IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1233/4/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25th 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 T W O

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.

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THE PRESIDENT: Mr. Harris.

MR. HARRIS: Good morning, Mr. President, Members of the Tribunal. Yesterday I had dealt with the previous Tribunal judgment, and when we reached para. 23 of that which talked about the remittal on the approach set out in that judgment I dealt with GET's grounds 2 and 3, and just by way of final postscript to those submissions, and so that the Tribunal knows this – more for the sake of completeness than anything – we agree with DFDS' point – not that it is needed – but that there would be absolutely no basis for thinking that, even if any of the SLC or remedies matters had been reconsidered the CMA would have come to any different conclusion. Of course, in a public law case that is another defence, but we do not even get that far in my respectful submission.

THE PRESIDENT: That is a difficult thing to assess.

MR. HARRIS: There is no evidential basis, that is my point. Then, last but not least, we say that it is telling that the SCOP does not take either of these grounds 2 and 3, they are misconceived.

That takes me on to s.3 on the road map. You will recall that there were some brief submissions on the law. I have two or three cases, and the CMA guidance. Then the longest section will be looking at some of the remittal report in detail – after all, I am here to defend the remittal report so it is important that we all know what is in it. After that there will be *AAH* and the retail merger cases towards the end.

It is in the course of the section on the report that I will be taking you to the indemnity documents, and some of the French Court documents, and it is in the course of the remittal report section principally that I will be dealing with as we go through many of the submissions that are made in my learned friend's oral and written submissions.

With that can I invite your attention, please to bundle of authorities 3A, and at tab 25 there is the case of *Thames Water*. Can I draw your attention in it to para. 21. The facts of this case do not matter, it was a dispute about the meaning of a statutory phrase in the context of some water supply arrangements. Picking up at 21 you can see that it is the same debate that we are having. There was an argument about whether or not, interpreting a particular statutory phrase there was a "margin of discretion". That is setting the scene.

Then at para. 22, in the judgment of Lord Justice Laws. He says:

> "It is incontestable that the meaning of any word, phrase, clause or sentence used in a statute is ultimately a matter of law for the court. Mr. Fordham is quite right so to submit. Sometimes of course there is a statutory definition . . ." etc.

Paragraph 23:"All this is elementary law." I do not know if that was intended to be a pun.

> "The water is, however, a little deeper when we consider the nature of the question, a very familiar question, whether a statutory measure applies to a particular set of facts. For this question is ambiguous. It may mean: is the statute to be construed so as to cover the accepted facts? That is a question of law. Or it may mean: are the facts to be judged as falling within the accepted meaning of the statute? That is a question of fact."

I just pause there. That second category is the territory that we find ourselves in because the first category has already been dealt with by the previous Tribunal's Judgment. You will recall what it says. It is to that definition that we now turn, i.e. what is the meaning of 'enterprise' within the Act?

What we are now in, and this is exactly coincident with the terms of the previous Tribunal Judgment and that is why they say it is a difficult question of fact and degree for the judgment of the CMA. So this is just reiterating, effectively, that approach.

It goes on in para. 24 really to underline this point. "This second class of case" – that is us.

> "This second class of case, where the facts must be evaluated to see whether they fall within the statutory rubric, arises where the legislature has used a term whose factual scope is a matter of judgment, even opinion."

That is our case. There is a definition of 'enterprise' in the previous Tribunal's Judgment, it is informed by *AAH* but it is not spuriously precise, it still leaves open, as the previous Tribunal Judgment says, in terms, a question of judgment; a question of judgment as to how to fit the fact into the meaning of that defined phrase which we know from this Judgment is "a question of fact."

Picking it up again in para. 24:

> "In such a case the debate is not about the meaning of the statutory expression, and it will have been the intention of Parliament to consign the issue as to the expression's application in a particular case to the judgment of the appointed decision maker."

That is exactly what we see in the previous Judgment. Then there is a dangerous driving example.

That is all I need from that case, but in the same bundle, I would like to take you to the case of *South Yorkshire* in the House of Lords at tab 12. Just whilst turning that up you might wish to note that para. 23 to which I have just taken you is, in fact, already cited in the previous Tribunal's judgment. They were quite clear as to what they were doing and why they were doing it.

In *South Yorkshire* I am going to take you to two phrases and then the best part of a page. The first phrase, if I may, is p. 29 (internal numbers) ----

THE PRESIDENT: This was about what is the substantial part of the United Kingdom, is that right?

MR. HARRIS: Precisely. You are quite right to pick me up on that, Sir, because not only was it about that but it was about the jurisdictional test in what was then the MMC. It is very closely related, if you like, albeit the facts are obviously different.

You are quite right, Sir, it was a 'substantial part' and what is the meaning of that phrase. We are talking about is it margin of discretion? Is it a question of law? Is it application of law to the facts, it is the same debate. The first remark in Lord Mustill's speech at p.29 is between C and D:

> "The courts have repeatedly warned against the dangers of taking an inherently imprecise word . . ."

- they were talking about 'substantial', we are talking about 'enterprise'.

> " . . . and by redefining it thrusting on it a spurious degree of precision."

That is all I need from this page because that is what, in particular, Mr. Gordon seeks to do, a spurious defined single criterion, essential transfer of a customer base. That is spurious. What in fact we know is that there is a slightly broader test set out in 105 of the previous Tribunal's Judgment and it expressly requires the application of Judgment to the difficult facts.

Over the page at para. 30, I will take this very briefly, just at D – this is trite law but, since I am in this case, it is worth saying it. ". . . linguistic analysis is of little help." You do not take the odd sentence of phrase out of a CMA or then a MMC report and subject it to detailed linguistic analysis and then say: "On one semantic view of that sentence something has gone wrong", you read the whole report. Yet, it is absolutely apparent, in particular from the SCOP's notice of appeal that is exactly what they have done, repeatedly. They take the odd phrase here and there, in particular from aspects of the second part of s.4 of the report and they say: 'look at the language used in that sub-clause, that shows that something has gone wrong." As we shall see in due course, when you look at the entirety of the Remittal Report and, in particular, s.3 where the meat of the reasoning and factual analysis is contained, all of these points just disappear – that is linguistics analysis par excellence, and it is flatly wrong.

That then takes us to the discussion at the end of Lord Mustill's speech, so we are now on p.31 and I am going to just identify the locus at the bottom of 31. There is a paragraph indented just above H, and the argument there is about relative proportions of the area

whether they be relative by literally square mileage, population, economic activities, because they are arguing about what substantial means. We do not need to dwell on the particular factual aspects, but over the page, at the top of p.32, Lord Mustill says:

> ". . . it is impossible to frame a definition which would not unduly fetter the judgment of the commission in some future situation not now foreseen."

If anything would fetter the judgment of the Commission improperly and impossibly it is Mr. Gordon's essential criterion of "nothing else counts but a customer base". Then Lord Mustill goes on to say: " . . . as a general guide" – and notably a 'general guide' - he adds in one or two points to that which had been said by Lord Justice Nourse in the Court of Appeal.

Then I pick it up at C, can I invite the Tribunal, please, to read from C to F.

THE PRESIDENT: (After a pause) Yes.

MR. HARRIS: So that sounds rather like the debate we have been having – is it a hard edged question or is it one which is a rationality test to which judgment needs to be applied. So that sets the scene similar to that which we have before us today. I go on to pick it up in the final paragraph on that page:

> "I agree with this argument in part . . . Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history."

The next sentence is very important.

> "The judgment now proceeds unequivocally on the basis of the criterion as ascertained."

That is what we cite in our skeleton argument. As it happens, in our case there is not one criterion, there are criteria, they are the ones set out in (a) and (b) and just beneath it in para. 105 of the judgment. But that is exactly what has happened.

Then Lord Mustill goes on to say:

> "So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision–makers"

– and here it is worth underlining:

> "each acting rationally, might reach differing conclusions when applying it to the facts of a given case."

That is the test that faces this Tribunal. We are applying not a spuriously precise or a single incredibly precisely defined criterion. We have the criteria in 105 and they involve the

application of facts in the judgment. They are difficult. Critically, and what we did not hear a single word of yesterday, that leads to a judgment, and it can be a rational judgment, and the present case - here I am just picking it up below H, just to round it off, reference to the familiar case of *Edwards v. Bairstow*:

> "Even after eliminating inappropriate senses of 'substantial' one is still left with a meaning broad enough to call for the exercise of judgment, rather than an exact quantitative measurement."

The conclusion at which the Commission arrived was well with a permissible field of judgment. That is the task that faces this Tribunal in the exercise: did the CMA, when assessing all the things that I am going to take you to in due course, all of the headings, when it added this to that, to that, and took a few things from here, added this and that and that, was it exercising its judgment rationally in coming to the view that it reached? We say unequivocally yes.

The principles of judicial review, of course, are not in dispute, so I am not going to labour those. I will, if I may, just refer you to one additional authority, which I hope has now found its way into your bundle. It is the case of *Georgiou (trading as Marios Chippery*, a thrilling case about VAT underpayments in the context of a chip shop. Is this at tab 51, or does it appear separately? If you cannot find them easily we have three more copies to hand up. I will hand up fresh copies. The facts do not matter, as I say, the context is very, very different. Could I just draw your attention to p.25. I am not dwelling on the principles of judicial review, they are not controversial, but obviously they include, "Do we rationally have a view of the evidence, is there some evidence available?"

This was a second appeal, what happened in the old world of VAT was there a tribunal, then there was a first appeal, and this is in the Court of Appeal, so a second stage appeal. The admonishment to which I would like to draw your attention, since it is so apposite in our case, is at the top of p.25. It begins five lines down:

> "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."

That means must be accepted by the court in the appellate or judicial review sense.

> "As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision making process which is undertaken by the tribunal of fact."

I appreciate this is an appeal case rather than a judicial review case, that point is the same. The CMA is the finder of fact, the tribunal of fact, and this court is undertaking an essentially different function:

> "The question [for this tribunal] is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but [rather it is], was there evidence before the tribunal …"

- substitute CMA -

> "… was there evidence before [the CMA] which was sufficient …"

and we could add there "in its rational view" -

> "… to support the finding which it made? In other words, was the finding one to which the tribunal …"

i.e. the CMA -

> "… was entitled to make?"

What we have in this case, which was disputed yesterday, but will increasingly become clear as we go through the Remittal Report, is we just have a whole series of factual disputes raised by SCOP and the GET for the Tribunal's analysis. They dispute, they disagree, we heard Mr. Beard say, "Wrong, wrong", increasingly loudly, "wrong, wrong, wrong", about the rational assessment taken of the evidence that was before the CMA. We will see this in many obvious respects when we go through the Remittal Report. Take, for example, the indemnity. His case there was, "You have got it wrong". His case has to be "It is irrational". His case cannot be, "You did not have evidence", because we were looking at the evidence. Your job is to not to say is it right, is it wrong, but is it an irrational assessment in the exercise of your judgment on the difficult facts of this case. It may even be, with great respect to the Tribunal, that you would not have not reached the same view. You may think it is wrong in that sense, but that does matter. Like in *Mario's Chippery*, that is not the job that faces you. You have to ask yourselves: did they have evidence, was it rationally open to reach the assessment of that evidence that they reached? We say that in every instance that was a rational view. Not a single one of the attacks is sustainable on that basis.

Just for the sake of completeness, of course, even if somehow you were to conclude that, say, one of the ten or 11 points was a view that was so wrong that it could not rationally have been reached by anybody, you would still have to go on and say, does that make any difference to the overall outcome bearing in mind that there are ten other features of it? If it would not have made any difference, the judicial review fails as a matter of law anyway. We can never lose sight of that prism of analysis.

This is helpfully further drawn in the third bundle of authorities in the CMA's guidance. That is bundle 3C, tab 38, p.17 under the heading "Enterprises". The previous Tribunal cites this guidance. The CMA cites this guidance in its Remittal Report. I will not be taking you to that section, but unsurprisingly it cites the guidance. Tellingly, none of this guidance is challenged. So what we are told effectively is that it is fundamentally wrong. We will see in a minute that there is not a single mention of the essential prerequisite of transfer of a customer base - it does not appear at all. This guidance is not challenged. What we see in 4.7 is a parallel reference in the CMA's guidance to the need to make a judgment. We have seen that in para.122 of the previous Tribunal's judgment. We see the need to have regard to the substance of the arrangement.

In 4.8 we see in the first sentence that an "'enterprise' may comprise any number of components." That is important because that echoes the finding of the previous Tribunal about the need for a combination. It is when you add this to that to that that you might have the elements of a business. It does not say "in every case" or anything like that. Most commonly you might include, and I put (i),"the assets and records needed to carry on the business".

Just pausing there, we do have that in this case. You will remember that from annex B.

Then (ii) "the employees working in the business". I have added the (ii). We have that as well in this case.

Then (iii), "together with the benefit of existing contracts and/or goodwill". As to that, as we will see when we look at the report, there was no benefit from existing contracts, but there was a transfer of the goodwill.

THE PRESIDENT: You did not get the contracts, whether there was benefit or not.

MR. HARRIS: In our rational assessment there was no benefit of existing contracts. Passengers are the most obvious example. Passengers, it is clear ----

THE PRESIDENT: The freight would be the relevant one, would it not?

MR. HARRIS: Yes, that is right. The freight is more germane, but we say, as you will hear in due course, the fact that you do not have every single one of these does not matter, especially when you have a whole package of relevant factors.

THE PRESIDENT: That is clear, you do not have to put ----

MR. HARRIS: That is right, and then just picking up the bottom line of that para.4.8, it varies from case to case. I am going to take this quickly because so much of it is so obvious. It varies depending on the industry in question. That is just a marker for *AAH*. *AAH* was a very different industry.

THE PRESIDENT: You have skipped over, "In some cases, the transfer of assets alone".

MR. HARRIS: I rely on all of this, Sir. I was just making the point that it is industry specific. When we turn to the section upon which Mr. Gordon places such reliance in *AAH*, we see that that is highly industry specific. That is a different industry. It was very industry specific, that they had to devote attention to what happened to customers, even though customer contracts were not formally transferred. That was a business that had double deliveries daily to customers from the depots. Passengers on this do not travel double daily, and the analysis is not the same for freight customers. Industry specific is an important point.

Over the page, "the CMA will have regard to the following specific considerations": customer records. They got transferred.

TUPE regulations: "The applications of the TUPE regulations would be regarded as a strong factor". I totally accept that. What it does not go on to say is that the absence of TUPE transfer is fatal or even critical. We say that Mr. Beard, on behalf of the SCOP, places far too much reliance upon "a single criterion", which is TUPE. That is not what it says in the guidance, and nor should it because it is a multi-factorial assessment.

What is more important is that in the case of Mr. Beard's clients, bearing in mind that this a multi-factorial assessment, is that in his notice of appeal he freely acknowledges - you do not need to turn it up, it is para.60 of his notice of appeal, and I quote, "the SCOP does not challenge the CMA's findings as regards the vessels and other assets which were acquired by GET from the Liquidator". Instead, the SCOP contends that the decision is vitiated by errors on two issues, and they relate only to activity and SeaFrance employees.

So in this multi-factorial assessment where nothing is an essential single criterion, industry is very important, Mr. Beard's clients only focus on two of the bits and they accept everything else.

THE PRESIDENT: I am sorry, what is the reference?

