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The Supreme Court's judgment in *Société Cooperative de Production Seafrance v CMA*

Date: Tuesday 19 January, 2016

Venue: Linklaters LLP

Speakers: Kelyn Bacon QC (Brick Court Chambers) and Simon Pritchard (Linklaters LLP)

Chair: George Peretz QC (Monckton Chambers)

Note taker: Jack Williams (Monckton Chambers)

SUMMARY NOTE

1. The topic of the meeting was the Supreme Court's recent decision in *Société Cooperative de Production Seafrance v the Competition and Markets Authority* [2015] UKSC 75 (*"Eurotunnel II"*). The judgment can be found [here](#). As will be well known to readers already, the Supreme Court case concerned the circumstances in which an asset acquisition can constitute a "relevant merger situation" under section 23 of the Enterprise Act 2002 so that the merger regime applied: did Eurotunnel acquire an "enterprise" (including the "activities") of SeaFrance, or merely its "bare assets" ("the jurisdictional question")?

Kelyn Bacon QC: "The Supreme Court's SeaFrance judgment: light at the end of the (Euro)tunnel?"

2. Kelyn Bacon QC opened the meeting with a useful overview of the backstory to the litigation. In November 2011, the French courts ordered the liquidation of SeaFrance and ferry services ceased. In January 2012, SeaFrance ceased operating and was placed into liquidation. Whilst the majority of remaining employees were made redundant thereafter, some remained to maintain the vessels in "hot lay-up". In May 2012, Eurotunnel bid for SeaFrance's vessels and other assets in association with SCOP (a workers' cooperative formed by former SeaFrance employees) which was to provide crew, largely drawn from ex-SeaFrance employees. In July 2012, Eurotunnel's acquisition of SeaFrance's vessels, along with other tangible and intangible assets, was completed. Eurotunnel's MyFerryLink commenced operations in August 2012.

Competition Commission decision

3. In June 2013, the former Competition Commission (now CMA) decided that a relevant merger situation existed which might result in a substantial lessening in competition in the markets for the supply of transport services on the short sea. On the jurisdictional question,

the Competition Commission listed a range of factors it had taken into account which included the fact that a large proportion of the staff provided by SCOP to run the service were previously employed by SeaFrance. Ultimately, the Competition Commission prohibited Eurotunnel from operating ferry services from Dover with the SeaFrance vessels for 10 years.

Eurotunnel I

4. Eurotunnel and SCOP challenged this decision on the grounds that the Competition Commission was wrong to consider that a relevant merger situation existed. The Competition Appeal Tribunal decision (“*Eurotunnel I*”) can be found [here](#). The CAT considered that the Competition Commission had not properly formulated the applicable test for differentiating between the acquisition of an “enterprise” and the acquisition of “bare assets” (see [105] – [106] of the CAT decision). (Bacon QC made the important reminder that *Eurotunnel I* was never, itself, appealed.)
5. The CMA accordingly made a remittal decision (27 June 2014) applying this test. This decision noted that the combination of vessels and employees meant that what was acquired, and the indemnity paid for the employees re-employed which was seen to “create a link between the vessels and the employee”. Thus, the CMA reasoned, Eurotunnel and SCOP had not acquired the assets as a going concern as such, but obtained “much of the benefit of so acquiring them.” Thus, the test for “enterprise” was met in that together the vessels and employees constitute the “activities or part of the activities of a business”. Eurotunnel and SCOP appealed.

