Neutral citation [2015] CAT 2

Case No.: 1235/4/12/14

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

20 January 2015

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chairman)
PROFESSOR JOHN BEATH
JOANNE STUART OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

GROUPE EUROTUNNEL S.A.
DFDS A/S

Interveners

RULING: PERMISSION TO APPEAL

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1. On 9 January 2015, the Tribunal handed down its judgment ("the Judgment") dismissing two applications brought under section 120 of the Enterprise Act 2002 for judicial review of the decision of the Competition and Markets Authority in relation to the completed acquisition by Groupe Eurotunnel S.A. of certain assets from the liquidator of SeaFrance S.A.: [2015] CAT 1. This ruling uses the same abbreviations as are set out in the Judgment.

2. The SCOP, but not Eurotunnel, seeks permission to appeal to the Court of Appeal.

3. In its commendably concise application for permission (the "Application"), the SCOP contends, first, that there is a compelling reason for the appeal to be heard on the basis that this merger reference to the CMA is the first to give rise to consideration of the concept of an "enterprise", as used in the Act. However, that confuses the issue considered in the Judgment, which is the subject of the present permission application, and by the differently constituted Tribunal in *Eurotunnel I* [2013] CAT 30. The question of the legal test for an "enterprise" and the meaning of the statutory definition were fully considered and addressed in the judgment in *Eurotunnel I*. We accept that those are important issues of general application. However, neither Eurotunnel nor the SCOP sought to appeal *Eurotunnel I*. The Judgment does not consider the appropriate interpretation of "enterprise" but, on the contrary, is concerned only with the subsequent decision of the CMA applying the test determined by *Eurotunnel I* to the facts of this case: see the Judgment at [55]. That is inherently a fact-sensitive exercise. It does not give rise to an issue of general application and there is no compelling reason for that to be reviewed by the Court of Appeal. Accordingly, we do not see that the second limb of the test for permission to appeal, i.e. that there is a compelling reason for the appeal to be heard, is engaged in this case.

4. In submitting in the alternative that an appeal has a reasonable chance of success, the SCOP relies on two grounds.

5. The first ground contends that the Tribunal failed to apply the correct legal test when considering whether Eurotunnel/SCOP acquired an enterprise. However, as the Application proceeds to acknowledge, the Tribunal applied the test derived

from *Eurotunnel I.* The fact that the Tribunal criticised certain passages in the Remittal Report (see Judgment at [77] and [83]) does not mean that there was arguably an error of law in the Tribunal's refusal to quash the decision in the Report. As noted in the Judgment, this was a long Report (in which the relevant sections comprise 237 paragraphs) and it is not unusual that fault can be found with particular statements or findings when subject to intense scrutiny on appeal. The approach of the Tribunal was to consider the Report as a whole and we considered that the few individual points that we criticised were not material to the conclusion that was amply supported by the detailed analysis set out in the Report: Judgment at [84]. With reference to the question of the employment of ex-SeaFrance employees and the issue of continuity, the Tribunal expressly applied the approach set out in *R v Monopolies and Mergers Commission ex p. The National House Building Council* [1993] ECC 388, which has been followed many times since. That was a judicial review of a report of the MMC, a predecessor body of the CMA, and the relevant passage, referred to in the Judgment at [80], adopted the statement in yet another judicial review of an MMC report:

> "…the Report must not be read as if it were a statute or judgment…It should be read in a generous not a restrictive way and the Court should be slow to disable [the] MMC from recommending action considered to be in the public interest or to prevent the [Secretary of State] from acting thereon unless any perceived errors of law are both material and substantial."

6. Contrary to what is stated in the Application at para 9, we did not find that the issue of continuity was not significant in the legal test set out in *Eurotunnel I*, but held expressly that the combination of all that was acquired, properly understood, entitled the CMA to find that there was here sufficient continuity to amount to the acquisition of an enterprise: Judgment at [82].

7. That may explain why the SCOP seeks to submit in the alternative under its Ground 1 that the test established in *Eurotunnel I* is wrong in law: see Application at para 10. However, that clearly is an attempt to challenge the judgment in *Eurotunnel I* and not a basis of appeal against the Judgment that is the subject of the present Application.

8. The further alternative argument advanced at para 11 of the Application submits that the Tribunal erroneously held that the SCOP's contention that merger control will only exceptionally apply to a business which is no longer a going concern was inconsistent with *Eurotunnel I.* However, this misinterprets the Judgment at [69]-[70]. The Tribunal there held that the various *factual* considerations put forward by the SCOP as to why this was not an exceptional case had all been considered by the previous tribunal in *Eurotunnel I,* and that accordingly for the Tribunal now to hold that they meant that no "enterprise" was being acquired would be inconsistent with the previous judgment. The Tribunal did not conclude that merger control would apply to a business that is not a going concern in anything other than an exceptional case.

9. The SCOP's second ground contends that the Tribunal erred in concluding that the applicable test was satisfied and that the CMA's conclusion was not vitiated by errors in its reasoning. This appears substantially to overlap with its first ground as it relies on the same criticisms made in the Judgment of the Remittal Report.

10. As regards the particular error relied on by the SCOP, although the Tribunal found at [83] that the CMA's finding that there was "continuity *of employment"* was not justified, we held that the CMA was entitled to find that there was in effect a transfer of part of the ex-SeaFrance workforce from SeaFrance to Eurotunnel/SCOP: Judgment at [79]. The test set out in *Eurotunnel I,* which the CMA had to apply, does not depend on finding continuity of employment as such, but refers to determining whether there was "a momentum or continuity in the combination between the vessels and workforce that takes this case over the line from an asset acquisition to the acquisition of an enterprise": see Judgment at [45]. That was the context in which the issue of "continuity" applied, and on that approach we found that the conclusion of the CMA was within the bounds of its reasonable judgment, adequately supported by the facts: Judgment at [81]-[82].

11. Accordingly, we consider that the grounds set out in the Application do not have a real prospect of success and we unanimously refuse permission to appeal.

The Honourable Mr Justice Roth | Professor John Beath | Joanne Stuart OBE

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 20 January 2015