MR. HARRIS: It is para.60 of the notice of appeal, which is to be found in bundle 1, tab 2, internal p.22. That is why in the skeleton and the defence we went to such pains to try to point out that there is a great deal in our multi-factorial assessment. If you only pick on two bits to begin with, and everything else is impeccable, that is a poor start for saying that the entire analysis is going to be flawed. Let us say there are ten things, eight of them are upstanding. You are only picking on two, and we say that those challenges are wrong anyway.

THE PRESIDENT: It all depends on the significance of those two.

MR. HARRIS: Yes, I do accept that some factors out of the ten can be more significant than others.

THE PRESIDENT: The employees are quite important in this case.

MR. HARRIS: I accept that as well. The point is nevertheless made that this Tribunal has to have regard to all of the things that are not mentioned and are not challenged when assessing whether the report, as a whole, is so flawed that it should be set aside.

Then the next bullet point down in the guidance is goodwill, a reference to goodwill. As we will see, the French court and the CMA both came to the view that goodwill had been transferred. We say that is a rational assessment.

4.9 is irrelevant, it is about outsourcing, it does not arise in our case.

4.10 is germane. This, of course, is not challenged. It says:

> "The fact that a target business may no longer be actively trading does not in itself prevent it from being an enterprise …"

Those are words that we are going to see in due course completely repeated in *AAH*. That was a non-trading business. Of course, I accept that it did not cease trading for as long as this business, but nevertheless it ceased trading. That is critical because it means that that cannot, therefore, be a decisive essential, let along single criterion. What it goes on to say is that, in those circumstances, there are other multi-factors you take into account - the period of time elapsed. That was subject to extensive analysis by the CMA both in the first report and in the second report. So it certainly has not been left out of account. Of course, it is on my friend's side of the equation, I accept that, but nevertheless it is not decisive.

What you also have to have regard to is the extent and cost of the actions that would be required in order to reactivate the business. That is vast swathes of the Remittal Report that we are going to look at in due course - masses of analysis of the extent and cost of the actions that would be required to reactivate the business.

The next one:

> "the extent to which customers would regard the acquiring businesses as, in substance, continuing from the acquired business"

"There is not masses of evidence on this point, but, as we shall see in a moment, what evidence there is, is on the CMA's side of the equation. The perception of customers was, such as there is evidence, pointing towards the continuation of the SeaFrance business. So that is on our side of the equation in this multi-factorial assessment.

Then:

> "Whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to be attached to the business and part of the sale"

That is again on the CMA side of the equation. There is express finding, not just by the CMA but by the French court, of goodwill. There are masses of things beyond the physical assets or site themselves. We saw them in annex B. We saw that they had big price tags attached to them. There were huge intangibles. There are customer lists, etc, etc. We have IT systems with specialist IT employees. All of that went. All of that is on the CMA side of the equation.

I end by 4.11:

> "None of these factors, individually, is likely to be conclusive. The CMA will assess all relevant circumstances …"

At the risk of repetition, that is why there is so much in section 3. They are assessing all of it.

Again, forgive me if it is repetitious, but nowhere in this section does it say anything about the transfer of a customer base, let alone that it is essential.

THE PRESIDENT: We have got that point.

MR. HARRIS: There is only one final reference. I am not proposing to turn it up unless ----

THE PRESIDENT: Is there anything else in the guidance you want us to look at?

MR. HARRIS: No, Sir. I am not proposing to turn it up unless you would like me to, I will just tell you where it is, but there is a previous MMC report called *Swedish Match*. It is in the second authorities bundle, tab 34, and there is a paragraph there, 7.47. It was a very complicated transaction in terms of the corporate arrangements. The point that emerges from that paragraph is that preparatory steps taken by a business immediately prior to a start up, they are "activities" within the meaning of the phrase "enterprise".

It would take too long to look at the specifics of that transaction, which was very convoluted. There was a company that was taken off the shelf and, as it happened, in the 24 hour period it took all manner of preparatory steps. It passed resolutions, it consulted with shareholders. It drew up some agreements, it entered into some agreements, and only then did the transaction get consummated. The MMC says in terms that those, if you like, pre-start up activities, getting ready to start up, that is all "activities" within the meaning of the phrase "enterprise". That is relevant for this reason: although the debate is not central, there is a dispute at times about whether the hiatus in this case is six months, seven and a half or nine. We say it does not hugely matter, the nature of the argument is effectively the same. What I do say is that under no circumstances could the period between 2nd July 2012 and 16th August 2012 be excluded from "relevant activities", because the findings of fact in the first report, let alone the second report, is that there was a frenzy of activity in that seven weeks - painting the ships, doing the engines up, training the crew, getting the safety

certificates, making sure the lights worked, etc, etc. All of that definitely is "relevant activities". It does not make any difference to the purpose of the CMA's defence whether one then has regard to six months or seven and a half. It is a further question of fact and degree. We say whether it is six or seven and a half, it is still outweighed by the other factors.

Last but not least, there is a *quasi*, if you like, section of law in the Remittal Report, the second part of section 4. That is what is known as the "broader observations on the jurisdictional test", and that is the section in the Remittal Report where the CMA says, "We have reached our conclusion on factual assessment and exercise of our judgment, there are some broader observations about wide jurisdiction, wide interpretation". All I propose to say about that now is that we continue to rely on all of that. That is dealt with largely in the written submissions on both sides. The important point to note is that we would have reached the same judgment wholly irrespective of what are called the "broader observations" on p.92 of the report.

The reason I do not need to turn it up is because when I go to *AAH* later on, we will see that in that judgment, or in that decision, a purposive broad approach is expressly endorsed by the MMC, and effectively that is what it says in the broader observations: take a purposive, broad and sensible substantive approach.

That is the third section of my submissions - reference to some case law, the guidance and the broader observations.

That takes me to the meat of this reply, the fourth part of my submissions, which is: did the CMA do what it was supposed to do as directed by the previous Tribunal judgment? Could I invite you then to hold open the Remittal Report, bundle 2, tab 2. I am going to be using paragraph numbers and internal page numbers, if I may. Can I invite you to pick it up on p.16, para.2.13. We do not need to read this because of course we have already read it. It says "The judgment of the CAT", and it cites the critical paragraphs from the CAT judgment, 105, then 107, 111, 112, 113, 114, 115, 116 and 119. We know they are the critical ones because we read them yesterday. What is important, having located that they are cited at the beginning of this Remittal Report, is that on p.20 of the report at para.2.24, the CMA begins by directing itself as follows:

> "In our assessment we have taken into account and sought to apply the principled approach set out in the judgment of the CAT."

It is very clear. They have picked the right paragraphs, they have set them out, and they say they are going to follow them. We say that that is very barren territory for a claim of legal misdirection and yet that is what you are faced with from these two challenges. They all

repeatedly say that they have not understood what they are doing, they have made a mess of it, they have misdirected themselves. That would be an odd thing to have happened, having begun by setting out the relevant paragraphs and saying that you are seeking to apply them. As to structure, if you turn to the index on p.1 you will see how this is put together. You will see that between pages 1 and 11 there is a summary. If you just trace down the index you will see that there is a section 4 on p.86. It goes from 86 to 92 before the broader observations. I respectfully, heartily endorse and commend both the summary and what is effectively in many ways a repetition of the summary at 86 to 92. They are very similar. I would respectfully invite this Tribunal after I have completed the more detailed look at some of the constituent elements to go back and read either the summary or those six pages, and you will see that they very faithfully replicate all of the individual parts of the meat of the analysis, some of which I am going to go through otherwise. They do so, if I may say this is on behalf of the CMA, very well. You will recognise every single thing, item by item, when you look at either or both of those.

My first task then is to explain and refer to some of the individual sections so that you know what combination of overall factors were assessed by the CMA, we say rationally, in its multi-factorial judgment. The first relevant heading is on p.24 of the report and it is under the heading "Background". You may recall from our skeleton that this is where we started with our summary, "Background". The background is actually very important in this case. It is one of the critical bases upon which the CMA - and I pause to say as directed by the previous Tribunal of course - was able rationally to come to the conclusion that there was continuity and momentum. Continuity and momentum from what? Well, from what happened before, i.e. from the background.

What I would like to take you to, first, within the section on background is para.3.11 on p.27. There is a reference in that paragraph to the first bid. You will recall that there were two bids by the SCOP and then one by GET. This is the first one by the SCOP. All I would wish to point out is that, though I appreciate that this is the first bid and therefore anterior in time and it was overtaken and it did not succeed - I appreciate all of that, as did the CMA. Nevertheless, in the indent the deputy chief executive of the SCOP stated:

> "the purpose of the SCOP at the time of its creation was to make an offer to acquire the assets of the SeaFrance business … In other words, the SCOP was created with the aim of securing employment for its subscribers …"

That is where Mr. Beard always ends effectively - it is all about creating employment, it does not really matter, is the gist of his submissions, or it does not really matter what the

employment was. But actually it did critically matter, right from the beginning, because after the comma it says::

> "… in particular by ensuring that the SeaFrance vessels continued to operate between Dover and Calais."

A continuation of the business. Of course, I cannot over-emphasise this because this is the first bid and life moved on.

My point is: is there continuity and momentum? Yes. It was always the aim of the SCOP to secure continued employment for these employees. Doing what? Continuing to use these vessels on this route. That is the starting point.

THE PRESIDENT: At that point, of course, they were still employed, were they not?

MR. HARRIS: Yes, and just so that you know, there was a side-swipe taken at an alleged typo of ex-SeaFrance versus SeaFrance ----

THE PRESIDENT: You do not have to worry about that, but of course you would say continued employment while they were employed. After they had been made redundant he might not express himself in quite those terms.

MR. HARRIS: It is not a semantic point, Sir, and I fully accept what you have just said. The point is, was it rational for the CMA, after we looked at the rest of the background, to come to the judgment that there was a continuity and momentum on the particular facts of this case, and this is a relevant starting point. It is all part of a puzzle.

Over the page at 3.13, in the first bid, there was a great deal that went into it. I just show you that so that you know that is there.

Then 3.16 on p.29 there is reference to difficulty of financing and it is pithily summed at 3.17:

> "Ultimately the French Court decided that it could not accept the SCOP's offer given the lack of financing."

The reason I mention that is because we see that that hole was plugged by the indemnity. So there was something that they wanted to do, in our submission, or we say rational judgment, they wanted to continue the business. Why could they not do it? Because there was a hole in the financing. As the background moves on we say there is a continuum and momentum because that hole gets filled by the indemnity, we will see that in just a minute.

PROFESSOR BEATH: Sorry, the paragraph above, when it talks of "financing" it seems to be referring to the bids for the vessels?

MR. HARRIS: No.

PROFESSOR BEATH: Somewhere in some of the other paperwork, I think it is actually in the first Tribunal Judgment, there is a bit I read last night which has some excisions in it, but

refers to €10 million and that has been used in the context of providing a kind of operating subsidy, not a bid for vessels and the indemnity has been used to subsidise operating costs rather than the acquisition of assets.

MR. HARRIS: That is broadly right, and as we go through this we will see a little bit more of the detail, but it is sufficient for my purposes that there was a lack of financing and, as it happens, it was €10 million – it needed another €10 million, and it gets filled by the very bespoke creation of an indemnity that is tied to particular ex-SeaFrance employees.

PROFESSOR BEATH: Okay.

MR. HARRIS: GET bought the vessels. The €10 million, we will see in a minute is more or less the right figure, the precise figure is redacted, but it does not matter, because it quite freely says almost the €10 million in a number of other places – so call it the €10 million. What happens is that GET acquires the vessels but there is a need for a further €10 million and that all has to come from ex-SeaFrance employees and it has to come from ex-SeaFrance employees operating these vessels on this route in and out of Calais. That is why the CMA comes to the conclusion, in a rational judgment of difficult facts, that that "forged a link" between these vessels and these employees in respect of these activities. You will recall from the previous Tribunal judgment what it says is if you explore this a bit more and you expand it, and you tell us a bit more about it you might find that that is a relevant missing part of the puzzle and that is what this report does; as we shall see in due course, that is exactly what this does. Every time you reach a position where you say: 'I wonder if that is right?', or "maybe I could interpret that phrase or that bit of the decision or those minutes a little bit differently, or maybe I was not quite so persuaded that that was forging the link, or forging enough of a link", that is no problem, but you cannot stop there, you always have to say: "Was it irrational for the CMA to reach that view", especially when they then combined it with all of these other factors, because no single one of these factors is determinative. Then on the next page, p.30, there is an invitation for further bids, and here we come back to a point on timing that I made as almost my first submission yesterday by reference to the previous Tribunal Judgment. If we pick it up at 3.22: "The French Court noted that the offer that the SCOP filed . . . " So this is the second SCOP offer filed on 6th January 2012. It brought some clarifications and improvements but, in the fifth line, it had the serious drawback of not making provisions for the necessary financing. So just pausing, the second SCOP offer, 6th January 2012, and it did not fill the financing hole. It was a bit better but it did not do the job, but then what happens is that only three days later, by a Judgment dated 9th January, the French Court rejected that offer, but in that Judgment we find the first mention of GET's involvement.

We do not know for 100 per cent when GET first became involved with the SCOP but we do know that it was bang on the same time that SCOP was making a renewed attempt to buy the business as a going concern. There must have been some mention and collaboration prior to it being found out by the French Court, that is much is obvious. We know from other findings of fact, in particular, in the first Tribunal decision, that the GET was using the SCOP's business plan.

My point is simply this, this is to repeat one of the points I made in opening yesterday, that it was a rational view – this is part of the rational view taken by the CMA in its judgment – that where the SCOP, right from the beginning we say on our view of the evidence, there is certainly evidence to support this view, was intending to carry on continuing this business with these assets on this route using these employees, and they sail for the second time, but at the exact same time it is morphing a little bit. The precise nature of the transaction is morphing a little bit. It is becoming one with the involvement of somebody who had some finance. So there is missing finance, but then the finance problem is overcome because somebody else joins in and they have a great deal more finance.

Of course, I am not saying that that is the only difference. I am not saying that the involvement of GET was nothing other than effectively as banker. That would be idiotic. GET had a different corporate ethos, had its own reasons for operating, had its own branding considerations and all the rest of it, but the true nature carried on being the same, in our rational assessment. What they wanted to do was carry on with what the SCOP had always set itself as its main aim and task. A continuation of these activities on these routes with these employees in and out of the Calais area where the unemployment level was so bad.

This is borne out by the indented citation at 3.23 on p. 30. So this is a finding of fact by the CMA:

> "An indication was given of the wish of the company Eurotunnel, by its Chairman and Managing Director, Mr Gounon, to buy SeaFrance's vessels and lease them to ----"

That is the SCOP, "SeaFrance Co-operative Enterprise", that is the SCOP, so what were they doing? Right from the beginning GET was 'getting in to bed', so to speak with not just any old other business, or some other market participant, not at all, it was getting into bed with the SCOP – this SCOP not some other SCOP:

> ". . . either directly or through a mixed ownership company."

Then, Professor Beath, this partly takes up your point about the missing finance:

> "This provision, coupled with a cash loan from local collectives . . ."

- so some missing finance came from the Calais area. That again ties it to the specific route, it was not for some other ferry route on the Mediterranean, or something. This is right at the very, very beginning of the entire story of the successful bid:

> ". . . as well as the voluntary conversion into capital by personnel of their redundancy compensation payments."

That is the indemnity. They needed it and they critically knew right from the beginning that this was a part of the puzzle, and they critically knew that it came from the SCOP, and they critically knew that it was from redundancy. We will see how it translates into the actual indemnity in due course. The point that is made against me that that is all predicated on a redundancy, so what? It is absolutely nothing to the point. It is, indeed, the very fact that there was a redundancy that enabled them to get their hands on the missing finance. It had to be the missing finance in the amount that we were going to see in due course was set out for that specific version of the job saving plan. It could not have been €3,500 or €10,000 because it had to reach or, in the event, nearly reach €10 million.

