IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1233/4/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24th November 2014

Before:

THE HON. MR JUSTICE ROTH
(President)
PROFESSOR JOHN BEATH
JOANNE STUART OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

Case No. 1235/4/12/14

THE SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and –

DFDS

Intervener

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H E A R I N G
D A Y O N E

APPEARANCES

Mr. Richard Gordon QC and Mr. Alistair Lindsay (instructed by Pinsent Masons LLP) appeared for the Applicant, Groupe Eurotunnel S.A.

Mr. Daniel Beard QC and Mr. Rob Williams (instructed by Reynolds Porter Chamberlain LLP) appeared for the Applicant, The Société Coopérative De Production Sea France S.A. ("SCOP")

Mr. Paul Harris QC, Mr. Ben Rayment and Mr. T. Sebastian (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Meredith Pickford and Miss Ligia Osepciu (instructed by Hogan Lovells LLP) appeared for the Intervener, DFDS.

THE PRESIDENT: Mr. Beard, just before we get under way can I mention that we have got in our bundles, and some of us have extracted it, the non-confidential version of the Decision. It may be that is all we need, but if we could take it out for just a moment, and go into it at p.45, you will see that there are quite extensive redactions about number of employees and proportion, which possibly may be relevant. Indeed, on p.44, there is a paragraph that may or may not be relevant, but we do not know because we cannot read it at all. I think it might be sensible if we could, please, be given at some point the confidential version.

Also we assume it is confidential vis-à-vis DFDS, and no doubt others in the room. I do not know it is confidential - there are different versions as between Eurotunnel Group and SCOP, or whether you have got one version. That may not matter. I think if we just see the confidential version ----

MR. BEARD: Sir, it was the second point that I was going to raise, that the confidential versions are not in the bundle. For the purposes of today's hearing it is not going to be necessary, but I was going to offer that we can provide the confidential version that we have to you, and indeed the previous report if that is of use as well, so that you can have the complete picture. On going through it did strike me that even though the matters may not be strictly determinative, it is important that the Tribunal has a full picture of these matters.

THE PRESIDENT: Particularly on the employees, because quite a lot is said about that.

MR. BEARD: Certainly.

THE PRESIDENT: Also, just for clarification, for example, on p.46, para.3.77, do I take it that in the second line the figures in the square brackets are non-confidential, and they are expressed that way because it is arranged?

MR. BEARD: Yes.

THE PRESIDENT: So one can say 80 to 90 per cent?

MR. BEARD: Absolutely. We have tried to minimise the amount of confidential information. There is a confidentiality ring in place, just because of the difficulties that arise for the purposes of submissions and indeed judgments. So this was seen as the cleanest way. It was a point that I was going to raise with the Tribunal at the outset.

THE PRESIDENT: It may be that there is very little in those passages, but if we can see them at an appropriate time, perhaps by tomorrow.

MR. BEARD: Yes, that can be arranged.

MR. HARRIS: Sorry to interrupt, Sir, we anticipated this might arise. We do have present and available right now the confidential Decision. It is obviously a document that would go in the ring. We are happy to hand it up now.

THE PRESIDENT: Have you got three copies of it?

MR. HARRIS: We have many copies, I think. We have certainly got copies for the Tribunal.

THE PRESIDENT: You can do it over the break.

MR. HARRIS: Just to assist the Tribunal, as regards the two particular points you raised on p.44 and 45, we looked at them carefully and we do not propose to refer to anything in 3.70. When you see it, you will see. As regards the precise numbers of employees, again, we do not need to refer to them. The ranges are sufficient for us and that is why we did not put it forward, but it is available so we will make sure it comes.

MR. BEARD: I think the position is the same for us as well, hence the reliance on non-confidential material.

Perhaps it is not necessary, but I suppose I ought to do proper introductions for all here. Working from your side of the bench from right to left, acting for the CMA, Mr. Sebastian and Mr. Rayment led by Mr. Harris. Then for DFDS Mr. Pickford and Miss Osepciu. Mr. Williams and I appear on behalf of the SCOP, and to my right Mr. Gordon and Mr. Lindsay appear on behalf of Eurotunnel.

As you know, the SCOP has a single ground of appeal, that the CMA does not have jurisdiction over the transaction which it characterises as a merger, in essence because SeaFrance have long ceased to operate, and so when the vessels were bought by Eurotunnel there were no SeaFrance business activities to be acquired, and the later recruitment of people to operate those vessels did not change that. We say that the CMA has strained the meaning of the term "enterprise" beyond its proper interpretation in order to maintain the effect of its previous Decision which the Tribunal quashed.

In order to make good that ground of appeal, obviously the Tribunal has our skeleton argument and notice of application. Today I am intending to deal with matters in three parts: first, some background by reference to the French documents relating to the demise of SeaFrance and the sale of its assets; secondly, remarks about the legal framework, including statutory material, past decisions and the previous Tribunal judgment; and then, thirdly, I will highlight the key criticisms of the CMA Decision and the reason why there was no merger situation in this case.

I have not done housekeeping because I can see behind each member of the Tribunal what look like five and a half bundles, and in those circumstances I will not go through the details of them.

To start with the background, if I may, perhaps we could take out bundle 2. I am going to refer to the document at tab 4. Just for your notes, the original French version is at tab 3. This is the Decision of the Paris Commercial Court of 16th November 2011. This document starts with an interesting history of SNCF and its involvement in the development of freight

and passenger services across the Channel, and a history of various parties being involved. If one can pick it up at 2.493, what we see here is a consideration of the position of SeaFrance following various changes, including the opening of the tunnel and the opportunities for duty free sales, and indeed various labour problems that occurred. In 2007, 2008 and 2009 one saw a progressive but marked deterioration in the trading conditions for SeaFrance, not only a fall in turnover but a very substantial move from profit to loss. So SeaFrance itself in 2009 started measures aimed at dealing with these issues. It reduced the number of ships it was operating, it reduced the number of staff that were involved. There were well over a thousand staff involved prior to those redundancies. But those measures, it transpired, were not sufficient to rejuvenate SeaFrance.

So, in a judgment dated 28th April 2010, the Court of Commerce in Paris opened proceedings for protective measures with regard to SeaFrance. I just note that it is back in 2010. So essentially, this is the start of an administration process in relation to a heavily loss-making undertaking, SeaFrance. Under the French scheme for administration there is a supervisory period, and that was progressively maintained and extended, as one can see just over the page, 494 final arrow bullet:

> "In a judgment dated 26 April 2011 and on an application from the Public Prosecutions Office, the observation period was renewed up to 28 October 2011, being 18 months from the start of proceedings."

So it had been a long period of supervisory administration effectively in relation to the company in question.

In the next passage one sees various data that run from start of those proceedings in 2010 through to the date of this judgment or shortly before. Over the page at 495 one sees significant matters that arose in the observation period: the desire to find a restructuring plan, and a desire to find outside companies interested in buying all or part of SeaFrance. So these are matters that had occurred during the administration period.

Then you see financing of the observation period. Effectively, SNCF funded SeaFrance during that 18 month period with various lines of credit. Then we see - and I just note this - the industrial and commercial restructuring plan. So at the start of proceedings SeaFrance began discussions (this is back in 2010) on an implementation of a recovery plan called the New Industrial Project [the Nouveau Projet Industriel which is then NPI throughout the rest of the document], culminating in a considerable reduction in structuring particularly in relation to staffing.

Then if one goes down after the next paragraph (the following paragraph is just about further staff losses):

”Over the same period, discussions took place with the competent departments of the European Commission in Brussels with the aim of obtaining authorisation to finance the recovery plan by the ultimate shareholder.”

So clearly what was in mind was this company, if it were to be able to survive and make money, needed a very significant cash injection. SNCF, however, being a public entity, required essentially the consent of the European Commission under the State Aid Rules, in order to be able to inject that sort of cash that was necessary to keep the company SeaFrance going. Hence the discussion with the European Commission, which was all part of this possible restructuring plan.

Then you will see at 3 the search for buyers:

“The administrators began a search for possible buyers from the outset of the observation period and set, in accordance with Article R.631-39 [the relevant French code, I believe], the final date for filing bids on 30 July 2010. On 31 July ... none of these bids were deemed been satisfactory [p.496].”

The administrators were persistent. You see in the next paragraph:

“The administrators renewed their search for buyers in a fresh call for bids on 1 July 2011 with a final date for filing bids set on 26 July 2011. Three proposals were then received from Louis Dreyfuss Armement company, LDA, in alliance with the Danish DFDS company, the BEING BANG company and the bid from a SCOP (workforce cooperative) being set up by SeaFrance employees. These bids were analysed by the bodies involved in the proceedings.”

Then we have reference to a private hearing on 25 October 2011. Just note: “(1) Withdrawal of the recovery plan as a going concern plan bid.” What happened was Brussels said no to the financing. So the recovery plan giving SeaFrance to operate as a going concern with a line of credit from SNCF was simply not available. You can see that from the last paragraph in that section:

“Taking account of the position which leaves SeaFrance unable to have the loans required to implement its recovery plan, SeaFrance is withdrawing its recovery plan, and this is to be recorded by the Court.”

Then we get on to the bids. In fact, BEING BANG withdrew its bid at that time. The joint bid from LDA and DFDS is set out. Its head terms are set out there. I just note over the page at 498 the four bullet points which set out the price that was being offered. Then we have got, over the page at 499, the takeover bid by the SCOP and the terms of it. If you go over the page to 500 I just note two things at the bottom of the page in the bottom two bullet points. The first was these arrangements that the SCOP was putting forward would mean

that the takeover then would be in compliance with the provisions of Article L.1224-1 of the Labour Code, so that would be the equivalent of TUPE; and the sale price in the last bullet point: it was a single Euro plus profit sharing.

Then we get the observations recorded at the private hearing from the court administrators, highlighting the fact that the Commission decision has meant that the recovery plan is impossible, the BEING BANG had withdrawn its bid and it says the SCOP bid is too low a price, there are various concerns with the DFDS bid. That is from the court administrators. Then you have the court appointed receiver and he recommends and he considers these matters as well in similar terms, on the last paragraph of 502 is:

> "As the official with responsibility for the general interest of creditors, Maître GORRIAS concludes that no bid is acceptable and declares himself in favour of a court-ordered liquidation, with or without continuation of business."

So those are the two options: with or without, but he says liquidation. Then you have got opinions from the debtors and from employee representatives, over the page from the SNCF, from the auditors, from the bankruptcy judge in these matters, the discretion of the court, from the public prosecution office. Then we get to the ruling of the court which determines the position in relation to the plan proposed by DFDS. You will see over the page at 506 for the reasons it sets out there, it says that the court will not adopt this plan. Then the plan proposed by the personnel through SCOP and it says it will not follow that plan either, it cannot adopt that plan. Over the page at 507 you have: "On these Grounds". The court orders the liquidation with a continuation of business until 28th January 2012. It is a liquidation, this is November 2011 with a continuation of business until 28th January 2012 of SeaFrance Limited Company with Management Board. Then it says:

> "Business activity: to operate directly or indirectly as a maritime carrier in particular on the English Channel, and to carry out financial, commercial or industrial, civil and operations and operations in moveable or real property that may be related to any of these specified purposes travel and shipping agent."

Then it sets a further date for the submission of any bids to buy at 12th December 2011. So here we have liquidation commenced, but there is a temporary continuation of business period that is put in place up until 28th January. In fact, SeaFrance wound down its business sooner than that.

THE PRESIDENT: To allow further bids was it not?

MR. BEARD: Yes.

THE PRESIDENT: That was the reason for the continuation.

MR. BEARD: Yes, it allows for the bids so you are bidding for effectively a business that is operating. The point, which I will come back to, rather obviously is that in contrast after 28th January what you are talking about is – Mr. Williams highlights that that point is made at 506, four paragraphs up – this is in contrast to the position that will be following the end of the continuity business.

Then we move on to the next document in this series which is, of course, the Paris Commercial Court Judgment of 9th January 2012, which is at tab 5 in French, and tab 6 in English. This is the Judgment handed down on 9th January, entitled: "End of Continuity of Business Within the Framework of the Court–Ordered Liquidation". So the end of the continuity of business is being ordered here, and this document sets out various of the interested parties and then 5.40 repeats some of the history of these matters.

If we could pick it up at 545, at the top of the page, after the discussion of the "BEING BANG" bid withdrawal. It refers to 28th October 2011 hearing, which we have already seen. Then we have the application of 30th November 2011 from the administrators, and then we have a Ruling on 19th December 2012 which effectively extended the time for bids beyond that which had been previously specified, in particular it enabled the SCOP to put in a bid ----

THE PRESIDENT: Sorry, the Ruling of 19th December, that must be 2011, must it not?

MR. BEARD: Yes, I am sorry, it is 2011, I apologise. It would require a remarkable degree of prescience from 9th January 2012 and then hearing on 3rd January 2012!

Then we have consideration of that SCOP bid over the next three pages. You have an outline of the terms of the bid at 546, 547. Then you have "Observations made in the judge's chambers" by representatives of the SCOP. Over the page you have comments from the administrators recorded, Maître Thevenot. He states that the SeaFrance SCOP is a good idea but it is not yet a reality.

Maître Hess "emphasises the importance of putting an end to the current situation, as there is no cash to pay salaries for January 2012."

The liquidator said in conclusion: "the criteria for the continuity of the business and protection of creditors have not been adhered to."

Then there is a report by the bankruptcy Judge, Mr. Agniel, who says – you can see from the bullets: "It would be a social disaster because 880 direct jobs are at stake", "It would be a financial disaster", "It would be an economic disaster". Then he clearly put a range of points. If you pick it up at the bottom of the page on 549, he is clearly very disappointed that the Brussels Commission would not allow State investment. He talks about the virtues

of co-operative enterprises and refers to "certain utopias from our school classes on the 19th Century", which I think may reflect a difference in French and English education.

At p.550 he then criticises the plan put forward by the SCOP and further down: "this situation is not acceptable". In the penultimate paragraph on 550:

> "He thinks that the court cannot hide that it has a responsibility to the creditors and that he would be failing in his mission by dismissing any valuation of the assets in order to favour an adventure by the SeaFrance Cooperative Enterprise, however sympathetic he may be."

Then I will just pick up the next paragraph, he says it should be rejected, that was his submission. Clearly he goes on further:

> "But before finishing off the subject, he wishes to say that the end of the temporary continuance of business is not the end of the road. On pronouncement, the liquidator under the control of the bankruptcy judge and the Court must undertake any discussions that are necessary with the interested parties."

That is inevitably going to be the case.

> "Clearly, there must be a trade-off between the value of the assets, which are mainly the vessels, and the continuance of employment contracts."

The CMA repeatedly quotes this: "It is not the end of the road and there must be a trade-off." It is just worth noting that even the bankruptcy judge, who has clearly been in full flow in relation to these matters then says: "In all cases, the procedure must follow three lines of action, as follows: Reclassification of the business… A solution for all employees who would not find employment with their current skills, by indemnification, training, enterprise creation aid and reclassification; and… complete transparency in any action..." But, of course, none of that changes his view that the SCOP bid must be rejected.

Then you have the views of the Public Prosecutor's Office: "with the regard to the continuance of business with the aim of obtaining an offer to take it over … any offer must include 'Provisions for business and financing'," and he thinks it is not financed and cannot be accepted.

Then you get the decision of the court over the page. SCOP had asked for an adjournment. That was rejected so any further extension of time had gone. The offer of transfer is then considered and was rejected. Then, over the page: "For These Reasons: The Court, ruling after due hearing of all the parties in the first instance", he then says ----

THE PRESIDENT: Probably the bottom of the previous page.

MR. BEARD: I am sorry. "Consequently, the court will end the period of continuance of the business of SeaFrance under court ordered liquidation." I was just going to note the fourth

bullet point, it ends the continuance of the business under the period of court ordered liquidation of the relevant business, and the business is described. It ends the mission of the administrators.

It is just striking that those phrases at the bottom of 552 and the bullets in 553, those are not specifically quoted, although there are all sorts of other quotes from opinions from people in this report, those are not actually quoted by the CMA. You might have thought that those would have been the critical parts of this judgment, but not according to the CMA.

I will come back to the job plan in due course, but if we could move on to tabs 9 and 10, which is the order of the Paris Court for the sale of assets and the accompanying minutes.

In this document the key order is actually at p.741.

THE PRESIDENT: 2.741?

MR. BEARD: Yes, I was going to pick up, just for the structure of this document, that is where the order is. This is after the end of the continuance of business period under the liquidation. So the liquidators are appointed, the administrators have been discharged, and as we will see in this document further bids were then later received in relation to the liquidation of the assets of SeaFrance.

Just picking up the order, "I, Roger Agniel, Court Receiver for liquidation proceedings", taking into account of the various relevant provisions and the observations -----

THE PRESIDENT: This is 11th June 2012?

MR. BEARD: Yes, this is the 11th June Decision. I am going to come back to it:

> "[I] authorise the sale in a private transaction of the property subject to SeaFrance's court ordered liquidation."

So that is about four paragraphs up from the bottom of 741. Then after that there are all sorts of lists of matters, but it is all in relation to the assets that are being ordered to be sold.

If we can go back to the beginning of this document, as I say, it is the 11th June 2012 document, and if one goes to 722, what you see at the start of minutes of the Paris Commercial Court Clerk's Office is, "Paris, May 29 2012".

THE PRESIDENT: I am sorry, where are you?

MR. BEARD: 722. I was just emphasising that the operative part of this Decision is that order at the end. These are the relevant minutes that deal with it. It is only dealing with it as a matter of structure. May 29 2012 to M. Agniel, Court Receiver for the Court Ordered Litigation of SeaFrance.

"The Undersigned" - these are those people who would have been acting as the liquidators.

First of all, at 1, provide a summary of the bankruptcy proceedings, so we get a repeated history of what has been going on in relation to various stages in the process.

Over the page at 724, under the heading "Asset Realization":

> "In accordance with the provisions of Article L 640-1 of the French Commercial Code, the bankruptcy procedure is intended to realize the debtor's assets through aggregate or separate transfer of his rights and property.
> To do so, it is the liquidator's responsibility to preserve the creditors' mutual surety and realize the company's assets under the best possible conditions.
> Article L 642-19 … provides that the Court Receiver shall either order the sale at public auction, or authorize, at the prices and conditions he determines, the sale in a private transaction of the debtor's other assets, i.e. property other than real estate."

The liquidators' report is summarising what has gone on and saying, "this is how we deal with asset realisation under the relevant provisions of the French Commercial Code.

Then there is an invitation to tender for a Broker regarding the Shops, and Parimar were appointed.

Then (b), which is half way down 725, you see a determination, you see "Determination of the Conditions for Realizing the Ships and Other Assets". So this again is realising assets.

There is the first reference here to the "hot lay-by" about eight lines down.

Then over the page at 726 establishing the Schedule of Conditions for the ships, so this is all about working out what the state of the assets is that are going to be sold.

Then over the page at 728, "Other Assets Sold". Then (e) "Sealed Bid Opening". This is the process of the consideration of the bids for the assets that have been invited in the light of the liquidation and the end of the continuance of business process. The first bid, that is the bullet point right at the bottom of 728, that is DFDS and LDA bid.

Then we go over the page to 730. The second bit was submitted by Stena.

Then the third bid was submitted by Eurotunnel. There are various considerations of what the bid involved and reference to the fact that there was intended by Eurotunnel to be an arrangement in the long term with the SCOP.

There is also recognition about four paragraphs up the bottom of 731 that, in fact, significant investment would be required in relation to the vessels in question, in particular in relation to environmental standards.

If we go over the page, this is more discussion of the Eurotunnel bid, which of course the SCOP was not party to. It did not know the terms of this bid.

Then if we go over the page to 732, I will just pick it up two-thirds of the way down the page:

"As a reminder, SeaFrance's staff was laid-off by the liquidator, following the liquidation without continuation of the company's activity.

However, the project in which Groupe Eurotunnel is participating is aimed at providing for a partnership with SeaFrance's former employees who shall form a SCOP [workers' production cooperative under French law] in order to revive the activities previously conducted by SeaFrance.

The proposed takeover of SeaFrance's assets by Groupe Eurotunnel therefore favors a partnership with the SCOP."

I just pick that up that because that word, that translation "revive", I think in a previous version at the last hearing was actually "rekindle", but the CMA is trying to place great weight on the term "revive" used in this context, and trying to suggest that this is, as we will come on to see, part of the story of continuity and momentum of the activities of SeaFrance. It does not take the CMA anywhere. Obviously this is in the context of a liquidation that is seeking to realise the value of the assets of SeaFrance. The term "revive" here is saying that, rather than there being a continuity with the activities of SeaFrance, what it is is a bid to create activities in carrying passengers and freight across the Channel.

THE PRESIDENT: It does speak about the takeover of the activities.

MR. BEARD: It does. Here it actually talks about the proposed takeover of SeaFrance's assets.

It is on the preceding page ----

THE PRESIDENT: Yes, the preceding page.

