelly, by way of riposte, says that the chances of the references being managed together is simply submission on the Defendants’ part unsupported by examples and that there is at least a real risk that the cases will be dealt with separately. However even if that is so, I consider that there must still be a reasonable chance they would be heard together or even if separately that this would not result in a significant delay in a reference’s determination.
- (7) The costs of a reference would not be substantial, there is no obligation on a party to national proceedings to make submissions on the reference and Daimler would not be obliged to do so. Each of these points is, I am satisfied, well-made.
- (8) If the currency of the transitional regime during the 2004 to 2006 period is regarded as at all doubtful (i.e. the Effect of Regulation 1/2003 Issue) it is convenient to refer that point as well, as it is a short additional point in circumstances where the point has not previously been considered by the CJEU, and it would not prevent the references being heard and dealt with together. I address the position in relation to the Effect of Regulation 1/2003 separately below.
- (9) Finally (and as already noted) the reference would address the risk of the *Stichting* case settling, and although this consideration at the moment is speculative (as Daimler rightly points out) it is well known that cartel damages cases often settle. Mr Kennelly left open the possibility that if the *Stichting* case settled and that reference did not proceed, Daimler could still apply for a reference in the present action (or the judge could make a reference). However, if made at a late stage that

would have highly undesirable trial management and costs implications. I consider this to be a further reason that supports the exercise of discretion to make a reference at this stage, albeit I recognise that it cannot be known at this stage that the *Stichting* reference will not proceed.

133. Ultimately, Mr Kennelly candidly accepted in his oral submissions in response to those made by the Defendants that whilst he maintained Daimler's position that a reference was not necessary, his real concern was if a reference was accompanied by a stay, and a reference without a stay was, as he put it "*of far less concern to Daimler*". I address the question of a stay separately below. I can see that if a stay was considered to be appropriate and necessary this might militate against a reference (given that it could lead to separate trials and increased costs subject to questions of catch up). However if a stay was not considered appropriate or necessary the making of a reference would not impact on the furtherance of all issues in the action.
134. In relation to the first question whether a reference is necessary to enable the court to give judgment, I do not consider that it can be seriously argued that a reference is not necessary to enable the court to give judgment. The question of law at issue in *La Gaitana* is decisive of the affected portion of the claim. If *La Gaitana* is correct, the affected portion of the claim, the non-European routes during the transitional regime, must fail (as Daimler recognises when stating that it will amend out such claims if the CJEU decision goes against it), whereas if *La Gaitana* is wrong (as Daimler contends and I have found to be arguable), the affected portion of the claim may proceed – that in itself suffices to establish that a reference is necessary. This remains so even though a reference has already been made in *Stichting* (see *UEFA* where a further reference was made notwithstanding an existing reference covering the same subject matter) though this is clearly relevant to discretion and whether a reference should be made. I am satisfied that a ruling by the CJEU on the questions proposed is necessary for the Court to give judgment and that accordingly I have jurisdiction to make a reference.
135. Turning to the exercise of my discretion and whether I should make a reference, I consider that it is appropriate to do so, and for each of the nine reasons that I have identified, and addressed above, each of which I consider to be applicable and to support the conclusion that a reference is appropriate in the exercise of my discretion, and that this is so notwithstanding that a reference has already been made in *Stichting*, and for the reasons identified above. I will be assisted by the parties in the drafting of the reference. I also propose to invite the CJEU to consider whether this reference should proceed with the *Stichting* reference given the overlap in issues that they raise.

