DOOMED ENTERPRISE: THE COURT OF APPEAL TORPEDOS THE CMA'S SECOND ATTEMPT TO TAKE JURISDICTION OVER EUROTUNNEL'S PURCHASE OF SEAFRANCE ASSETS

Société Coopérative de Production SeaFrance S.A. v. CMA and DFDS A/S [2015] EWCA Civ 487

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Introduction

The concept of an "enterprise" has been at the heart of the UK's idiosyncratic system of merger control from the passage of the Fair Trading Act in 1973 through to the present regime set out in the Enterprise Act 2002 ("EA02"). A consistent feature of the regime has been that it catches a transaction only if it involves two (or more) "enterprises" ceasing to be distinct. Leaving aside for present purposes the complexities of the notion of "ceasing to be distinct", when a purchaser buys a collection of assets previously used to carry on a business, has it bought just a collection of assets, or has it bought an "enterprise"? If it has bought only assets, but not an "enterprise", then the transaction lies outside the scope of UK merger control. So the question of what "enterprise" means is, often, a critical one on which turns the regulation of very major transactions.

In the mid 1990s I was the lawyer tasked with advising the then Office of Fair Trading on merger control issues. (The use of the singular may come as a surprise to younger readers, but is entirely accurate: in those far-off days, the OFT easily managed with only one lawyer dealing with merger control.) Having been entrusted with this important task, which plainly required getting to grips with the concept of an "enterprise", I went first to look at what the statute said. But then, as now, the statute was of limited help: "enterprise" is defined, only, as "the activities, or part of the activities of a business", and "business" is defined so as to include professional activities and any other activities carried on for gain or reward[1].

With a certain sinking feeling, I then turned to the books of case-law. The sinking feeling stemmed from my passing acquaintance with employment law, which I knew just well enough to appreciate quite what a cat's cradle the employment tribunals had managed to make of the parallel question under TUPE. But, to my mingled astonishment and relief, I discovered that – despite the critical importance of the point for major transactions – there was no case-law at all either to assist or to hinder the analysis. In fact, the only thing that passed for authority was a single report by the Monopolies and Mergers Commission ("MMC") in the *AAH/ Medicopharma* case, where the MMC had established to its own satisfaction that

1 See what is now s.129(1) EA02

the purchase of depots, computer systems and stock from the receiver of an insolvent pharmaceutical wholesale business did amount to the acquisition of an enterprise and duly asserted jurisdiction. However, the purchaser had meekly accepted that its transaction was caught and had not troubled any judicial body with an appeal. Armed with this meagre, but highly convenient, "authority" I then cheerfully advised that a whole load of transactions – notably acquisitions of bus depots by Stagecoach, then a highly acquisitive operator with which the OFT had a running battle on a number of fronts – fell within the merger control regime. And to my surprise, even Stagecoach, each time, failed to challenge the conclusion that there was jurisdiction, even when it was made to sell off, in a firesale, its newly acquired bus depot – a depot which, despite its ordinariness in every other respect, had been dignified by the OFT and the MMC with the grand title of "enterprise".

Despite that good run, I am pretty sure that I would not have predicted that it would take almost another 20 years before the "authority" of *AAH* came to be considered by a court. But it is nonetheless the surprising truth that the concept of "enterprise" in UK merger control legislation was not subject to any judicial consideration before the Eurotunnel/SCOP/SeaFrance saga.

However, like buses in the old adage, you wait forty years for cases on the point and then three come along at once. The first was the judgment of the Competition Appeal Tribunal ("CAT") on the first *Eurotunne*l appeal, in which it held that the Competition and Markets Authority ("CMA") had not established that what was bought was an enterprise but gave the CMA another bite of the cherry ("*CAT1*")[2]. The second was the CAT's holding that the CMA had, in its second bite, done enough to reach a sustainable conclusion that what was brought was an enterprise "*CAT2*"[3]. And the third was the Court of Appeal's judgment last month, by a majority, that that conclusion by the CMA was unsustainable[4].

The obvious question after those judgments is whether the concept of "enterprise" is any clearer now than it was before this saga hit the courts. I am not at all sure that it is. But in order to develop that answer, readers need to bear with me while I say something about the facts.