MR. BEARD: It does talk about the takeover of SeaFrance's activities. This is the one place, so far as we can see in all of this, that there is a reference to activities, but it is not consistent in those circumstances with anything else that is being discussed here, or indeed the legal structure that we are dealing with.

The legal structure, as I have been at some pains to work through, is dealing with a situation where after you have a lengthy period of administration, where there are attempts to sell the business as a going concern, you have that temporary period of continuation of business where further bids were permitted. Those failed, so the business was shut down formally, as well as already having been shut down in practice. In those circumstances, it is clear that these observations from the liquidators are talking about realisation of assets. So to place great weight on the reference there is to misunderstand what is actually being submitted here by the liquidator, because these are the liquidator's observations in relation to these matters.

As I say, it does refer to takeover of SeaFrance's activities on 731. If one looks at it in context from the top of the page, about six lines down:

"The bidder presents a comprehensive, integral bid bearing simultaneously on the ships and other tangible assets and intangible assets whose acquisition is proposed …"

So clearly to do with assets -

"… as part of an industrial project integrating the participation, via SCOP [workers' production cooperative under French law] composed of SeaFrance's former employees.

The relevant local authorities … have clearly demonstrated their desire to be associated with the proposed recovery through a financial contribution …

The bidding company continues in this industrial rationale by proposing to take SeaFrance's industrial assets and operate them through special purpose companies, in accordance with the interests of the Group and its shareholders."

So that is consistent. Eurotunnel, the SCOP, the local authorities, they wanted cross-Channel passenger and freight services, using the vessels that had been used previously by SeaFrance. There is no doubt about that. The area of Calais is one where there are significant unemployment problems. The end of SeaFrance was something of a disaster. There is no doubt that for a whole range of social reasons it was desirable that someone began operations of those vessels and employed people in the Calais region - no doubt about that. But that does not suggest that here, what was actually being sold were the activities of the SeaFrance business. That is entirely contrary to the scope and structure of the liquidation process with which we are dealing.

So I will not go through all of the remainder of this. As I say, although on the previous page it refers to takeover activities, is then talks about (on 732) the proposed takeover of SeaFrance's assets by Eurotunnel favours a partnership with the SCOP including SeaFrance's former employees. And then there is a discussion of some of those matters. It talks about the financing on 733. Then it talks about more details in relation to the matters that are, as it is put just above the break on 733, "the assets considered for auction by the liquidator". So then we have (1) the ships; (2) tangible and intangible assets, and then there is more detail on those various matters and attachments.

Then if we get to 736 we have the recorded observations of the hearing of 10 May 2012. Fourth, we have the liquidator's further opinion. You will see under there it says:

"Since 9th January 2012, SeaFrance, a wholly owned subsidiary of SNCF, has been in liquidation. The individual assets must now be transferred to provide for best compensating its creditors, the primary one being SNCF Group."

Then over the page, 737, just below the break:

"Notwithstanding this unique proposal, Eurotunnel appears to be the best bid with regards to the value offered for the two other ships together."

THE PRESIDENT: Sorry, where are you?

MR. BEARD: I am sorry, 737, just below the break. I would invite the Tribunal to re-read all of these documents. I am just trying to pick out some of the key points in relation to the overall structure. So forgive me if I am not picking up every potentially relevant reference here. "Notwithstanding this unique proposal" - in other words, there is something slightly unusual about it - "Eurotunnel appears to be the best bid with regards to the value offered for the two other ships together." It is worth stressing they were the only bidder for all three ships.

Then over the page at 738 you will see capitalised: "WHEREFORE, MAY IT PLEASE THE COURT RECEIVER" it is suggested that there should be a sale by way of private transaction of the following property. Then after that we come to the operative order, which I took you to at the outset.

PROFESSOR BEATH: Mr. Beard, might I just ask. Could we go back to 2.732, this word you pointed us to "revive", which, as you say, has been made much of. I have not found the original French word, but would the context be changed if the translation were "restart"?

MR. BEARD: I think I am going to be very cautious about the proper translation of every term in relation to that.

PROFESSOR BEATH: This is the word.

MR. BEARD: It is an important word, save that what we have got is a word being used in the context of a process where a business has been held by the administrative process for the administration and liquidation under the French commercial code to have ended its business. In those circumstances, if you translate the term as "revive" then it is start again. If it were translated as "restart", then that would be perfectly acceptable and entirely cohere with what we say.

I think the term in fact used is "renaitre" which is to be born again. Now, in a way that might be a more helpful translation, but I am slightly loathe to fixate on translations. We say revive here has to be read as restart, recommence, commence afresh. That is consistent with a perfectly proper translation of the term. As I say, I think the French word is "renaitre" and therefore that coheres with what we are saying.

Very helpfully, Mr. Williams points out it is 2.656, right at the bottom, left hand corner "de manière à faire renatîre les activités précédemment exploitées par SeaFrance."

PROFESSOR BEATH: I could not find it myself.

MR. BEARD: Unfortunately this translation does not do it page to page and therefore it is difficult to track through. As I say, we would say that supports our case. But we do put the case more broadly than just hinging on the translation of a particular word. Indeed, it is one of our criticisms of the CMA that they selectively pick out words like "revive", as used here, and place enormous weight on it, when it is a fragile translation at the best of times and we say is entirely consistent with the "start again" interpretation. We say you have to look at it in the overall structure here.

We also criticise the fact that they pick out phrases like "it is not the end of the road", which is part of a set of observations by one of the parties in an earlier proceeding, as if that tells you how the administration and liquidation process actually worked here and what was going on.

PROFESSOR BEATH: It has got to be read as a whole, has it not? You cannot just focus on one phrase.

MR. BEARD: That is precisely our point. It is for that reason, whilst it would be very tempting to grab at "renaitre" and say that is very clearly being born again; it is a new thing; it is entirely separate, we do recognise that it has to be read as a whole. We say reading it as a whole simply reinforces our conclusion.

I have run through those documents. Now, if I may, (and I hope by doing so giving some sort of general background) I will move on to legal issues. I recognise, of course, that the Tribunal will be familiar with the provisions of the Enterprise Act but if I may I will just pick up one or two of those provisions, because they are obviously important to the statutory interpretation exercise in which we engage. Authorities bundle 3A tab 4 is the Enterprise Act. I am not going to try to do a thesis on the structure of merger control, entertaining though I am sure that would be, I am just going to pick out one or two key issues. Obviously, the process in relation to merger control in the UK is that the OFT (as it was at the time), if it thought that there was a completed relevant merger situation that might give rise to a substantial lessening of competition it would refer the matter to the Competition Commission. That is what happened here.

Then if we turn to 3.27 and section 35, if we can just pick it up there. We have the two key questions that have to be decided by the Competition Commission (now the CMA) on a reference. This is in 35(1):

> "(a) whether a relevant merger situation has been created; and (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services."

Plainly we are concerned with 31(a) and if there is not a relevant merger situation, whether or not that further exercise has been undertaken, there is nothing to be done by the CC or CMA.

If we could then go backwards to s.23 which is headed "Relevant Merger Situations" and it does not disappoint, as compared to its title. It sets out the criteria for an RMS, albeit that this is something of a convoluted test. 23(1):

> "For the purposes of this Part, a relevant merger situation has been created if :
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section.24. "

Section 24 is the provision about time limits, so it is essentially has it happened in the prior four months? I am abbreviating, there are some complications but they do not matter for the purposes of today. The value of turnover in the UK of the enterprise being taken over exceeds 70 million, and for the purposes of this part a relevant merger situation has also been created.

> "If two or more enterprises have ceased to be distinct enterprises at the time circumstances falling within [s.24] . . . "

and as a result one or both of the conditions mentioned in subsections (3) and (4) below prevails to a greater extent.

The only reason I mention that is because if you go on to (3) and (4), these are what are referred to as the 'share of supply tests', so if we just do (3) the condition mentioned in this subsection is that in relation to the supply of goods of any description

> "at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom - (a) are supplied by one and the same person or are supplied to one and the same person; or (b) are supplied by the persons by whom the enterprises concerned are carried on or supplied to those persons."

Then (4) is the equivalent for services. The reason I just emphasise that is, as I will come back to, what it is asking is at the time of the merger is there effectively an increment above 25 per cent market share, very loose, I am interpolating certain words and terms there, but that is broadly it. It is the temporal issue that I will pick up again in a moment.

Just touching on s.26, over the page at 3.17, that is the essential question of whether or not the enterprise has ceased to be distinct, and that is to do with there arising common ownership and control, and there are various bands of common ownership or control that constitute a merger, so you can have full ownership, you can have *de jure* control if you

effectively have over 50 per cent shareholding, and you can have material influence and any one of those levels of control will suffice. Again, I think not critical for today.

If we turn on then to 3.136 what we have are the other interpretation provisions under s.129. What we have half way down the page on 137: "enterprise", "enterprise means the activities, or part of the activities, of a business."

Then, if we go back we have "business", at the bottom of 136:

> "includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge."

There are two things I am going to emphasise here: (a) the reference to "activities" which is critical to the definition of enterprise, and just note also, (b), "business" is something that is carried on for gain or reward. It is the term "activity" that is obviously critical in these circumstances in deciding whether or not two enterprises have ceased to be distinct. What you have to assess is whether a transaction results in activities, or part of the activities of two businesses coming under common ownership or common control.

It is important in noting those terms that the purpose of the legislation is not to enable UK competition authorities to review transactions which might substantially lessen competition. That is not the purpose. It is to enable them to review merger situations which might substantially lessen competition. Parliament could have just referred to entities, or businesses or assets being taken over, but it did not, it specifically referred to activities in the definition of "enterprises" so Parliament was specifically restricting the scope of merger control scrutiny. I will come back to the previous Tribunal judgment, but this is a point that was recognised by the Tribunal at para. 107 of its previous judgment, and the Tribunal there recognised that it is quite possible to conceive of a whole range of transactions which might, to an economist's mind or possibly even a lawyer's mind, have the effect of reducing competition. But the CMA, and the CC before it cannot scrutinise those sorts of transactions under Part 3 of the Act.

So, you have a scheme that has a specific jurisdictional limit that is referring to activities as the criterion of that jurisdictional limit and, of course, it is just worth bearing in mind that Parliament has implemented a scheme as a whole that is not mandatory, you do not have to notify any transaction at all and it does have a series of thresholds which means that regulatory scrutiny cannot be extended to certain types of transactions quite apart from the activities threshold, so there are a range of limits put in place, but the limit that we are concerned with is the limitation by reference to activities, the term "activities" as in 129 and used in s.23, and we say: how do you interpret that? The obvious starting point for the

interpretation of the term "activities" is in accordance with canons of statutory interpretation and we have included in the bundle of authorities 3C tab 42 – I will not take you to it – an extract from **Bennion**, that the relevant starting point for the interpretation of a Statute is its ordinary language meaning, and we have included that ordinary language meaning at 3C tab 45 from the OED which defines activity as "the state of being active". That, in turn, is defined as "existing in action", "working", "effective", "having practical operation or results". Our simple point is when Eurotunnel came to buy the assets you could not, as a CMA say that there was a business, or part of a business, existing in action, working, effective, or having practical operation. That is simply a misconstruction of the terms. They have strained mightily, they have put down many words, it is a long report, but it does not fundamentally grapple with that problem.

At times in their submissions it was suggested by the CMA that actually you should adopt a rather wide approach to the interpretation of activities in the RMS test. We say that is wrong and there is no basis for it. We note in the most recent submissions from the CMA in their skeleton they do not appear to pursue that point. We say the meaning of activities is straightforward and clear, and if and to the extent that the business which is not actively trading could be considered as engaged in activities for the purposes of the relevant test that is going to be an exceptional case.

Of course, that to some extent is reflected in some of the other threshold tests. I took you to the share of supply test, the second limb of the RMS test, which asked whether the merger causes an increase in the total share of supply of the merged entity. This assumes that both the merging parties will be actively present on the market so as to contribute to that increment in market share, practical operation, working.

THE PRESIDENT: So what are the exceptional cases?

MR. BEARD: That is the cruellest question that a judge can ever ask because, of course, the nature of exceptions are open ended, and it can never properly be defined what constitutes an exceptional case. All we say is we are not ruling out the possibility of exceptional cases. We say this is not one of them, and that is all we need to do. Indeed, the nature of exceptional cases is that, as I say, they will not be predicted.

THE PRESIDENT: *AAH*, for example, you would say would be an exceptional case?

MR. BEARD: Precisely, because in *AAH* you had a situation where the whole arrangement was structured, effectively pre-ordained, to avoid the impact of merger control. We do accept that if you structure arrangements, you enter into agreements and arrangements beforehand so as to shut down a business and immediately open it up again, that in those circumstances

you do have an exceptional case. So we have found one definitely. Beyond that I think we do not need to go.

THE PRESIDENT: Except for this: the issue may be that this clearly was not a trading business, and whether for all the slightly unusual features here this does constitute an exceptional case.

MR. BEARD: We say there is no possible basis for pulling together the various bits and pieces. The key bits that are pulled together are essentially the vessels' value was maintained through the hot lay-up process. We say, so what? Assets being maintained, whether they are old assets or new assets, in order to maintain their value, does not tell you anything more and it does not make it an exceptional case.

The second point that is raised against us is essentially the continuity of employment point. The very simple answer to that is, there was no continuity of employment. There is no point telling an ex-SeaFrance worker who has received their redundancy notice in January of 2012 that actually they have got continuity of employment whilst a liquidation process is going on. They have no job, they have no salary, they are not going backwards and forwards across the Channel. In those circumstances, to talk about continuity of employment is simply to divorce the analysis of the situation from reality.

The other bits and pieces that are picked up, they do not progress matters any further, and I will come back to each of those because that was what I ----

THE PRESIDENT: That is really the crux of the case.

MR. BEARD: Yes, I quite agree that this is the crux of the case. I think it is important, however, to put it in proper context in relation to the French proceedings. It is also important to put it in the context of the legal framework. In fact, I was going to go on and deal with *AAH / Medicopharma* right now. If I may, I will do that. It is at authorities 3B, 35. We have provided references to *AAH / Medicopharma* in the notice of application. It is worth mentioning that at the previous hearing *AAH / Medicopharma*, as you will see from the Tribunal's judgment, was referred to by the SCOP and emphasised as being the exceptional case that essentially shed light on why it was that circumstances that arose here were not such as to suggest that this was in any way an enterprise ceasing to be distinct in the sense that activities were ceasing to be distinct.

It is a lengthy report, but the provisions are perhaps best picked up at external page numbering 3.1548. In future I will refer to the internal page numbering for ease. It is 122, "The arrangements giving rise to the reference". There is a fuller account of what were the features of the arrangements in Chapter 2, and I do not think I need to go back to those. At 6.54:

> "As Chapter 2 described, the principal features of the arrangements on 3 November …"

3rd November was a Sunday, which is material.

> "Medicopharma (UK) BV, Medicopharma Ltd and PIUK… each resolved to cease trading with effect from 3 November."

So on 3rd November they all said, "Right, we are going to stop trading".

> "Directors were authorised to dismiss employees and to announce the closure of the businesses [on that Sunday]. Under the Asset Transfer Agreement PIUK transferred all its assets … to Medicopharma UK."

So it all got accumulated.

Then further down the paragraph, about seven lines from the bottom:

> "Under the Share Purchase Agreement AAH Subsidiaries acquired from Medicopharma NV …"

within whom all of the assets had effectively been accumulated from those three companies above

> "… the whole of issued share capital of PIUK for the sum of £1. At this time PIUK was indebted to ABN-AMRO Bank …"

for a large amount and so AAH took on this debt. So the three companies accumulate all rights and assets in a single place effectively and say they are ceasing trading, and then enter into a share purchase agreement with AAH subsidiaries.

Then there is a description of those matters in 6.55, 6 and 7. I will just pick it up at 6.58. This was, of course, a case under s.65(1) of the Fair Trading Act 1973, but I think nothing turns on that, and no one has suggested that there should be any other interpretation in the wording.

Then you see at 6.59 what AAH argued.

> "AAH argued that Medicopharma NV's United Kingdom pharmaceutical wholesaling and importing activities ceased on 3 November and from that date none of the relevant companies constituted an enterprise within the meaning of the Act. AAH stated that its acquisition of PIUK did not amount to the acquisition of an enterprise, as PIUK was a company that was no longer trading, which had ownership of certain assets (which were not employed in any business activity), and had bank indebtedness. Following the closure of Medicopharma UK on 3 November 1991, AAH argued, all business transacted thereafter by AAH comprised AAH's own business and not a continuation or a revival of part of the activities of Medicopharma UK."

So they were putting it absolutely plainly, no activities here, therefore no enterprise, therefore no merger.

As we see later on, just moving to 6.71, you see:

> "AAH openly and with the benefit of advice took a course of action which, it asserted, did not create a merger situation qualifying for investigation but which, it accepted, gave it commercial advantages over its rivals."

So the critical thing was that AAH approached this and entered into arrangements with Medicopharma with the view to avoiding the application of merger control. It is not saying it was a fraud, but it was definitely a structure put in place effectively to circumvent merger control.

Can we then move down to 6.73 - I will not go through all of this:

> "We note in this context that a recital in the Asset Transfer Agreement stated: 'on the date hereof the Guarantor [ie Medicopharma NV] has announced its decision to close down the business with immediate effect and the vendors and purchaser have given notices of redundancy to each of their employees'. It was a requirement of the Share Purchase Agreement that PIUK should deliver to AAH a duly executed copy of the Asset Transfer Agreement. While AAH pointed out that a recital was not a binding provision, we consider that some weight may be given to it."

In other words, it is plain that Medicopharma and AAH were entering into arrangements that were predicated on Medicopharma shutting down the business effectively for a sort of legal scintilla of time, reviving it immediately, it being a condition of the acquisition that it be shut down, and then saying no merger control applies.

> "Moreover, the evidence from the various parties confirmed that the clear understanding was that AAH would sign the agreement to purchase the various assets as soon as the redundancy letters were sent and would not do so unless this had happened."

So again, it is all part of the prior structuring.

THE PRESIDENT: Mr. Beard, I think we can all see why this is an exceptional case and was held to be an exceptional case. One may say, "If that is not an exceptional case, what possibly could be?" Is it your submission that unless it is, as it were, an avoidance arrangement, deliberately structured to avoid merger control, then it cannot be an exception?

MR. BEARD: It is difficult to see, in circumstances where there has not been some sort of prior arrangement, that one should say that a business that has ceased to trade is to be treated as

having activities, but we do not have to say that it is absolutely impossible for the purposes of this case. We do not see it, but what we say is that in this case there was a huge period of inactivity and what the CMA have tried to do is say there was continuity and momentum - presumably continuity of the SeaFrance activities, and momentum, we are not quite sure what it means.

THE PRESIDENT: They have picked that phrase from the judgment.

MR. BEARD: They have picked that phrase from the judgment. We quite see that, although it was used in the judgment in a very specific context. We say that cannot be enough. The reason we emphasise *AAH* is because *AAH* indicates that prior knowledge is significant, that circumvention is significant, that it being a very, very short period of non-trading is significant. The plan was that actually AAH would be trading on Monday, on 4th November. It turned out that there were some issues in relation to the depots and it only started trading on the Thursday. But the plan was: effectively, we do all this on a Sunday (where there is not materially going to be any trading), we are back up and running on the Monday. In other words, you go to bed on Saturday as Medicopharma, you wake up on Monday as AAH.

THE PRESIDENT: We can all see that that is reasonable, but equally they are not saying that is the only possible circumstance. They had to focus on their facts, facts you say are far, far removed from the present case. It seems to me they clearly are.

MR. BEARD: What we emphasise is that in this case, which you might have thought, given circumvention, given the pre-ordained arrangements that were put in place, given the effectively scintilla of time of legal closure, that actually there would be no difficulty in reaching an assessment of this sort. Instead, however, the Competition Commission is very careful to look at the circumstances and say even though there is circumvention, even though it is sorted out in advance, we are concerned because formerly this business ceased trading.

What we say is that the Competition Commission here is rightly focused on the fact that if you cease trading you do not have activities in anything other than very exceptional circumstances. That is the basis on which they proceed here. That is why this case is particularly instructive as to how you interpret the relevant provisions and how the CMA should have gone about its consideration in this case. It is for that reason that I emphasise those various matters in relation to AAH. It is not just a case of "well, it is a long way away", yes it is a long way away, but even that far away you have to struggle with these issues because actually there was a cessation of trading on that Sunday.

I think it is just worth picking up one or two points which are worth mentioning, which I will come back to in due course. The first is that of course redundancy notices were actually issued to the staff, but the staff at the depots were then re-employed and actually even their holiday commitments that they had already booked were honoured thereafter. I will come back to why TUPE is or is not instructive. Of course, here the issues to do with the transfer of undertakings regulations did not really arise because the whole arrangement that was put in place ensured that the employees effectively could move straight across, those that were employed at the relevant depots. It is not to say there were not some redundancies more broadly in relation to Medicopharma because Medicopharma had a whole range of particular problems, but for that reason TUPE is not relevant. It is also worth noting that in fact at 6.89 the AAH board thought that TUPE would apply in this case.