Then what happens in the chronology there is then the hiatus so we know that 9th January happens to be the very day, that is when the French court said: "Enough is enough", even the temporary continuation of business ceases.

Then there is the period until 2nd July when the transaction completes and, as I said, seven weeks of frenzied activities thereafter.

There is a hiatus then -----

THE PRESIDENT: What I find a little strange, in a section that is called "The background" as you said, which seeks to summarise this rather complicated story step by step, is when we come to the French Court decision of 9th January all that is quoted is the opinion to the court of the bankruptcy judge, but nothing from the actual court's own reasoning and decision, which one might have thought in an objective rational approach to summarising what happened in the court on 9th January would have found its way into the report, because it is certainly something one might think is relevant to take into account, and should have been taken into account even if the CMA says: "For all sorts of reasons we do not think that is decisive in this case".

MR. HARRIS: What we say in response to that is there is actually quite a lot of cross-reference and reliance, some of which we are about to come on to, to the bankruptcy judge, to the court receiver, to the administrator of SeaFrance, and to various parts of the minutes of the French court, so I do not accept that there is only a minute or limited cross-reference. But, in any event, we say it would not matter, even if that were the case, and that is because it is a multi-factorial assessment we are entitled to, and we did rationally have regard to. What

we have just seen is the managing director of GET, but in a minute we are going to turn to his equivalent at the SCOP, who takes, in our rational assessment, effectively the same view. So you add a Mr. Gounon to a Mr. Giguet which we will see in a minute, and then you add to him the administrator of SeaFrance who, after all, is an expert in administration of businesses, and he is saying the sorts of things that would rationally support our judgment.

Then we see the court receiver who, again, is an expert in an administration of business, and he is saying things that rationally support our judgment. Again, it is multifactorial, when you add this to that, to that, to that and to that, can it rationally support our view, which we say was, indeed, the view, or is certainly rationally sustainable and supportable as being the view of the French Court.

What is telling about these things ----

THE PRESIDENT: The French Court, on 9th January, said: "No", we are not going to return it, because this has been going on so long, the creditors have to be protected, the business must come to an end, activities must stop. I know the first sentence of 3.25 says the activities should cease, but they say rather more about it in the judgment.

MR. HARRIS: What we do say is important is the very first cross-reference is in 3.25 and who is it who we are citing? We are citing the bankruptcy Judge, i.e. the Judge of the bankruptcy court.

THE PRESIDENT: Yes, but this was now the decision of the Commercial Court.

MR. HARRIS: I am sorry?

THE PRESIDENT: On 9th January it was the Commercial Court's ----

MR. HARRIS: I accept that.

THE PRESIDENT: --- view. They get reports from all sorts of people, that is the French procedure.

MR. HARRIS: It is a relevant factor. It is particularly relevant that this is an expert in bankruptcy. What is important is I do not have to rely on anything in particular, whether it be from the bankruptcy judge, the administrator, the French Court, Commercial Court properly so-called. If I had none of that it would not make any difference. Every time I have somebody, particularly an expert, who takes the same view that we have taken, self-evidently that is rationally supportive of the view that we took. If you are asking yourself the question: could nobody else have taken this view, i.e. it is irrational, nobody could have reached the view, well, actually what we have is a multiplicity of experts who had their hands on, getting dirty in this particular set of transactional mechanics about receivership

and liquidation, and they are taking, we say, views which are the same as ours or as a minimum rationally support our view.

One very telling view is at 3.25. What the bankruptcy judge is saying is that notwithstanding the end of the temporary continuance of business – I accept that. That is what happened, the temporary continuance ceased. But, he is saying – or perhaps she is saying – that is not the end of the road.

Mr. Gordon and Mr. Beard would have it that it not only was the end of the road, but they were well and truly buried under 10 feet of dirt, they were in a coffin and the funeral had been held; they were completely kaput. But, that is not what these experts are saying, and one can see why, when one starts to draw in the background, as I have just done and, in particular, as we go through this morning, we see all the other multi-factors that come into the assessment. It does not end there, because these experts are saying, on pronouncement, the liquidator under the control of the bankruptcy judge and the court, must undertake discussions. Clearly there is a trade-off between value of assets and continuance of employment contracts. Then, very tellingly, in our respectful submission, the market exists, the vessels are quite new, and even the business may be sold later on.

What you are being told in the challenges is that that is completely irrational. Nobody in their right mind could possibly have added up the factors and reached that view that even the business may be sold, it is not the end of the road, and yet here is somebody else taking the exact same view at that point in time.

Over the page at 32, picking up at para. 3.26 the chronology continues, so we have the two weeks following, and this, Members of the Tribunal and, in particular, Professor Beath because you were asking about the indemnity, is we find the first mention of the indemnity. I pick it up half way down:

> "At the first meeting between the liquidator and the SeaFrance works council, employee representatives requested the insertion of a clause intended to provide special assistance to buy the assets of SeaFrance. Ultimately, this resulted in SNCF agreeing to fund a €25,000 for each ex-SeaFrance employee employed on the SeaFrance vessels used for a similar operation and provided certain other conditions were satisfied."

We say that this is first mentioned as part of the background but, we will see in a minute, there is a separate subsection analysing this that I will take you to, but this was an important part of the package, and what we were we directed to consider? My recollection is that we were expressly directed in para. 105 to consider the combination and whether adding that up it could all produce activities that, and I cannot remember the exact phrase but 'make

money' was the gist of it. The CMA is saying here that this was part of the package – an important part of the package. Just to predict some of my submissions later on when we get to the indemnity document itself there is no suggestion here that this indemnity was available to somebody else in reality, even to some other SCOP, indeed, there is no mention of any other SCOP. There is no mention anywhere of any other SCOP, there was no other SCOP, let alone some other commercial body.

Just so I can show you how this is to other relevant personnel – we talked about Mr. Gounon, he was GET, and I mentioned Mr. Giguet, so if you could keep your finger, please, on p.32 and flick forward to p.49 and para. 3.89. It reads:

> "The SCOP considered that it was entitled to the €25,000 indemnity payment in respect of its members/employees. . . At the time of GET's hearing with us in the context of the original merger inquiry, Mr. Giguet . . ."

Mr. Giguet is footnoted as the CEO of the SCOP. So here we have the other side of the equation:

> ". . . told us that these indemnity payments were expected and were absolutely necessary for SCOP/SeaFrance to be able to run the company."

And you see that in the indented citation in the final line; this is Mr. Giguet in English saying that this money was absolutely necessary to the capital liquid of the SCOP to run the company.

So, again, what we have is a situation where, right from the very beginning, they needed to plug the hole in the finance. Right from the very beginning it had to come from redundancy payments. Well, who was redundant? Ex-SeaFrance. That money plugged a critical hole, and who thought that this was all critical? Everybody. The GET thought it was critical and knew it was going to happen. Mr. Giguet for the SCOP thought it was critical, absolutely necessary and knew it was going to happen.

It does not end there, because when is it happening? It is happening the exact same time that they had been trying, as a SCOP, to buy as a going concern but failed twice, and something stepped into the breach, and that was GET. Then the transactional mechanics then become of no particular importance, because we know from the guidance, and we know from everything else that you do not get fixated on the transactional mechanics, you look at the substance and, in particular, you do not get fixated on the fact that there has been a cessation of employment contracts. It says it in terms in para. 116 of the previous Tribunal Judgment. As if that was not enough, *AAH* was a case where there was a cessation of the formal employment contracts. That was the whole point. On the Sunday night everyone was sent a redundancy notice bar a handful of people. In actual fact, in our case,

in relative important terms, there were less people made redundant in the hiatus period because as we will see in a minute a large number of the ex-SeaFrance employees carried on in the so-called hot lay-up or lay-by process.

What we have then, going back, is p.33, para. 3.29, is just some more miscellaneous points. We have at 3.29 a reference to P&O bidding for the customer list and domain names. That is important because the domain lists and customer lists are completely ignored by the challengers as if they do not materially contribute to the overall multi-factorial assessment but, in fact, they do, and they do add value. We have seen the actual money that was attached to them, and there was actually a market for some of them. P&O were cross-bidding against the GET for some of these things, and why? Because they obviously contribute materially towards the continuation of activities of a business. That is the whole point about getting things like customer lists and domain names. What did it enable the French court to say in its court minutes, having looked just at these factors so far, so we have vessels, employees, missing finance, customer lists and domain names, what did it enable that court to say about this? It said, and here is the citation:

> "The bidder [GET] presents a comprehensive, integral bid bearing simultaneously on . . ."

and then I summarise: fixed assets, tangible assets, intangible assets, "as part of an industrial project". Just pausing there, that is why these phrases are repeated in the defence and the skeleton. This is where they come from, and why is it, because they are doing the same thing, in my respectful submission, as the CMA was directed to do. The CMA was directed to look at the overall combination and whether it could go towards the maintenance and continuation of a business, and this is the French Court doing the same. It is saying: "Look, put all that together and what do you get? You get a comprehensive integral bid, that is exactly what we say, and it is an industrial project that integrates the SCOP, the ex-SeaFrance former employees.

In the next paragraph it goes on to say that this is a Regional Council and they:

> "have clearly demonstrated their desire to be associated with the proposed recovery through a financial contribution."

That is not re-start, or recreation. Again, I agree with Mr. Beard – it is about the only point where we are *ad idem* – you do not want to become unduly fixated upon the odd word here and there, whether it be revive or, in this case, recover, or renaître, or whatever it may be, but what his submission has to be, although he did not put it like this for obvious reasons, is when you go through the entirety of these minutes, and the entirety of these reports you

cannot rationally sustain the conclusion that we reached, and he pointed to the odd bit here and there.

What I am saying is that there is a lot more to the picture and there are all kinds of factors that do rationally point in our direction and support our judgment. This is just one of them. So it is a recovery, it is not a recreation.

Tellingly, and this is a point, Mr. President, that you made, at the bottom of that page, after references to partnerships, there is "The takeover of SeaFrance's activities". We cannot take that completely out of context as an isolated phrase, but it is, as you will see when you go through the court minutes, repeated, multiplied, that is their phrase of choice *'reprise'* in French, 'takeover' in English, the takeover of SeaFrance's activities. That is what they thought was going on at this time. As it happened, it took some months to progress through the liquidation process. It took some months to finalise. You may recall from the previous reports, there were quite difficult arrangements, there was TransManche 1, and TransManche 2, all these separate companies, and all manner of things had to be done. It took some months and, of course, I accept that. What I am saying is right from the beginning this was how it was perceived and, indeed, continued to be perceived because these court minutes are 11th June 2012. That is why, when one turns over the page in the report to p.34, we say it is entirely consistent with that, seen against its background and its development and gestation, that the court properly said in the English translation – this is the third paragraph down on p.34, that:

> ". . . 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 in order to revive the activities previously conducted by SeaFrance."

That is entirely consistent with the story that one can rationally draw out from the background when one actually has regard to the background.

Then there is the point that I mentioned before about the need to plug the hole, this is the €10 million in addition to financing the project relies, and I should intersperse always did rely to everybody's knowledge, on funding from the SCOP's employees limited to about €10 million, and then there is reference to some more money from the GET and the same point is made at 3.31 over the page, it is the critical €10 million. You can see that.

The final sentence of 3.31 is telling. "We understand that the indemnity payments that the SeaFrance works council negotiated with the liquidator . . ." and we see that in para. 2.34 which we looked at a minute ago. I intersperse there: 'right at the very beginning of the arrangements to everybody's express knowledge and need', "and which the SCOP subsequently received enabled it to fund its €10 million contribution." So this is a very

particular or peculiar combination that was put together right at the beginning, following immediately on the same day that the second takeover as a going concern bid was failing, this bid was growing, was bringing everybody together very deliberately, to do what? To do exactly, or as near as exactly what had previously been done by SeaFrance as was possible.

I pause there for a minute, I do not have to have a SeaFrance, if you like, mirror image, or facsimile. All I have to have is the activities, or part of the activities, of a business. I do not suggest for a minute that this was literally identical. A jolly good job it was not literally identical because what a mess they made of it before. They had to shed some of their boats and some of their staff, and some of their terrible working practices, and that, of course, is one of the differences when GET came in – no criticism here, obviously – it is an out and out commercial undertaking, and it must have said to itself: 'We saw some of this in the previous report, the business plan, crikey, we need to shed this, this and this, do it properly.' So, the business, when it was revived, did not look identical to the previous business – which businesses do when there is a merger? There is nothing in any of that.

We have seen the references to takeover. I am going to skip over a few pages now because the way this report works is you have the first key section – background, then the analysing, and then they give the views – "Our views" – and if you pick that up on p.38 you will see that the heading is "Our views" above para. 3.45". I am not going to dwell on much of this because in the course of making submissions as we have gone through the facts you will see that I have espoused many of 'the views' under the heading 'The views', but I do just note one or two things.

Para. 3.47, at the risk of repetition and please stop me if you have heard this too much before, what they say is that a considerable portion of the inactivity was due to the requirements of the liquidator's sale process. That was in danger of getting lost if one does not draw it out. What they are saying there is the fact that it ended up being six months is really neither here nor there in context because, yes, it is six months and not six days or six hours or six minutes, but that is largely a function of just the sheer fact that you are in a liquidation process and there are formalities and court hearings and the need for administrators and liquidators in the French set up, bankruptcy judges, they all have to report and then you have to have another hearing etc. No doubt there are all kinds of other interested parties, it seems like the Calais Board of Commerce was having its two pennies worth. Fair enough, but all I am saying is that the fact that it ended up lasting so long is a function of this court process, and therefore, whilst not to be discounted as a length of time,

it is obviously an important factor on the other side of the equation from me, but nevertheless, it is partly explicable just by it being a function of a court process.

In 3.49, I have made the point about continuity and momentum. In 3.50 I have made the point about aim, but I just do want to pick it up at 3.51 and 3.52. As I have submitted, the CMA was concluding, I say rationally, in its judgment on these facts, that the collaboration between GET and the SCOP presented a solution, and it did. It presented a solution to the missing hole in the finance, and the fact that the previous business needed restructuring. It said in the final sentence of 3.51:

> "It had not been possible to find a viable solution producing value for creditors and the continuation of the SeaFrance operation involving all employees under their existing terms"

Absolutely right, but nothing to the point. It does not have to be a continuation of literally identical activities for there to be a merger of two enterprises, there can be a cessation or a revival of part of the activities of the business. This business was one that desperately did not need all employees under their existing terms because otherwise it would not have survived, and that – again, to preface some remarks about the section on TUPE – is effectively the answer to TUPE. What is said, as you know from yesterday, is that we say TUPE is not determinative one way or the other. If it is there it points in favour of an enterprise having been transferred, but if it is not there it is not fatal, and it is completely wrong for, in particular, the SCOP, to say that we turned it on its head and said the absence of TUPE is a factor in favour of, pointing towards. All we are saying is that the fact that TUPE did not apply is just a factual observation. The fact that it did not apply meant that you did not have to carry on having all the employees under all their existing terms – we will see that when we reach that section of the report. It is a mischaracterisation, misperception of the CMA to suggest that we have turned it to the opposite direction. It is just a factual observation.