The essential facts

SeaFrance, the well-known cross-Channel ferry operator, was a wholly-owned subsidiary of the Société Nationale des Chemins de Fer ("SNCF"), the French State railway. It was a company subject to French law. Despite its connections

2 [2013] CAT 30
3 [2015] CAT 1
4 [2015] EWCA Civ 487, Tomlinson LJ and Sir Colin Rimer in the majority, Arden LJ dissenting.

to the French State, it went into administration in summer 2010. After a failed attempt by the French Government to obtain Commission permission to give the dying company State aid, and a failed bid for the business by a worker's co-operative (the SCOP) set up by former SeaFrance employees, the *coup de grace* was finally given in late 2011/ early 2012, when SeaFrance was liquidated and required by French law to cease trading. Its ships were put into "hot lay-up" (i.e. left moored outside Calais but kept in a state where they could be made ready for service quickly if any purchaser emerged) and its employees made redundant, except for a few kept on to maintain the ships in hot lay-up.

Those with any familiarity with French employment law will be aware that it offers a formidable system of protections to employees against the vagaries of the market. That system duly swung into action: and its result was a "job saving plan"[5], adopted in early 2012, under which SNCF agreed to pay what was (somewhat oddly) called an "indemnity" to certain employers if they engaged any of the former SeaFrance employees. Importantly, the indemnity reached a high of €25,000 per employee if the employer was a business operated wholly or partly by the SCOP or a similar co-operative and consisted of the running of the old SeaFrance vessels on a similar basis.

By June 2012, Eurotunnel had made a bid for the old SeaFrance assets which it proposed to operate as a crsss-channel ferry business in partnership with the SCOP. After approval by the French courts, this arrangement was agreed and implemented, and MyFerry began to run a ferry service across the Channel using SeaFrance's old boats and employing a very large number of SeaFrance's former employees.

At this point, one can appreciate why the CMA was keen to assert jurisdiction. The CMA was concerned that the effect of all this was that Eurotunnel - which obviously competed with cross-Channel ferries - had acquired a ferry business using the assets of a business which had formerly been a competitor, thereby substantially lessening competition. That is precisely the sort of result that merger control exists to deal with. And from a policy point of view, why did it matter that Eurotunnel had acquired the assets in the way that it had rather than buying all the shares in SeaFrance, while it was still operating, directly from SNCF (a transaction that plainly would have been the acquisition of an enterprise)?

On the other hand, any merger control regime needs to exclude purchases of mere assets: if it does not, then it risks catching purely organic growth or the development of a new business from assets purchased in the market place - and, in general, organic growth and new businesses are to be encouraged, and not discouraged by regulation, even if they lead to growing economic power by the growing company. That need is addressed in the UK regime by the concept

5 *"Plan de sauvegarde de l'emploi"* or "PSE"

of an "enterprise": and the position of Eurotunnel and the SCOP was that they had not bought an "enterprise" but simply a collection of assets: this was the development of a new business and not a merger.

The litigation in the CAT

Eurotunnel's and the SCOP's challenge in *CAT1* to the CMA's[6] original report covered a large number of issues. But the only point that need trouble us is CAT1's analysis of the "enterprise" question.

CAT1 adopted as "helpful" the critical part of the MMC's analysis in *AAH*: the correct approach was to identify what, if anything, had been acquired above "bare assets" and if so to ask if that placed the buyer in a different position than it would have been had it just bought the assets. It went on to add that in answering those questions the decision-maker had to take as a "guiding principle" an understanding that an enterprise involves a combination of tangible and intangible assets used to turn inputs into outputs.

CAT1 then made two points relevant to the facts in the instant case. First, it was possible for an enterprise to wind down and then be wound up again: continuous trading was not essential. But, second, the fact that the purchaser of the assets uses those assets to operate a business that is exactly the same as the business that operated those assets previously does not mean that the business was the same: and the fact that the merger control system would have been invoked to prevent or reverse the acquisition of the former enterprise does not help in answering the question of whether what was bought was in fact the enterprise (so that the CMA's policy concerns were, at this jurisdictional stage, irrelevant).

Since the CMA had not applied the analysis in *CAT1*, the CAT remitted the question of "enterprise" back to the CMA. In remitting, *CAT1* indicated that the CMA might want to look again at the extent to which maintaining the ships in hot lay-up speeded up their return to service and at the link between the €25,000 indemnity under the job-saving plan and the employment by Eurotunnel/ SCOP of a very high number of ex-SeaFrance employees: moreover, those employees might have been in a uniquely good position to spped up the return to service of the ex-SeaFrance ships. In short, the CMA was invited to look at the *"momentum or continuity in the combination between the vessels and the workforce"*.