I will not go through any further matters. I would just note prior knowledge in 6.85, the fact that AAH was effectively following on from the position of Medicopharma in relation to Medicopharma's debtors in 6.86; 6.87 talks about the speed with which it reopened; 6.88 and 6.89 deal with those redundancy matters and TUPE that I have touched on; 6.91 actually picks up some redundancy compensation issues that AAH were picking up in relation to any redundancies; 6.92 refers to the absence of customer lists; 6.93 the share purchase agreement meant that AAH became Medicopharma's agent in recovering Medicopharma's old debts. So if anyone did have debts with Medicopharma, they became payable to AAH effectively, as Medicopharma's agent. Then 6.98 is the candid acceptance that this whole structure was put in place in order to seek to avoid competition scrutiny, a matter that is also picked up in 6.102.

So the position there, as I say, a long way away but still created a real issue for the CC because there was a cessation of trading.

I was just about to move on to the Tribunal judgment. I am conscious that the shorthand writers may need a break.

THE PRESIDENT: Shall we take five minutes.

(Adjourned for a short time)

MR. BEARD: If I may, I will pick it up at para. 97, this is under the SCOP's previous ground that Eurotunnel did not acquire the activities of a business - that was the fourth ground. 97:

> "For the reasons given in paragraphs 46 to 50 above, we consider the Commission's contention that the meaning of 'enterprise' is simply a matter of fact and degree to be incorrect or, at the very least to ignore the fact that what the Act understands an enterprise to be is in the first instance a question of law."

I only highlight that and the preceding paragraphs because there are moments in the defence and skeleton argument of the CMA where the phrase "fact and degree" is heavily relied upon and it is suggested that there is a broad discretion here, such that really these legal issues are niceties one should not trouble with. It is the wrong approach and the Tribunal was right in that regard last time, and that deals with cases such as *East Berkshire Justices*, the *Thames Water* case, and we highlighted in our notice of appeal and skeleton argument the fact that this issue has also relatively recently been considered in the *AKZO Nobel* case, the extent to which even though you may have a term that admits of some sort of discretion being applied, the first thing you have to focus on is the correct legal interpretation.

Over the page we get, at 41, para. 100 onwards, consideration of the definition of "enterprise", and the Tribunal rightly at 102 neatly and tersely says:

> "an enterprise is the activities or part of the activities, of a business."

It then refers to *AAH* which, as I say, was put by SCOP to the Tribunal as indicating the proper approach to these matters, that cessation of business meant that you would need to show really exceptional circumstances and *AAH* did exhibit those exceptional circumstances. The Tribunal rightly found that approach, set out in *AAH*, helpful. At 105 a distinction between 'bare assets' and something more than that.

Further down in para. 105:

> "However, 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."

Of course, the "provided for gain or reward" echoes the definition in the term "business" in section 129. We just pose the question: how could that be said in relation to Sea France following the end of continuation of business in January 2012 at the latest?

Paragraph 106, they note at (a):

> "it is perfectly possible for an enterprise to wind down, and to wind down to such an extent that it ceases to be an enterprise."

THE PRESIDENT: The question of fact and degree is stressed, is it not, in the middle of 105?

MR. BEARD: Yes, absolutely. We are not shying away from the fact that a regulatory authority when applying a legal test has to consider facts and must exercise some degree of judgment. We do not suggest otherwise. We could not suggest otherwise, that would plainly not be sensible. But, there is a difference between that and moving to a position where it is all broadly at large. We can exercise our discretion at large rather than focusing on the term itself, "activities", and the purpose of it, which is to restrict the scope of merger control –

that is not to argue for a narrow interpretation, this is just an ordinary language interpretation that we press for in relation to these matters, and then we look at what the CMA has done here, and we say that it just does not add up on the basis of that legal interpretation.

106 – it is perfectly possible to wind down to such an extent that it ceases to be an enterprise, and we would interpolate here that this Tribunal did not have before it all of the French documents I took the Tribunal to - did not have these sorts of matters – I will briefly go back to the earlier report but these were not issues that were relied on previously, so it did not have sight of these sorts of matters. It did not have sight of the job plan, it did not have sight of those liquidation judgments, or it did not have consideration of them in the sense that those were not matters that were put in play by the CMA. There was a reference, for instance, to the job plan in the previous report but it formed no part of the reasoning. What the Tribunal did not have here was the full story prior to 2010 of the collapse of SeaFrance, the administration process through the Commercial Code in France and then the end of the continuance of business, because that was not the focus of this consideration here.

106(b):

> "… the fact that the acquiring entity emulates the business of the acquired entity, and even uses that entity's assets, does not necessarily mean that the acquiring entity has acquired an enterprise."

This was a line run by Mr. Pickford and rejected by the Tribunal.

> "Mr. Pickford's references to the creation of a situation in which a substantial lessening of competition may result in *nihil ad rem*."

Without the Latin, we simply say, going back to our point about the nature of the statutory scheme, it is not all transactions, it is only relevant to merger situations.

Secondly, it also emphasises that point:

> "As regards the question of whether a relevant merger situation exists, the statutory test is <u>not</u> whether the acquiring entity is carrying out the <u>same</u> activity that was once carried out by acquired entity, even with the same assets."

There is an emphasis on the fact that the statutory test is not by the acquiring entity. If it reconstructs the business, that is not the same thing.

We then go on to the present case and the Commission's factual analysis begins at p.45. There is consideration of what are the relevant assets and do they constitute an enterprise, which was what was considered in 4.3 to 4.72 in the Decision below.

Can you leave that file open and open bundle 2 at tab 1, because this is the previous Decision. Can we start at internal page numbering 23? What we see is the discussion of the "relevant merger' situation at chapter 4. Then the sub-heading, "Enterprises: what are the relevant assets and do they constitute an 'enterprise'":

> "In this section, we consider whether the assets acquired by GET, taken together, amount to the activities, or part of the activities of a business."

So we started off with the right legal phraseology. Then we get to "the legal test and the CC guidance", and we get Eurotunnel's views, SCOP's view, and then we get "Context of the analysis" at 4.8:

> "As a preliminary matter, the fact that the assets were not trading at the time of the acquisition does not of itself exclude the CC's jurisdiction."

In the light of *AAH* we do accept that, but we say that is very much the exceptional case. At 4.9 the question is:

> "… whether, on balance, the totality of the assets transferred constitutes the activities, or part of the activities, of a business …"

It notes in 4.12 that SeaFrance has ceased operations for seven and a half months before the date of completion.

Then it talks a little about the vessels at 4.16 and there are various bits to do with the staff starting at 4.22. The point I would emphasise here is that what you see is a consideration of whether or not the SCOP was an associated person or that there was material influence over SCOP by Eurotunnel. It was not any consideration of the sorts of issues that are now put in play in relation to the employment arrangements and the liquidation process that we are now focused on.

The reason I say that is because when the Tribunal is dealing with those sorts of things you had this issue mentioned to you. The question you are faced with is if the CMA has got it wrong in relation to the legal interpretation, should we quash it and leave no room for remittal? It did have issues that had been touched in the course of the hearing and they left the door ajar in relation to those matters, because it could not make findings in relation to them because it really did not have the material before it. It is really in that context, therefore, that one has to look at what is said by the Tribunal in the remainder of its judgment.

Can we go back to 110:

> "Nevertheless, it is appropriate to consider whether the facts, as found the Commission, enable a conclusion that something more than bare assets was acquired.

> 112. There are a number of factors identified by the Commission that point towards this being no more than the acquisition of assets …"

The cessation of operations, the surrendering of berthing slots and the workforce being dismissed and the vessels being placed in hot lay-by. It says that the Commission took those factors into account. Then 114:

> "We have some doubt whether, formulated as they are by the Commission, the acquisition of the vessels and the SeaFrance employees constituted anything more than an acquisition of assets."

Then it refers to the hot lay-by:

> "Incidentally, this had the effect of rendering it possible to bring these vessels into service quickly, but we doubt whether this is enough to turn these assets into an enterprise, at least without a more detailed explanation of the extent to which this expedited the return of the vessels into service."

Of course the Tribunal did not have that detailed story before it in the circumstances.

THE PRESIDENT: Why is that relevant?

MR. BEARD: Sorry, why is it relevant before them?

THE PRESIDENT: No, the extent to which this expedited a return of activities? You say there are no activities, there is a long period of cessation, not surrendered, workforce dismissed, clearly not an exceptional case of the narrow kind that one saw in *AAH*, end of story.

MR. BEARD: Yes. We do say that.

THE PRESIDENT: That was not the Tribunal's view otherwise they would have said stop at 114, clearly no enterprise.

MR. BEARD: Let us take it in stages. The Tribunal was acting with an abundance of caution because it does not have all of the relevant material before it. In relation to the point that is raised.

THE PRESIDENT: It does not have all the material but on your case does it not have enough material?

MR. BEARD: We said at the time that it did have enough material in order to reject the matter, and we say that in relation to the question of whether or not there are activities in these circumstances, for the Tribunal to say, "We are concerned about these matters, we will let it go back", it may well have been a very cautious approach to have adopted. We do not understand what more detailed explanation of the extent of expedition of the return of the vessels would be such as to give rise to the possibility of activity being found in the context of this case. We do not understand that. That is what the Tribunal left open. We do not

understand how that fits with the analysis of activities, because we do not understand the fact that you can get assets up and running quickly as making any difference in and of itself. Of course, new assets, you may be able to get them up and running very, very quickly. It may be the vendor of an asset makes sure that they are turnkey assets. You get them, you start them running.

It may be that in relation to those sorts of matters you have a situation where the speed with which you can operate is actually an important part of the value of the asset, the new asset, but that does not change anything here.

The situation in relation to issues pertaining to hot lay-up therefore are difficult to understand, that final code in relation to 114, because it is difficult to see how that could potentially give rise to any consideration of finding of activities. We say that those matters were not considered fully by the Tribunal and the Tribunal was adopting an approach that exhibited an abundance of caution.

We then move on, in relation to 115, as regards the ex-SeaFrance employees, on the face of the analysis in section 4 it is difficult to see how these employees were acquired from SeaFrance at all. They were undoubtedly acquired by Eurotunnel under the terms of the assessment that the Tribunal reaches on the merger, but that is different from whether or not they were acquired from SeaFrance, and whether or not that gave rise to an acquisition of activities. Then it talks about the uncontroverted facts and it says:

> "Subject to one, to our minds important, proviso, which we consider in paragraphs 117 to 119 below, their relationship with SeaFrance simply came to an end. However, it can easily be said that formation of the SCOP subscription and a number of ex-SeaFrance employees and the subsequent employment of some of them by the SCOP constituted the creation of a new legal relationship with no element of transfer from SeaFrance to the SCOP"

And we say yes, that is right.

But the Tribunal then says:

> "Of course, it is possible to imagine cases where the employment of a workforce by one employer ceases, but the workforce migrates - as a workforce - to a new employer. That, we consider, could amount to the acquisition of that workforce by the new employer and could amount to the 'acquisition' ... of a business activity. That might well be the case even if the workforce's contracts of employment were not formally transferred from the old employer to the new one, but terminated and new contracts entered into. If the reality is that a

> workforce is being transferred, then the fact that wholly new legal relationships are formed as part of that process should not affect the position."

That, of course, actually reflects what was going on in relation to AAH. That is perfectly proper. Then on to 117, because 117 through to 119 are effectively a proviso to that consideration in 116:

> "In this regard what might be a material fact emerges from other parts of the Decision. Paragraph 3.29 notes that Eurotunnel 'also told us that it was public knowledge in France that under the terms of the liquidation agreed between SeaFrance's owner (SNCF), the Court and the SCOP, the SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed. The liquidator agreed to pay these funds and part payment of these funds was made by the liquidator to the SCOP in late January 2013'. [Then there is a reference to the decision.] (119) It is not clear from the Decision how much of a contribution the former SeaFrance employees actually made, but it is clear that the sums in question are not insignificant and that (in themselves) they might, if fully explored, provide a cogent reason, on the part of Eurotunnel/SCOP to employ SeaFrance employees. Equally, it is clear that this was a benefit derived from the fact of the relevant employees' employment by SeaFrance. In short, it seems to be a benefit emanating from employing an ex-SeaFrance employee that would not be gained were an employee from elsewhere to be retained."

So what the Tribunal was rightly saying there was: hang on, we spotted something in 329; it was a passing reference (I am sorry, I did not take the Tribunal to that paragraph in the decision, but it is 329 and it simply refers to the existence of the job saving plan indemnities), and it was highlighting that albeit that it was not part of the general arguments in relation to these matters, that there might be something out there that was of concern to it. If that were explored there might be circumstances that it was not ruling out that it could have a potential impact.

We say that on proper consideration of these issues it is clear that the position in relation to the ex-SeaFrance employees and the indemnity plan do not suggest that there were any activities that were acquired. The Tribunal is here saying: "we do not have all these facts; we do not know what was going on and we are leaving it open." It may have been creative on the part of the CAT. We say it is very difficult to see how, in any circumstances, these arrangements could give rise to a finding of any activities. We do put it in those terms. Nonetheless, what we say is when this CMA panel came to look at these issues, came to look at the matters in more detail relating to what had happened in relation to the job saving

plan, they still went wrong in relation to the consideration of whether or not the activities were acquired. In broad terms, the fact that there was a job saving plan that had been put in place did not mean that there was any continuity of employment in relation to the activities of SeaFrance. There was no continuity of employment. If there was no continuity of employment there were no relevant activities of SeaFrance in relation to these matters that could be acquired by Eurotunnel. I will come back to that in a bit more detail in a moment. For the Tribunal to leave it open is obviously something it is well able to do. There is one point in its submissions where the CMA suggest that we should have appealed these matters. That is rather bold. In circumstances where the Tribunal is saying we are remitting it back; we are not constraining what sort of matters you can argue about, or the significance of any of these issues. It was plainly unnecessary for us to appeal in relation to these issues in order to maintain the arguments that we are maintaining today, and indeed had maintained before the CMA during the course of the relevant process.

THE PRESIDENT: Unless you are saying they are wrong in saying these might provide --

MR. BEARD: Sir, with respect, even if the situation were that, in these circumstances the arrangements in relation to the job plan could not give rise to a continuity of employment finding and a finding of activities, it is not necessary to appeal those matters because it is well open to the SCOP, and indeed Eurotunnel, to say: but look, the key test is that which you have articulated previously, which is the reference to activities. Nothing here can go behind that fundamental articulation of the test. We are entitled to make submissions about the matters that you speculate about, and its proper consideration in relation to issues of law.

Two further points are worth just emphasising in relation to appeals. First of all, we would have ended up in a situation of having to appeal an order remitting, because it is the order not the reasoning that one has to appeal. Of course, we have seen in the course of other CAT proceedings how warmly the Court of Appeal considers people turning up trying to appeal against reasoning in relation to these matters.

Second of all, with respect, although the Tribunal is effectively a co-ordinate level decision maker to you as a Tribunal, in fact you are not formally bound by their findings in relation to these matters in any event. We simply say we look at the legal approach and a consideration of the CMA and we say it does not stack up here.

THE PRESIDENT: Yes, but it would help me to know for myself whether you say any part (and we are coming on, of course, to paragraph 120) is wrong. You made a comment about the end of paragraph 114.

MR. BEARD: We do not see on what basis the material referred to by the Tribunal could ever give rise to a relevant finding of activities, the material referred to in 116, 117, 118, 119. But of course when we say that, we do it with knowledge of the details of what went on, whereas the Tribunal did not have that depth of knowledge; it had not been subject to submissions and argument. So for us to say it was entirely wrong for the Tribunal even to have concerns that these possibilities might arise, it is a very potentially remote possibility, but to say that that is somehow itself irrational and that is necessary to appeal would perhaps be going too far. But we really do not understand on what basis it could be said that an incentive to employ someone actually amounts to a continuity of employment in relation to a person, which is what this job plan arrangement boils down to. We do see that as being extraordinarily difficult. You only have to put yourself in the shoes of the potential employee to feel a quite stark difference between an employer having an incentive to employ you and actually employing you. If you are talking about continuity of employment, plainly there was not continuity of employment. There was a raft of redundancy notices, and the employees were redundant in relation to the relevant period. As I say, what we have done in our appeal now is challenged all of the CMA's relevant findings in relation to continuity and momentum which are the findings it rests on as saying that these matters are significant. That is plainly the proper way in which these matters should be dealt with.

Then we come on to 120 in relation to the further factor where the Tribunal says: we wonder about the possible inter-relationship in relation to various factors that you have identified in 4.68 which is described previously in 113. They say: we do not know whether or not the possible inter-relationship of those matters might give rise to a situation (as they put it). It may very well be the case that this combination may enable MyFerryLink to begin operations much more quickly than it could have done had it acquired crew and vessels from other sources. In short, there may have been momentum or continuity in a combination of the vessels and the workforce that takes this case over the line for an asset acquisition to the acquisition of an enterprise.

I am going to reiterate my submissions in relation to these matters. Essentially, the Tribunal is saying you, CMA, did not think about any of these issues. We are going to leave open that possibility. We look at those matters and say: we cannot see how it could be that the matters identified in 4.68 would ever get you over the line and give you that momentum or continuity. But then, for the CMA to say: "You needed to appeal that" when the Tribunal has simply said: "Look, you did not consider this interrelationship issue. We are remitting it

back to you" would again be the sort of matter that would, I think, quite rightly, fall upon deaf ears in relation to the Court of Appeal.

THE PRESIDENT: But if it is clear that none of these factors could take it over the line, then the decision to remit was wrong, because irrespective of whether it might have enabled My FerryLink to begin operations more quickly is just irrelevant, and so they should not have remitted, they should have quashed.

MR. BEARD: That may well be.

THE PRESIDENT: Therefore, the remittal decision could have been appealed on that basis, but on the material they have set out this is not a proper basis for remittal.

MR. BEARD: If it were clear that no matter what interrelationship one was referring to in the context of findings of fact that were not being made by this Tribunal, but it was leaving open for the CMA to consider further on remittal, and therefore explore these matters further, and consider the interrelationship. In those circumstances to say: "You had to appeal these matters, otherwise you cannot challenge them now, is a very bold submission because, of course, it may well be that that remittal decision, if tested to destruction in relation to every possible permutation of findings in relation to matters that are referred to, and the interrelationship between those findings, would mean that there was no good case for remittal, "yes" you would say, "there could be a ground for appeal". But, to say that has any impact on what we are saying now is very difficult to understand because it is not clear in relation to these remarks being made by the Tribunal exactly what it had in mind in relation to these issues, or how it worked. Secondly, when it comes to consideration of the decision taken by the CMA the question that has to be asked is: "Is that decision lawful on the basis of the law and the findings that were made at that time, i.e. the new decision?" Nothing here constrains the Tribunal from looking at the law correctly and applying it correctly or, indeed, from considering in the light of the greater detail that you now have in relation to these matters, for instance, the French material that I have taken you to, for instance, details of the job plan, that in those circumstances you should not accede to our appeal in relation to these matters.

THE PRESIDENT: I understand that last point, I am not sure about the previous point. This was a remittal, but it is not simply a remittal, the Tribunal gave guidance effectively to the CMA as to how it should approach this matter, and when the CMA came to reconsider it unsurprisingly they did it on the basis of that guidance. To say: "Oh well, what you did CMA is wrong as a matter of law. Forget about that guidance, it was altogether misleading, we are concerned with the legal test, and therefore we can disregard para. 120, or para. 114 because we find it hard to understand", I find that troubling.

MR. BEARD: I am troubled that you are troubled, Sir. In the circumstances with which we are dealing you have a situation where whilst you say the Tribunal is giving guidance, what the Tribunal is saying is that "We are not making that final quashing decision because we have certain uncertainties in relation to these matters."

THE PRESIDENT: Yes.

MR. BEARD: The fact that uncertainties exist in relation to those matters does not mean that when the CMA comes to reconsider these issues it must reach a conclusion one way or another and in particular it does not mean that it has to conclude that, for instance, matters relating to the hot lay-up of vessels is critical, relevant, or material to the overall finding of activities, nor does it require the CMA to make any such findings in relation to the matters concerning the continuity of employment issues, or the job plan.

THE PRESIDENT: No, it does not require them to reach a conclusion one way or the other; clearly not. But it does, does it not, require them to consider those matters as relevant?

MR. BEARD: It certainly requires them to consider whether those matters are relevant.

THE PRESIDENT: No. Well, that is where, perhaps, we are at odds. It seems to me they are saying: "These are relevant questions for you to look at. We do not know how they will be answered."

MR. BEARD: No, no, with respect, Sir ----

THE PRESIDENT: And I had understood much of your case is to say that when you look at them, they have answered them the wrong way.

MR. BEARD: That is obviously right. But can I just go back to the actual wording of what the Tribunal says. 117 – "In this regard what might be a material fact", so it is not saying that we are telling you, you have to find this relevant. The CMA has taken it in that way and it is wrong.