G. Case Management and any Stay

136. When a reference is made to the CJEU proceedings the relevant aspect of the claim will be stayed to await the preliminary ruling of the CJEU unless the Court orders otherwise (see CPR r. 68.5), which is a matter for the exercise of the Court's case management discretion. The question that therefore arises is as to whether the associated claims should be stayed pending determination of the reference or should continue in parallel with the other issues in the action. I consider that the answer to that question is obvious on the facts of the present case, and that a stay is not appropriate in the light of the case management factors I have already identified and addressed at length in Section E above

when ruling that it would not be appropriate to strike the claims out/grant reverse summary judgment and which I consider are equally relevant in the context of considering whether to order a stay. I will not repeat those, but highlight the following points in particular:-

- (1) I consider that any prejudice in terms of allowing the claims to proceed without a stay will largely be capable of being compensated in costs, and there is no suggestion that Daimler would not be able to pay such costs.
- (2) The evidence before me suggests that the CJEU is likely to reach its decision on the existing reference within a period of around 16 months (and it is possible that the same might be true in relation to the matters now to be referred). Even with active case management, and without in any way binding the judge on the CMC, I consider that a trial is likely to be at least two years away (if not more). The likelihood is therefore that the decision of the CJEU will be known in advance of, and probably well in advance of, the trial of the action. This is a considerable benefit – if the CJEU depart from the reasoning in *La Gaitana* and the national court has jurisdiction, the necessary work will have been done in terms of advancing matters towards trial (in terms of documentation and preparing evidence for trial), and the preparation can continue for one trial without any delay. If the CJEU upholds the reasoning in *La Gaitana* Daimler will amend out the affected claims, as it has confirmed it will do, narrowing the issues for trial. Either way delay in the resolution of all issues in the action will have been avoided.
- (3) If at all possible, all claims should proceed together and to one trial which will minimise both the utilisation of Court resources and costs. In contrast, if there was a stay, then in the event that the CJEU departed from the reasoning in *La Gaitana*, there would be little or no prospect of this aspect of the case catching up with the likelihood of multiple trials, witnesses having to be called twice and the spectre of potential inconsistent findings. Whilst these claims only represent a small percentage of the overall claims, the sums claimed are nevertheless not insubstantial and as such would be likely to be pursued. It would be a standing start in terms of any specific points on disclosure, as well as witness evidence and expert evidence in relation to those claims, and would lead, almost certainly, to increased costs and delay, contrary to the overriding objective, and it would also be likely to result in the use of increased Court resources to bring such issues to trial, and determine the same.
- (4) For the reasons that I have already given, and without impinging upon the exercise of the Court's case management powers at the CMC, I consider that the temporal and geographical scope of the Claimant's claim is likely to be the same or very similar with or without the claims the subject matter of the reference, and that the extent of the claims is unlikely to be determinative of what disclosure is appropriate to be ordered. Indeed if no stay is imposed this may assist the Court on the CMC, as if a stay was imposed there could be added complications in either trying to separate out what disclosure should or should not be ordered or given depending on whether it (allegedly) only went to a stayed matter, or in applying and putting into practice on disclosure such orders as the Court might think appropriate. Such complications are obviated if all the claims proceed.

(5) In terms of the overall resolution of the dispute, and the possibility of settlement, such aims are maximised if all the issues are prepared and tried together and there are not outstanding issues still to be determined as experience shows that unresolved outstanding issues can be a hindrance to the overall resolution of the dispute and any settlement thereof.

137. Accordingly, and for the reasons given, I order that the claims shall continue in parallel with all other claims in the action rather than their being stayed.

The Effect of Regulation 1/2003 Issue

138. It will be recalled that Regulation 1/2003 (the “Modernisation Regulation”) which took effect from 1 May 2004 (see Article 45) repealed both Regulation 17/62 and Regulation 141/62 (Article 43) and substantially amended Regulation 4056/86, removing the special procedures for Commission investigations in this sector set out therein.

139. The Modernisation Regulation replaced the old Regulation 17 system with a broad new statement in Article 1(1) that:

“1. Agreements, decisions and concerted practices caught by [Article 101(1) TFEU] which do not satisfy the conditions of [Article 101(3) TFEU] shall be prohibited, no prior decision to that effect being required”.