Eurotunnel and SCOP did not appeal against either the analysis in *CAT1* or against the decision to remit rather than simply quash.

6 At that stage, still the Competition Commission: but I ignore that wrinkle in what follows.

The CMA duly looked again at this issue. In its remittal report, it came to the same conclusion that there was the acquisition of an "enterprise". Eurotunnel and the SCOP challenged the CMA on the basis that it had not correctly applied *CAT1*: but in *CAT2* a differently-constituted CAT rejected that appeal. The SCOP then appealed to the Court of Appeal.

The approach of the majority of the Court of Appeal

Sir Colin Rimer's judgment, with which Tomlinson LJ agreed, sets out the majority's view: Tomlinson LJ added some further remarks. Arden LJ gave a dissenting judgment.

It is important to note at the outset that, by this stage in the litigation, the question was whether the CMA had acted rationally. The SCOP did not challenge the legal guidance given by *CAT1* (though, as we shall see, the Court of Appeal was not by any means convinced that it was right). What it argued was that the CMA's conclusions in application of that guidance had no rational basis. That is because It is now well-established that when a decision-maker faces a wooly test that he has to apply in deciding jurisdiction (such as whether there was an "enterprise" or, in the leading case of *R v MMC ex p. South Yorkshire Transport*[7], whether the share of supply test was met in a "substantial part" of the United Kingdom), he is entitled to exercise a discretion with which a court can only interfere on classic judicial review grounds (such as irrationality).

Before looking at the key reason why the majority considered that the CMA's findings were irrational, a couple of important background points emerge from their judgments.

First, at the heart of the majority's approach is their emphasis on the lapse in time between SeaFrance's cessation of activities as a result of the French insolvency court's order in November 2012 and the acquisition by Eurotunnel/ SCOP. Thus, Sir Colin Rimer opened his judgment by observing that the key element of the definition of "enterprise" was the word "activities": and he immediately observed that on the facts the apparent logical difficulty that the CMA faced was that the existence of this gap during which there were not just no "activities" but (due to the court order that it cease business) *"[no] prospect that [SeaFrance] could or would*" resume activities[8]. Tomlinson LJ added that this gap seemed to be him to be very different from a seasonal hiatus, and described the CMA's conclusions that there were continuing activities as of the date of acquisition as *"counter-intuitive"*, requiring *"cogent and powerful reasons"*[9] to support them.

7 [1993] 1 All ER 289, HL
8 §146
9 §§133-134

This emphasis partly reflects, in my view, a scepticism expressed by the majority about the correctness of the approach in *CAT1* to the question of what the legal meaning of "enterprise" is. Sir Colin Rimer made the general comment that he did not find the CAT's approach an easy one[10], and later admitted to *"respectful doubts"* about its correctness[11]. It appears from §167 that he was attracted by an approach that limited the concept of acquisition of an enterprise to cases where a business is acquired as a going concern – an approach that would mark a significant narrowing of the *AAH* test (although his reference in his discussion of *AAH* to the point that in that case the acquisition was deliberately structured with a view to avoiding merger control[12], combined with Tomlinson LJ's emphasis on the fact that in the present case there was no suggestion of any such attempt[13], may well indicate that they would have added a rider to any attempt to formulate their own test to the effect that the authorities would be entitled to discount clever arrangements designed to avoid merger control). However, since the SCOP did not try to challenge the approach in *CAT1*, the majority did not formally over-rule it (though its fate, at least at Court of Appeal level, must now be open to doubt). What though remained, when the majority came to apply the *CAT1* test, was a clear scepticism about any attempt to argue that there was a continuing enterprise when the business appeared to have ceased for anything more than a hiatus or seasonal break (an analogy the majority found entirely unhelpful to the SeaFrance case)[14].

Second, the majority were clearly not minded to accept that the concept of "enterprise" should be interpreted "widely" – criticising the CMA for adopting precisely that approach[15]. It may be noted that even *CAT2*, which upheld the CMA, was hostile to that aspect of the CMA's reasoning[16], rejecting the idea that "enterprise" should be interpreted expansively. And even though (as Sir Colin Rimer noted) it is now established that a purposive construction is appropriate, it is not self-evident that a consideration of Parliament's purpose points in the direction of an expansive, as opposed to a narrow construction: if one sees Parliament's purpose as being to exclude from merger control organic growth by asset purchases, that purpose does not clearly dictate either a wide or a narrow approach.