Then 3.52:

> "The liquidation process and subsequent termination . . . meant that the TUPE Regulations did not apply . . . Continuity of employment was effectively safe-guarded by the formation of the SCOP, which held the workforce together."

That was a perfectly rational conclusion to draw now that we have seen the background. That is what the SCOP itself said it was doing.

THE PRESIDENT: What proportion of the previous workforce were ----

MR. HARRIS: The answer, Sir, is a few pages further over, and the best place to pick it up is 3.77 on p.46.

THE PRESIDENT: That is when it started ----

MR. HARRIS: And there is a more detailed breakdown – I think you now have the confidential as well as the non-confidential version on the previous page, 45 with different dates. You can see in table 1 SCOP employees, and there are certain different categories. Take, for example, 1 July 2012: "Total ex-SeaFrance employees [90 to 100] per cent.

It is also revealing, a point that I said earlier I would come to in due course and I might as well do it now, if you look at para. 3.68, p.44. I said that not all of the employees were formally made redundant and, indeed, less so proportionally or in importance terms compared to *AAH*, and this is the manifestation of that submission.

THE PRESIDENT: Where are you?

MR. HARRIS: I am in para. 3.68 of the report, at p.44. It may be that when I have just done this and a couple more final points ----

THE PRESIDENT: That is the "significant number" referred to in 3.52?

MR. HARRIS: Yes. That is the significant number involved in the lay-up. But, we know that it was being held together – that was the very first remark I made, I think it was para. 3.11 of this report, the very foundation. The purpose of the SCOP as described by the Deputy Chief Executive of the SCOP, namely to ensure the SeaFrance vessels continued to operate between Dover and Calais. That is what enabled the CMA rationally to conclude that the SCOP was holding the workforce together, and then there is a lesser point, the significance of the employees in the lay-up.

The details of the lay-up employees are worth just noting in 3.68. It is 34 officers and crew, but that is on each boat, so that is the best part of 100, more than 100 in fact – my wayward maths!

It does not end there, because that is a third of the number of staff that would have been required, so a significant chunk and then it does not end there as well, because in 3.69 we have the remainder of staff whose contracts of employment were also extended by the liquidator and look, they are the sorts of staff who contribute towards an ongoing set of activities. Why do you need six commercial staff to be kept on if you are not trying to preserve the ability i.e. it is not the end of the road, the business can still be sold. You do not need any of these people if the business is dead and buried in a coffin – well, maybe a director potentially. 18 finance staff, you do not need those people either; you certainly do not need 18 of them. The pièce de résistance, perhaps, 19 operations staff – well, on GET and SCOP's view of the world there are no operations, so what are these people doing? Just twiddling their thumbs? 16 human resources staff – 'blimey', these are the sorts of things that go towards the rational conclusion that we reached that, if you like, to take the words of

the former Tribunal: the embers of a business that could be fanned back to life. This, of course, was deliberate because everybody was saying that it is not the end of the road, it is capable of still being sold, the goodwill and the business, and this is why. Indeed, that takes the words out of my own mouth because at 3.53 that is exactly what the CMA then go on to say. They cite again the "not the end of the road" remarks in the French Court minutes, I think as we saw before from the bankruptcy judge. That enables them to conclude, and we say entirely rationally, the final sentence of 3.53, the PSE3, that is the "Plan de sauvegarde de l'emploi" – the job saving plan, safeguarding employment, I note, "was designed to support such a business continuity solution". That is how and why we can take that rational view. That is just so far how we can take that rational view, and that is before we have even turned to the separate part of this report that deals with the analysis of employees, indemnity, sister ships, pilots' exemption certificates, berthing arrangements, IT systems. What it enables us to do therefore is say in 3.54, expressly in concert with the direction we were given by the previous CAT:

> "Overall, we consider that a review of the background to the transaction shows that there is a considerable continuity and momentum between the time of SeaFrance's operation of the Dover-Calais ferry and the commencement of MFL's operation . . ."

And, though this was not laboured yesterday, in the written submissions it is, it is multiply said in the written submissions against us that we have misdirected ourselves because we have not done that, and they consistently ignore the final sentence, which says in terms that it is not just a collection of assets coming to the market, that has just been bought and then set up to create a business similar: "the circumstances of this case are fundamentally different" – these are some of the key circumstances that enable that rational conclusion, and now that we have reached there you can see perfectly well how and why that was a rational conclusion, open to the CMA in their judgment of the facts.

The last remark, again picking up one of the particular grounds of appeal is it is said that we have ignored, misunderstood and/or ignored the fact that there are differences between the failed SCOP bid one, and the failed SCOP two and we have illegitimately elided them all into the third bid, the GET bid, we have misdirected ourselves, but there is absolutely nothing in this point.

Let us look at the next paragraph 3.55: "We appreciate that there are material differences between the transactions involving the SCOP." They expressly knew this. There is express reference to 'redundancy', so there is nothing in those grounds of appeal either.

With your permission, I suggest that that is a sensible place to pause, and what I will be going on to do is talk about the employees, the indemnity, the vessels themselves, the crew and some other assets, and having done that we will have dealt with the bulk of the report that I am defending.

THE PRESIDENT: Yes, thank you. We will take five minutes.

(Short break)

MR. HARRIS: May it please the Tribunal, I had finished dealing with that part of the Remittal Report that was the important background, and hence why I spent time on it. If you were to turn back to the index, which you do not need to do, you would see that the next section is employees, and I am going to turn to that next. Then there is a section about the indemnity which I will come to, and vessels, in particular alternatives, and then crew.

I just locate it like that, because this is a manifestation of what I keep saying about how you add this to that, to that, to that. This is how it is all happening in the report.

The first point on p.41 of the report under this heading about employees is just a demonstration that we did not make the mistake that we are accused of in various places in the written submissions. It is at para.3.57. What we considered was whether employees transferred to or were acquired by the SCOP from SeaFrance. It is said repeatedly that we lost sight of the fact that these people had to come from SeaFrance. It expressly says there that that is what we are addressing our mind to.

What this, of course, is substantially directed to is the question that was posed for us at para.116 of the CAT's judgment, which is, notwithstanding a formal cessation of workforce contracts and redundancies, could there nevertheless "in reality" be the transfer of a workforce? Just so that you know we were doing what we were told to do, that appears on the next page, p.43, we recite para.116. That is exactly what we were told to do and that is exactly what we are, in fact, now doing. As you know, we did reach the view that when you do properly analyse it, in particular the actual facts, together with the indemnity, it did, in reality, come to the view that there was a transfer of a workforce from SeaFrance through the mechanism of the SCOP and the SCOP/GET combined associated person.

Just before I develop that, I need to deal with a much more pedantic and discrete point that is raised by the SCOP, the SCOP's point number 7. You will find that this is dealt with at the bottom of p.23 of our skeleton. You do not need to turn up any of those documents.

The point in a nutshell is that we are said to have acted inconsistently in this remittal report with submissions that we made in the first challenge. The point is that SCOP cannot be sensibly found to have "held the workforce together" - that is the finding in 3.52 - because

back then there was a different challenge about when the employees were acquired by the SCOP from SeaFrance.

What you will see, if you were to read 3.59 through to 3.61 of this report, is reference to the chronology of the SCOP. All I need to do is draw your attention (it is dealt with in our skeleton at the bottom of p.23) to 3.61 in the middle. The CAT - this is the previous CAT:

> "… found that the 382 employees … were 'acquired' by the SCOP during what the CAT considered to be the relevant time period …"

So the argument back then was, what is in the relevant four month statutory limited time period and what is not? The argument was that because the SCOP and the GET came together at a certain point in time you could not have regard to something that only the SCOP had acquired at a different point in time. It was all an argument about time limits. The Tribunal previously found that actually, within the relevant four month time limit, post the point in time at which the GET/SCOP became associated for time limit purposes, even after that there were relevant employees that were acquired by GET/SCOP. It has got absolutely nothing to do with the finding in para.3.52 which is that, on the CMA's rational analysis of the previous history, the SCOP was holding the workforce together.

So to summarise, there is nothing in the point because the time limits argument is completely unrelated to the point we make about the SCOP, in reality and in substance, right from its beginning, right from its nascence, holding the workforce together.

So that disposes of that ground of appeal. I only raise it because it is a discrete point.

I had already traversed the ground that I was going to cover in 3.68 and 3.69 about the various employees involved in the lay-up. You can see for yourselves the actual numbers, let alone the spread of numbers, of employees coming from an ex-SeaFrance background. That is all obviously highly germane to the analysis that we are directed to perform under para.116.

Then we reach, as we do with all of these sub-categories of topic, "Our views". That is on p.46. What happens is that the CMA, we say rationally, came to the view, the conclusion, on this particular topic that on 20th August, by the time of commencement of the service, 80 to 90 per cent of the SCOP workforce was ex-SeaFrance. As at 29th October 2012, the date of the reference, it was 70 to 80 per cent - you can see the figures.

They go on to say in terms, "We appreciate that interest all of the SeaFrance employees gained employment", but then, as I have said before, hardly any surprise there. That would have been a gross commercial mistake to do that. Instead, as indeed the French court had recognised that, at the same point it was being told this is not the end of the road, the business can still be sold, actually there probably is a need, or there is a reference to

reducing the staff position ratio. Again, they needed to rationalise this business in order for that part of it to carry on.

What we say is that these are factors that rationally support the view that the arrangements in question led to the substantial transfer of a workforce, or the transfer of a workforce in reality, and in particular they do not have to be continuous working contracts for there to be such a transfer, because that is exactly what it said in the judgment paragraph that we cite, 116.

Critically, it does not end there. On this particular fact set, and as part of a sub-sub-category, a relevant part of the story is the indemnity. I said I would come to the particular documents when I went through this report, and this is the point at which I propose to do just that. We saw the ones I wished to turn up yesterday, so I will take them ----

THE PRESIDENT: Before you come to the indemnity, do we find somewhere what proportion of the ex-SeaFrance workforce is in SCOP.

MR. HARRIS: 3.79.

MR. BEARD: I think 3.73 might be useful in the confidential version. During the administration period over 400 SeaFrance employees had been made redundant, so from the time of the crisis in SeaFrance they have gone from a situation of well over 1,000 down to the numbers we see there, and then less than half.

MR. HARRIS: Sir, further references are footnote 83 on p.44, you will have to have the confidential version for that obviously. You may find that is of assistance in 3.79 in the confidential version. You will see the second sentence, "As at 3 January 2014", and then there are some confidential numbers. Plainly, this is that part of the report where one finds the detail.

Then in bundle 2 of the hearing bundles, I would like to take you briefly to two documents you have seen before. The first is at tab 8. This is the English version of the Job Saving Plan or the PSE, the final version of which came to be known as PSE 3. I do not need to dwell upon this because, picking it up at internal page number 27 - it may be that you have highlighted the relevant bits from the first two pages that I can skip over - there is gradation of allowances, €1,500 on p.27 for X, €3,500 for Y. Over the page at the top, €2,500 for Z. Further down the page, 3.3, €10,000 for A. They are all different. Then there is a B, 3.3.2 on p.29, half way down the page, there is a €10,000 or a €1,500 for B. None of those applied.

What we were asking ourselves, per the judgment para. 105(a) and (b), was what was obtained in fact, and was it over and above bare assets, and can it be said to have been something that could have been obtained out there if you "had just gone into the market"?

What was not obtained is neither here nor there. All of these other things were not obtained, and in any event they are materially less beneficial than what was, in fact, obtained.

Let us have a look at what was, in fact, obtained. It is at 3.3.3:

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

and then critically -

> "… allowing similar operation …"

Just by itself that might go all the way, but it is "similar operation" of what? It is of the vessels. So we already know we are talking similar operation of cross-Channel ferries. Which vessels? It is the exact vessels that were owned by SeaFrance.

In order to get your hands on the $25,000 per employee you had to do effectively the same thing that SeaFrance was doing because you had to do a similar operation of those very vessels that had been owned by SeaFrance.

Then the next part, "in favour of" - in favour of whom? Strictly speaking, yes, as indeed you, Sir, said, Mr. President yesterday, it says "in favour of the SCOP or any other company". It does say that, but the point is that there was no other SCOP and there was no other company. In any event, what we had to look at was what in fact happened, not what might have happened by some other hypothetical SCOP which did not exist, or some other hypothetical company that might have been in the market to do "the similar operation of these vessels belonging to SeaFrance". There were no other people.

So what in fact happened is what we would have to look at, and in any event it was very tightly constrained. It was in favour of this SCOP. Yes, there is a little window there of possible hypothetical other people which never existed.

What does it have to be? It has to be a SCOP or any other company in which the employees have a direct interest and an indirect interest. That would rule out virtually every hypothetical company on earth. That is when you get your €25,000 per employee. Of course, that is massively higher than any of these other figures, and that was in fact obtained. We know - and I am sorry to repeat this - we know that right from the beginning Mr. Gounon and Mr. Giguet knew that they had to convert these voluntary redundancy payments into the missing €10 million, and this is where it comes from. Right from the beginning everybody knew that this is what was going on.

It is absolutely nothing to the point the following three things. Mr. Beard said ----

MR. BEARD: Let me be clear about one of the submissions being made by Mr. Harris. He has made the point, I think a couple of times, and I just want to be absolutely clear, when he

refers to Mr. Gounon and the quote from the judgment that he has gone to that was quoted at 3.23, he keeps saying "conversion into capital by personnel of their redundancy compensation". Is he actually saying that Mr. Gounon was referring to the PSE3 indemnities? That is what I am understanding him to say. If it is, it is not sustainable and I can come to that in reply. I just want to clarify that because that is not actually what the report says and it is not what Mr. Gounon says.

MR. HARRIS: Sir, I rely upon what is cited in 3.23. It speaks for itself. It says in terms, as well as the voluntary conversion into capital by personnel of their redundancy compensation payments. We know that right at the beginning, at the same time as this was being said by Mr. Gounon, Mr. Giguet was talking about the absolute necessity of getting the €10 million.

MR. BEARD: I am concerned ----

THE PRESIDENT: I think the point being made, Mr. Harris, is that conversion of their redundancy compensation may not relate to the indemnity. It is a different point. I think that is the point that you are making, Mr. Beard.

MR. BEARD: That is right, and I am particularly troubled when Mr. Harris relies on the comments of Mr. Giguet at 3.89. I am sure he will have looked, but of course footnote 94 of 3.89 makes clear that that was a comment made in January 2013, and January 2013, just for clarity, was at a time just before GET went to the French court to try and secure the indemnities because, of course, the liquidator had not said that the SCOP and GET could have them up until that stage. So it is a year after the acquisition.

I am just particularly concerned that the case is being put clearly and I know what I am supposed to deal with in reply. Thank you.

THE PRESIDENT: You see the point, Mr. Harris, that the quote of Mr. Gounon does not appear to anticipate necessarily anything like this indemnity. It is just saying you will voluntarily convert your redundancy compensation.

PROFESSOR BEATH: I wonder if the thing that links 3.23 and 3.3.3 is not the voluntary conversion into capital by personnel of their redundancy compensation payments, it is the share of equity capital being referred to in 3.3.3? It says there are two things in which employees have a direct interest, share of the equity capital.

MR. BEARD: Sir, with respect ----

THE PRESIDENT: Just one moment. Mr. Harris, is that your understanding of the link?