140. At the same time, Article 1(2) provided that:

“2. Agreements, decisions and concerted practices caught by [Article 101(1) TFEU] which satisfy the conditions of [Article 101(3) TFEU] shall not be prohibited, no prior decision to that effect being required”.

141. In relation to national courts Recital (7) provided as follows:-

“National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles [101 and 102 TFEU] in full.”

142. Article 6 (under the heading “*Powers of the national courts*”) expressly empowered the national courts to apply both Articles 101 and 102 TFEU, providing, “*National courts shall have the power to apply Articles [101 and 102 TFEU]*”. It is Daimler’s case (denied by the Defendants) that Article 6 confirmed the powers that national courts already had as a corollary of their obligation to give effect to those Treaty provisions, including to accord them direct effect in proceedings between private parties.

143. Article 32 limited the scope of the Regulation. As enacted, it stated that the Regulation did not apply to:

“(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.”

144. Prior to coming into force on 1 May 2004, Article 32(c) was deleted by Regulation 411/2004 which came into force the same day as Regulation 1/2003, so that the Regulation became applicable to all conduct in the international air transport sector. No amendment was made to Article 32(a) or (b) at that time.
145. The Modernisation Regulation repealed most of the special procedures for applying competition law to the maritime transport sector that were set out in Regulation 4056/86. However it left in place the exemptions for technical and liner conference agreements, as well as a procedure to enable the Commission to seek to reconcile conflicts between EU competition law and the law of third countries with which it might conflict (Article 9). It also left in place the basic definition of the scope of the Regulation, as being limited to “international maritime transport services from or to one or more Community ports, other than tramp services”.
146. An issue that arises between Daimler and the Defendants is whether Regulation 1/2003 had the effect of bringing non-EEA maritime transport within the scope of application of EU competition law (that I have defined as the “Effect of Regulation 1/2003 Issue”). The issue arises in circumstances where Article 1(2) of Regulation 4056/86 contained a positive definition of those maritime transport services that fell within scope (materially, services from one or more Community ports) whereas Article 32(a) and (b) of Regulation 1/2003 was an express provision that specified that certain services were excluded (tramp services and services within a single Member State).
147. Daimler contends that this difference in wording had the effect of bringing non-EEA maritime transport services within the scope of application of EU competition law, and that Regulation 1/2003 is to be construed as applying generally subject only (so far as material) to the express exceptions in Article 32. The Defendants submit that that is not the case, and that it was not intended by Regulation 1/2003 to create any different scope of application of that regulation compared to Regulation 4056/86. The battle ground in relation to the Effect of Regulation 1/2003 Issue, therefore, is that even if *La Gaitana* is correct, Daimler submits that this Court has jurisdiction to apply the prohibition to non-EEA services insofar as they were provided after Regulation 1/2003 entered into force, i.e. after 1 May 2004, whereas the Defendants say that such services remained out with the regime until Regulation 1419/2006 took effect in October 2006.
148. The Defendants submit that neither the travaux for nor the recitals to Regulation 1/2003 evinced any intention to create any different scope of application of that Regulation compared with Regulation 4056/86. In fact it is said that the contrary is true. First, Regulation 1/2003 did not amend either the scope of Regulation 4056/86, or the recital to that Regulation that explained the connection between port of origin and destination

and the territorial limits on the application of EU law in this sector. Nor did any of the recitals to Regulation 1/2003 record any different analysis of the territorial scope of EU law in this sector. In particular, they did not suggest that the “*effects test*” could justify the application of EU law to non-EEA services. Rather, the discussion of maritime transport in the recitals to Regulation 1/2003 merely explained that the specific procedural provisions in Regulation 4056/86 (and the other transport regulations) should be deleted so that the sector could be made subject to the new procedures set out in the Modernisation Regulation. The Defendants submit that that was the only change to the application of competition law to maritime transport that the legislator intended to make.