Eurotunnel II: the CAT and Court of Appeal

6. In the first decision of the *Eurotunnel II* litigation, the CAT upheld the rationality of the CMA’s decision on the grounds that it was rational that the indemnity created a link between the employees and the vessels, and there was effectively a transfer of the ex-SeaFrance employees to Eurotunnel/SCOP (see [79] of the decision, found [here](#)).
7. SCOP appealed to the Court of Appeal. The majority (Tomlinson LJ and Sir Colin Rimer; Arden LJ dissenting) upheld the appeal on the ground that the CMA’s finding on the employee transfer point was irrational because the effect of the liquidation order issued to SeaFrance in 2012 was that the “activities” which the workforce had engaged were to cease and that the employees were made redundant; the re-employment of those workers was simply that – a re-employment, rather than there being any connection existing between the purchased vessels and those employees (see [198] of the judgment [here](#)). As Bacon QC pointed out, whilst the decision was made on rationality grounds, Sir Colin Rimer also expressed *obiter* doubts, at [167], about the *Eurotunnel I* guidance surrounding the interpretation of Enterprise Act. Those comments were one of the main reasons why the CMA pursued an appeal to the Supreme Court.

Eurotunnel II: the Supreme Court

8. The CMA sought permission to appeal to the Supreme Court on two grounds: (i) on the matter of the underlying question of law regarding the jurisdictional question (particularly the meanings of “enterprise” and “activities”); and (ii) that the rationality decision of the Court of

Appeal was wrong. Around the time that permission was granted by the Supreme Court, SCOP was placed into liquidation and the liquidators did not wish to participate in the appeal. The Supreme Court therefore requested an Advocate to the Court to assist in SCOP's absence. Bacon QC was that advocate and explained to the audience the interesting position she found herself in, not having a client and yet, at the same time, not having particularly clear instructions from the Court as to what they expected from her.

9. As to the legal test, the Court held (see [here](#) for the judgment) that the interpretation of section 23(2)(a) of the Enterprise Act 2002 is a matter of law and depends on the usual statutory construction rules, rather than necessitating any discretion or deference to the CMA. In interpreting the section, the Court held that the merger control provisions of the Enterprise Act are not limited to the acquisition of a business as a going concern. Lord Sumption, giving the judgment for the Court, held that for assets to be an "enterprise" they must (1) give the purchaser more than he might have acquired by going into the market and buying factors of production and (2) the extra must be attributable to the fact that the assets were previously employed in combination in the activities of the target enterprise. The question, Lord Sumption said, "turns on economic continuity" (see [39] of the judgment).
10. Regarding the second issue, the Court held that the CMA's decision was not irrational (as the Court of Appeal had held), because the Court of Appeal had, in the eyes of the Supreme Court Justices, taken an overly formalistic approach. This followed because, as a matter of "economic substance" rather than formal legalities, the employees were transferred from SeaFrance to SCOP which pointed to the economic continuity of the business (see [38]).

Comment

11. Regarding the legal test, Bacon QC commented on the lack of full exploration of the meaning of "economic continuity", a phrase which appears in cases concerning fines on successor undertakings for breaches of competition law, and cases regarding the recovery of aid from purchasers of assets of aid beneficiaries. She commented that a test of "economic continuity" clearly requires more than a simple identification of the assets transferred, but instead requires the CMA to explain how those assets contribute to the economic substance of the business. For example, Bacon QC suggested that factors the CMA will look at include: (i) what is acquired, (ii) the full logic of the transaction; (iii) timings; and (iv) purposes and intent. Thus the test is not just about some sort of asset "shopping list", but about asking how those transfers transform the acquisition into one of an enterprise which continues *economically*.
12. As regards the rationality ground, Bacon QC opined that the Court's rationality conclusion turned on the "specific" and "unusual" facts of the case. In particular three points struck her: first, that even without the employee transfer element, the Supreme Court suggests that there were the "embers of an enterprise" (see [42] of the judgment); second, the criticism that the majority of the Court of Appeal had focused on form over substance; and third, the tone of the Supreme Court's judgment that there generally needs to be more caution from appellate courts before they overturn the economic judgments of an expert tribunal such as the CMA and then CAT on appeal (see [44] of the judgment). Whilst the CMA is not "shielded" from rationality challenges, Bacon QC cautioned that the Supreme Court has signalled greater judicial 'deference' or 'restraint' in the assessment of CMA decisions.