Paragraph 120: "A further factor that may be relevant", again the Tribunal is saying "It may be", not "It is", "that you must find", this is part of the reason the CMA have misdirected themselves. It is not as strong as that. It is identifying uncertainties and saying: "We are not sure whether or not this stuff is relevant, or, if it is relevant, to what extent, we leave it to you, because we are not sure whether it may be relevant, and the extent to which it may be relevant. In those circumstances we are leaving it open".

It may have been a cautious approach, but that is entirely proper. Mr. Williams very helpfully points out two points: in relation to 114 it is just worth bearing in mind 114 says: "We doubt whether this is enough to turn these assets in to an enterprise at least", but that cannot be read as requiring that to be treated as relevant, and if one then turns over the page again at 121: "We cannot exclude the possibility that the Commission, using the approach

we have described might properly reach the conclusion that Eurotunnel/SCOP did indeed acquire an enterprise." 'We cannot rule it out', that is all that is being said. It is not saying these things are relevant.

THE PRESIDENT: Using the approach we have described.

MR. BEARD: Yes, absolutely using the approach we have described.

THE PRESIDENT: So that is the approach to be used?

MR. BEARD: It is saying that those are the matters that it has identified as relevant for consideration but not necessarily when you go and look at those you have to conclude that they are relevant to your findings. It is requiring consideration but it is doing no more than that.

I should think it is important to emphasise, of course, that the key points in relation to the approach we have described are not the provisos, that would be putting the cart before the horse. These are described as provisos, if one goes back to 115, and 114. What we have is an approach set out from 97 onwards which focuses on the correct analytical approach, and that approach is the one that we have expounded and emphasised by reference to the proper interpretation of enterprise activities, the reference to *AAH* and the issues to which I have already taken you.

THE PRESIDENT: Yes.

MR. BEARD: Mr. Williams, in that regard, helpfully points out that at 123 it says:

> "We consider that it is important for the Commission to consider the question of its own jurisdiction anew, applying the approach which we have set out in paragraph 105 above." That is the core.

So, these criticisms about appeal are practically mistaken, wrong in relation to the interpretation of the judgment, but also do not take the assessment of these matters further before this Tribunal now.

THE PRESIDENT: Well, 105 asks essentially three questions, or three stages: one, what exactly in more than bare assets does the acquiring entity obtain? Two, if so, has this placed the acquiring entity in a different position than if it had simply gone into the market and acquired the assets. Three, whether that difference is capable of constituting what would otherwise be bare assets into something that may properly be described as “activities of the business” - a question of fact and degree. That is the three stages.

MR. BEARD: That is right, but I also have referred the Tribunal to the guiding principle that is then articulated in relation to the proper interpretation of “activities”.

THE PRESIDENT: That is the approach they are referring to in para.123.

MR. BEARD: Absolutely. We do not see that approach as qualifying the proper interpretation of the term "activities" as we have articulated it previously. Then it highlights those provisos and says, "We do not know, but there might be the possibility of these other things being relevant and we do not know to what extent". The CMA has essentially failed to recognise that those were only provisos and has placed great weight on them, and has tried to take those words in 120, "momentum and continuity", and effectively turn them into the basis for a very lengthy decision and say, "There was continuity and momentum, so the fact that there was inactivity for six months, or seven and a half months, or nine months, does not matter, there was continuity and momentum". There was not continuity of any operation. There was not working in the sense that the ordinary language term "activities" means. There was not continuity of employment certainly.

With those points in mind, I am going to highlight - although to some extent I will already have anticipated some of these submissions - and pick out key themes in why we say the CMA's approach is wrong, so the third part of my analysis. I can go to various of the other decisions that we referred to in the skeleton, but I am not sure that they are of great assistance and would refer to our notice of appeal and skeleton in relation to the various other legal authorities.

As we say, the central error, and it is highlighted by the exchange that has just been had, in its analysis is that the CMA has failed to recognise that the term "activities" must be given its ordinary meaning, and to treat any business that is not active as an enterprise is an extension of that term. It is an exceptional circumstance that would have to apply. The CMA is simply wrong to read *AAH* as suggesting any sort of broad approach to interpretation of "activities", and it is wrong to see the Tribunal's judgment as supporting any such broad approach. The CMA's stated concerns about circumvention that it picks up at various points, which it suggests do not apply in this case but might apply to a broad interpretation of the term, that is not right. To the contrary, concerns about circumvention of merger control suggest that you should not broaden the term because circumvention can be dealt with as an exceptional case.

As I say, what the CMA sought to do is transform inactivity somehow into activities by its findings on continuity and momentum. We say there are just a series of insuperable obstacles that the CMA faces. Before the liquidation, all attempts to sell the business as an active business, rather than bare assets, had failed. The CMA itself found that this was due to unviability of the business in its then existing form and the need for the business to be restructured. Because there were no purchasers for the active business, it was liquidated

and reduced to assets. In the liquidation the remaining three vessels were sold to the highest bidder in a sealed auction, the outcome of which was completely uncertain.

In the meantime, all of the employees had been made redundant with no concrete prospect of future employment through the SCOP venture unless and until the Eurotunnel bid succeeded. In the end, Eurotunnel did not acquire the vessels until seven and a half months after SeaFrance have ceased activity, and did not start to use them to provide ferry services, which are the activities in question and of course are the activities that are the focus of the Commission's further finding in relation to SLC, until a period of nine months had elapsed.

So what are the key counter arguments? The first from the CMA is that the business need not be trading as at the date of acquisition. We have dealt with this issue. It is true, we recognise that, but it will be absolutely the exceptional case. Normally, when you are buying the activities or a business, you are buying a trading entity or a part of it.

As I say, in making this point, the CMA relies very heavily on *AAH*, but *AAH* does not assist it. For the CMA to say that the distinction between the present case and *AAH* is simply one of degree is clearly to misconceive the proper reading and interpretation of what is being said in *AAH* and translate it across here.

It is no lack of audacity to rely on *AAH*, a case that was cited against it in the Tribunal below and seen as the basis why the CMA was wrong - there is no lack of audacity, but it is misread. It is not simply a matter of degree between *AAH* and the present position.

The position now is wholly and fundamentally different - no pre-ordained structure to shut down on a Sunday and reopen on a Monday, no arrangements put in place previously.

THE PRESIDENT: We understand that.

MR. BEARD: The second point that is made is that efforts were made to maintain the value of the vessels. Again, I would suggest that is a matter that I have already canvassed. The fact that arrangements were put in place to maintain the value of the vessels does not assist. It may have been an issue that the Tribunal said you need to think about on remittal, but when you think about it, says the CMA, you have to get your conclusions right. In these circumstances, this is a question which it does not matter how broad a discretion we are talking about here, there is no good reason to say that maintaining the value of assets in some way maintains the continuity of activities or the momentum of activities. It does not do that.

It might mean that you can *start up* faster, but it is *starting up* faster. In physics terms, it is reducing inertia, it is not increasing momentum.

In those circumstances, the second point about efforts being made to maintain the value of the vessels does not assist.

The third point that is made is that all of these arrangements have the aim of providing employment to SeaFrance employees. In the Decision the CMA asserts that the aim of various transactions considered following the demise of SeaFrance was somehow, therefore, to continue the activities of SeaFrance. This simply confuses two issues. As we have set out in our notice of appeal, paras.94 to 96, the SCOP very much had the aim of providing employment to ex SeaFrance workers, but that is simply not the same as SeaFrance's activities continuing. The SCOP has made clear that the liquidation process, as we have seen from the documents from the French courts, was concerned with securing value for creditors, not about ensuring employment for ex-SeaFrance workers, notwithstanding that there was plainly a range of people concerned about employment in the region.

To be fair to the CMA, in its defence at para.114, it does seem to accept that the role of the liquidation process was securing value for creditors, not ensuring employment for ex-SeaFrance workers, but that is simply in tension therefore with its reliance on the idea on the aim of these transactions was to provide employment to SeaFrance employees.

As I say, the SCOP accepts, of course, that there was significant concern about the position of those ex-SeaFrance workers. Obviously, for people like the liquidator it was seen as a subjective benefit in seeing them back in work. But that was true of the Calais Chamber of Commerce; it would be true of the local area more generally; it would be true of businesses in the Calais area. All of these people would see this as a potential benefit. But that does not mean that there was continuity of activities of the SeaFrance business at all.

Then we come on to the continuity of employment point itself, which seems to be at the core of the CMA's findings. The CMA found that the formation of the SCOP "safeguarded or preserved continuity of employment for SCOP's members". In its skeleton at paragraph 56(g)(i) it says: "There was continuity of employment and the SCOP's objection is unsustainable". I have already picked up this point. There were wholesale redundancies. There was not continuity of employment. SeaFrance ceased to employ people to provide cross Channel ferry crossings because those activities had entirely ceased. There was a number of people that were involved in the hot lay-up activities; completely separate activities. The CMA now says it was not in fact continuity of employment for the whole of the SeaFrance workers, not on the basis of the same terms and conditions, but a number of SeaFrance workers were employed by the SCOP after the acquisition. As I say, not remotely disputed. The involvement of the SCOP in the process was to secure employment for its members. Whether they could get work on the vessels again depended entirely whether Eurotunnel succeeded in its bid for the vessels. The SCOP itself had failed in its bid to get SeaFrance as a going concern and maintain employment.

It is very difficult to see that where you are talking about a sealed bid process in a liquidation, the outcome of which was unknown, that it could possibly be said that you had continuity of employment in relation to individuals who are supportive of one of the bids. A non-Eurotunnel bidder could have won. The CMA is quite rightly not saying that the bidding process was flawed or pre-ordained, so on that basis alone there is no continuity. But just as there was uncertainty as to whether Eurotunnel would win its bid, even when, in the end, it did win the bid, the prospective workers all had to participate in the SCOP's recruitment process. In other words, no-one had any continuity, even under the Eurotunnel bid; you had to go and apply for a job. Indeed, a number of people who now work for MyFerryLink are not ex-SeaFrance workers - between a quarter and a third, as you see from the ranges in the Decision itself.

It is also just worth noting that the CMA have no answer to the SCOP's point that is made in its skeleton argument that the CMA's position appears diametrically opposed to the position it took before the Tribunal previously on the basis of which it successfully resisted the second ground of the SCOP's appeal. It was said there that the workers in question were acquired by Eurotunnel only after the success of the Eurotunnel bid. That was the basis on which it was said that the workers were acquired for the purposes of the analysis under Ground 2. They were not acquired beforehand. There was not employment beforehand. There could not have been employment beforehand.

Then the argument of the CMA appears then to be that a job saving plan put in place "gave rise to sufficient continuity of employment (skeleton paragraph 56(g)(ii)) notwithstanding the fact of the redundancies". The first and most obvious point to make on this is that the plan only gave rise to an incentive to employ someone in certain circumstances; it was not a safeguard of employment. The CMA at 56(g)(ii) says: "whether those arrangements can be characterised as involving a formal continuing of employment is of no particular importance." That statement, in and of itself, is rather remarkable. There is simply a world of difference, as I have said, between a prospective employer having an incentive to employ you and actually employing you. There may be a range of things that mean the incentive simply does not work.

The second point to note in relation to the job plan is it was not something instigated by Eurotunnel or the SCOP; it was a necessary requirement of French labour law. It did not provide either continuity of employment or transfer of a workforce.

THE PRESIDENT: Why does it matter if it comes from French labour law?

MR. BEARD: The only issue would be if there was any question being raised as compared to, for instance, in relation to *AAH* where arrangements were being put in place beforehand by a party to the arrangements.

The point is that French labour law imposes requirements, in the case of mass redundancies a whole range of measures need to be taken to try to protect those who are going to suffer redundancies. You see that in the plan itself. It might just be worth briefly going to it.

THE PRESIDENT: The point is made that TUPE did not apply, the equivalent of TUPE. In other words, the argument, as I understand it, being if it had applied that might have been relevant the other way to say there was continuity if the French TUPE had applied, but that is French labour law. I was just looking at the consequences on the arrangements as regards the employees, whether they come from the law or a contractual arrangement.

MR. BEARD: It only matters to this extent: the focus is obviously on the particular incentives if the ex-SeaFrance employees took control of an entity that operated the vessels. That was how the highest level incentive was structured. But it is important for the Tribunal to realise that actually the scheme that was put in place, the job saving plan, started with a scheme for redeployment within SNCF. That was the primary issue. So it is part of a broader scheme that you are talking about. First of all, can you be redeployed within SNCF; can you relocate? There were funds for relocation. There is also a scheme for ensuring that there would be the possibility of retraining and a specialist bureau to help with re-employment. There was also a range of incentives provided not just for this particular structure of employment, which would get 25,000 Euros per person, but other incentives at 10,000 Euros/15,000 Euros which did not involve operation of the particular vessels. We say: what you have here is a whole package of arrangements that is intended to enable the social consequences of these redundancies, of the end of SeaFrance to be mitigated. The fact that you have a situation which says: if you can get those vessels up and running and start a business running those vessels, we will invest more, there is a whole range of collateral benefits that arise if we get that happening, that does not tell you that somehow there is continuity of activities at all. What it is is a recognition of the social premium effectively that is attached to that sort of activity. It is only when one sees that in the context of a whole job plan that one really sees what these incentives are in the circumstances. As I say, they are only incentives. Given time - I will not go to the job plan; it is in the second bundle at tab 8 in English, 7 in French. It is referred to as the job saving plan that arose because of the judgment at the end of the continuity business on 9th January. Thirdly, as also set out in the SCOP's notice of application paragraph 141 to 144, under the plan adopted what you have is the range of options, and that one limb of the scheme related

particularly to employment in circumstances where there was a re-starting of cross Channel ferry services using these vessels and that does not assist in this regard. It must also be borne in mind in this context that the point made by the Tribunal and the consideration that supposedly the CMA is undertaking is whether or not there has been a transfer of the workforce as a whole. The job plan itself does not remotely suggest there is a transfer of a workforce occurring. Sir, you have already indicated, we would also say that the lack of the application of TUPE in relation to these matters is significant because TUPE (for your notes, authorities bundle 3A tab 5 is the UK legislation, tab 6 is the underlying directive which has to be implemented throughout the Community) indicates that where you have economic activities being transferred - and it is agnostic as to the mechanism by which that happens - TUPE will be applied.

The CMA seeks to say this does not matter; if it applied that would suggest it is a merger; if it does not apply, that does not tell you anything at all. We say that is not right because it is all part of the overall scheme which is if you have an active business, and people are employed in it, then the legislators have decided that their terms should be protected if there is a transfer of those activities. If that legislative scheme does not apply, it is an indicator that you do not have a transfer of activities, just using the ordinary language terms. The CMA says: there are technical reasons why TUPE does not apply here, because you had a move from the employees of SeaFrance (they always omit the “ex” bit or often omit the “ex” bit) the ex-employees of SeaFrance taking on roles that are different because of their shareholdings within TUPE and therefore TUPE does not apply for technical reasons.

But that just fails to grapple with the broader point that when one looks at the basic conditions of application of TUPE in relation to a case such as this, they are not met. I have dealt with the fact that the CMA refers to the fact that TUPE is not referred to in *AAH*, that is not instructive.

The second point against TUPE that the CMA runs in its defence at para. 120, that although it would normally be regarded as an indication that there is no acquisition of an enterprise, in this case it should be treated as a factor having the opposite effect, because this is a matter where it says that TUPE did not apply because MFL's business was unviable. We say "yes, exactly, it was unviable". There were not activities. That is why it was liquidated, that was why there were sales of assets, and that is why TUPE does not apply. TUPE is relevant in these circumstances.

THE PRESIDENT: You said "MFL's business", you mean SeaFrance?

MR. BEARD: I meant SeaFrance, yes. I apologise. Those behind me I think would have had strong words with me at lunch time.

Those various issues are clearly not determinative of any good counter arguments to the basic position that we put forward. Just briefly, obviously I cannot go through the entirety ----

THE PRESIDENT: Just to make sure I understood it, so you are saying although the new entity acquired the former SeaFrance employees in August.

MR. BEARD: Yes.

THE PRESIDENT: It was not by way of - SCOP acquired them?

MR. BEARD: The acquiring entity acquired them because you have those associated persons and their issues.

THE PRESIDENT: That was in August and there was no continuity.

MR. BEARD: Yes, and if there had been the sort of continuity that is being referred to you would have expected TUPE to apply, and the fact that the CMA says there is a technical issue in relation to TUPE which meant it would not have applied because the ex SeaFrance employees moved to being shareholders in the SCOP, we say just look at the overall framework you are talking about in relation to TUPE. Sorry, I am corrected that some employees were acquired from August, the process, in fact, took much longer to actually work up to the level of manning that we have.

As I say, the report is a lengthy document, what I will try to do in the light of those submissions is simply pick up some of the key points that are highlighted in the report, and summarise why those are wrong. I have already trailed most of these points but it is perhaps easiest to do by reference to the report, so that is tab 2 in bundle 2. It could be done in relation to the summary, the conclusions, the various sections, but I will try and focus on a section of the report that seems to raise most of the points that the CMA seek to rely upon, albeit they then seek to expand on them later in the report.

So far as we understand it, if the CMA's case is that there is some sort of exceptional circumstance it appears that it comes out of this section, which then seeks to draw on later material in the report but, as we will see, it picks up various of the points to do with vessels and assets and employment.

We start at p.38: "Our views on the history of the transaction and the period of inactivity", 3.45:

> "We recognise that there was a considerable period in which SeaFrance was not trading. The period of inactivity was significantly longer than in the *AAH/Medicopharma* merger."

Well, yes, I have dealt with *AAH*, but it is different in kind, it is hugely longer than the day, or three days, potentially, that was at issue in *AAH/ Medicopharma*, but that really does not

do justice to the type and extent of the difference that exists in relation to *AAH/Medicopharma*.

At 3.46:

> "We note, first, that decisional practice of the CC and OFT, the CMA guidelines . . . all recognise that in the context of 'enterprises ceasing to be distinct' it is not necessary for the purpose of establishing that an enterprise rather than an asset is acquired that the activities of the acquired business continue up until the date of completion of the transaction."

That allows for the possibility of the consideration that there might be an RMS, but it is still the exceptional case, and it really is not informative here when you have such a lengthy gap, such a lengthy period of inactivity. Then the final sentence:

> "Were it otherwise, it would be very easy for businesses to evade UK merger control law."

As we have made clear, we accept that anti-evasion measures, and anti-circumvention issues will give rise to different issues as we see in *AAH*. Then 3.47:

> "We note, secondly, that a considerable portion of the period of inactivity . . . was due, directly or indirectly, to the requirements of the liquidator's sale process which followed on from the failure of the SCOP's two attempts to purchase the SeaFrance business as a going concern."

Yes, and no. There was a long period of inactivity, and that was because SeaFrance had utterly failed to find a new buyer to operate as a going concern during the preceding 18 months of the administration process. It went into liquidation and the nature of that was cessation of the business, and an asset sale. So the fact that the inactivity occurred during that period does not tell you anything at all, it is simply an incidence of the fact that this business had stopped.

Then the reference to the two former bids by SCOP, we do not understand how that assists in any way, because that simply reinforces the picture in this regard.

Then 3.48:

> ". . . considerable efforts were made to maintain the value of the assets during the period inactivity."

Yes, you do that with assets otherwise creditors do not get maximum value, that is true of all assets, even brand new ones. It does not mean there are activities here. The final sentence here:

> "The vessels were put into hot lay-up and 190 SeaFrance staff were involved, directly or indirectly, in their maintenance."

Well, yes, ex-SeaFrance people did help with this activity, but we are not concerned about ship maintenance services, we are concerned here with passenger and freight activities. Indeed, this just illustrates the fact that those passenger and freight activities, the business of SeaFrance, had come to an end. 3.49:

> ". . . while various transactions involving one or both of the parties were considered, they all had the aim of continuing SeaFrance's activities in some form, and providing employment to SeaFrance employees."

I have dealt with the fact that aims are: (a) not material here in the sense that the liquidation process was about realising assets; (b) there is an extent to which this is just begging the question of whether they had the aim of continuing SeaFrance's activities – no, they did not. They had the aim of ensuring, certainly from the SCOP's point of view, employment of people on new services using the vessels that were coming through the liquidation process, and when it says: "and providing employment to SeaFrance employees", again that is one of those instances where the "ex" seems to have been dropped from the analysis. Yes, there were lots of people in the liquidation who were interested in ensuring re-employment, but that is a very different matter entirely. Then it goes on:

> "One reflection of this is the successful negotiation by the SeaFrance works council of an indemnity payment . . . which was substantially higher in the event that the ex SeaFrance staff were re-employed."

I have dealt with this, it fits with the social interest in creating new economic activity which would fill the void left by SeaFrance, no issue there.

Then we come to 3.50:

> ". . .the SCOP was formed with the aim of providing employment for SeaFrance employees who were faced with redundancy."