MR. HARRIS: What I say as regards 3.23 is that this was at a nascent stage of the PSE. There must have been a PSE 1 and then a 2 and then a 3, and we know that, in fact, as at 9th January it had not been fully conceived because it is only at the first meeting which was two weeks after 9th January that the particular insertion of a clause intended to provide the

special assistance was raised in the Works Council. That is 3.26. What I am saying is that this was a clear understanding at an early stage, 9th January, so two weeks before the precise PSE 3 comes into existence, that there needed to be a voluntary conversion into capital by personnel of their redundancy compensation payments. That was because of the critical need for missing finance.

What then happened was that it took the form of the PSE 3, and that was one of the things that was going on during this period of several months during the liquidation process. I am not suggesting that the reference in Mr. Gounon's statement prior to the PSE 3 even coming into existence was a precise reference to the PSE 3, because it obviously could not have been. What I am saying is, as part of the continuity and momentum that emerges from the background, there was a missing hole in the finance and it was clearly contemplated that it had to be provided from SCOP members, and we know that they very largely were ex-SeaFrance employees. So it is nothing to the point to say that there was not a reference on 9th January in Mr. Gounon's statement to PSE 3, because it did not exist at that point. That was the evolution of the liquidation process.

THE PRESIDENT: It does not actually come from SCOP members, does it, it comes from SNCF?

MR. HARRIS: It comes from SNCF, but it is critically tied to per ex-SeaFrance employees. It is €25,000 per employee.

THE PRESIDENT: It is aid to assist in employing those people, but it does not come from them.

MR. HARRIS: I am happy to rephrase it. It arises by virtue of the link in each case with it being an ex-SeaFrance employee. You do not get it unless you are an ex-SeaFrance employee, and in particular you do not get it unless you are taking on an ex-SeaFrance employee doing what I said before, a similar operation of these vessels on this route.

As for, Professor Beath, your point about the share of the equity capital, one does not know precisely what that is intended to mean. I can still make the point that the critical missing hole that was seen to be absolutely necessary is filled by this payment. That is why the CMA is able, rationally, to take the view that there was this link which the previous Tribunal adverted to as being a possibility. If you will remember from the previous Tribunal, it only would come if you got an ex-SeaFrance employee as opposed to, from para.105(b), going out into the market. If you went to a crewing firm you would not get any of this money.

That importantly gels together the package, so when you have this, you have that, and you have that, that and that, and there is a lot of gel. There is a lot of cement that is kept together by the missing finance provided through this indemnity.

It is absolutely nothing to the point, with respect to Mr. Beard, that it was not certain. So what? It did, in fact, happen. We were invited to analyse what did, in fact, happen. He made the point several times yesterday it was not certain. It makes no difference to me. He made the point yesterday that they were not necessarily entitled to it and they even had to go to the court for it. Absolutely, so what? They ended up with it. We were told to analyse what happened. We did.

It is absolutely nothing to the point, and I apprehend he may take a point, "Oh well, there may have been payments in tranches, or it may have taken a while for some of these payments". Nothing to the point at all. Did they get the money? Answer, yes.

So those are the points that I wish to make by reference to the document at tab 8.

Then the next document I may skip over in light of time, it is at tab 10 of the same bundle. We have seen large parts of this document already. I am entirely happy for it to be read in its entirety. I have no problem with that at all. That was one of the points that was taken against me. This is the document - I think you have got it in your bundle as 2.724 of the bundle pagination, where in the court minutes it is recording what the Court Receiver said (this is at the top of that page), "In this judgment" - do you have that?

THE PRESIDENT: Yes, we have got that.

MR. HARRIS: This is, *inter alia*, part of the court's record, the Court Receiver reporting to the court:

> "The end of the temporary business continuity is not the end of the road."

The reason I can take this fairly quickly is because we have seen it in the report and we saw it yesterday. That is the one that says even the goodwill may eventually be sold, and that is six lines down.

You may just wish to note, if you keep your finger in this document and go into tab 6 of the same bundle, which I think is 2.551 - that was a document to which you were taken yesterday by Mr. Beard, and this is again a reference to the bankruptcy judge's report - in this version of the translation, which starts at the top of p.2.551, "not the end of the road", so that is the same. Then five lines down:

> "The market exists, the vessels are quite new …"

So one can see that the translation is ever so slightly different. This one says the vessels are quite new and even the business may be sold later on.

The critical thing is that, whichever translation is used, it stands on our side of the scale, whether it be business that may eventually be sold because it is not the end of the road, or the goodwill that may eventually be sold on the second translation, they are self-evidently rationally capable of supporting the conclusion that the CMA reached.

Then back into tab 10, on p.2.731, that is where we find those references that I have cited in the report to the comprehensive integral bid.

Over to the next page (by the second hole punch), that is the reference to reviving the activities.

You could perhaps in your own time just take up the number of times that it refers in these few pages to "takeover" as opposed to mere "purchase of assets".

Then at the top of p.2.733, there is the reference that I think I took you to from the report that says three lines down, "the project relies on funding from the SCOP's employers".

That is, Sir, why I perhaps characterised it as I did earlier on, though I am not wedded to the particular language. The project, in the view of the French Commercial Court, did rely upon the funding that I have been saying, and in what amount? The €10 million that was missing from the GET funding.

Then it goes on to refer to some of the other assets necessary.

Incidentally, this is also the same document that refers to the vessels being "hyperspecialised". You will see that in a moment in the report. If you need the reference that is 2.748.

You may also care to note, finally, at 2.756, just an extract from a report by an outfit called Parimar Francharte, which is a specialist vessel broker who were employed by the court for an opinion. Amongst other things, they say at the top of 2.757, three paragraphs down:

> "We believe that DFDS would not want to miss an opportunity to acquire cheap ships known and valued by Channel customers."

That is just simply another factor. We will see it mentioned in the report in due course. I appreciate that this one is referring to DFDS. The critical point is there is another person, expert in the market on vessels, who is contemplating, one assumes rationally since that is what they do for a living, that there might be something worth acquiring in ships known and valued by Channel customers. We will see in a moment that the CMA completely agreed, and it was certainly rational for them to have done so.

If we can put bundle 2 away, that takes us back to the report.

That then gives rise to the end of the section of staff and indemnity at p.52, another sub-heading, "Our views". I have effectively, in the course of making the factual points, summarised the CMA's views. Overall what I say, of course, is now that you have seen them and understood them in context, particularly against the background and particularly by reference to those bits of evidence that I have just cited - after all, they were bits of evidence before the CMA, the French Court minutes, the bankruptcy judge's views, the court receiver's views, Parimar Francharte's views, they are all evidence. Did we have

evidence? Yes, that is what it was. Did we rationally assess it? Yes. Do you agree? Maybe not. Was it rational? Yes. Does it all contribute when you start adding it all together? Yes.

We do not finish there because what we then go on to is an exposition of the SeaFrance assets. That is the next heading in the report that begins on p.55. I am obviously going to take this much more rapidly, not just because of time but because these are not even disputed by the challengers, but, as I said before, it is critical that we know that they are there and how many strands there are within them.

Under the heading "Assets" they analyse characteristics and combination, and they ask themselves the right question. At p.57 of the report under the heading "Assets" and Suitability of the acquired vessels", 3.119, they note in the middle that the shipbroker, Parimar, thought that the ships might be known and valued by the Channel customers. They say:

> "We are of the view that there is a link between the vessel names and the route …"

That is a rational view based on evidence, based on professional evidence -

> "… and that GET/SCOP is likely to have acquired some advantage through goodwill inherent in the vessel names."

You will recall that in appendix B there is reference to goodwill. This is one of the constituent elements of goodwill. We have assets, special hyperspecialised, we have staff, we have, in our rational view, continuity of staff essentially, and then we have a whole raft of further strands, hyperspecialised vessels giving rise, *inter alia*, to goodwill.

Then over the page, 3.121, it does not end there. There is a further benefit, and here I am quoting 3.121, from having acquired sister ships.

The analysis, I am not going to dwell upon that, you have read it. You will have seen that there is a value in having sister ships. It is a particular factual detail, but it is a further strand, so we add that strand to the mix.

Then they ask themselves, and this is exactly in accordance with para.105(b) of the previous Tribunal judgment, could you have got these elsewhere? So they analyse the main alternatives. I am not going to go through them item by item because you have read them. There is a cost. They analyse cost. They, therefore, compare with what you could have got had you gone out into the market. That is exactly what they were supposed to do and they did it. What they conclude essentially is that the cost of going out and buying other vessels would have been, in relative terms, prohibitive, assuming they were even available. The analysis there, as we are about to see under the next heading on p.62, is that they were not

actually available. Bespoke hyperspecialised ships were not available, so that is the end of that, especially not bespoke hyperspecialised sister ships, they were not available out there in the market. This is the analysis of evidence upon which rational views are being taken. They then ask themselves, what about new builds? That is no good because that would have been (3.140) "significantly more expensive and more time-consuming". So far that is a rational view.

I know you have read this section, but you can see the sorts of things that were going on in this analysis, this specific evidential analysis of the vessels, 3.147. Some of the alternatives that were bandied around were 30 years old. They are obviously not substitutes for these hyperspecialised sister ships. Some of them (the next paragraph) were sub-optimal.

All of this, over pages and pages of analysis, so that is some ten pages of analysis, leads to 3.149 and 3.150, based upon all that evidence, "In our view… limited number of suitable vessels". So they have asked themselves the question in 105(b), what could you have got going into the market? Answer, a limited number of substitutable vessels - they are not sister ships, they would not have given similar service. You could not have chartered one, let alone two, of a similar size, and even if you could they would have been sub-optimal. That is the difference between what they got in their transaction and what you could have got going out into the market. Is it rational? Obviously. Was it based on evidence? Well, there is all the evidence for you.

Then 3.150, further specific considerations about these particular vessels. Again, obviously based on evidence.

That takes you over to 3.152, "In our view", the same sort of structure that we have been seeing elsewhere in this report:

> "In our view, the acquisition of the SeaFrance vessels …"

i.e. the ones that we have just analysed over 15 or 20 pages -

> "… is likely to have reduced the commercial risk for GET/SCOP compared with either buying/chartering and converting vessels …"

Reference to things like sister ships, retention of vessel names, further down, the fact that they were known to the ports. That is relevant, of course, because, first of all, it is what the previous Tribunal directed, but secondly, with respect to them, it is self-evident that if you have a business that is proceeding in actual revenue generating activities until a certain point in time, A, and then it stops, which this one did, but you can nevertheless, with reduced commercial risk, and elsewhere it is said, quickly, with relative lack of difficulty, start the business up again. So it carries on until point A, it stops for a bit, but then it is relatively easy, and certainly a lot easier than going out into the market and buying all the

stuff out in the open market, you can start it again. It is not that difficult to say that was a continuation of the activities of the business or a part of the activities of the business.

It is a bit like *AAH*. They carry on until point A, they then stop. Of course they stop for less time, but the point of principle is the same. Did they then start up again with relative ease fairly quickly and cheaply in *AAH*? Yes. Did they do this on the different fact-set here? Here are all the pages of evidence and analysis that says when you look at the specific things here and you add them all together, yes, they started up with relative ease, with relatively low cost and less commercial risk, and that is what the Tribunal told us to look for and analyse and here we are doing it.

That then takes us on crew, the next section on p.67. Again, I am going to take this one fairly quickly, but it is important not to lose sight of the fact that these are additional strands of the analysis. So there are some particular things that arise out of it being this crew, as opposed to some crew that you could have got, or, in fact, as we see in a minute, not got from a mere manning or crewing company. They, of course, were familiar with the vessels. At 3.158, it would have taken longer to train up some other crew.

A particular point here again that contributes to this overall combination that we were invited analyse, 3.159, you would be forgiven for never having known this at all in the face of the challenges, but there are particular factors relating to this particular crew, namely what is called Pilotage Exemption Certificates (the 'PECs'). This particular bundle of ex-SeaFrance employees that was obtained in this particular transaction, not some hypothetical transaction out there in the market, came with all kinds of added benefits.

That is what we were asked to look at. Did it come with something that was something more than bare assets? Answer, yes. Amongst many other things, like sister ships, etc, etc, some of these people came with PECs. Why is that important in this case? It is so obvious that it hardly needs stating. When you have got PECs and knowledge of the ports, etc, then it is going to be easier to start up something that has gone quiet for a while, easier when compared to going out and buying a new sea captain out there in the market, assuming there is one available, who does not have any knowledge of Dover and does not have a Dover or Calais PEC.

The list goes on and on and on. For instance, there is an analysis of the berthing arrangements and the fact that I think at Dover male goes on to female. The gangplank falls out from the dock on to the boat. That is what these ships were. They were, if you recall, hyperspecialised purpose built sister ships for this route, for this set of activities. If you had gone out into the market, which is the comparator that we were directed to look at, what they are saying is half the other ships, assuming they are available which they are not, they

have female/male berthing arrangements. So one does not need to get bogged down in the niceties of precisely those structures.

The point is that when one reads all of these pages one sees that there is a great number of additional factors that come together because it was this particular combination of assets from this particular former user or, if you like, actor with these assets. We were asked to determine whether there was something that you got over and above just the bare assets. That is what *AAH* directed us to do, that is what para.105 says, and these are our rational views on the evidence of some of the extras, if you like, that you get over and above by getting this particular conglomeration of assets.

Then one asks the question: can you rationally think that, having put this together with that, together with that, and that and that, can it amount to the continuation of the activities or part of the activities of the business notwithstanding that there was a period of time, not an insignificant period of time that they were not actually being used? Our view was, rationally, yes, when you add them all together in this context, when you analyse them evidentially like we have, you can say that that was a rational combination that, if you like, either one can analogise with a dormant business, a seasonal business, it went dormant for a while - to use the language of the previous Tribunal, it was reduced to embers but they did not go out - or alternatively one could perhaps say that it almost, if you like, a conglomeration of assets that are capable of being used but do not happen to be being used at that point in time, and that is because by that stage in time they had entered into a formal court liquidation process. So there had to be a point, there had to be a certain period of months when they were not actually being used because that is what the court had ordered. It does not mean that it is the end of the road. I wonder where I got that phrase from!

Then there is the berthing. I will skip over that. I have just effectively summarised that. Incidentally, you will just note that 3.175, DHB, that is the Dover Harbour Board, they told us, the CMA, that the process of establishing a new service was facilitated by the fact that the vessels were known to it. It knew which ferries fitted into which berth. These are other people taking the same view as us, which is relevant, of course, to the rationality challenge.

I am pleased to say that that takes us off those assets, and I would like to take you, before lunch, to some yet further parts of this combination that were acquired. Picking it up at p.74, there is a heading "Other acquired assets". As we know from appendix B, there was a great deal to the other acquired assets. Some of them are summarised here at 3.184, trademarks, including the SeaFrance brand, domain names, information systems, computer software and data files, as well as furniture, fixtures and facilities and computer equipment. Appendix B is referred to.

Can I just pause for a second? This is quite similar to what you will see or perhaps did see overnight in some of the retail merger cases. There is a big long list of multi-factorial assessments that together contribute towards the assessment that there was a business or part of a business. Here is our big long list and it really is significant. Domain names and information systems. Those are the sorts of the things - if you just take a step and ask yourself the question, "What might I need as well as physical assets for this kind of business for it to be an active business as well as my cross-Channel ferries?" I am going to need some staff, all the better if they are really experienced staff that come with the right certificates, all the better if they know the ports, we have got all of that. What else might I need? I might need some domain names. You did get that. I might need some information systems to get the business up and running, to actually make it work. You did get that as well. I might need some computer software. Lo and behold, you got that. I might need some data files including freight and passenger customers. Gee, you got all that as well. Then, on top of that, you got a whole associated paraphernalia of further fixtures and fittings and facilities. You paid quite a lot of money for it.