Simon Pritchard: “GET me some Gumbo”

13. In a talk both entertaining and informative in equal measure, Simon Pritchard explored the policy context and implications of the judgment for the CMA’s jurisdiction.
14. Pritchard began by posing the question whether the concept of the CMA’s jurisdiction for merger control was more like a hard-edged cliff face of the White Cliffs of Dover, or more akin to the “fuzzy”, blurred boundaries between land and water of the Louisiana Bayou. The “long list of expansive tools in the CMA’s tool kit” were listed (for example material influence, associated persons, share of supply, substantial part of the UK). Was “enterprise” more of a hard-edged test? Or would the Court’s interpretation coincide with the CMA’s “embarrassment of riches” for phase 1 merger control?
15. In exploring these matters across the stages of the Eurotunnel litigation, Pritchard suggested the following delineations:
 - a. The Competition Commission’s submission that what constitutes an “enterprise” was essentially a question of fact and degree = Bayou (fuzzy)
 - b. The CAT’s decision in *Eurotunnel I* that “enterprise” must be defined and this definition question has no margin of appreciation for the Competition Commission = Cliff (hard-edged)
 - c. The CAT’s decision in *Eurotunnel II* that although the question of “enterprise” definition goes to jurisdiction, that does not mean it is a question of one answer, with the result that it is a matter which calls for the exercise of judgment = Bayou (fuzzy)
 - d. The Court of Appeal’s judgment in *Eurotunnel II* that there is no sustainable basis for employee transfer from SeaFrance to Eurotunnel/SCOP because “that is not what happened as a matter of law or any rational assessments of the facts” (see Rimer at [199] = Cliff (hard-edged))
 - e. The Supreme Court’s judgment that “the test... is a question of law... [its] application to particular facts may call for expert economic judgments. But otherwise the [CMA’s expertise and specialist nature]... do not clothe it with wider power” (at [31]) = Cliff (hard edged)...
 - f. ...However, the Supreme Court’s continuation that “economic continuity... call[s] for difficult and complex evaluations of a wide range of factors... cannot usually be reduced to simple points of principle... in purely legal or formal terms... the [Court of Appeal] sought to reduce the question of economic continuity to [a] single question ... and led them to take an unduly formal approach... and to discount the depth of economic analysis.” (at [44]) = Bayou (fuzzy)
16. Pritchard then commented on the “fantastic result for CMA” of *Eurotunnel II* considering the quotes in the judgment, at [35] for example, that “merger control is the principal weapon in the law’s armoury for pre-empting concentrations liable to affect [market structure]”. It was commented that the ultimate result of the Supreme Court’s decision was probably the “best

finale” for the CMA after the judicial “ping-pong” between Cliff and Bayou interpretations of the word “enterprise”. After the CAT and Court of Appeal had dismissed the CMA’s focus on what it saw as an anti-competitive deal rationale as ‘misplaced’ and “concerning”, respectively, the Court did not criticise, in Pritchard’s words, a smell test.”.

17. This conclusion was further explained with a metaphor of Gumbo (explaining the title of Pritchard’s presentation). Gumbo is a Cajun soup whose central ingredients can be almost anything. Much like this, Pritchard argued, is the “embarrassment of riches” which the CMA has in its jurisdictional tool-box. This can be seen from the *ex p South Yorkshire* judgment and subsequent case law regarding “substantial part of the UK”. What is relevant? Area, population, GDP, vehicle mileage, services available, tourism etc etc... This is a list more than a test. But *Eurotunnel* was not a complete re-run of *South Yorkshire* – for the latter, the CMA would seem to be able simply to list Gumbo ingredients to underpin “substantial”. The margin of appreciation afforded to the CMA by the Supreme Court in *Eurotunnel II* in deciding whether there is “economic continuity” does allow economic substance to prevail over legal form. But the history of the case suggests that the CMA needs to do more, even as an expert authority considering a question of economic substance, than simply list ingredients to establish “enterprises ceasing to be distinct” – it must put forward its own *recipe*: how the ingredients bond together – which are critical, and is this a dish you can over- or under-cook?