Yes, it was formed at that time when it was well into the administration process, when SeaFrance's position was absolutely dire, and then it was trying to get employment for those people when they were redundant. Yes, absolutely, it tried to acquire the SeaFrance business before liquidation in order to preserve it, but it could not, it just cast an even more stark light on the fact that SeaFrance was at an end. It had no passenger or freight activities, they were gone.

351:

> "In our view, the collaboration between GET and the SCOP presented a solution that addressed two main concerns flowing from the liquidation of SeaFrance: (a) payment of creditors; and (b) ensuring employment for ex-SeaFrance workers. Although the various schemes previously considered by the French Court had at

> their core the continuation of a ferry service and employment for SeaFrance employees, it had not been possible to find a viable solution producing value for creditors and the continuance of the SeaFrance operation."

And the coda is: "involving all employees under their existing terms and conditions." Well, you do not need that. It had not been possible to find a viable solution producing value for creditors and the continuation of the SeaFrance operation. There were no extant activities of SeaFrance.

3.52 is about TUPE.

> "Continuity of employment was effectively safe-guarded by the formation of the SCOP, which held the workforce together, and, to a lesser extent, due to the fact that a significant number of employees were involved in the lay-up of the vessels."

That is just a remarkable statement. 800 people were ex-SeaFrance employees, half of those employed on MFL, so "holding the workforce together" - it is a funny old 'holding together' at that point if it is less than 50 per cent that have been able to gain re-employment, and I have made the points about the bidding process, the recruitment process, and the period of very significant unemployment for those people having been made redundant.

The references to the laying-up of the vessels which the CMA here says:

> ". . . to a lesser extent, due to the fact that a significant number of employees were involved in the lay-up of the vessels."

Actually, that is just wrong, that does not assist at all because it is different sorts of activities in any event, but it does not take them far enough.

3.53:

> "At the point the decision was taken that SeaFrance activities should cease, the French Court recognised that the aim of achieving some sort of business continuity remained unchanged."

We do not understand how that sentence can be derived from the material that I took the Tribunal through to start with.

> "This is clear from the statements made by the French Court such as: 'the end of the temporary continuance of business is not the end of the road'."

That is just wrong. The French Court did not say that. That was part of the opinion that was given to the French Court as I took you to.

> " . . . and there must be a trade-off between the value of the assets, which are mainly the vessels, and the continuance of employment contracts."

Again, taken out of context, undue weight placed upon it, misunderstanding of the French liquidation process. "PSE3" – that is the job plan: ". . . was designed to support such a business continuity solution". Again, that is not borne out by the terms of the job plan. It was not about business continuity, it was about employment, redeployment, retraining, and various incentives to have people employed. Then we come to 3.54:

> "Overall, we consider that a review of the background to the transaction shows that there is considerable continuity and momentum."

So this is the conclusion that is drawn from these factors. Those factors are, of course, considered further in the remainder of the report, but in essence those issues to do with the employees, the maintenance of the vessels and the various other issues, those are what are being picked up here, we say there is not continuity, there is not momentum, there is no way of bridging that period of inactivity.

THE PRESIDENT: Mr. Beard, I have not read PSE3, was that the plan that involved the SNCF payment?

MR. BEARD: Yes, PSE3 is simply the job plan. If, in the same bundle, Sir, you go on to tab 8, "PSE3" and "the job plan" are just different names for the same process.

THE PRESIDENT: And the payment – is this right – was significantly higher because they were employed on the vessels?

MR. BEARD: Yes, I think I probably do need to just take you to this.

THE PRESIDENT: Is that right?

MR. BEARD: Yes. If we go to tab 8, you will see on the front this is the "Memo For Information And Consultation of The Works Council On The Collective Redundancy Plan", so "Collective Redundancy Plan" is what this really is, it is referred to as "PSE3".

THE PRESIDENT: Would you like to do that at 2 o'clock?

MR. BEARD: Yes, I was just wondering.

THE PRESIDENT: We will say five past two.

MR. BEARD: I am grateful.

(Adjourned for a short time)

MR. BEARD: We were going to go tab 8 of bundle 2. This is what has been referred to as the Job Saving Plan or PSE3, and it is following on from the judgment at the end of continuity of business on 9th January 2012. That is the front page. If you turn on to internal page numbering 5 to the preamble drawn up under the terms of the French Commercial Code, fifth paragraph down:

"It will be down to the Court Appointed Liquidator to undertake the redundancy of all employees, subject to their redeployment, within a period of 15 days of the end of continuation of business, so the employees can be covered by the AGS [guaranteed salary scheme]."

Then the document has six parts that are just set out there, the first being reasons for the collective redundancy plan, the next the number of workers, then the order of redeployments pursuant to the redundancy order criteria. Then provisional timelines, job saving plan and the annexes.

If we flip past one, we see at p.10, the end of that section:

"Therefore, the economic redundancy of all staff under SEAFRANCE SA contract must be envisaged."

That is through the liquidation process.

Then we have the numbers. Then over at p.12 we have the order of redeployments pursuant to the redundancy order criteria.

"Preamble

The end of continuation of business of SEAFRANCE entails the redundancy of all staff. The redundancy order criteria are only indicated here as key criteria making it possible to decide between two or more employees who may claim a same redeployment …"

So this is primarily to do with the redeployment measures.

Then, if we go on, 14 is the provisional timeline. Then p.16, the job saving plan. Then the preamble, second paragraph:

"According to Article L 1233-61 of the French Labour Code, when in a company of at least 50 employees it is envisaged to make at least ten employees redundant, the employer must establish and implement a job saving plan 'in order to avoid redundancies or limit them in number and to facilitate the redeployment of people for whom redundancy cannot be avoided'."

Then A is "Measures intended to limit the number of redundancies", and under the first paragraph it is recognised that actually there is not going to be any limit on redundancies. Then at 1 you have the examination of the possibilities of redeployment within SeaFrance, and it explains how that is simply impossible because SeaFrance does not exist, effectively.

"Insofar as the cessation of the continuation of business was decided by the Commercial Court on 9 January 2012, the company is therefore no longer able to offer redeployment solutions within its structure.

Due to this, no redeployment …"

It just goes to the point that is perfectly obvious. SeaFrance does not exist as an operating entity. It has no activities, there is nothing for people to be redeployed to do.

Then you have got 2, examination of the possibilities of redeployment within the companies of the SNCF Group. There are various issues. There is quite a structure that has to be built. Over the page, p.18, there is establishment of an advice and mobility information board to help people with the process of redeployment within SNCF.

Over the page at 20 at 3, offers of redeployment and the possibility of mobility, i.e. moving to be redeployed.

Then if you go on to p.25 you get measures aimed at facilitating return of redundant employees to work, so it is return to work. This is the scheme that is then brought in, an employment bureau, a "return to work" system, and then measures promoting or accompanying the return to employment. 3.1 is actually mobility aid, so it is up to €18.000 to help you with redeployment within SNCF. So there are very significant incentives there that can actually be increased by reference to how many dependent children you have.

Then at 3.2 there is aid for training and aid for accreditation of previous experience. There is a scheme for training aid being offered up to €3.500.

Then 3.3, aid in creating or taking over an enterprise:

> "3.3.1 The purpose of this aid is to give financial aid to persons made redundant for economic reasons who create or take a minimum 50% stake in a company in a public limited company, a limited liability company … or a business in France or in another country in the European Union, and carry on actual work there.
>
> This aid of an amount of €10,000 gross will be allocated by SEAFRANCE only for the plans approved by the Employment Office …"

You need to get approval of it.

> "3.3.2 Employees creating or taking over an enterprise locally with the aim of contributing to economic development either in that area or within a radius of 50 km of the job location in the Calais region may receive special aid relating to the scheme for developing the employment catchment area …. In addition to this scheme, the allowance of €10,000 stipulated in article 3.3.1 will be increased to €15,000."

So if you are creating or taking over an enterprise that exists.

> "3.3.3 Where the bankruptcy judge in the liquidation of SEAFRANCE has to rule upon an assignment in a final ruling allowing similar operation …"

so similar operation of the vessels belonging to SeaFrance -

"… in favour of the SCOP or any other company (of any form) in which the employees have a direct interest (share of the equity capital) and indirect interest (employment contract), the company will be paid €25,000 per employee, on receipt of the official documents … The aid of €25,000 gross may not be combined with the aid of €10,000 gross referred to above in paragraph 3.3.1."

It is this incentive upon which there is great reliance placed.

The incentive is put in place for the creation of a new company in relation to a similar operation of the vessels belonging to SeaFrance - in other words, on the basis that the vessels of SeaFrance are not operating- and it is an increment above the other available redeployment incentives or mobility allowance incentives, and indeed the incentives offered in 3.3.2, but I reiterate the points that have already been made in relation to this. Of course, obtaining this money was by no means certain at the time that this job plan was being put in place, because you had a situation where there were various bids going in, some of which involved the SCOP and some of which did not. In relation to individual incentives, you have to go through the open process for seeking employment. It is also worth noting that even after the Eurotunnel entity had acquired a number of ex-SeaFrance employees, there was a question whether or not there would even be entitlement to this incentive. In the end, the SCOP and Eurotunnel had to go to court in 2013 to secure a declaration that they were actually entitled to it, because there was an argument about whether or not ex-SeaFrance employees in the SCOP had the requisite creation or ownership of the new entity to justify those incentive payments. The court declared that in the circumstances those incentives should be paid.

But when one is winding this back and asking how significant is this for issues of continuity of employment, there are just layers of uncertainty that apply in relation to it. To say that these incentives meant that there was continuity of employment in relation to some or all of the ex-SeaFrance employees just does not take matters any further forward.

PROFESSOR BEATH: Have I understood this properly: it does not have to be the SCOP?

MR. BEARD: No, absolutely not.

PROFESSOR BEATH: It can be any company that employs the ex-SeaFrance employees?

MR. BEARD: Yes, but it has to be in relation to similar operation.

PROFESSOR BEATH: These vessels.

MR. BEARD: Yes. So if, for instance, DFDS had got the vessels and the employees had some sort of stake in DFDS and were operating the vessels --

PROFESSOR BEATH: They could just be employed by them.

MR. BEARD: Yes, that is the indirect interest employment contract issue.

PROFESSOR BEATH: It has to be both, does it?

MR. BEARD: Yes. Of course, the SCOP did not have the vessels and therefore there was an issue as to whether or not it was compliant. It was said by the court in the end there was sufficient compliance to enable this under the labour law scheme.

PROFESSOR BEATH: That was a French labour court?

MR. BEARD: Yes, it was January 2013, as I recall. 23rd January I am told behind me. We can provide further details of that. The point is you did not know whether or not you were going to get this. You may have had a hope when you put in your bid that these sorts of monies might come through, but they were not hypothecated to the SCOP and it was not clear that you were going to get them.

One does have to take a step back. These are incentives for someone to be employed, there is no doubt about that. But I go back to the fundamental point: an incentive to employment is not continuity of employment. So that, I think, is the job plan.

You can see in relation to 4 that the focus of all of this, as I said, was ensuring the minimisation if possible of the social detriments that occurred in the Calais area, and essentially that the various incentives that were being offered were broadly concomitant with the social benefits that were being conferred on individuals and the area to fill the void that had been left by SeaFrance.

There are various other provisions here to do with rights to training and so on. I am not sure that there is anything more material to cover in relation to this. I hope that explains the structure. I can go into it in more detail if that assists. Unless I can assist the Tribunal further those are the submissions of the SCOP. Its central point is a simple one: the Act has circumscribed the impact of merger control; it does so by the reference to activities; where a company has been through a period of administration so that it could be sold as a going concern and that has failed, and it is liquidated, there is a sale of assets; it is difficult to see how activities are being acquired in that liquidation sale. I say difficult because it is almost an analytic proposition that we never say never in these circumstances. But the CMA simply cannot use terms like continuity and momentum to conjure from an extinct business a continuation of activities. Nothing in the CAT judgment, whether it is paragraph 105 or references to continuity and momentum in 120, justifies that approach. There is a fundamental flaw in the CMA's judgment.

THE PRESIDENT: Are you saying, just so we understand the basics of the challenge, as so much is made of that by the CMA, that the decision is irrational in the sense that properly directed itself the CMA could not have come to that conclusion?

MR. BEARD: We put it on both bases. We put it as an error of law in relation to the interpretation of the relevant term, but also irrationality in the sense it does not add up. I think we have cited *Ex Parte Balchin* in relation to that in our notice of application. So it is put on those two bases. We are not turning up here and saying there is not any assessment to be carried out by regulator, but it must be done on the basis of proper interpretation of the legal terms. And there are limits and those have been surpassed here.

THE PRESIDENT: Yes. Thank you very much.

MR. BEARD: I am grateful.

THE PRESIDENT: Mr. Gordon.

MR. GORDON: Sir, we endorse the submissions of Mr. Beard. He has grappled, if I may say so, very eloquently with the factual side of this. Just picking up that last interchange between the Tribunal and Mr. Beard, once one starts to think in terms of a ghost business one really is in the elephant in the room in terms of rationality, so we endorse those submissions.

That is perhaps a broad way of looking at the challenge. We also agree with Mr. Beard that there is a fundamental legal error made by the CMA. In order to analyse that legal error my learned friend has relied in particular upon the very simple concept of a business ceasing to trade and put everything else into the exceptional case. The Tribunal asked Mr. Beard at an earlier stage this morning what about the exceptional case; what about fact and degree? It is those two questions which, in our submission, can be answered and can be answered analytically. If they do swell the category slightly of exceptional case, it was no part of Mr. Beard's submissions to say that there were not other possibilities; he did not close the door.

What I want to do is suggest five propositions, some of which need to be analysed perhaps more than others, by way of complementing the submissions that the Tribunal has already heard.

The five propositions are these. First of all, although the application of principle to fact is one for the CMA (we fully accept), the task of identifying the relevant principles governing whether an enterprise was transferred is a question of law applied to fact. That, if I may say so (picking up a case that was handed to me at about 2 o'clock) is the answer to the question - or rather, the proposition was going to be put against us. It is the case of *Georgiou (trading as Mario's Chippery) v. The Commissioners of Customs & Excise*. The court will have it, but it does not really matter for present purposes. The proposition against us is it is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. We embrace that fully in the submissions we make.

The second proposition that we advance is that in its judgment or ruling prior to remittal the CMA did not lay down in express terms the principle for which we contend, but it necessarily endorsed it by reference to its approval of the *AAH* ruling. Moreover, and in any event, it did not have to lay down an exhaustive legal treatise for regulating when an enterprise is, as a matter of law, capable of being transferred.

The third proposition, however, is that in a case such as the present that is a case in which it is common ground that an enterprise has ceased trading. The key principle in ascertaining whether that enterprise is acquired is whether the effect of the transfer of assets to Groupe Eurotunnel was to transfer a significant part of the former SeaFrance's customer base, that necessarily encompasses the transfer of assets that were engaged in or were being used to undertake commercial activities.

THE PRESIDENT: Just pause a moment, you say in a case where an enterprise has ceased trading the key question is?

MR. GORDON: The key question is whether the effect of a transfer of assets of that – I will call it, by way of shorthand – 'former enterprise' is to transfer a significant part of the former customer base to the transferee and that necessarily encompasses the transfer of assets that were engaged in or are being used to undertake commercial activities. So they have to be assets which are the subject of commercial activity, and that is why you get into the question of the customer base, and once one adopts that principle, as we shall see when we get to the retail merger cases, which we put into clip 50 in authorities bundle 3C, you will see that the way in which cases of transfer are approached, where you have a former trading entity is to look at the enterprise/customer relationship, is there anything in a business sense that has been transferred. Whether you call that 'going concern', whether you call it a 'customer base', whether you call it 'assets that are being commercially used' in a customer/enterprise sense, that is the principle which we say the CAT endorsed, it is the approach of *AAH*, it is not only the approach of *AAH*, it is the approach, as far as we can see, of the cases that deal with a former trading entity.

The expansion of that principle into anything further is where the dangers begin, the dangers, that is to say, of collapsing legal principle into an assertion that departure from legal principle can be camouflaged by fact and degree. I will come back to that – that is perhaps the most important proposition for which we contend.

The fourth proposition is simply this, and it picks up what my learned friend was saying a little earlier, in its reasoning on remittal the CMA's reasoning was deficient by reference to the legal principle that I have advocated for.

The final proposition is that nothing in the respondent's defence, or skeleton argument engages with that principle. In particular, the respondent's skeleton argument, where one would expect, perhaps, the most precise articulation of the respondent's case, is guilty of the following three solecisms. First, it fails to engage with the fundamental points we raise. Secondly, it makes references to passages in the CMA's remittal decision that are erroneously said to erode our case; and thirdly, it wrongly advances submissions to the effect that our arguments are somehow internally inconsistent. So those are the five legs of our submission. Some of them are well set out in our skeleton argument and I will therefore probably race through those given that Mr. Beard and I agreed that he would have the lion's share, but I would have an hour and a half.

I should say that that is ground 1. We also have two further grounds, which I can deal with fairly shortly at the end.

The first submission: a question of law. There cannot be any doubt about this as my learned friend said this morning. The first time round the CAT said that the meaning of enterprise is a question of law on which there is no margin of appreciation, and I will give the reference without going to it, it is 3B, tab 29, para. 98, p.3.1109.

If one just analyses the Tribunal's judgment, I want to make this further point. As the tribunal observes in the immediately preceding paragraph, that is 97, referring back to its analysis at paras. 46 to 50, the then Commission had erred in law in considering the matter to be one of fact and degree. That is important because it is worth, in this context, revisiting, if only very briefly, the Tribunal's criticism at para. 47 where, after citing extensively from Mr. Harris's submissions to it, it said that he had overemphasised the importance of factual questions and so the margin of appreciation in the Commission, and under emphasised the importance of legal questions.

I mention that criticism of my learned friend, Mr. Harris, because we say he has unfortunately repeated that error today. May I just refer to it because I am sure the Tribunal can read these passages later, but if one looks at the CMA defence, it pays lip service to error of law in para.2, but then it immediately elides error of law with a rational view of the facts so I am going to para. 2 of the defence, and I cannot accuse my learned friend of not saying that there is a question of law involved in this case. What we do say is that he then elides that to a rational view of the facts, and if one goes then through the next three lengthy paragraphs we will see that they dwell on nothing but fact. That, we say, when we get to it, is the approach of the CMA. This is now looking at the case very broadly, but what it has done is take a rag bag of factors, many of which appear in the CAT Ruling first time round, but do not anchor those facts or principles, to an overall legal analysis that leads anywhere

in terms of transfer of an enterprise, so that is the first structural defect in the CMA's approach.

The second defect, and perhaps the hole in the case if we are right, is that they treat the legal questions as to what is meant by the word 'enterprise' as being exhaustively contained in and co-extensive with the words used in the first CAT Ruling. We can see that from para. 12 of the skeleton argument which, unless the Tribunal has it separately, 1 tab 9, pp.1.204 to 1.205. They are immediately under the italicised sub-heading, the legal interpretation of the new enterprise, para. 12 opens with the words: "The first part of the CMA's task, of course" – that is the law, "had already been carried out by the prior Tribunal." That is, if I may use I hope not too emphatic a word, a gross simplification of the first Tribunal ruling, because the first Tribunal ruling laid down an approach. Its approach was, we would say, determinatively informed by the *AAH* case. It is an approach which endorses the legal principle for which we contend but, as with any court judgment, as with any incremental development of the common law, or European law, if particular things are not spelled out in express terms, it is sometimes open to a party to say "That was not said". So we did not have to do that. It is certainly a simplification for the CMA to say: "We do not have to look at the customer base because the first CAT did not tell us we had to". The answer is, if we are right on our analysis of the first CAT ruling, it was a necessary corollary of the principles there set out.

So those are two overarching errors of law which, in our submission, have informed - perhaps the correct word would be 'misinformed' – the approach of the CMA on remittal. That is our first core submission.

The second submission is twofold and, in a sense, I have made it so I can take it quite quickly.

THE PRESIDENT: So when the Tribunal says to the CMA: "Go away and consider the question of jurisdiction applying the test we set out in para. 105" ----

MR. GORDON: It meant it.

THE PRESIDENT: -- you say they should do more than that?

MR. GORDON: No. I say they did.

THE PRESIDENT: And you take that as the correct instruction.

MR. GORDON: Absolutely, that that is what they should have done. Can I take the Tribunal very quickly to two paragraphs of the Tribunal ruling. It is bundle 3B, tab 29, paras.104 and 105. We find them at 3.111, I think. Let us start with 105. As Mr. Beard reminded the Tribunal this morning, 105 is the narrow focus of remittal. Let us look at the first sentence:

> "We find this approach a helpful one."

What approach? You cannot read "this approach" without looking back.

THE PRESIDENT: It is *AAH*, is it not?

MR. GORDON: It is *AAH*. In express terms, the Tribunal said, "We find the approach in *AAH* a helpful one". Then it describes what the MMC did in *AAH*, and then in the light of that context it says:

"The key to distinguishing between 'bare assets' and an 'enterprise' lies in …"

Then we have (a) and (b). All we suggest is that in defining or describing exactly what over and above bare assets the acquiring entity obtained, and the first threshold question, and we say that, as it happens, the only threshold question, because there is no "if so" in this, one has to go back inevitably to *AAH* to fill out, to flesh out, the approach that was taken.