149. Article 32 of Regulation 1/2003 expressly cross-referred to Article 1(2) of Regulation 4056/86 to define the scope of what was excluded. The Defendants submit that that strongly suggests that the legislative intention was to achieve the same scope of application in this sector under the Modernisation Regulation as was and remained the scope of application for Regulation 4056/86.
150. The Defendants refer to the Explanatory Memorandum to Regulation 1/2003, which said the following in relation to what was then the proposed Article 33 (which became Article 32).

“This Article sets out areas to which the Regulation does not apply. These are certain areas of the sea and air transport sectors that are not covered by the present rules implementing [Articles 101 and 102] (see Regulations (EEC) Nos 4056/86 and 3975/87).”

151. The Defendants also make further, more refined points in support of their position. In this regard it is submitted that it would be very odd if Regulation 1/2003 were interpreted as having a different scope of application in relation to maritime transport than Regulation 4056/86. On that interpretation, the Modernisation Regulation would have excluded intra-Member State transportation (Article 32(b)), but included (implicitly and without comment) purely foreign transportation, including that which was wholly within a single non-Member State (e.g. a shipment of cars within Australia from Melbourne to Perth). Furthermore, on that interpretation, technical agreements and liner conference agreements (within the meaning of Articles 2 and 3 of Regulation 4056/86) would have been exempt from Article 101(1) TFEU in so far as they related to transport to or from an EU port, but would have subject to EU competition law without the benefit of any exemption in so far as they relate to transport between non-European ports. That would have made no sense, and would have called for explanation in the recitals or *travaux* to Regulation 1/2003.
152. The Defendants submit that properly understood, therefore, Article 32 must be interpreted as mirroring the scope of the corresponding provisions of the air and maritime transport regulations. In particular, Article 32(a) and (b) must be read as excluding all maritime transport services that were excluded from the scope of Regulation 4056/86. Indeed, it is said that this is reinforced by considering the position in relation to air transport. Article 32(c) of Regulation 1/2003 only excluded “*air transport between Community airports and third countries*” but the legislature could not have intended, by phrasing the exclusion that way, to bring within the scope of EU competition law purely

foreign air transport (e.g. flights between Mexico City and Toronto), while excluding air transport from third countries to the EU (e.g. flights between Mexico City and London).

153. Recitals 1-2 to Regulation 1419/2006 summarised the history of competition enforcement procedures in the EU. They identified the main substantive features of Regulation 4056/86 (the exemptions for liner conferences and technical agreements and procedures for dealing with conflicts of laws). They noted that the procedures for enforcing competition law had been harmonised with those of other sectors of the economy in Regulation 1/2003, but that cabotage (i.e. intra-Member State maritime transport) and “tramp” services were excluded entirely.

154. In this regard Recital (2) provided as follows:-

“Council Regulation (EC) No 1/2003 ...amended Regulation (EEC) No 4056/86 **to bring maritime transport under the common competition enforcement rules applicable to all sectors** with effect from 1 May 2004, **with the exception of cabotage and international tramp vessel services**. However, the specific substantive competition provisions relating to the maritime sector continue to fall within the scope of Regulation (EEC) No 4056/86” (emphasis added).

155. Both the Defendants and Daimler rely upon this Recital. Daimler rely on the first sentence and the lack of any mention of any exclusion for non-EEA services under Regulation 1/2003. Daimler also rely on Recital (12) which provides that “[c]abotage and international tramp vessel services... are currently **the only remaining sectors to be excluded from the Community implementing rules**” (emphasis added). It is said that this is the EU legislator recognising in Regulation 1419/2006 that following Regulation 1/2003, only cabotage and tramp shipping remained excluded, and that save for these two exceptions, international maritime services had been brought within Regulation 1/2003, including on routes between non-EEC/EEA ports.

156. The Defendants point out, however, that Recital 1 (which described the position under Regulation 4056/86 before the enactment of Regulation 1/2003) also only refers to the exclusion of cabotage and tramp, without referring to non-EEA services. It is said that nothing in those recitals suggests that Regulation 1/2003 brought about any change in regulation of non-EEA services.

