

# The Supreme Court's *SeaFrance* judgment: light at the end of the (Euro)tunnel?

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# The backstory




# The liquidation of SeaFrance

-  30 June 2010 – SeaFrance put into administration, but continued to provide cross-channel ferry services.
-  Various offers made to purchase the business, including from SCOP, a workers' cooperative formed by former SeaFrance employees. Offers all rejected.
-  15 November 2011 – French Court ordered liquidation of SeaFrance; ferry services ceased.
-  9 January 2012 – Court ordered SeaFrance to cease operating and placed company into liquidation. Majority of remaining employees made redundant by 24 January 2012, but some remained to maintain vessels in 'hot lay-up'.

# Acquisition by GET/SCOP

-  May 2012 – GET (Eurotunnel) bid for SeaFrance vessels and other tangible/intangible assets, in association with SCOP which was to provide the crew, largely drawn from ex-SeaFrance employees.
-  Acquisition of assets was completed on 2 July 2012. GET's subsidiary MyFerryLink SAS commenced operations on 20 August 2012.
-  7 November 2012 – French competition authority considered the transaction to be a merger, but cleared it subject to commitments by GET.

# CC Decision (6 June 2013)

 Relevant merger situation existed, which might be expected to result in an SLC in the markets for the supply of transport services to passengers and freight customers on the short sea. On the jurisdictional issue:

‘Our assessment turned on the ease and speed with which the Vessels were put back into operation; the fact that GET and the SCOP acted together to secure control of the Vessels and other assets and/or that GET had material influence over the SCOP; the fact that a large proportion of the staff provided by the SCOP to run the MFL service were previously employed by SeaFrance; and the fact that GET’s bid had assigned some value to the brand and goodwill ...’

 Prohibited Eurotunnel from operating ferry services from Dover with the SeaFrance vessels for 10 years.

# *Eurotunnel I* judgment (4 December 2013)

- 🇬🇧 Challenges by GET and SCOP *inter alia* on grounds that CC wrong to consider that ‘relevant merger situation’ existed under s. 23(2)(a) of Enterprise Act 2002.
- 🇬🇧 CAT considered that CC had not properly formulated applicable test for differentiating between the acquisition of an ‘enterprise’ and the acquisition of a ‘bare asset’, and remitted for reconsideration.

‘if a guiding principle is sought, then we consider that it lies in an understanding of what an enterprise – the activities or part of the activities of a business – does. An enterprise takes inputs (assets of all forms) and by combining them transforms those inputs into outputs that are provided for gain or reward. It thereby also may generate intangible but valuable assets such as know-how or goodwill. It is in this combination of assets that the essence of an enterprise lies.’

# CMA remittal decision (27 June 2014)


- ‘PSE3’ indemnity paid by SNCF for the benefit of SCOP for the employees re-employed by them ‘creates a link between the vessels and the employees’ and ‘shows that a large proportion of the SeaFrance workforce effectively transferred from SeaFrance to the SCOP’.
- Combination of vessels and employees meant that what was acquired was more than a ‘bare asset’.
- Although GET/SCOP did not acquire the assets as a ‘going concern’, ‘in reality they obtained much of the benefit of so acquiring them’.
- ‘We conclude that the collection of tangible and intangible assets (including the transferred ex-SeaFrance employees) that GET/SCOP acquired meets the legal definition of an enterprise in that together they constitute the activities or part of the activities of a business.’

# *Eurotunnel II* judgment (9 January 2015)

- 🚢 Challenges by GET and SCOP to CMA's renewed conclusion that there was a relevant merger situation, dismissed by CAT.
- 🚢 Central criticism was the rationality of the 'employee transfer' findings.
- 🚢 CAT agreed that some statements in CMA report were misplaced, but upheld the rationality of the CMA's decision.