That is the subject of my third submission when I do try - and we do this in our skeleton argument - to explain how *AAH* did it. I would add, by way of parenthesis, it is not just *AAH*, it is the approach generally to retail merger cases in the present context.

We say that the Tribunal did indicate in the clearest possible terms in law what the approach was. When one goes to all those paragraphs, 114 onwards, saying, "This may be helpful", "This might in this regard be helpful", these are all necessarily only going to be legally relevant factors if they are anchored to the approach adopted in *AAH*. Again, if I can foreshadow what I am going to say about that approach ----

THE PRESIDENT: The approach adopted in 105 or in *AAH*, because 105 sets out, drawing on *AAH*, what is the approach. You may say it is the same thing. One can take it, and we do not have to go back to *AAH*, do we? We have it in 105 and that is what the Tribunal said. They did not say apply the approach in *AAH*, they said apply the approach in para.105.

MR. GORDON: Sir, when we go to *AAH*, we will see that *AAH*, itself, asks over and above assets. That is why the Tribunal at 104 cites that paragraph.

THE PRESIDENT: That is fine. We do not need then to go there because we have got it there.

MR. GORDON: You do need to go there, for this reason: you need to analyse whether, when we contend that the correct legal principle is to look at the enterprise customer relationship, that was either expressly or implicitly endorsed by the CAT in its first ruling. We say it was expressly endorsed, but it does not actually matter ----

THE PRESIDENT: Just so I am clear - at the moment I am a bit confused - are you saying, first question, nothing was acquired over and above bare assets? Is that what you are saying?

MR. GORDON: I am saying that there is something more than bare assets. As explained in *AAH*, there is the acquisition of a significant part of the customer base.

THE PRESIDENT: Therefore, here you are saying nothing more than bare assets was acquired?

MR. GORDON: Yes, we are saying that. Absolutely, that is our case. That is where we coincide with Mr. Beard's submissions. All I am trying to do is give legal anchorage to the exceptional situation.

We say that the CAT in its first ruling explained how that approach was to be adopted and given effect to. In attempting to analyse the case from any other perspective, the CMA has misunderstood the first Tribunal ruling. It cannot, therefore, be said as against us, in my respectful submission, that we should somehow be appealing a ruling, the first CAT ruling, with which we agree. It seems to us a very strange proposition. It would be a strange proposition in any event, but certainly nothing that we advocate for is in any sense, shape, size or form, inconsistent with what the CAT articulated in its first ruling.

In essence, our propositions are simple from now on if the Tribunal accepts those first two points. It is not an answer to our case to say this is all fact and degree. There will be questions of fact and degree. In fact, when we see what *AAH* said, analysing whether there is a transfer of a customer base is a question of fact and degree. You have to analyse it though. What you cannot do is analyse other factors which do not anchor into that analysis. If you do, you get into quicksand, and that is exactly what the CMA has done here.

That is, effectively, our second proposition.

May I turn to the enterprise customer relationship, as we call it, the customer base. In a sense it is ----

THE PRESIDENT: There is no reference to customer base anywhere in this judgment, is there?

MR. GORDON: Sir, may I go back then to my second submission?

THE PRESIDENT: I know you say it is not spelt out and therefore it is simplistic to say that it does not mean it is not relevant, but quite a lot is spelt out. It is a fact that an approach the Tribunal took was to say, "We rather doubt there is anything more than bare assets in this case". You would say amen to that. It is just possible there might be. They raise some possibilities. They do not, in raising those possibilities, direct anyone's attention, which would be surprising if it is, as you say, the key (I think was your word), the key question.

MR. GORDON: It is the key question.

THE PRESIDENT: It is completely missing from the judgment.

MR. GORDON: Not really.

THE PRESIDENT: Where is it?

MR. GORDON: Can I take the Tribunal, first of all, to para.104 of the Tribunal judgment. One finds it at p.3.111

> "In our view, however, although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them

and it clearly acquired more than bare assets, as described in greater detail above."

When I come to my third submission, what you will see is that the words "greater detail above" refer back to a complete analysis of the customer base. That is the point.

If the first Tribunal is to be castigated for not actually using longhand when shorthand would do, so be it, but we agree with the first Tribunal ruling, and that is the point I am seeking to make, that the first Tribunal ruling is authority for the proposition that there must be, in order to understand whether there is anything over and above bare assets, close analysis of the customer enterprise relationship.

THE PRESIDENT: I find that very odd. They are drawing on that for the general proposition that there must be something over and above bare assets. They are not saying there has to be the same something as in *AAH*, they are saying there has to be something. Then they go on later on to consider what it might be here in some detail, you may say illustrative. In all that illustrative discussion they do not say, "Moreover", or, "It would be important", let alone, "The key question the CMA should look at is the customer base". It is a pretty strange way of analysing a reasoning if it is the key question.

MR. GORDON: Can I take it in two stages then. The first stage is to suggest that when we look - I am slightly fast forwarding but I will come to the submission in a moment - at the legislation, when we look at *AAH*, we will find that it is the enterprise customer relationship, commercial relationship, that is central to whether there is an existing enterprise. That is proposition three.

Going backwards to the first Tribunal ruling, two stages: first of all, is there anything in the first Tribunal ruling that is inconsistent with the legal propositions to which I am about to come? Answer: absolutely not. Not only is there nothing inconsistent, but the approach of the first Tribunal is entirely consistent with that legal analysis. I say it goes further, however, than that (but it does not need to go further than that). Not only is it consistent with it, but the very citation of *AAH*, the very endorsement of the approach adopted in *AAH*, when one goes to *AAH*, we find that the approach that the first Tribunal describes as helpful is in fact a careful analysis of the customer base where you have not got customer contracts as here.

So whether or not the first Tribunal said expressly: you have to look at a customer base does not matter because it did endorse *AAH*, to which I am about to come in a few moments. That is our second proposition.

Let me move to the third proposition which is the legal principle for which we contend. Perhaps I should start by just asking this forensic question: if there is not a regulating

principle to ascertain what is acquired over and above bare assets, we are in the realm of no principle at all. There has to be a regulating principle to address a legal question. The legal question what, over and above bare assets, was acquired has to have a legal answer so that the facts may then be assessed. In the absence of the principle for which we contend, there is simply no legal regulating principle.

Let me turn now to the third submission, what I will call for shorthand the customer base submission. We analyse that in our skeleton argument at tab 7 bundle 1. We start with one of the sections to which Mr. Beard took the Tribunal this morning, section 129(1) of the Act where an enterprise is defined as "the activities or part of the activities of a business". So we then (see paragraph 15 of our skeleton) look at the two component elements. They are activities and business. So we say that means that there must be commercial activities which generate or are intended to generate revenues from customers.

THE PRESIDENT: There must be commercial activities.

MR. GORDON: There must be some commercial activity which either generates or is intended by the enterprise to generate (we deal with the prospective business later) revenues from customers. That is what the whole of the Enterprise Act is concerned with; it is the second stage test in any event where the jurisdiction leads to. We are concerned with commercial activities of a business.

We have, like Mr. Beard, looked at dictionary definitions of activity. We have given that in paragraph 16, ordinary English word "natural, normal function or operation".

THE PRESIDENT: On that definition, "generates or intends to generate" as it were in the future, in that case there will not be a customer base.

MR. GORDON: No, what I am talking about is - all we say is that in a case such as the present that is to say where you have a former enterprise that has ceased trading, what you must be looking at in order to understand what has either been lost or gained, is whether the commercial relationship with customers still subsists.

THE PRESIDENT: Why cannot it be intending to generate?

MR. GORDON: It is dying.

THE PRESIDENT: It is dying and it has been reborn.

MR. GORDON: It ceased trading. That much we accept. It ceased trading. We can look at the picture that Mr. Beard painted so graphically this morning because (he did not put it quite like this) it is dying. The attempts of the Paris commercial court to breathe resuscitative palliative care failed. It died. Its assets were sold. In that context, and that is this context, what we are looking for, what we should be looking for, as the legal reflection of the legislative structure is the preservation of a significant part of the enterprise customer

relationship. Otherwise, there is no business to be acquired. It is a very simple point. It does not need an anachronistic or arcane legal analysis to make the point. It simply is, we make the point, that it is there in the cases, it is there in the legislation, it is there in the first CAT ruling, it is there as a matter of common sense.

So we look then, at the next stage of the argument, to the definition of the word "business" in section 129 pp.136 to 137 3A tab 4. What we see here is that a business includes -- I was not quite sure when I first looked at that, I have to say - whether includes here meant as an example or whether, as in a case I did in the House of Lords 20 years ago, "includes" actually was meant to encompass everything. The present includes the following. It does not matter for present purposes because the definition of business is professional practice; any other undertaking which is carried on for gain or reward; or an undertaking in the course of which goods or services might otherwise be free of charge. What we say (see paragraph 22 of our skeleton argument) is that the common thread running through all four of the contextual examples given in the Act is that the business is referred to either generating revenues (typically from customers), or actively taking steps with a view to doing so. That is not this case; it is a different case. That is why I say you cannot necessarily stereotype every case by reference to the same legal principle, but what you can and must do is match a legal principle to a context such as the present, or you end up in factual quicksand.

What we say is simply this. If that analysis is correct, and we respectfully submit that it is correct, the respondents never grapple with it at all. What they say is, this is the density or thinness of the case against us, we do not have to talk about law because it was all dealt with by the first Tribunal. That is simply fallacious in our submission. There is no other answer to the arguments we put. In fact the only answer put (and I will come to this later) to our analysis of *AAH* is not to say you are wrong in your analysis, but in a footnote to say: that is a very different industry. That is the only answer.

Three responses, very briefly, to that. First of all, if it was a completely different industry, nothing to do with this case, why did the first Tribunal find it helpful? Second point: the retail merger cases that we put into clip 50 of the bundle of authorities 3C show that there is a range of cases with defunct enterprises which have fallen each side of the CMA jurisdiction line. What has, in each case, been done is to identify by reference to customers what the answer is to the time lapse of trading.

THE PRESIDENT: Will you be taking us to them, because we have not looked at them.

MR. GORDON: I will. We have given a note on the front, which I will simply go through, but I hope that the Tribunal will read those cases later. But it provides further support for why our approach, we submit, is the correct analytic approach.

We also say (see paragraph 23 of our skeleton argument) that section 129 Enterprise Act does not stand by itself, and that takes us into Mr. Beard's points about relevant merger situation, the commercial context, the turnover test and so on.

Very briefly, we say here that the guts has been taken out of SeaFrance; it was a former enterprise; it ceased trading; it died. No analysis can breathe legal life into it as a business under the Enterprise Act. If it could, and of course this is the answer to the remittal point made which Mr. Beard answered, of course it would have to be done by a very careful analysis of what exactly, in what intuition says must be bare assets, gives them something else that turns them into a business with customers after seven and a half months and after all the points that the French Court made about that enterprise.

The first Tribunal was not going to say on the material it had: "Nothing you can say, CMA, makes any difference" so it throws in some examples, but they were examples of potentially relevant factors. Again foreshadowing what I am going to say, just to take the point about continuity and momentum about which so much has been made, continuity and momentum was, indeed, mentioned by the Tribunal and it was indeed mentioned by the CMA, but it is not mentioned in the context of enterprise/customer relationship, the whole analysis is skewed towards GET gets in earlier, very quickly. There is no analysis other than as new entrant, but the Tribunal made it clear that mere new entrants taking over bare assets are not in any shape, size or form, having a business transferred to them. So that is the point, you cannot use old wine in new bottles, you cannot use old concepts in a way that makes no analytical sense simply because they were used by the Tribunal as a possibly relevant consideration.

May I now turn to *AAH Holdings* and, again, our analysis of this is so exhaustively set out that with only just over an hour to go I hope I can take the Tribunal very briefly to the relevant passages. First, we say it is important for two reasons. It plainly and unequivocally identifies the customer base as critical in the context of an enterprise that has ceased to trade and where there is no evidence of a customer contract – that is this case. The whole analysis is devoted to answering the riddle of whether, in such circumstances there is an extant business, despite the fact that it has ceased trading.

Secondly, the decision is very important because, as I said earlier, it was relied upon by the first Tribunal, and so one cannot ignore *AAH* as it is obviously central. It is so central because it is actually referred to in the focus paragraph, para. 105.

At para. 29 of our skeleton we set out the facts which Mr. Beard has done in any event, and we submit that para. 6.102 of *AAH* is the key to the conclusion. Perhaps I should state the issue and we find that at para. 6.81, which is 3B, tab 35, p. 3.1553. As regards contracts with customers, that is the fourth line down in 6.81:

> "AAH did not take on any existing contracts either with suppliers or with customers. AAH drew our attention particularly to this point as supporting its argument that there was no *de facto* continuation of business. AAH already had a close and existing relationship with all relevant suppliers. As regards contracts with customers, we recognise that in many cases it is the assignment and fulfilment of such contracts that preserves or plays an important part in preserving the customer base and thus transfers goodwill and provides for the continuation of the activities of the existing business in new hands as a distinct entity or part of the business of the acquirer."

But, then it goes on to say:

> "What is most important in the preservation of the customer base of a pharmaceutical wholesaling business such as that of Medicopharma UK is to create a contact and connection with the customer. We have therefore considered whether such a connection with customers and a continuation of the business of Medicopharma UK after 3 November 1991 was provided by other means."

So what this case is saying as clearly as can be is that you may not have ongoing contracts but we must investigate, because you have ceased trading we have to investigate whether there is a continuing contact with customers such as can be passed on. We find the answer after an exhaustive analysis of different factors. But all the factors that are then considered between para.6.82 and 6.101, and this is the really important part, are all factors which are anchored to the ascertainment of whether outside the question of contacts because they do not apply, there is a continuing relationship with customers and enterprise/customer relationship.

So, when we get to the conclusion at 6.102 ----

THE PRESIDENT: I thought those paragraphs also include discussion of employees, do they not?

MR. GORDON: Yes, all as part of the analysis of whether there is a continuing relationship with customers. So when we get to the employee ----

THE PRESIDENT: The employees - I was trying to understand ----

MR. GORDON: What I am planning to do, by reference to our skeleton argument, is to take you to those long passages and explain how those factors were being used in *AAH* was the right

approach. In shorthand, they look at employees in terms of the customer contact. They do not look at employees as some kind of abstract idea, there is a continuity of employee, they look at it in terms of the enterprise/customer relationship and that is what this CMA has failed to do right down the line.

What 6.102 effectively says is that:

> ". . .although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them and it clearly acquired more than bare assets …"

And it explains what were obtained, and the arrangements ----

THE PRESIDENT: So, we have goodwill - goodwill pleaded as more than bare assets. I am looking at 6.102 – "clearly acquired more than bare assets". "It obtained three depots complete with stock and fixtures and fittings . . . would have carried with them a certain degree of goodwill." Is that the bit that is more than bare assets?

MR. GORDON: What I want to do is finish the sentence at the end, and then take you back to the beginning. "All the above matters (dealt with in more detail in paragraphs 6.82 to 6.100) affect the three depots acquired by AAH."

So we go back to the detail and we find that from 6.82 onwards, that is the other means of ascertaining the connection with customers referred to in 6.81. So the whole of the analysis in *AAH* leading from the premise, in the form of a question, is the customer connection, 6.81.

6.82 to 6.101 deal with that question, and 6.102 answers it. So you have to look at the structure of the analysis in order to understand what the MMC was doing in *AAH*. That is what it was doing, it was looking at other means of finding out whether there was a continuing customer connection.

PROFESSOR BEATH: Could I just get some kind of pitch on this? I did take your earlier hint to us before the proceedings and indeed read *AAH Holdings*. The thing that my eyes rested on in para.6.102, the bottom of p.131, it talks about:

> "By these means it gained the benefit of those employees' knowledge of Medicopharma UK's customers as well as the benefit of their relationship with those customers."

There seemed to be something very special about this particular industry where there is a kind of personal relationship between the employees and the customers, and that is what creates this customer value. Are you trying to imply that there is a similar link ----

MR. GORDON: I think it is backwards. I think the reasons should be backwards. Certainly if you do not have customer contracts you have got to find out whether there is a customer

relationship so as to create commercial activity through other means. In the *AAH* analysis, one of the other means was that the employees would have a particular knowledge. That is one of the special factors in *AAH*.

What is not special, what is not essential, is that special relationship. What is central, however, is that if you have not got contracts showing the customer enterprise relationship, you have got no evidence, you have got no evidence there are any customers, you have got to find that relationship somehow by other means than on the contracts. That is the approach adopted in *AAH* which we say is of general application. That is how we put it.

When we look at the retail cases - I am sorry I have mentioned them, because nobody has yet read them, still less our note - but when we get to those at 50 there is not any special relationship in those cases between the customers and the industry, but in every single case there is an analysis, we say, of what the customer enterprise relationship is.

So that is how we put it. We say that it is not so much that the actual features discussed in *AAH* at 6.82 to 6.101 are of general application, what is of general application, however, is that you have got to find a customer enterprise relationship in order to have the commercial activities for which you are looking in the legislation. It is as simple as that.

It is simply putting icing on Mr. Beard's factual cake. If you actually look at this case with any degree of common sense, with respect, seven and a half months ceasing of trading, assets sold in a liquidation, etc, etc, you have not got assets actively being used commercially. That is it.

What I am trying to do, however - because it did strike us that a question the Tribunal might ask in a judicial review context, is: what is your suggested analytic framework for looking at this? - is suggest what we think the correct analytic framework is.

Having answered that question, sir, which I am very grateful for, I do not think it necessarily helps in advancing our analysis to go through the factors in *AAH* which were not necessarily special, but they can be illustrated. If the Tribunal looks at para.34 of our skeleton argument and looks at the several stages of the analysis, none of these are necessarily special factors to this case or to that case or indeed any other case, but what they are are examples of how you analyse whether there is a subsisting commercial activity. Customers comes to the forefront (see para.6.81, customers in para.6.54, customers in para.5.85, customers, 6.88 to 6.91 and 6.102, and so on and so forth). That is our suggestion.

I should also perhaps pick up what we say in para.41 of our skeleton argument where we say that the MMC's focus was plainly not on the commercial operability and coherence of the depots, it was firmly and exclusively on the preservation of the customer base

attributable to assets that were being used to undertake commercial activities at the time of the acquisition.

That is *AAH*, that is the legislation, and, as I think I have anticipated by answering the Tribunal's questions, that is the approach of the CAT. We also mention the CMA guidelines if further assistance were needed. They are not central to our analysis, but they are the new guidelines prepared when this case was ongoing and are entirely consistent with our analysis, and we deal with the CMA guidelines at paras.63 to 65.

Can I turn to our fourth submission, which is easier to understand coming to it in this order, which is, without being impolite, I hope, that it is legally defective. We say two things if our analysis is accepted: first of all, there has to be a proper analysis as to the existence or otherwise of a customer base, because in a case such as the present it is determinative of whether there is an enterprise to be transferred. I hope now, in a case such as the present, it is clear what I mean by that.

The second point: if our analysis is accepted, the questions asked by the CMA will, of necessity, be directed towards that analysis. I think I used the word "anchored". They will not be raised as piecemeal or isolated points, disconnected from themselves and unanchored to the focal point of the correct analysis.

Our respectful submission is that the CMA has not undertaken an analysis as to whether there was an existing customer base. We say that it has not looked at the various issues that it plainly has looked at with a view to determining whether there was a customer base. It has looked at them as if they were all merely part of some general but unstructured balancing exercise designed to answer a question of fact unanchored to any legal ----

THE PRESIDENT: If you are right in your general submission that this is the key question and determinative, clearly that is not the way the CMA approached it.

MR. GORDON: You might say that I could cut this submission short.

THE PRESIDENT: The question is whether your primary submission is correct.

MR. GORDON: I agree.

THE PRESIDENT: You need not take us to those - you say we have not read them. I do not think they were referred to, if I am right, in your skeleton, nor were we asked to read them. It is tab 50, or something.

MR. GORDON: I am going to come to that. I will come to that, but I am going to come to it in my final submission.

THE PRESIDENT: I do not think the CMA is suggesting that it based its analysis on customer base.

MR. GORDON: It is. Yes, it is.

THE PRESIDENT: I thought its case is that it is not the determinative factor - that is its argument.

MR. GORDON: It is its argument. What it says is ----

THE PRESIDENT: It does not say, "We thought that the key factor" ----

MR. GORDON: No, it does not say that. It says two things. It says it is not the key factor. Not only is it not the key factor, but the CAT has never mentioned it. Then it says, "But anyway we did it".

THE PRESIDENT: It says, "We looked at it, but not as the determinative factor, we only looked at one of the lot, and in this particular industry in this context, it is less relevant". I think that is paraphrasing rather than the way they put it. If your basic submission is right that is no good. It is the basic submission that is the point, because they did not take the course that you say has to be taken.