That is why the CMA was able, rationally, to say, all right, when you have actually got that full combination it is perfectly rational and reasonable to say that, in context, that amounts to a continuation of the activities, or part of the activities of the business, notwithstanding that it stopped operating commercially for a period of months. This is what is going on.

Just to pick up a few more points, there is "Our views" on p.76, so this is talking about our views on trade and domain names. There is a particular point I wish to draw out here because you were taken three times to para.3.194, but not to the critical cross-reference. What it says in 3.194 is:

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

That is about customer views. You may recall from this morning that customer views was a specific sub-bullet of the CMA guidance. They say it is relevant to have regard to customer perception, and it is. As it happened, on the facts of this case, neither party submitted any such evidence, and, due to the passage of time, the CMA could not do it itself. So one might have thought, *prima facie*, that that is not going to go very far.

What you were not taken to is the cross-reference that follows. If you read down, we have instead , so instead of the customer surveys or other evidence, reached a view based on other evidence. In particular, we note the SCOP's point at 3.225. Let us just turn that up, you have not seen that before. This is on the question of customer perception, and it is on p.83 of this report. What that says is:

"At the time of our original inquiry, the SCOP made the following statement in respect of freight commercial activity:

'We are suffering and we are appearing as a company in the continuation of ex-SeaFrance and we are not, but it has been very difficult to explain to the freight customers that we have nothing to [do] with what happened on the SeaFrance time.'"

So, in so far as it goes - and I am not pretending this is a customer survey, I am not pretending it is evidence that it is not - what evidence there is on this relevant factor is four-square on the CMA's side of the line. It is the SCOP saying, "We are appearing as a company in the continuation of ex-SeaFrance", entirely consistent with the sort of remarks that were being Parimar Francharte about goodwill and customer perception of ongoing use of vessels, a point made by the CMA earlier on in this report about retention of vessel names contributing towards goodwill.

What it says then, going back to p.77 in this report, at 3.195 at the top of the page is:

"Whilst we acknowledge that some of the goodwill associated with the brand and domain names is likely to have dissipated … nevertheless …"

THE PRESIDENT: Are they relying on the amounts offered by GET and P&O?

MR. HARRIS: Exactly. Then we go on to say that there is some value in these intangible assets.

Again, I am not overplaying this, I am not saying it was a critical part of the equation. As you know, I say that it is a cumulative exercise that you are performing and we were performing. You add this to that, to that to that, and this is a part of the material benefit.

Exactly the same point applies two pages further on at p.79 to the views that the CMA give in this report, its rational assessment of information systems and software. Is that the sort of thing that is necessary for "running a ferry service"? That is what the CMA say at 3.205, it is impeccable, it is obviously the sort of thing that is necessary for running a ferry service. That is why GET bid for it. Again, a perfectly rational assessment there.

It does not end there. In 3.206 it did not just get the IT systems that at 3.207 turn out to be bespoke IT systems. What do they get in addition? They get the very IT staff who were ex-SeaFrance employees who were experienced and "likely to have been useful in operating that system". That is not what you get when you go out into the market under para.105(b) and you just buy some IT system off the shelf and some IT data inputters. That is not what they got, they got this IT system for this route and this business with these IT people who knew how to run it. That is a further contribution to our assessment.

Did it contribute to reducing the risk associated with having to introduce new and proven IT systems? Obviously yes, so again, a further factor on our side of the equation.

Again, that is not the end of the story. Over the page, 80, customer databases, this is at para.3.213, are they entitled to consider the transfer of customer records is important? It says it in the guidance and it said it in the previous Tribunal judgment to have regard to all of these factors. Unsurprisingly, the CMA says, yes, it is important, and indeed P&O also bid for it, there remains some value.

That is a large and long list of things that were required and how they fit together. That only leaves me before lunch to deal with some things that were not acquired, and then after lunch in the remaining time it will simply be dealing with *AAH* and the merger retail cases.

THE PRESIDENT: It would be sensible to stop there and come back at five to two?

MR. HARRIS: Yes, we are quite happy to do that.

THE PRESIDENT: Very well, five to two.

(Adjourned for a short time)

MR. HARRIS: Good afternoon. I was about to turn to the assets not acquired on p.81, but I just want to make some round-off remarks in relation to the point where Mr. Beard interjected, so that is on p.30 and 31 of the Report, a few short remarks. So this was by reference to the citation from Mr. Gounon on 9th January 2012. The first point is the suggestion, I think, was being made that his reference to voluntary conversion to capital by a person of their redundancy compensation payments, that was not to the PSE3, or that is how I understood it. You heard the first answer to that is a chronological one, it did not exist then. The second answer is that it says the personnel have their redundancy compensation payments so as to allow the plan to overcome its two main handicaps, and no.1 one of those was initial financing. We know the gap there was significant, so whatever this was referring to it was referring to a significant need for financing, and the indemnity filled that gap. So the precise nomenclature is of less concern but, in any event, if you would like to turn back up – unless you want to take it from me – in bundle 2, tab 8, the indemnity document, to p.2.625 you will find that all of the various types of monies that were being offered, 1500, 2500, 10,000, 15,000, they all come under the following heading: "Measures Aimed at Facilitating Return of Redundant Employees to Work". So it would be completely unfair if any suggestion is, in due course, to be made that there is no rational basis upon which the view could be taken that this reference to what must have been significant conversion of redundancy compensation payments to fill the gap of initial financing could not be fit by what subsequently invented and emerged, being a PSE3, given that that is referred to as a measure for redundant employees.

Then the final point is this, Mr. Giguet's remarks, a chronological point was taken about them – look at the footnote, look when he mentioned them. That, with respect, goes

nowhere because, first, it does not make any difference when the precise receipt of the moneys via a €25,000 indemnity arrived in the hands of the SCOP it just does not make any difference at all whether bits arrived on day one, a little bit more dribbled in six months later, it does not make any difference whether it had to go to the court and establish the legitimacy of that payment, it does not make any difference, it all arrived. There is no basis upon which it can be said in any event that Mr. Giguet's remarks, as cited at 3.89 of the Report, can only possibly have been referring to the absolute necessity for that money as at January 2012. First, there was no basis in the language used for him meaning that, and it would not have made any sense, because if it was absolutely necessary at any point, and the suggestion being here that it can only mean absolutely necessary in January 2013, if it was absolutely necessary in January 2013 it was equally absolutely necessary in January 2012 and, furthermore, it does not even say that. It does not say: "I am only making this point about it being absolutely necessary now in January 2013". If anything the suggestion, and I am not suggesting this is comprehensive because I do not expect the point was particularly in mind, but there is a reference to "previously" in the formal negotiation, so there is a reference to 'back in time' in any event.

Finally, just to put this point to bed, this is a good example of one even if, which I deny, of course, there were anything in this point, on a rationality basis – somehow we have gone completely irrational when we were assessing this – you would then have to ask yourself the question: does this precise nomenclature/chronology point make any difference to the overall assessment? The answer is obviously not, because the substance of the matter is they were missing finance, the finance then got provided, and how did it get provided, critically by the forging of a link through the indemnity between the ex-SeaFrance employees and the vessels on this particular route.

So, even if there were anything in the minutiae or the detail, which I do not accept, it would not go anywhere anyway.

That then takes me over to assets not acquired, and then after that to *AAH*. This one is very self-explanatory in the report. I pick it up, if I may, at p.81 under the heading: "Assets not acquired". I am going to go straight to our views on p.82. Because, *inter alia* in the guidance and *inter alia* in the previous Judgment it is made clear that transfer of customer contracts or potentially a customer base is relevant – is a relevant factor, you look at it. Just because it is not there does not mean that you die, that your analysis fails. As it happens, there was no transfer of customer contracts or, for that matter, supply contracts, whether they be passenger contracts or freight contracts in this case. Incidentally, just as in *AAH*,

they were deliberately not transferred, the customer contracts in *AAH*, and they were not transferred here either and yet both were mergers.

What it says is very straightforward, picking up at 3.222:

> "In relation to freight traffic, GET told us that customers typically entered into framework purchase arrangements"

And that amounted to a certain percentage of turnover. However, 3.223:"Typically, freight contracts are not exclusive and it is common for customers to have contracts with several providers", and critically:

> "A contract does not commit a customer to a particular level of usage and it is not necessary for the customer to have a contract in place in order to use a particular service."

So you can come along and use MFL's freight services wholly irrespective of whether or not you have a freight contract with them and, for that matter, even if you are using MFL you can use P&O and you can use DFDS, you can use whoever you like – you can use the Tunnel, and some of the bigger players probably use all of them. "The arrangements may, however, specify some certain beneficial commercial terms". We do not deny that, here we are citing it.

3.224, GET told us certain things and:

> "Despite these difficulties, GET indicated that it had been able to demonstrate that it was a credible operator . . ."

So, notwithstanding GET did not have these freight framework contracts in place, nevertheless, it was a credible operator.

We have seen the point at 3.225 before about customer perceptions. Over the page at 3.227:

> "Our view is that, while GET did not receive the benefit of any existing freight contracts on acquisition of the assets, the opportunity to negotiate contracts arose relatively quickly (within five months . . .)"

I just pause, this is just the freight framework contracts; that does not mean that they did not have freight customers before the freight framework contracts were negotiated. On the contrary, they started to gain customers post 16th, or perhaps 20th August when they started operation even without freight framework contracts. What it says is that: "MFL was at that stage able to compete for those contracts" i.e. the framework contracts, "on a normal commercial basis".

Indeed, when the response is, as it is, and perhaps will be later this afternoon: "Ah, yes, but we did not get very much and it took a while" partly the answer to that is that some of the difficulties that the company had in negotiating freight contracts are likely to have been due

partly to the fact that MFL's prices were initially too high, so that is partly the answer on the evidence and the rational assessment to that point. It does not end there because on the final sentence: "There also appears to have been a negative effect from a perceived continuation of the SeaFrance business".

Just pausing for a moment, of the three things that are at stake here, freight contracts, passenger contracts, and supply contracts – things like supply of oil and tobacco etc., we have dealt with freight contracts and a rational view is taken that although, yes, there are some benefits, to freight framework contracts, some of the commercial arrangements about discounts and rebates, loyalty, that type of thing, in the context of this other big conglomeration of factor and strand after strand after strand they were not unduly important. You can get freight customers anyway, and you did. You may not have got as many as you might have wanted but that is partly your own fault, and you can, in any event, after only a few months negotiate the very freight framework contracts, and in context they are not of critical importance, such that when they are not there it means that you fall flat on your face.

THE PRESIDENT: We have read the other two paragraphs. Your point is a very simple one, they did have regard to the fact that these contracts were transferred. They looked at it and they concluded in the context of this industry, for reasons they explain, it is not that important in this industry as it might be.

MR. HARRIS: Absolutely, in the case of freight contracts there is a little bit of importance but it is not that important, and in the case of passengers and suppliers of nil importance; absolutely nil. And, critically, Sir, the point you just put to me "in this industry", because what we are told is that *AAH* wins this case, hands down, right from, the beginning, even though, of course, the previous Judgment does not say that, and the guidance does not say that. But, what we are about to see, when we turn to *AAH* is that the critical part of the assessment there was about that industry, why it was important in that industry, and that is a different industry with certainly different features.

So that is what I have to say about the report, save only for this postscript that I do not propose to do out loud, but just to reiterate a point I made before. Apologies for the length of this, but I am sure you appreciate how important it is in defending this report to see the report, if you now were to re-read either the summary (the first 10 pages) or pp.86 to 92, you would see that they are a very faithful succinct summary of all of those sections that I have just been through, so if you were to just re-read them and say, for example, when you talk about the specialised nature of the vessels it means sister ships, pilot exemption certificates, etc, when you look at the indemnity and you say this pithily, what you mean is

all of that subsection, etc. So I do respectfully commend the re-reading of either or both of those sections after this hearing.

Unless there are any more questions on what is in the report, I would like briefly to go to *AAH*, and after that to the merger cases. This is to be found in your bundles at authorities bundle 2, tab 35.

THE PRESIDENT: Your point, just pausing for a moment, all this about Mr. Gounon, and so on, you are trying to suggest there is some continuum to the PSE3. There is a little bit of that in the Decision suggesting that the contracts of employment were not terminated – I think they pick up the phrase from the Judgment – with no thought as to how they might be employed in the future, although the Judgment below actually said that was the case, it did not beg the question, that was the position. But the basic reasoning of the CMA, it seems to me from reading it, is not really tied to some continuity in that respect, it is to do with the link which the indemnity creates between taking over the vessels and re-employing the ex-SeaFrance employees, that is a very particular and rather unusual feature, in fact, highly unusual feature of this case.

MR. HARRIS: I completely agree, Mr. President. When one reads it in the summary of the first part of section 4, the phraseology used is "forged a link" – absolutely critical. We say, and on the basis that I have been through, that that is the indemnity that ties together the critical missing bit of finance with the critical relevant employees, i.e. with all of these features about knowledge of the route, pilot exemption certificates, and the critical vessel to which they, themselves, were so specialised. That is why before I referred to it as a bit of a 'gel' or 'cement' or the terminology of the report is 'forging the link'. What we say is there is no sensible basis upon which you could say that that was not a rational conclusion to reach. I absolutely 100 per cent endorse that comment, but I would not limit it to that because for the reasons I have given, including by reference to the background there is the continuity point as well.

As for the last point, Sir, when you say "unusual", "highly specific" – absolutely. All of these cases turn on their facts. I do not mind if this is called "unusual", "highly unusual", "exceptional", call it what you like, the facts are the facts, and when they are rationally assessed they can lead to that conclusion.

So there is *AAH* which, as I say, is in bundle 3B, tab 35. This was a case in which a merger was found. I would just like to identify, but without turning all the pages, some of the features which were not present as part of the transaction, but nevertheless the judgment was, when applying the judgment to the facts, that it ended up in a merger – even with these features. So virtually all of the employees were made redundant, so there was no

continuous service. There was no acquisition of the benefit of any Medicopharma existing contracts, nevertheless it was still a merger. There was no acquisition of any customer lists for Medicopharma but it was still a merger.

There was a hiatus, looking at the report, if you just want to note it is at 4.108 and 4.110. The hiatus in trading was three or four days. We know that it ceased on the Sunday night, that was the 3rd, if you look at 4.108 and 4.110 the depots crept back into operation, one on the Thursday, three days later, and one on the Friday, four days later, so that was the hiatus in that case.

Then the argument was made that a whole raft of other benefits were not acquired – picking it up at p.61. So the merger parties were making the same arguments to this MMC that these challengers are making to this Tribunal, and they list out a whole raft of things that did not feature in their transaction in an attempt to persuade the MMC that this was not – let us just look at them: "(a) There was no transfer of customer goodwill", "(b) There was no continuity of customer order supply", "(c) No trading or business names." "(d) No trading records", "(e) No rights . . . as successor to the 'business'". "(f) No rights to prevent . . . selling other warehouses… all trading names" did not go. "(g) No non-competition covenant", "(h) No customer lists", "(i) No outstanding supplier orders." "(j) No . . . licences", "(k) No employees were acquired by right." "(l) No computer software licences". "(m) No… franchise." "(n) No trade or other creditor liabilities were acquired", "(o) No arrangements were made to prevent other wholesalers gaining full access." So all of these things did not take place in that case and yet it was still a merger, which just goes to show that the absence of any one of these would not be determinative, let alone none of them were present, and it still was not determinative. There were plenty of other factors that pointed in the opposite direction. They were assessed in the rational judgment of this MMC, and they came to the conclusion that it was a transfer of a business from A to B.