‘... we consider that it was clearly open to the CMA to find that the indemnity “creates a link between the vessels and the employees” and had both the purpose and result that a significant number of ex-SeaFrance employees were employed by the SCOP. On the particular circumstances of this case, we do not think that it is irrational or fails properly to have regard to the facts for the CMA to have concluded that for those ex-SeaFrance employees who were hired by the SCOP there was in effect ... a transfer of that part of the ex-SeaFrance workforce from SeaFrance to Eurotunnel/SCOP.’

# Court of Appeal judgment (15 May 2015)

 SCOP appealed. 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.

‘The effect of the court order of 9 January 2012 was that the “activities” in which the workforce had formerly been engaged were finally to cease and that the employees must be dismissed within 15 days as redundant, as they were. At the point of dismissal, the employees’ connections with SeaFrance were finally severed.’ The re-employment of the SeaFrance workers was ‘a true re-employment of employees whose services were available for hire in the market, albeit a re-employment incentivised by the terms of PSE3.’

 NB however Rimer’s *obiter* doubts about *Eurotunnel I* guidance:

‘the statutory language in section 129 of the Enterprise Act 2002 ... shows in my view that **Parliament’s intention was focused only on the case in which the acquiring entity takes over another business as a going concern**’.

# Appeal to Supreme Court

- 🚢 CMA sought permission to appeal to the Supreme Court, which was granted.
- 🚢 Meanwhile, on 31 July 2015 SCOP was placed into liquidation, and on 31 August 2015 GET agreed to release the vessels to DFDS. SCOP's liquidators dropped out of the appeal.
- 🚢 Supreme Court therefore requested Advocate to the Court to assist in the absence of SCOP. Subsequently GET also intervened.
- 🚢 Two main issues for the Supreme Court:
  - 🐟 the legal test
  - 🐟 the rationality finding





# The judgment of the Supreme Court



# The legal test

- Preliminary point taken by CMA on jurisdiction to interpret s. 23(2)(a) dismissed: interpretation of test is a question of law, which depends on the construction of the Enterprise Act.
- Merger control provisions of the Act are not limited to the acquisition of a business as a going concern.
- Object of distinguishing between ‘bare assets’ and assets amounting to an ‘enterprise’ is to prevent merger control from capturing organic growth. 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 turns on ‘**economic continuity**’.

# Rationality of the CMA's decision

-  GET/SCOP acquired substantially all the assets of SeaFrance: not only vessels in hot lay-up, but also trademarks and goodwill.
-  In addition, the arrangement with SCOP enabled the service to be resumed with 'substantially the same personnel'.
-  The ex-SeaFrance employees also came with the PSE3 'dowry', aimed at encouraging their re-employment, which 'created a link between the vessels and the employees'. As a matter of 'economic substance', employees were transferred from SeaFrance to SCOP, which CMA was entitled to regard as pointing to the economic continuity of the business.
-  Majority of CA took 'unduly formal' approach to the issue. Appeal on rationality ground allowed.

# Commentary (which ship sank?)






# The legal test

- 🇪🇺 CMA's argument that the statutory language was 'linguistically irreducible' sank pretty quickly; CMA ultimately supported the economic continuity test.
- 🇪🇺 cf notion of economic continuity in Case C-434/13 P *Parker Hannifin* (fines on successor undertakings) and Case T-123/09 *Ryanair v Commission* (recovery of aid from purchaser of assets of aid beneficiary).
- 🇪🇺 Effect of 'economic' continuity test → insufficient simply to identify the combination of assets transferred (the problem with the initial CC decision); rather CMA needs to explain how those assets contribute to the continuing economic substance of the business.

# The rationality point

 Rationality conclusion turns on specific (unusual) facts of this case. NB in particular:

-  Suggestion that too much emphasis placed on ‘employee transfer’ conclusion. Supreme Court suggests that even without that finding, cumulation of other factors (see slide 13) meant that CMA was right to find that there remained the ‘embers of an enterprise’ (see §42).
-  Concern that the CA majority had focused on form over substance in their findings on the employee transfer point (§§43–4).

 More general point: caution required before an appellate court can be justified in overturning the economic judgments of an expert tribunal such as the CMA and the CAT (§44).

Thank you

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