MR. GORDON: That is true. I am not 100 per cent sure that that necessarily lets me off the hook in terms of pointing to why I say they acted erroneously, but I do understand that I might be able to shorten it.

What the CMA, in fact, did - I suppose this is really the point I should make - is to examine a series of questions that it posed for itself. The questions it posed for itself were commercial operability and coherence of assets, whether, as a consequence of acquisition, Groupe Eurotunnel could commence operations more quickly, whether Groupe Eurotunnel acquired substantially the same business within a short period, whether Groupe Eurotunnel was motivated by the advantages of continuity. I suppose that slides that into continuity and momentum. None of these, not only are they not legally determinative, even if one steps back from our focused submission on what is determinative, if you look at the legislation, you are looking at whether a particular business was acquired, business in the sense of commercial activity, and we say that these are still legally erroneous - necessarily legally erroneous - factors, because they are not directed to that question.

Looking at the commercial operability and coherence of assets - I am not sure where that comes from - that is not, in itself, going to answer the question of whether there is a business. It may be one factor amongst many, but you are looking at it in order to answer our overarching question. If you have a collection of assets, they are still assets. It does not matter whether they are commercially operable.

In relation to whether Groupe Eurotunnel is motivated by advantages of continuity, so what in terms of whether you are acquiring a business. It may be, of course, that a deliberate attempt to evade or avoid merger laws, coupled with proximity might lead to particular conclusions, but that is a different kettle of fish.

THE PRESIDENT: Was that not also part of *AAH*: proximity and intention to avoid merger laws? That was Mr. Beard's point.

MR. GORDON: You could not avoid, and I think Mr. Beard accepted this, in a case of one day's loss of trading on a Sunday with a deliberate intention to avoid merger laws, collapsing those into one question. But to atomise those questions and say because that was a special factor in that case it must be a legally relevant factor in this case, is simply not to compare like with like. There is no suggestion here that Groupe Eurotunnel has acted so as to acquire a business that is still actively using commercial assets. The question is and has to be: is there an active use of commercial assets generating revenue with customers? That has never been looked at.

I think I can shorten this. We deal with this at paragraphs 76 through to 80 in terms of whether there was any analysis of the existence of a customer base. I need not perhaps in view of the Tribunal's indication go through that again. What we do know is that there was not the benefit of any existing freight contracts (see paragraph 78 of our skeleton argument), and in relation to passengers actually we can find the position in relation to passengers at paragraph 3.194 at page 2.334 (page 76), so tab 2 bundle 2 page 76 internally paragraph 3.194:

> "We note the submission of both the SCOP and GET that we have not considered whether customers regard the MFL business as continuing the SeaFrance business. Neither party submitted any evidence to us in this regard. Further, due to the passage of time, it was not possible for us to carry out a customer survey regarding the extent to which customers perceived any such continuity between SeaFrance and MFL at the critical time (namely, the point at which MFL launched its services). We have, instead, reached a view on how the period of inactivity impacted on these assets based on other evidence. We also note the views of the SCOP on this point with respect to freight customers, ... that MFL was affected by its association with the SeaFrance business."

An association does not tell you whether you have got an existing business, any more than your ability to set up as a new entrant, or for a business to be restarted from scratch. But in effect we accept that the Tribunal is right that if our analysis on customer base is correct, there must be flaws in this decision. The analysis, as I say, is carried through up to paragraph 80.

Then, what other means could the CMA have used? If there were not any other means that simply means that they could not establish that there was any existing customer base. But obviously there are ways in which one can, other than having contracts, determine whether

there is a continuing relationship with customers. In *AAH* it was the fact that the employees knew the customers, had a personal relationship. One might look, in fact one almost always would look (and this is why it is so central) at the lapse of time since trading. What we do know here is that the entire customer base deserted SeaFrance in that seven and a half months. That we do know, 100%. They went to others.

THE PRESIDENT: They had no choice.

MR. GORDON: They had no choice. That is why it is so important; that is why the time lapse is so important. It is not just an isolated factor. Of course we accept that a day's ceasing of trading may make little difference to that fundamental commercial relationship.

THE PRESIDENT: But it means if you have a seven and a half month period of inactivity you cannot have a continuing customer relationship.

MR. GORDON: It is very unlikely.

THE PRESIDENT: It is impossible.

MR. GORDON: It is extremely unlikely. Mr. Lindsay, with his creative competition imagination, talks about perhaps ski operators, seasonal, maybe.

THE PRESIDENT: Yes, but not for this ferry operator.

MR. GORDON: Unlikely.

THE PRESIDENT: Then why did not the Tribunal just quash it?

MR. GORDON: Because the Tribunal was not in a position, as Mr. Beard said, it acted out of an abundance of caution.

THE PRESIDENT: But not on your analysis. His analysis is quite different. Your analysis is there is a key question: customer base, and you just accepted the ferry company, inactive on the route for seven and a half months, the customer base clearly gone, end of story. Why waste everyone's time sending it back for the investigation, new consultation, new decision?

MR. GORDON: But the analysis of the CMA, as I understand it, is: we did investigate the customer base issue. It was one factor but we looked at it.

THE PRESIDENT: I was not asking you about the CMA. You are saying the Tribunal got it completely wrong because the answer to that question is self-evident.

MR. GORDON: I think it is self-evident, certainly looking at the second decision. I cannot say that it was necessarily self-evident to the first Tribunal, I cannot say that.

THE PRESIDENT: How can you say that if a ferry operator stops operating for seven and a half months it retains its customer base? Mr. Lindsay might come up with a number of other industries where you could, but we are only concerned with this industry.

MR. GORDON: Sir, at 3.194, to which I took the Tribunal earlier, it was submitted to the CMA, both by the SCOP and Groupe Eurotunnel that we had not considered whether customers regard the MFL business as continuing the SeaFrance business.

THE PRESIDENT: This is in the context of the name.

MR. GORDON: "Neither party submitted any evidence to us in this regard".

THE PRESIDENT: But if you see the domain names associated, that is not the customer base, is it?

MR. GORDON: The point is that if the *AAH* approach was adopted, you had to use other means than mere contracts to finding out whether there was a customer base. There were other means which could have been used. Second time round the CMA said: due to the length of time we have not been able to do it. I do not think that was necessarily self-evident to the first Tribunal.

The second point I would make is that to make the submission that a customer base, that enterprise customer relationship is essential, is determinative, does not mean that there are not factors which go in to evaluate it, sometimes no doubt by inference, whether that relationship subsists in practice. But none of that was done. We do not say that it was an impossible conclusion, at least as far as the first Tribunal was concerned, to reach the conclusion, properly evaluated by an *AAH* approach that there was a customer base (regarded as most unlikely), but it was never done; it was never attempted.

I do not accept the critique that if Mr. Beard is right the various points made by the Tribunal between paragraphs 114 to 120 fall away and are irrelevant. These are all properly anchored to an analysis of customer based points that in theory may have been raised. It should also be borne in mind, and I suppose it is true of any court, Judge, Tribunal, you have determined the main legal issues, you have found there is an error and you remit it back with a few helpful indications, but you are not actually putting yourself at all in the role of a decision maker, you are not even saying it is very likely to happen, you are simply remitting it back and saying that these are some factors which you may find useful.

It is also fair to say that as far as the first Tribunal was concerned the focus was on – certainly *AAH* was referred to as an important decision and we know from its citation by Mr. Beard before the Tribunal that they adopted the approach, but it is by no means clear that the specific issue of customer base was focused on in the same way as it is before this Tribunal. That does not mean that it was not an important element in the *AAH* approach, or that somehow we should be appealing the first Tribunal, but one can see how, in a forensically recreative sense, the first Tribunal could have addressed the matter, and did address the matter as it did.

I have been handed a note which says: "Shorthand Writers, they might want a short break", I do not know if that is convenient?

THE PRESIDENT: In that case we will take a break. You were due to finish about 3.30. We will give you a bit longer. You wanted to take us to that new material.

MR. GORDON: Yes.

THE PRESIDENT: Mr. Harris, we have, in fact, quite a generous timetable in this case, if you are slightly shortened today there will be time for you to make up tomorrow.

MR. HARRIS: Sir, yes, I am entirely in your hands when we finish today.

THE PRESIDENT: You were going to have I think something approaching an hour today, that is now not going to be possible. It looks to me that if you have half an hour today and an extra half hour tomorrow, that does not put in jeopardy our chances of finishing tomorrow?

MR. HARRIS: No, I am very comfortable, thank you, Sir.

THE PRESIDENT: We will not sit beyond 4.30, so we will have a five minute break and we will give you then until 4 o'clock but no longer.

MR. GORDON: I am very grateful.

(Short break)

THE PRESIDENT: Yes, Mr. Gordon?

MR. GORDON: Sir, given the relatively short amount of time left, may I deal with four things: first of all, finish off on the guts of the customer base issue. Most of the rest in terms of rebutting the CMA's defence and points made against us in the skeletons is in our skeleton argument. I will then turn very briefly to the cases in the clip at tab 50. Then, finally, and in order deal with Grounds 2 and 3.

Just finishing off on the customer base, whatever words you want to give it, let us think of an aspect, and perhaps the most central aspect, of the customer base here as the distinction between a collection of assets on the one hand and assets being used commercially on the other, so as to generate revenues, and you generate revenues by customers.

Let us take an example: you start with a mop, a ladder, a sponge, a van, even logo on the van, all assets which might be capable of being used, if they were so used actively, to generate revenue and attract customers. You might sensibly talk of a window cleaning business. If they are not and if they are mere assets, you plainly have not got assets being used actively, commercially. That is ultimately at the heart of the distinctions which we both, in our different ways, seek to draw to the attention of the Tribunal as being absent from this case.

By no stretch of the imagination can SeaFrance be termed a business in the sense of any assets being used actively and commercially. They are a collection of assets. Mr. Beard

drew your attention to the words where that concept was used. In a sense, that is such an obvious point to make that it is perhaps not surprising that the first Tribunal did not labour it, because that ultimately was the distinction it was drawing. We have simply tried in our submissions on drawing that into the relationship between customers and enterprise to make good that point in a more analytic way. That, in effect, was what the first Tribunal was saying. The guidelines it threw down or suggested were possible guidelines as to how that exercise might be carried out.

What we were concerned about was the exceptional case: how does one look at the exceptional case where trading has simply stopped? It is common ground trading stopped here. It is also common ground that a few cases have, even where business has stopped, been able to find that customer perception, customer relationship, active generation of assets, etc.

So what we have done in 3(c) is added a number of cases. I am not going to, we have not got time, to take the Tribunal through them now. What we have done is provide a short note at the front of the clip of five extra cases. This is designed to address the point made by Mr. Harris and his team in his skeleton argument where he says that on our approach some retail mergers would fall outside merger control since there is often no customer base to transfer. I do not know whether all the Tribunal have seen the note. The clip has five cases, and there is a two page note.

THE PRESIDENT: We have got it, but we have not read it.

MR. GORDON: I am going to take you through it. I will just take the Tribunal through the note.

What we say by reference to earlier OFT decisions is that in those cases where retail mergers have been held to fall outside the jurisdiction, there has been a cessation of trading. In those cases the OFT has adopted an approach which is consistent with what we say is the correct principle, and it has not caused any practical difficulties. Often, though not always, the OFT has found such cases to fall within merger control. We highlight passages from the cases we provide. Those highlights are in bold. If I look, for example, at *Cineworld*, the first cases - of course the Tribunal can read these cases in due course:

> "… a single day's gap in trading between the Vue cinema and Cineworld cinema and thus a potential transfer of goodwill …"

unsurprising with one day's cessation of trading:

> "In this respect, it is notable that customers' perceptions would be that the 02 cinema business, previously operated by Vue, had been taken by Cineworld."

Then the *Hollywood Green Cinema case*, the second one, the highlighted words:

"… customers' overall perception will be that the operation of the Premises as a cinema will in essence be continuous …"

That is very different from this case.

Third line:

"The locations carry some element of goodwill since customers for DIY home enhancement products will inevitably have some expectation that such activities are carried on from the Leasehold properties."

So those were all cases within merger control. Then on the border the *HMV/Zavvi Stores* case:

"At paragraph 19 of that case the OFT noted that one music store folded in its jurisdiction only on the '*maybe the case'* test and not on the *'is'* test. This means that the OFT would have found the acquisition of that store to fall outside control had it been applying the balance of probabilities threshold."

The analysis explained in the footnote - I just go to the highlighted words for time reasons -

"However, set against this, HMV did in fact take on the employees in the store and did acquire the fixtures and fittings with the store. It would also inherit any goodwill that still attached to the store; even if there were to be a temporary interruption in the identity of leaseholder, customers' overall perception will be that the operation of the store as an entertainment retailer would have been continuous in essence."

Then a case falling outside merger control,

"Regarding goodwill, given the frequency of grocery for the bulk of consumers, the OFT does not expect the material degree of goodwill will be passed to Tesco after more than two months of the store being closed."

So in each of those cases we see an approach which is customer related. As I say, whether you use the syntax of customer or activity of assets for commercial purposes, you still get into the approach which we contend for, which is you cannot call a case where there has been seven and a half months' cessation of trading with all the customers departing, without any analysis of customers' perception, or any other means of establishing the necessary enterprise customer relationship, and you cannot say there is an extant business to be acquired.

That is our case, that is Mr. Beard's case. The reason that our case complements his is that we have tried, successfully or unsuccessfully, to answer the Tribunal's question at an earlier stage, namely: what do you say the exceptional case is? Mr. Beard, forced to think on his feet in answer to the question from the Tribunal said: "I cannot think of any apart from…",

however he did not close the door. He was right not to close the door because when you look at these cases they supplement the answer but they still retain the analysis. That is what keeps this case from a fact and degree case; it is what keeps this case within the boundaries of legal analysis and therefore of judicial review.

May I now turn briefly to Ground 2. I know that the Tribunal has read our Ground 2.

THE PRESIDENT: We can put away tab 50?

MR. GORDON: Yes. On Ground 2 we put our case very shortly in the skeleton argument from paragraph 94. I want to put it in a clear way, so that the Tribunal understands the importance of this point. It is not a fag-end ground in default of anything else. What one had here was a remittal by the first Tribunal because of an absence of jurisdiction. The effect of an absence of jurisdiction, as the Tribunal itself noted at paragraph 106(b)(i) of its ruling at bundle 3B tab 29 p.3.1113. I will read the relevant words.

> "If, as the SCOP contended, no relevant merger situation has been created, then the question of whether there is or may be a substantial lessening of competition simply does not arise."

What that means, and can only mean, is it does not arise as a matter of law; the rug has been pulled from under the SLC's decision. There is no decision; it is legally void; it is invalid. It is not invalid necessarily because of any of the reasoning contained in it, but the effect is that it is legally invalid.

THE PRESIDENT: This was in answer to Mr. Pickford's point, trying to, as it were, rely on the SLC point in the context of the argument about jurisdiction. So that is a misconceived approach.

MR. GORDON: We say that the CMA was wrong not to consider points that we would have raised before it by way of argument on SLC which were either not facts but which had been challenged successfully in the first Tribunal hearing, or points which had not even been put. Where you get a legally invalid decision, there is no decision.

THE PRESIDENT: They have not held it was legal, have they?

MR. GORDON: No, there is no legally valid SLC finding as a result of the first Tribunal's ruling.

THE PRESIDENT: I just do not follow that.

MR. GORDON: Because --

THE PRESIDENT: They have not quashed the ruling on the grounds --

MR. GORDON: No, there is nothing to quash because if you quash the jurisdiction finding, the SLC issue does not arise as a matter of law.

THE PRESIDENT: But they did not quash it.

MR. GORDON: No, no. They remitted the jurisdiction issue to the CMA. So having remitted the decision to the CMA --

THE PRESIDENT: They did not remit the decision; they remitted that question.

MR. GORDON: Yes, they remitted that question.

THE PRESIDENT: That is all they remitted.

MR. GORDON: But since the approach to jurisdiction had been erroneous, as the first Tribunal held; there was an error of law, the result of that error of law was that there was no legally valid decision on SLC. That is the short point. Probably because that which is legally invalid cannot create something that is legally valid. No jurisdiction to do it.

So for that reason we submit that the correct analysis is that the CMA was at liberty to consider, and certainly had jurisdiction to consider, new points put on SLC, even if they had not formed the subject of a successful challenge in the first hearing.

THE PRESIDENT: Why did they bother with the other grounds? There was a whole series of grounds, I think, were there not?

MR. GORDON: Yes, certainly they had to analyse those.

THE PRESIDENT: Why, if there is no jurisdiction?

MR. GORDON: Because it is conventional to analyse a challenge.

THE PRESIDENT: If one ground of challenge is fundamental and destroys the whole decision and everything else has to be done again, you just send that back and say it is no decision, everything else goes. But they did not say: we send everything back because there is no jurisdiction.

MR. GORDON: No, the question is not really whether they sent everything back, the question is whether, having quashed the jurisdictional basis on which the SLC decision was made, there was a consequence in law on that SLC decision. We say there was a consequence in law, because the SLC decision no longer possessed legal validity. If one looks at those cases (we have not brought them) such as *Hoffmann La Roche* and *Smith v. East Elloe* the presumption that an administrative decision is valid can be rebutted. There could be no clearer rebuttal than the removal of the basis on which that decision depended.

So we say that the consequence of that is (this is a point we made to the CMA in argument) that they did have jurisdiction. Of course, we accept that they are not going to start from a blank piece of paper; we accept that, having not taken a valid decision, they can more or less go back to where they started from. But they do have jurisdiction. This is the key and narrow point of our Ground 2. They have got jurisdiction to entertain submissions on SLC outside the four corners of section 41. The four corners of section 41, or perhaps I should say two sides of section 41(b): material change of circumstances on the one hand, or other

special reason on the other. But the CMA's understanding of its jurisdiction in law is that because the SLC decision was not remitted we have no further jurisdiction to entertain any further argument save in the context of material change of circumstances, which they did, they did consider that. So, our argument is a quite simple one, it is that it does not matter whether SLC was remitted, what matters is of course we accept that the CMA had power to consider it if they assume jurisdiction, but we say they also have power to consider new arguments outside the corners of s.41, and it is a simple proposition, but we draw some support from the principle of severance. You have seen the arguments we put there. The fact that one can remit in part does not bite on this at all, it has nothing to do with the point. The point is what is the consequence of a remittal where the decision making process on SLC is interdependent upon the legal validity of the initial assumption of jurisdiction?

As far as ground 3 is concerned, a relatively straightforward ground, if we win on ground 2 we do not need ground 3, but if we lose on ground 2 we do say that it does not actually matter that a challenge – here a challenge to the SLC initial ruling- does not succeed on judicial review principles for there to be another special reason why the Tribunal should entertain new argument. The CMA appeared to think that it could not entertain any new argument because it was bound by s.41. Section 41, of course has two component elements. One of the elements is special material change of circumstances, and the other is or the CMA has special reason to do so, and we say that in the context of the arguments we were advancing there were two points that we raised in particular going to remedy and duration, and those points could have been, and should have been, decided as a matter of jurisdiction. It did not depend, as the CMA appears to have thought it did, on the fact that there was not a material change of circumstances, and that their original reasoning had been upheld. In other words, there is a distinction between not winning on judicial review on the one hand, and nonetheless being able to put arguments that have not succeeded on a judicial review basis, on a merits basis to the CMA, and so that is the separation of our ground 3 from our ground 2, if we lose on ground 2.

THE PRESIDENT: These would be arguments on SLC that you are saying could have been put?

MR. GORDON: I am saying that we were entitled to put remedy arguments as well.

THE PRESIDENT: And remedy?

MR. GORDON: Yes.

THE PRESIDENT: Remedy being one of the grounds in the previous appeal?

MR. GORDON: Yes, I think it had, yes.

PROFESSOR BEATH: That would have effect, is that right, on a judicial review?

MR. GORDON: They were based, as I say, on judicial review grounds, and the distinction we draw for the purposes of ground 3 is the fact that you lose on a judicial review ground and the fact, even if it be the case that you do not succeed on material change of circumstances and, even if we are wrong about remittal on ground 2, there may still be a special reason to hear new arguments that may not have succeeded earlier just on their merits. We say that the CMA fettered its discretion by finding it had no jurisdiction; that is our argument.

I think those are all my submissions, I will just check very quickly. (After a pause) Those are my submissions.

THE PRESIDENT: Thank you.

MR. HARRIS: Good afternoon, Sir, members of the Tribunal. What I propose to do in the time available this afternoon is to take you to some critical passages of the prior Tribunal's judgment. It is critical that we set the scene of what happened in this remittal by reference to what we were directed to do in the remittal. That will be the first part of my submissions. I would hope that that will be done before the end of today.