Let us have a look at some of those factors, because it is quite telling, though obviously the factors are different, that is part of my case that this is a fact by fact, case by case assessment, but some of them are really quite telling. I am just about to turn to them but, before doing so, can I just draw your attention, please, to p.124 because there is a little section about how one goes about, in the view of the MMC, interpreting the relevant provisions of the Act, which are materially identical. 6.67 on p.124: "The word 'brought' is not defined in the Act." Then, the final line: ". . . the question whether it limits what can be taken into account is to be examined, having regard to its context and the purpose of the Act."

So, in our "broader observations" at the end of section 4 of the Report, where we talk about having regard to context and purpose of the Act, that is specifically endorsed by this MMC. Then they are talking about not looking at things in isolation at 6.68. We are not confined to the legally enforceable agreements of transfer, you have to consider it in its context and having regard to the purpose.

6.69:

> "In our view, one of the intentions and purposes of the Act is to enable the MMC to consider commercial realities and results and not just the results of legally enforceable agreements."

Again, we respectfully completely endorse and, indeed, repeat effectively that phrase in the section "Broader observations" at the end of s.4 of the report. We have had a look at commercial realities, and we have had a look at results – not hypotheticals, and we have not been hidebound by minutiae or transactional mechanics or particular chronologies, what we have had regard to is commercial realities and results, and no surprise that this is what the previous Tribunal says we are supposed to do. The previous Tribunal said it, the MMC said it here, we repeat it and then we do it. That is again a forlorn territory for a misdirection challenge.

That then takes us over to some of the particular factors in this case. At 125 they talk about having regard to the overall effect. Then we can pick it up at p.126 ----

THE PRESIDENT: This is still on common control, is it not?

MR. HARRIS: Yes.

THE PRESIDENT: Not on enterprise?

MR. HARRIS: No, it is not. 6.77, I said I would come to this, and here I am coming to it. The MMC says:

> ". . . if a company has decided to cease to trade, this decision, and whether and to what extent it has been given effect, is a relevant factor . . ."

but it is not determinative. That is exactly how the CMA has approached it. It is a relevant factor and, indeed, we accept it is an important relevant factor in this case – a non-trading period of several months. But it is just one factor amongst others.

Then another factor is what the company in fact transferred.

> ". . . we consider that the mere fact that a company has made the decision to cease to trade, or even has ceased to trade, and is thus not actively carrying on its business as before does not mean that its business or part of it cannot be transferred as a going concern or that the activities or part of the activities of its business

cannot be brought under common ownership or common control with enterprises of another."

In other words, it is not decisive.

THE PRESIDENT: Well, that is common ground.

MR. HARRIS: I accept that. What is important here is it is just identifying it as another factor amongst many.

THE PRESIDENT: It is obviously relevant.

MR. HARRIS: What they then go on to say, at 6.79, the critical sentence is the final one combined with a sentence in 6.80: "In our view, the facts of this case lie between these two situations" – where there is either a complete cessation or a continuation. What they go on to say in the second sentence of 6.80 is: "We consider that this question is one of fact and degree." Again, this is exactly what the previous Tribunal said, exactly what they directed us to do and, therefore, exactly what we did. What is more you should do this "as a matter of commercial reality", that is what it says at the top of p.127. So that is what they do, they have a regard to all of the facts in the exercise of their judgment, bearing in mind that it is a question of fact and degree, and you should approach it as a matter of commercial reality, and then what is about to happen is they have regard to the critical set of factors on the facts of that case.

Just before we start to look at a few of those it is worth pausing to note that that conceptually is identical to what the CMA did in this case – fact and degree, exercise of judgment, look at all the factors, multi-factorial assessment, no particular one is decisive let alone cessation of trading, and you do it as a matter of commercial reality. Of course, the factors are different, but the approach is the same.

What it says in 6.81 – now we are talking about contracts with customers – is that in many cases that is an important consideration, not in all cases, obviously.

Further down they go on to say that it was true that outstanding customer orders had not been assigned to AAH, etc. "What is most important in the preservation of the customer base of a pharmaceutical wholesaling business", so what they have done is they have said in many cases customer contracts can be important but in this business, this is in the middle. Most businesses between retail pharmacies and wholesalers are not on the basis of formal or long term contracts, so in this particular industry that is not a terribly helpful criterion is what they are saying. What they do say is that in this particular pharmaceutical wholesaling business one might have regard to the preservation of the customer base, and what is important in that regard is the creation of a contact in connection with the customer.

Pausing there, that is fine. I have absolutely no difficulties with this as regards a pharmaceutical wholesaling business that has daily double orders from customer to supplier and lots of phone calls between the customer and the supplier, and a personal relationship between the guy on one end of the telephone and a woman on the other, etc. No problem at all. One can understand exactly why they have analysed it. None of that applies to a ferry business. Indeed, the actual analysis of the customer, if you like, set up in the ferry situation is the bit of the report that we just looked at, freight contracts by way of framework are not really that important, albeit there is something to be said about them, and the rest of it is completely irrelevant, it does not matter two hoots. So, for Mr. Gordon to then say that this is the essential and single criterion for the transfer of enterprises is utterly unsustainable. It is a fact dependent analysis of the industry in this case and even then it does not work because what he subsequently went on to say is that every single remaining paragraph between 6.81 and 6.102 is only about, and exclusively about the transfer or the preservation of the customer base or a substantial part thereof. It is just wrong.

Let us take the next one, that one is talking about locations of a depot, so it is attributions of a physical asset, that is the focus of that paragraph. As it happens, there are relevant characteristics or criteria associated with physical assets in our case, not preservation of customer base at all. For instance, male/female docking sister ships, etc.

THE PRESIDENT: The location of depots is important because of its ability to serve the customer, is it not?

MR. HARRIS: In part I agree with that, but in the same way the characteristics of the vessels are important because they had, to quote Parimar or, perhaps badly misquote it, customer perceptions associated with them, so that is a parallel, and there was also the point about the retention of the vessel names, which had an element of goodwill in the names of customers

THE PRESIDENT: I cannot follow that given SeaFrance's general reputation.

MR. HARRIS: If you recall, they do not say it was very pronounced, but they do say that, in combination with many other things it formed part of a material benefit. After all, Sir, one says that and, I agree, somewhat sceptically but, after all, they paid hundreds of thousands of Euros for some of these intangible parts, customer lists and domain names, trademarks and logos, and P&O were busy bidding for them as well. So, we can slightly turn our noses up at them, but they cannot be disregarded.

Then there is further focus on particular depots in 6.83 - I am not going to go through them all in the interests of time but, in any event they are different. At 6.88 a key element of the goodwill is the knowledge that the employees have of customers in relationship with them in that industry, but in our case the customer lists were bought.

THE PRESIDENT: We understand your general point which you made very clearly.

MR. HARRIS: To finish then on *AAH*, 6.102, p.131, what you have then in those previous four or five pages is a value judgment exercised by the Competition Authority after a multifactorial assessment on the reality and it says you obtain much of the benefit, and that is identical to what happened in our case.

That simply leaves the cases at the end that were added by GET yesterday at tab 50 with their note. I am conscious that the Tribunal may not have had a chance to look at them, we have prepared a very short note of our own to respond. This is just a speaking note, so you can locate them later.

The essential point we make in our skeleton, to which the tab 50 cases were supposed to respond, has been missed altogether. What we simply said is that some retail businesses do not have a customer base that can be transferred, they just do not. The one we say here is imagine a retail corner shop has nothing but *ad hoc* drop-in customers. That might be an example. It does not particularly matter what the example is.

Another example might be an undertakers, you are not expecting a repeat business, self-evidently, if you are an undertaker, or perhaps door to door sales - perhaps you go and offer to relay the concrete on somebody's driveway by knocking on the door by saying: "We got a bit of concrete here" - you are not coming back, but you have a business. You do not even have a geographical location. You might have employees, you might have a trading name, you have vessels, you have kit and equipment, and you have a business. All that can be sold but it does not have a customer base, so-called. All we were saying is, if - which is wrong - the single criterion that was essential for the two enterprises to cease to be distinct is that you transfer the customer base that would mean that some retail mergers would not fall within the scope of merger control at all because they just do not have a customer base. That does not depend on whether the particular retail business in question ceased trading for a hiatus period or not. If you do not have a customer base you do not have a customer base in the sense of one that can be transferred whether you are trading or not trading.

But GET, in their note, ignore that altogether. The point is actually made and instead they come back with some references to some cases solely where there was a cessation of trading. It is beyond me why they have done that, but anyway that is what they have done.

All we do in the remainder of this note is we go through those cases in bullet point form. We show that by reference to each of them, and we have not found a single reference in any of them to the necessity for the transfer of a customer base, let alone that it is the essential criterion. On the contrary, what we found in all of them is a conglomeration of a broad range of factors in a multi-factorial assessment, including - no surprises - many of the things

that we found on our assessment of this case, such as a combination of assets, fixtures, potential transfer of goodwill, etc.

Just for good measure, if you would not mind adding a footnote on your copy of the note on para. 5(b), p.2, we refer there to the perceptions of some of the customers, the maintenance, the expectations of that type of business and, as you know, the relevant bit of evidence in our report is Remittal Report para. 3.225, where the SCOP were saying that they are - to paraphrase - continuing to be tarred with the SeaFrance brush.

What one gets out, in conclusion, from these cases is not the proposition - for a start they miss the point that is being made and, in any event, they do not establish the proposition for which they are sought to be advanced. On the contrary, they are supportive of a multifactorial assessment of the type that we have engaged in.

What I have done in the course of those submissions, I hope, is to establish the defenceability of the report and swept up the various challenges that are made against it, sometimes specifically but more usually compendiously and overall.

If there are any specific points arising out of any specific parts of the written challenges that you wish to put to me I am very happy to deal with them, but I do not propose to go through any of the specific points.

May I have just one moment? (After a pause) Sir, unless I can be of further assistance those are the CMA submissions.

THE PRESIDENT: Thank you very much, Mr. Harris. Mr. Pickford.

MR. PICKFORD: Mr. President, Members of the Tribunal. We adopt Mr. Harris's, if I may say so, powerful and eloquent submissions. We would just like to highlight and draw together some points which we say are of particular importance in this case, and I am proposing to cover, subject to time, three or possibly four broad areas.

First, we would like to consider very briefly some overarching points in relation, in particular to what we say is the correct legal approach on some of the key issues arising in the case.

Secondly, I would then like to step back and consider at a slightly more general and abstract level what activities and enterprise the business actually performs, and then apply any insights from that to the present case.

Thirdly, and this is very much the one that is subject to time, I may look at some of the specific issues that we highlight in our skeleton under "further observations", that is at paras. 19 to 29 of our skeleton. If I do not have the time I simply refer to those points and we do not resile from any of them.

Finally, I would like to spend a few minutes on the commercial context which we say it is important not to entirely lose sight of.

Given my limited time I am not going to be able to go to the source materials and the authorities, obviously where I do not I will try to give the relevant references.

Starting, therefore, with the overarching points of the case. Much has been said about the distinction between questions of law and the exercise of judgment in relation to matters of fact and degree. I would hope that by now it should be common ground that the definition of an 'enterprise' is a question of law, and then the application of that definition to the facts of the case is a matter of fact and degree. We see that, for instance, in the original Judgment from the Tribunal at paras. 97 to 99, 105 and 122.

We say it follows that the CMA has no margin of appreciation in relation to the question of law, but it does need to apply its judgment and it therefore has a substantial margin of appreciation in relation to the application of the legal test to the facts of the case as it finds them.

In the present case the legal test is set out clearly in para. 105 of the Tribunal's Judgment - I do not need to repeat it, we have heard it said a number of times. What the CMA did is apply precisely that test to the facts as it found them. It made an assessment of the particular combination of assets that were acquired by GET and SCOP, and it found that that went beyond bare assets, and that is because it is said that when those assets, which we have heard from Mr. Harris included the vessels, the former SeaFrance employees, the IT systems, the customer lists etc., when they were combined together in the particular context of providing ferry services between Dover and Calais, and when looked at in the round they enabled - and this is to quote para. 4.19 of the Report:

> ". . . establish ferry operations, more quickly, more easily, more cheaply and with less risk than if the relevant assets had been otherwise acquired in the market."

We say that should be in many ways the beginning and the end of the case.

How do GET and SCOP attempt to attack that approach? SCOP says, first, that the CMA's approach was a legally erroneous one, and there are two immediate responses, we say, to that. First, that as the President anticipated yesterday, the CMA's test is the Tribunal's test, and if SCOP had a problem with that test they should have appealed that a year ago because the seven and a half month hiatus in trading, or nine months - however one describes it - with a significant number of employees being made redundant, was quite clear from the facts at the time. There was no dispute about the fact that there was that seven and a half month hiatus. If that had been determinative, then that should have been appealed because the right order in that case would have been quashing rather than remittal and even if the

right order had still been remittal in order to consider whether there was any kind of risk of some other potential finding, and the out of abundance of caution suggestion that Mr. Beard suggested yesterday, there still would have been a different test, we say, to the one that was actually applied at para. 105, that is implicit in the SCOP's legal case, and I will come on to that in a moment.

We say the second problem with the SCOP's approach is that it is unable to articulate precisely what the right legal test should have been. It says that generally you cannot have a cessation of trading - perhaps sometimes you can; one example would be *AAH* but we cannot tell you precisely what the guiding lights are, we are going to reserve our position on that.

We say that if the allegation is an error of law that approach is not sufficient, because if the CMA misdirected itself, the SCOP needs to be able to articulate precisely what direction in law the CMA should have given itself, and we say its failure to do so is indicative of the lack of substance in the suggestion that there is an error of law. Now, Mr. Gordon, for GET recognised that problem, he was quite right to recognise that problem because he tried to fill in and demonstrate what the test should, in fact, be. However, his test had its own problems, and we say that they, in fact, illustrate perhaps why the SCOP was a little more coy about articulating a test of its own.

The problem with GET's approach is that, first, it is flatly inconsistent with the Tribunal's test because no one was suggesting before the Tribunal that there was any customer base that was transferred and so if that was critical in this kind of a case it should have been determinative, and therefore the right order should have been a quashing order and not a remittal order.

The second problem with the GET legal submission is that we say it is inconsistent with their own recognition that there are plenty of enterprises where you do not have any clear customer base. There are the start-up pharmaceutical companies that they refer to, or the seasonal businesses that we have also had reference to today.

THE PRESIDENT: I think his point was that this test - the customer based test - applies where you have a cessation of trading, that is clearly if trading continues, it is taken over as a going concern, this problem does not arise at all. If you have a cessation of trading then you have a big question mark - is it still an enterprise? He says in that situation the customer base is the governing test. I think he says therefore you do not have to apply it where you have an ongoing enterprise set up with a view to gaining customers, which are his illustrations.

MR. PICKFORD: I will come on to deal with that because I would like to give some counter illustrations ----

THE PRESIDENT: That is the way I understood it, anyway.

MR. PICKFORD: -- which illustrate very clearly that one can, in fact, have a cessation of trading and there still to be an enterprise that has value in it, and I will come on to that under my second topic, when I am standing back and considering the question in a slightly more abstract sense.