157. The Defendants refer to the final sentence of Recital (2) as recognising that (post Regulation 1/2003) the substantive competition provisions relating to the maritime sector continued to fall within Regulation 4056/86 (the same not having been repealed in contrast to procedural provisions).

158. Daimler says that such reliance is misplaced as it is said that the substantive provisions of Regulation 4056/86 (Articles 1, 2, 3 and 6) which survived the amendments under Regulation 1/2003 related to matters immaterial in this case, for example exemptions or exclusions for technical agreements and liner conferences. However, as the Defendants point out, the language of Article 1.2 (within Part I, the substantive section) is that Regulation 4056/86 “*shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessel services.*”

159. Both parties recognise that the Effect of Regulation 1/2003 Issue is not within the scope of the reference to the CJEU in *Stichting*, and indeed it is not a point on which the CJEU has, as yet, had an opportunity to opine. It has also been described by Mr Kennelly as a “difficult and novel point of law” and by Ms Demetriou as a “nuanced” point of law, both of which are, in my view, apt descriptions. The point does not feature in any application notice before me, as a point to be determined at the hearing on the merits.
160. Ms Demetriou, on behalf of the Defendants, nevertheless invited me to “grasp the nettle” and decide the point in the context of the Defendants’ strike out application whilst Daimler submitted that the Defendants had failed to show that the part of the Claim relating to non-EEC RoRo Services provided on or after 1 May 2004 “discloses no reasonable grounds” or has “no real prospect of success” and as such that part of the claim could not (and should not) be struck out. Had it been necessary to consider matters from a strike out perspective, I am satisfied that it would not have been appropriate to strike out claims in respect of this time period as Daimler has a real as opposed to fanciful prospect of success on that issue based on Daimler’s submissions that I have identified.
161. Of course that would not have prevented me “grasping the nettle” and deciding what the proper effect of Regulation 1/2003 actually was (as opposed to what was simply more than merely arguable) if I had considered it appropriate to decide the point. However if I was minded to consider doing so, this would itself raise the question as to whether it was necessary for me to refer the question to the CJEU in order for me to give judgment, and whether I should do so in the exercise of my discretion.
162. The situation that has arisen, however, is that I have considered it necessary to make a reference to the CJEU on the *La Gaitana* issue. The question that arises is whether, in such circumstances, I should also make a reference in relation to the Effect of Regulation 1/2003 Issue, or should decide the point now or simply leave matters to trial. It was the stance of the Defendants (as reflected in Ms Demetriou’s oral submissions in reply to me) that, “*in those circumstances then we say the correct approach is to make a reference to the European Court and to include the [Effect of Regulation 1/2003 Issue]*”. I did not understand Mr Kennelly to dissent from such submission on behalf of Daimler if I was otherwise minded to make a reference on the *La Gaitana* issue.
163. I am satisfied that this is the right approach. I do consider that it is necessary to refer the Effect of Regulation 1/2003 Issue to the CJEU on the interpretation of Regulation 1/2003 and whether as a result of Regulation 1/2003 national courts have jurisdiction in relation to non-EEC RoRo Services provided on or after 1 May 2004 a novel and undecided point of EU law. In such circumstances I have jurisdiction to make a reference. In relation to the exercise of my discretion, and in circumstances in which no previous guidance has been given by the CJEU on this novel and undecided of EU law, I consider it appropriate to make a reference as with the benefit of the decision of the CJEU it will be possible for this Court to answer the question in definitive terms and with certainty. I will be assisted by the parties in the drafting of this aspect of the reference as well. I do not consider that any separate case management issues arise in relation to this aspect of the reference. The action will proceed in the normal way in the meantime.

164. I trust the parties can agree an Order consequent upon my decisions on the Applications. I will hear the parties on any outstanding matters, and the terms of the reference, at or following the hand down of the judgment.