It will be convenient, when I reach the end of that section of the judgment to deal extremely briefly with GET's grounds 2 and 3 that we have just heard. I anticipate that will be done today. Then the third part of the presentation, doubtless tomorrow, there will be some minor references to case law, relevant in jurisdiction challenges, judicial review jurisdiction challenges, and then fourth, and most substantially of all, will be some references to what the Commission did in its remittal report itself during the course of which I will be taking you back to some of those materials from the French Court, including the indemnity and then various minutes and so on. That will all be tomorrow. That is part of the submissions – understanding what the CMA actually did in its report, and having regard to a great number of things that have not been mentioned at all.

If I could invite your attention, then, for the purposes of this afternoon to the previous Tribunal's judgment, which is in bundle 3B of the authorities at tab 29. Can we please pick it up first at para. 7 on internal p.3, a passage that we have not looked at before, and it is just a helpful list of what was in fact acquired during these arrangements, or this transaction, however you like to call it. "In addition to the three vessels there were" and there then follows a whole list of things to which no reference is made by GET or SCOP, or hardly any: "Logos" – SeaFrance logos no less, "brand and trade name, computer software, websites and domain names" – that is SeaFrance websites and domain names, of course. "IT systems, customer records and the inventory of technical and spare parts, as well as IT hardware and office equipment."

If we could just keep that open, please, and turn to the remittal report itself just for one moment – there is just one reference to this – and it was something that may or may not have found its way to you as a request to add to the pre-reading, a single page, or page and a half. It is appendix B of the remittal report itself.

THE PRESIDENT: 2.408.

MR. HARRIS: Yes, thank you. So here again we have this list, but this time it is helpfully broken down; I cannot overemphasise. Bear with me, please, if, during the course of my submissions there is repetition of the entirety of the combination of assets. It cannot be overemphasised, not least of all because it is so singularly ignored in many respects by the challengers. But this one is not only the entire list, but it very helpfully breaks down some values that were attributed to other parts of the list. So we have at the top the three vessels. That is obviously most of the money, but there are significant sums paid for other tangible and intangible assets. The third bullet point then breaks down the intangible assets, and one can see that the price tag was €2.8 million. So, in addition to physical assets there were a large number of intangibles to which significant value was attributed in the course of the bill, €500,000 for trademarks, trade names, logo and brand. Of course, those are all SeaFrance trademarks, logos and brands; one wonders what on earth was the point of buying any of those - let alone for €500,000 if they had no value, they had all died, defunct, kaput.

Next, "SeaFrance domain names and internet sites" again, these are all of the SeaFrance business, again €500,000. One would be forgiven for thinking, from what we have heard so far today that that was utterly pointless. What on earth is the point, I ask rhetorically, of buying a domain name and an internet site for a completely dead and defunct business? None at all. Yet, here they are paying €500,000 for it.

The next one, "Information systems/computer software/data files" etc, including, no less, a database of SeaFrance freight and passenger customers, that which we are largely accused of having ignored altogether, lo and behold it appears on the list of assets, intangible, bought, and lo and behold there is a price tag on that one of €1.8 million.

So far, just pausing there for a moment, we have some key assets. We are going to be reminding ourselves, when I turn the remittal report, of just how key “hyperspecialised” assets were - and I will come on to the detail of that, that will be tomorrow - but it is not limited to those hyperspecialised assets. On the contrary, it includes some critical intangibles with significant price tags attached to them, something about which we have heard nothing whatsoever.

Then there is the next bullet point, some other tangible assets - furniture, fixtures and facilities. That, of course, was one of the factors relied upon in the *Zavvi* case that Mr. Gordon just cited, but he makes no mention of it in his challenge.

Then there is computer equipment. That, of course, was critical in the *AAH* decision, but again that is ignored in this challenge.

Then there is a warehouse. Then there are residual movable assets. Over the page, there are some more assets in the UK.

Then last but certainly not least, again one would be forgiven for thinking that it was not least, given that it has not been mentioned at all, aside from the staff, there was goodwill. We will see in a moment an express finding of the transfer of some goodwill between the former SeaFrance business and new My Ferry Link business. We will see that when we go to the remittal report sections. For good measure there is a lease of premises.

So what is going on, ladies and gentlemen, in this remittal report, in this Decision, is an analysis of all of these features and all of these factors. They are all put together in combination and then they are all analysed together. It is at the end of the analysis of the entirety of that annex B list of assets, not limited to tangible assets - by no means - that the CMA was able to reach a conclusion on its judgment of fact and degree - and I will be coming to that in just a moment - that there was the continuation of the activities, or part of the activities, of the ex-SeaFrance business.

What you are being told, although of course it has not been put like this because it is such a difficult hurdle - it is of little surprise that it has not been put like this - that when I take you back through the whole of that remittal report, the relevant parts of it, and you add up these ten or 11 sub-categories, no rational person could have reached the conclusion that that combination on the facts of this case, given the background to this case, given the indemnity in this case, that that amounted to the activities or part of the activities of a business. That is an impossible hurdle for the challengers to overcome.

Can I take you back to some passages in the previous Tribunal judgment that we have seen before, just as some points of emphasis. I will take them fairly fast because we have seen them before. Just before I go back to para.97, can I invite you to go to para.64, internal page number 27 of the previous CAT judgment. This is entitled 'the corporate history of the SCOP'. I just want to draw out one point from the chronology at (c) on p.28. We see this is repeated in the findings of fact in the remittal report. The point is this, half way (c) on p.28 we can see:

"… from at least January 2012, the SCOP was in discussions with Eurotunnel and, because of those discussions, did not bid for the vessels after 9 January 2012."

Just pausing there, Mr. Beard helpfully pointed out in the chronology that there was the first failed bid by the SCOP earlier in 2011. We are now on the date of the second failed bid. The second failed bid was 9th January 2012, but at that time, at the same time, January 2012, the SCOP was in discussions with Eurotunnel in what became the successful bid, call it the third if you like. Chronologically it came later.

My point is, and we will see this a bit more clearly when we go to that section of the remittal report that is called "Background", and how it is viewed on the background, is that it is not difficult to see a continuity and momentum between a bid that fails in mid-July 2011, a second bid that fails in January 2012, whilst simultaneously the third bid is in gestation - literally simultaneously, the third bid is in gestation, and then the third bid succeeds, albeit, I of course acknowledge that it took some months to crystallise into success. As we will see …

\b out 4.10

As you will see in due course when you look at the remittal report, the CMA, one of the factors that it draws upon is that that was largely a function of the court processes in France; that it took that many months.

The CMA's point in the remittal report is that is one of the reasons why, having had regard to the background, you can see a continuity and momentum. (1) and (2) failed, yes, but as (2) was failing (3) was coming into existence, and shortly thereafter (3) succeeded. So that is the preface for some of tomorrow.

Going, therefore, on in the judgment at paragraph 97, I can take paragraphs 97 to 99 compendiously. There was an argument before the former Tribunal as to the legal meaning of the term "enterprise". The CMA, whom I represented on that occasion, were told: you are being over-generous in your fact and degree on the legal meaning; this is in fact the legal meaning and then they set it out. They say in 97: what does the Act understand an enterprise to be? It is necessary to have a grasp, the enterprise must be defined, and (99) it is to this question that we turn.

That is then exactly what they did. So this time the CMA on its remittal was given the answer to the legal question. That is the question to which they turn and that is the question that they then answer and that is what we then apply. So we are not any longer arguing about the legal term, the legal definition, the legal interpretation of the word "enterprise".

That has been done for us. Of course, the critical part there, members of the Tribunal, is paragraph 105, as we heard in the interchanges with Mr. Gordon. There is reference to *AAH* and it is said that the approach is helpful but it does not say, of course, the approach necessarily or essentially incorporates the transfer of the customer base. It signally does not say that. It does not use the phrase Mr. Gordon used this afternoon of it being a necessary corollary. It is a quite inescapably bad point for that to be said to be essential when here is the previous Tribunal saying what the definition is, and it does not mention this point at all. It would, as a minimum, have had to have a separate subparagraph. It does not appear at all. It is a bad point.

What instead this Tribunal says, answering the legal question, is there are effectively a number of key determinants. There is (a) over and above; (b) how this placed the acquiring entity in a different position; and then he goes on to talk about, very importantly, how, when these questions are being answered (in the second sentence between the two hole punches)

> "Inevitably this is a question of fact and degree and there will be no single criterion giving a clear answer."

Again, that fatally undermines Mr. Gordon's submission. To the extent that it was previously put, though it seems to have been rowed back from now, to the extent that previously it seemed to be put that TUPE was a prerequisite or necessary criterion, that would also be wrong for this reason. It is a question of applying the judgment of the CMA to the legal test that has been set out above, and in so doing the CMA has to assess questions of fact and degree, in respect of which no single criterion will give a clear answer. So we have already set the framework extremely clearly. It could not have been much clearer. But it does not end there. There are some others. There is an absolutely critical point that comes out of the remainder of this paragraph that has not been mentioned: it is the guiding principle.

The guiding principle is: what does an undertaking do? The next sentence: it puts inputs (assets of all forms) and combines them. It combines them and in so doing transformed inputs into outputs. So the critical verb is "combining". I go back to Annex B for a moment.

THE PRESIDENT: It is not just combining; it is combining them into outputs that are provided for gain or reward.

MR. HARRIS: Absolutely, I completely accept that.

THE PRESIDENT: Not just a combination.

MR. HARRIS: No, I entirely agree with that. What I am focusing on, though, although they have to be provided for gain or reward (which I entirely accept) is the critical nature of the

exercise which is going on. If you have only an asset it is going to be difficult to say that is anything resembling a business, a physical asset. If you have only an intangible asset, it might be difficult to say that is a business. If you had only a little element of goodwill, somehow if you could have that in isolation, just hypothetically, it would be difficult to say that that is a business or a part of a business. But what is essential in this exercise is that when you combine them together, if (and I take your point, sir, that you then have to end up with something being provided for gain or reward) subject to the non-trading point which I am obviously going to come on to, the little bit of goodwill here, the intangible asset here, the physical assets here, and in some cases employees (as it happens, this case) it might be that in some cases customers too - whether through customer contracts or preservation of a customer base - it is the combination that enables one to say it is not just an asset, it is not just a bit of intangible, say, IPR, it is not just some former employees, it is not just a bit of floating goodwill, those are the constituent elements of a business provided they come together.

Lo and behold, what do we have? We have Annex B, we have all of those things. We have the employees, we have the physical assets, we have the intangible assets. As it happens, we also have a great deal of money spent on customer lists. You will recall that in *AAH* there were no customer lists at all. They were deliberately not sold. In this case they were deliberately sold. They were deliberately acquired for a considerable sum of money.

So what is going on? What you always have to ask yourself, with respect, we contend in this case, especially tomorrow when we are looking at some of the items, item by item, is when you add that to that to that to that, to that, that, that and that, there are about 11 or 12 of them, can you then say, in accordance with this direction of the Tribunal (because, after all, that is what the CMA was doing and we were following this direction of the Tribunal) could that rationally come to a view that the conglomerate bundle of assets was rationally capable of being described as the assets or part of the assets of the business? We say ineluctably yes. When you add it all together you do not lose sight of most of the things, then yes, you have that combination. That is so, notwithstanding that the enterprise (to use the words of the former Tribunal) were wound down a very considerable extent or reduced to embers. Indeed, even more starkly, the proposition that I just advanced is set out in terms in paragraph 106 of the former judgment at the final sentence:

> "A hiatus does not preclude the existence of an enterprise. Continuous trading is not essential."

That could not be any clearer. So certainly in some of the residual submissions put before you, they came very close, if not expressly, to saying (and indeed at one point they do say)

inactivity equals no activities as if that is the end of the case. Demonstrably that is wrong. We are being told here, by direction of the former Tribunal, a hiatus does not preclude the existence of an enterprise and continuous trading is not essential.

THE PRESIDENT: Is it not that in the context (which is a point you made, Mr. Harris) you look at the particular circumstances of the industry and that remark is in the context of certain kinds of industry where the business does not trade continuously, and it is not being said here, for example, that all the ferry companies stop operations in the winter, so the fact that SeaFrance did not trade in the winter is neither here nor there. One can envisage such a case if those were the facts. As I understand it, that is what that subparagraph is directed to.

MR. HARRIS: My Lord, yes we agree. Non-trading seasonal businesses are good examples of things that do completely cease and yet they are not no longer enterprises. So I can draw comfort and succour from that. Yes, sir, I do take the point that the former Tribunal is not saying that this is an example, or SeaFrance have a seasonal business that literally stops for six or nine months a year, let us say, because the Channel is very rough. It is not that. But what is absolutely critical from this passage is that as soon as you recognise that a business does not have to be continually trading day by day, minute by minute, into the takeover, then it becomes a question of fact and degree. That is the point. That is the point that the other side in this case cannot escape. Every time they turn to the hiatus, the non-trading period, and seek to elevate it into the key or the single most important, or a prerequisite or an essential, they must be wrong on the basis of this judgment. If not, they would have had to appeal this part of the judgment.

THE PRESIDENT: But if this is a business where you do trade 12 months of the year, then if a company stops trading for seven and a half months, that is not the normal activity of such a company. It is quite abnormal and extraordinary, and that is why one would ask is that business going on?

MR. HARRIS: I completely agree, and that is why so much time and attention is devoted to it by the CMA in its report. They do recognise that it is unusual. Perhaps exceptional is not the word that I would use, but it does not matter to me if you employ the word exceptional. It is unusual; it is an unusual factor, like *AAH* was an unusual factor.

THE PRESIDENT: There has certainly been no case in the whole history of UK merger control where you have such a long gap.

MR. HARRIS: I completely agree with that as well, sir. That is why there is so much analysis through what I described before as the 10 or 11 factors that we will see in due course - things like the sister ships, things like the pilot exemption certificates, things like the port arrangements and the berthing arrangements, to name just four off the top of my head. The

list is huge, and they all get combined together. That was my point before: you pick this, and you add that, and you pick this and you add that, and lo and behold, at the end of it you can rationally say you have got the activities or part of the activities of an enterprise.

Those so far have re-referenced back to two critical paragraphs in this judgment: 105 and 106, but it is worth reminding the Tribunal (I will not go through them because we have seen them in some depth before) in particular 116. 106 was the Tribunal saying (if I paraphrase) *prima facie* this seems to be an end of the employment relationship, but then critically at 116 the former Tribunal says:

> "Of course, it is possible to imagine cases where the employment of a workforce by one employer ceases, but the workforce migrates - as a workforce - to a new employer. That, we consider, could amount to the 'acquisition' of that workforce by the new employer and could amount to the 'acquisition' ... of a business activity. That might well be the case even if the workforce's contracts of employment were not formally transferred from the old employer to the new one, but terminated and new contracts entered into. If the reality is that a workforce is being <u>transferred</u>, then the fact that wholly new legal relationships are forged as part of that process should not affect the position."

That is exactly what the CMA found on the remittal. We will see that tomorrow. I will take you to the exact passage. That is exactly what they said: we have looked at this in reality and substance and notwithstanding that - and this is all of Mr. Beard's final points today - notwithstanding the fact that there were some redundancies, notwithstanding the fact that there was a new recruitment process, and notwithstanding the fact that some people got jobs in the interim, we take the view - as this Tribunal expressly adverted to as a possibility - that there was nevertheless in reality the transfer of a workforce.

Critical to that part of the story is the indemnity which we will be looking at in more detail tomorrow. But I just pause here to note as follows: that this would have been the place, obviously, in this previous Tribunal judgment where the previous Tribunal would have said: and in this analysis TUPE is either essential (or that seems to have been moved away from now) or truly central if not essential, or a key criterion. This is where they would have said it. They would have said: the workforces' contracts of employment were not formally transferred from the old employer to the new one, but terminated and new contracts entered into, except where TUPE does not apply, in which case we can ignore all this.

They do not say that, and that is because, with respect, TUPE is just another relevant factor. We can obviously all see how, if TUPE did apply, it would have been instrumental in the reasoning that a business continued. But the mere fact that it does not apply does not

withdraw any basis upon which to conclude that there was the continuation of the activities of a business or part of them; it is just another factor.

Just like the length of the non-trading period. I accept in this case it is a big point that I have to deal with, and the CMA spent pages and pages and pages dealing with. But it is just another factor. When we turn to *AAH* one of the paragraphs that was not read to you is the one that MMC (in its then guise) said that it is just another factor.

I have nearly finished on this, so I will be able to finish this judgment and then deal with GETS 1 and 2 by 4.30. We have para. 119 - that we have seen before. Cogent reasons to employ ex-SeaFrance employees. Having analysed it further, as was adverted to as a possibility by the previous Tribunal, the CMA found that the indemnity was, indeed, a cogent reason to employ ex-SeaFrance employees. We will look at more of the facts tomorrow. They say, and this is the former Tribunal who we were directed to follow in approach, we will see in a moment – this is the final sentence:

> "In short, this seems to be a benefit emanating from employing an ex-SeaFrance employee that would not be gained were an employee from elsewhere to be retained."

That picks up 105(b), that is the second part of the test in 105, and this Tribunal is saying that if you analyse it further that might be effectively a tick against 105(b), and when we see the report tomorrow we will see that, indeed, it was tick on a rational view of the evidence presented to us.

Then there is 120, exactly the same submissions can be made, albeit in respect of a different factual point. What they say is: is there an interrelationship, and is there a combination? They say previously that that might amount to a relevant point for your further analysis on remittal, and lo and behold it proved to be exactly that. We did analyse it further, we did have evidence available to us and we did rationally take the view that it contributed towards the judgment that we were applying to these difficult questions of fact and degree, that there was a continuation of part of the activities of a business.

Of course, the Tribunal, with respect, today, must have been completely right in the interchange that it had with my learned friends, that these must have been wrong on the presentations that have been made to you today. We were told today that on no basis could anybody understand how, if you could construe and analyse any of this, it would have made any difference. That is what we were told – "on no basis". Necessarily, therefore, they should have appealed. This is now a collateral attack being mounted on the terms of this prior Tribunal judgment because they do not like it. It must have been the case, if what we were told today was right, that these paragraphs are all wrong.

Of course, that is not how we saw it. Incidentally just so we know of course that is where continuity and momentum comes from in 120. The former Tribunal says we are not going to engage in the merits, we cannot exclude the possibility that you could have analysed these things in such a way to rationally come to the view that there was jurisdiction. They say on p.49 of the judgment: "Given the approach that we have stated . . . it may be open to the Commission". Effectively you are now being told today: "No, not that approach. That approach is wrong", that is not what this Tribunal judgment says, and it was not appealed.

Then para. 122, that is where the words "judgment to the difficult facts in this case" come from and, of course, I emphasise that; nobody has mentioned that before, but that is in fact what is going on once the legal question was decided. Then para. 123:

> "We agree. We consider that it is important for the Commission to consider the question of its own jurisdiction anew, applying the approach that we have set out in para.105 above."

Then the final sentence: "To this limited extent, we find that the SCOP's Ground 4 succeeds."

That completely undermines Mr. Gordon's submissions on his grounds 2 and 3. On his case now that must be wrong as well. That must necessarily have said, if his grounds 2 and 3 are right, he would have had to delete the final sentence, reference to "limited extent". It would have said: 'Applying the approach that we have set out in para. 105 above to the jurisdiction question, and revisiting the entirety of your SLC analysis because that is now all to be thrown in the bin.' It does not say any of that. Why does it not say any of that? Well, we all know the answer to that, so just to dispose of 2 and 3 entirely that is because there is s.120(6) of the Act, which allows there to be a remittal of the question or part of a question, or a specific issue, that is obviously what they were doing in paras 120 to 123. Our jurisdiction on the remittal is, of course, expressly limited, self-evidently by the terms of Act, so we could not go any further. There was no jurisdiction to do so. The only thing that we could do – this is s.41(3) of the Act, again expressly by reference to the statutory framework – is have regard to the material change of circumstance and MCC. We did that. We had a raft of submissions and evidence about that and it was all dismissed, and tellingly ----

PROFESSOR BEATH: That is not challenged.

MR. HARRIS: None of it is challenged, and that is very telling, of course, because this is now a back door attempt to get round the fact that they did argue for an MCC and it all failed. They are effectively now saying: 'Never mind about that, now it is a special reason'.

This is my final point for today: of course, there is nothing in the special submission reasoning because what it boils down to is little other than: "Our special reason", say GET, "is that we disagree with your merits' analysis of, in particular, remedies". We know that, so what? It is completely irrelevant. It does not make any difference in judicial review and it certainly does not amount to a special reason, and one can test that proposition – my final point for today – in a very simple way. There would never be a case, ever, where there was no special reason. Everything would always have to be revisited *ad infinitum* at public expense because have you ever seen a challenger in this court who comes along and says: "Of course, we agree with all your merits' analysis, absolutely no problems"? No, of course they do not, they are always coming here and saying: "We do not agree with your merits analysis" and on GET's submission that would be a special reason. It is nonsense. For those reasons GET's grounds 2 and 3 are unarguably bad.

So, with that, members of the Tribunal, I propose to pick it up with some brief references to the law tomorrow, and then go into the remittal decision.

THE PRESIDENT: Thank you very much. Half past ten tomorrow.

(Adjourned until 10.30 am on Tuesday, 25th November 2014)