Third, the majority identified two points that led them to adopt "*special care*" in scrutinising the rationality of the CMA's conclusion. One was that the CMA's erroneous view that "enterprise" should be read widely gave rise to *"a concern as to the width that the CMA may have attached to the concept of an*

10 §162
11 §167
12 §159; see also §184
13 §131. Tomlinson LJ found that the absence of any suggestion of such an attempt in the present case was a significant factor to which insufficient weight was given by the CMA.
14 §158
15 §§184 and 194
16 §86

'enterprise'"[17]. The other was that the decision was *"of the greatest importance"* and *"went to whether [it] had jurisdiction to wield its very considerable powers in a manner that would or might have the potential to affect hundreds of jobs."*[18]

Where, then, did the CMA go so badly wrong that its reasoning was irrational? The starting point is that the CMA's reasoning critically depended on its finding that the ex-SeaFrance workforce *"transferred"* (or *"effectively transferred"*) to MyFerry. The other elements identified by the CMA in support of its conclusion on "enterprise" (transfer of good will and maintenance of ships in hot lay-up) were more or less accepted by the CMA to be no more than makeweights to that critical finding[19].

However, the majority could not see how the finding of "effective" transfer could be reconciled with the fact that all SeaFrance employees (apart from those few maintained for the purposes of the ships in hot lay-up) were made redundant in January 2012, well before Eurotunnel came onto the scene[20]. As for the job-saving plan, it held that the CMA's view that that plan had the aim of continuing SeaFrance's activities in some form simply begged the question. The employees had been dismissed; and, although the aim of the plan was plainly to secure the re-employment of those employees in a cross-channel ferry business, that plan could not be characterised as an intention to continue the business (as opposed to creating a similar business)[21]. Both members of the majority were clear that any bystander, or any of the employees, would not have regarded the employees as "transferred"; rather, they obtained employment in a new business (and Tomlinson LJ noted wryly that the half of employees who were not re-employed would not have agreed that there was any continuity of employment as between SeaFrance and MyFerry).[22]

Arden LJ's dissent

A couple of points can usefully made about Arden LJ's dissent. First, she rejected the submission by the SCOP that a defunct business could only exceptionally be the subject of a merger situation, noting that that proposition did not appear in *CAT1*[23]. That point supports the point that I made above to the effect that the majority's insistence that the CMA's conclusion that there was a continuing enterprise was counter-intuitive and required powerful reasons to support it was linked to its scepticism as to the correctness of *CAT1*. Secondly, she accepted that, as a matter of fact, given that 70-80% of MyFerry employees

17 §194
18 *ibid*
19 Tomlinson LJ did not agree that the hot lay-up point assisted the CMA at all; see §136.
20 §198
21 §173
22 §136
23 §112

were ex-SeaFrance and that (because of the indemnity) the SCOP had been closely involved in the acquisition, the CMA could rationally conclude that there had been a "*migration"* of employees from SeaFrance to MyFerry.

Points for practitioners

The effect of the Court of Appeal's judgment is to throw considerable doubt over the correctness of the *AAH* approach as developed in *CAT1*. It is difficult to put it higher than that, because the majority were careful to note that their reservations about *CAT1* were not the subject of argument, and so were *obiter*. But as I have argued above, the majority's reluctance to accept that (save in exceptional circumstances or in the context of a deliberate attempt to avoid merger control) there could be a continuing enterprise after a substantial gap of the kind at issue is in distinct tension with the approach in *CAT1.*

The majority's judgment also contains passages that will in future be heavily relied on by applicants for review by the CAT of decisions as to jurisdiction. It expressly rejected an expansive approach to jurisdiction, and called for special care in scrutinising decisions that jurisdiction was established, given the extent of the powers available to the CMA when it was established. It may be noted that those comments apply as much to the CMA's market investigation jurisdiction as to its merger jurisdiction. The CMA retains a discretion to apply the wooly concepts used in its jurisdictional tests: but it has been warned that judicial scrutiny of its approach may now be more searching than has previously been the case.

The SCOP was represented by Daniel Beard QC and Rob Williams instructed by RPC.

The CMA was represented by Paul Harris QC and Ben Rayment.

Meredith Pickford QC and Ligia Osepciu represented DFDS AS which intervened in the proceedings in the CAT and the Court of Appeal, instructed by Hogan Lovells.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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