Then, just dealing with the question of the need to appeal, because Mr. Beard suggested that there was no need to appeal, in fact, in this case because the Tribunal has co-ordinate jurisdiction with the previous Tribunal and is entitled to reach a different view. We say that is wrong. We say that for the very same parties to the original Tribunal proceedings to now attack the Tribunal's decision ----

THE PRESIDENT: It would be very odd to quash the decision of the CMA reached following an earlier Judgment of the Tribunal telling them what they should do if, in fact, they did what they were told to do, because we think the previous Tribunal was wrong, because the CMA are then in a sense damned if they do and damned if they do not.

MR. PICKFORD: Absolutely. That is our point. We say it would, in fact, be an abuse of process, or however one describes it, whether it is an impermissible attack, a collateral attack on the previous Judgment or an abuse or simply as you described, very odd in the circumstances, it would be quite wrong.

We refer to some more relevant authorities in a letter from my solicitors of 20th November. The key one - I am not proposing to take you to it now but I will give you the bundle reference.

THE PRESIDENT: Letter of 20th November?

MR. PICKFORD: Yes, it was 20th November, last week.

THE PRESIDENT: I am not sure I am aware of that.

MR. PICKFORD: It was dealing with issue estoppel, and it was pointing ----

THE PRESIDENT: We have it, yes.

MR. PICKFORD: -- out issue estoppel, *per se* may not apply.

THE PRESIDENT: That is right, yes.

MR. PICKFORD: But abuse of a process does, and in particular the key authority is the *Ryan* case, it is bundle 3C, tab 48, para. 30 in the Court of Appeal. I am not going to go there because I think the Tribunal well have this particular point on board.

I would, however, just add very briefly in relation to what we say would be an abuse, that it is also important to consider the commercial context here. I am going to develop that, as I

said, at the end of my submissions, but just very briefly to anticipate what I am going to say in relation to that. The commercial reality here is that, as found by the CMA, GET and SCOP are operating a loss making business. Why would they want to do that? The reason why they are doing it is because there is currently excess capacity caused by the operation of MFL and DFDS at the same time on the same route, and plainly there is a game of 'chicken' in relation to who leaves the market first. If DFDS leaves, which is what the CMA believes will happen if this merger is permitted, then there will be a substantial lessening of competition. In that case we say that given the delay that will be caused by any kind of revisiting of issues, that should have been appealed against a year ago, now and the effect that that would have potentially on my clients, and therefore consequently on the public interest, again it would be quite wrong to allow that kind of impermissible revisiting of issues at this stage. That deals in very brief terms with an allegation of an error of law. That simply leaves SCOP's argument that the CMA's approach was irrational in relation to which we say simply this. If one accepts, testing the pure irrationality challenge, that the CMA applied the right legal test which, by assumption one must, and that it was correct to identify what was acquired above bare assets and how that put GET and SCOP in a different position to attempting to start a business entirely from scratch. We say it is not possible in those circumstances, as Mr. Harris has explained very clearly. What is irrational about the CMA's approach? I do not intend to say anything more about it given my limited time.

The final point we make in relation to the correct legal approach is this: we say the question of what constitutes an 'enterprise' is an objective one. The SCOP make much of the fact that in *AAH v Medicopharma* there was an attempt at circumvention. We say the interpretation of what constitutes an 'enterprise' does not depend on the subjective intention of the merging parties, whether it is avoidance of merger rules or otherwise, and I can demonstrate that with a simple example. If one imagines two sets of arrangements, which are entirely identical in objective factual terms, the difference between them is in the first case the arrangements have been designed that way because the person who designed them attempted to avoid merger control.

In the second case the arrangements are identical but there was never any intention to avoid merger control, it is just how they happened. We say whether those arrangements caused enterprises to cease to be distinct must be the same in either case - there is no subjective element under the test in the Enterprise Act at all. We say either there was a transfer of an enterprise or there was not, and so the way which we say anti-avoidance come into the picture is as follows - it is relevant but we say it is relevant in this particular way. The legislation obviously needs to be construed in a way that avoids it to be deliberately

avoided, and so insofar as that means it must be broadly construed, we are quite happy with that. What we say is that that will carry across and apply to all situations on the same facts, even if there is not actually an intention to avoid merger regulations. We say it follows that the reasoning in *AAH / Medicopharma* could not logically have depended upon the particular subjective intention of the merging parties, and when one actually looks at para. 6.102, which we have been to so I am not going to revisit it, we say that is clear from the key reasoning set out there.

There is just one other point I need to make about intention because intention does feature in the CMA's Report. We say intention can be relevant in this other sense in that it can provide relevant background which provides the narrative and is corroborative of the objective construction of the objective arrangements, and we say that is the way in which, in fact, it has been used in the present case. Ultimately, there is an objective test, but it is quite permissible to supplement that by looking at the narrative of what the parties were intending and using that in a corroborative sense, and that is the only way in which we say ultimately those matters, properly understood, have been used by the CMA.

THE PRESIDENT: It might be relevant, might it not, if the question is looking at the commercial reality, which is an objective sense?

MR. PICKFORD: Yes.

THE PRESIDENT: The commercial reality might be different if they are saying 'deliberate avoidance'?

MR. PICKFORD: It is possible, Sir. That is taking my example and saying that the commercial reality is, in fact, different in each case. The objective arrangements are different in each case and if the objective arrangements are different, and you can see that they are different because of something that you know from the surrounding context, that is permissible.

THE PRESIDENT: Although the technical steps being taken are identical, the commercial reality of what is being done is actually different, objectively viewed.

MR. PICKFORD: We say it has to come back, ultimately, to an objective view, yes.

THE PRESIDENT: Yes, I am not sure, interesting though this discussion is, that it matters hugely for this case.

MR. PICKFORD: That takes me to the second broad set of submissions I had to make on the question of what is a business. I would like to step back a little and consider that issue at a slightly more abstract level, away from the current factual context and then reapply it to the current factual context.

Plainly, when you buy shares in a business, say a FTSE company, you do not merely pay a price reflecting what the assets are worth when it is broken up, you pay something that

reflects the combination of those assets in the particular use to which they are put and, insofar as they are intangible assets, or there is goodwill you buy all of that. Now, where the business is a very successful one, for instance, Apple, plainly the value of the business, the combination for the particular purpose, may be worth vastly more than the individual elements broken up. Where the business is not a very successful one, for example, the former SeaFrance business, that combination of assets may command less of a premium over the assets broken up, but there may be some value nonetheless; it does not have to be enormous value for there to be some enterprise value and that is what the CMA found on the facts of this particular case.

Clearly, the question of what it is that drives the value in a business, we say that really lies at the heart of the question to be answered in this case, and we say that value can come from two key sources. It can be customer driven, in that the value comes from the fact that the business is actively trading, or has a valuable customer base, and/or it can come from the production side, in that there may be particular features of the business which its constituent parts are combined for a particular purpose, and on the production side that is what adds particular value. Most enterprises will have both of those elements that add value, but we say there are a number of examples that one can see where, in fact, one side is likely to predominate over the other. So GET itself identified a number of start-up examples, we have considered those.

You can see another example where a customer base may have very little, if any, relevance to the value of a business, notwithstanding that it has already started trading. If one imagines, for example, a seasonal café which has a monopoly franchise at a tourist attraction - it only opens in the summer. The café opens after, for the sake of argument let us say, a seven and a half month hiatus in trading. There is absolutely no existing customer base, and the people that go there only go there because it is the monopoly franchise, they have no other reason to go there. That does not mean that the café is not a valuable enterprise, it is just that the value lies in the right to be the monopoly provider of the drinks or the snacks, having that right in a particular context, namely, at the popular tourist attraction and having the know-how as to how to run a profitable catering business, and you put those things together and that is where the value is.

Another example I might give would be a power generation activity. Again, the customer facing side of that is of very little relevance to the value in the business. If you own a power station and you sell your electricity on to the Grid, as long as you have access to the Grid you are always likely to be able to sell your electricity. Indeed, your power station might shut down for a while, perhaps because of a fire. Does that mean there is no

enterprise, that it is entirely destroyed if your power station shuts down, we would say "no". Obviously, a lot of the value resides in the combination of the asset, which is likely to be extremely valuable, with the technical know-how of how to operate that asset, those two things coming together are what really drives the value in that business. It is not the fact that you have a particular customer, because there are potentially ultimately any number of customers who would be prepared to buy electricity, it is entirely fungible.

Similarly, the examples that GET gives in its skeleton argument at para.24, if one asks where does the value come from in those examples, it comes from the fact that there are assets, including intangible assets and know-how and they are brought together in a particular combination.

That leads me on to a related point, which is about the multifaceted nature of the activities a company undertakes. Some of those activities may be customer facing, and some of those activities will not be customer facing. Mr. Harris took us to the present case - internal IT or human resources, or the technical or engineering side, they are non-customer facing activities - but you do not need all of the activities to be transferred in order to satisfy s.129(1) of the Enterprise Act, because that refers to the activities or a part of the activities of business, and Mr. Harris took us to the *Swedish Match* case that makes that point clear on the authorities as well (3B, tab 34), and the relevant paragraph is 3.47.

So, where does all of this slightly more abstract discussion take us in the present case? In Mr. Harris' clear explanation what the CMA identified in the present case is where the value was in the particular combination purchased by GET in the particular context in which they were bought. I am not going to go through all of the points because we have already heard them at some length, but just to illustrate, in relation to context, context was particularly key because these vessels were exceptionally well adapted for the particular use to which they were put on the route between Dover and Calais. They could not have been purchased or chartered as appropriate vessels on the open market, at least without considerably greater risk and cost. That is an example of context. There are many others that Mr. Harris has taken us through.

Similarly, the combination of assets is also important, and there were a number of examples of this, the fact that the crew were trained and familiar with the particular vessels, as compared to a new crew. The fact that the IT staff came from SeaFrance and therefore had particular knowledge of SeaFrance's IT system, again it is the combination of those coming together that had value in this case.

There is one particular respect in which the combination of the assets and their particular context overlap and that is the fact that SCOP's staff were of particular value in the

operation of a similar business to the SeaFrance one with these particular vessels. So the similar business is the particular context, and it is the combination of those staff and these vessels that meant that they attracted a €25,000 indemnity. There were other indemnities but none was as high as that particular context and that particular combination.

Applying the point that I made about activities, a constant refrain we hear from the SCOP is that there were no activities undertaken by SeaFrance for seven and a half months; no activities they say. It is quite true there was a hiatus in trading activity, but it is far from correct that for any of the period of the seven and a half months there were no activities being engaged in. Throughout that hiatus in trading there was significant activity that was specifically directed at maintaining the value of the vessels and ultimately enabling the reviving of the former trading activities as quickly as possible.

Mr. Harris took you I think it was to para. 3.68, which dealt with some of the activities that were carried out. There were, in fact, some 190 staff that continued to be employed after the liquidation in various contexts including the hot lay-up and commercial, finance, human resources procurement.

We say 190 people working cannot properly be described as inactivity. We accept it is not trading but it was keeping the whole operation ticking over and enabling it to be revived as soon as possible, and we say that is on the production side effectively of the business.

THE PRESIDENT: We do not know if it was designed to be revived or just to manage the liquidation process, we just do not know. But any liquidator of something as complex as this will retain some of the staff because they are the best people to manage the redundancy process, keeping the vessels in good order so they can be sold most effectively to satisfy creditors. The business is no longer operating. The assets are being preserved and there are certain winding down operations that have to be carried out when company is wound up. So it is more than just not trading, I think. I do not see that it proves that therefore the business is ticking over.

MR. PICKFORD: Ultimately, it does not depend on whether the purpose was to enable it to be revived. The fact is those activities did take place, and they did enable it to be revived and, therefore, there was an aside to this business on the asset side that contributed to value.

THE PRESIDENT: Well, the liquidator wants to realise maximum value.

MR. PICKFORD: Yes.

THE PRESIDENT: But every company that goes in to liquidation might then be sold off in different ways - vessels to one party, computers to someone else, and so on. It will have some staff retained to preserve the assets.

MR. PICKFORD: It may, and there will be a dividing line in some cases between when that sale leads to all of those assets being divided up and there being no enterprise left in them at all, and when that sale involves a large number of those assets together in combination being sold on, in which case there may well be a transfer of some enterprise value, notwithstanding that it is not the entire set of activities that has been transferred, that is my point. We say, certainly in relation to the suggestion of a customer base that ----

THE PRESIDENT: It is not just activities, it has to be activities of the business, not the activities of a liquidation.

MR. PICKFORD: These were activities that permit a business. Obviously, ultimately any business needs to have customers, so at the end of the day there has to be a view to have revenue. Insofar as that is what was suggested by GET as being the *sine qua non* of any kind of activity, that even when they are not ultimately trading, such as a start-up company they need to have that objective, we can accept that, but there is no suggestion that that was not the case in the present case. There is no suggestion anywhere that GET or SCOP did not have the objective of ultimately making revenue, making money out of the assets that they bought. The fact that they went for a period when they were not capable of being used for that purpose we say does not destroy the enterprise base.

THE PRESIDENT: Over this period they were not, were they, employed by GET or SCOP, they were employed by a liquidator, were they not?

MR. PICKFORD: That is right.

THE PRESIDENT: So the question is once GET acquired it, the fact that there might have been a short period before the ferries actually started operating, I do not think one is concerned about that. Once GET acquired them then GET had a business, even if it was just not immediately trading. It is the period before that one is concerned about.

MR. PICKFORD: Sir, you have my submission on it and we say that one can see that there are relevant activities here, even though they are not ones that clearly could be making money during that period. It is not essential because even if the Tribunal does not agree with me on that you have the position that Mr. Harris advanced in relation to it, which was simply focusing on the final part of that period.

Sir, in light of the time in relation to the specific observations I am simply going to have to rely on what is in my skeleton argument and move swiftly on for just one or two minutes to the final issue, which is the commercial context, and this is the only part which requires me to turn to the report itself. If you could please pick up bundle 2 and turn to tab 2, and para.5.76. This is not directly concerned with the question of a test, this is directing the

Tribunal to the commercial context here, which I would like to spend just a couple of minutes on.

THE PRESIDENT: Speaking for myself I have not read that section.

MR. PICKFORD: I quite understand. The purpose of this is simply to direct your attention and the attention of the other Tribunal Members to a couple of paragraphs which hopefully you may have an opportunity to look at in more detail after the case finishes. If we go to 5.76 On conclusions on profitability of three ferry operators on Dover-Calais we see the CMA said:

> "We believe that market conditions during 2013 are as we would expect in a situation of over-capacity in which each operator is waiting for capacity reductions from another operator."

Then, skipping to 5.79 there is some analysis of that in more detail:

> "We conclude from this analysis that the recent growth in demand, accompanied as it has been by reduced average revenues on the Dover-Calais ferry segment, is unlikely to enable three ferry operators to break even by 2015 or earlier. We therefore continue to believe that the most likely scenario for capacity reduction, absent an intervention, is a DFDS exit from the route."

Then at 5.80, final sentence:

> "We believe that it remains the case that DFDS is likely to exit. (see also the analysis of DFDS's financial performance and evidence relating to the chartering of the *Molière* below)."

It would probably be helpful if I continue into DFDS' financial performance. If we then continue on we see at para. 5.104 an assessment of DFDS' financial performance.

> "We noted that DFDS's financial performance as a Group had improved in 2013 from 2012. However, its Channel routes, whilst showing an improved performance, were still loss - making. Statements in DFDS's annual report indicate that the losses on the Channel had a negative 2.5 percentage point effect on DFDS's return on invested capital. The Dover – Calais route (part of the Channel) made a loss in 2013 of €14.6 million . . ."

in one year. So at that point my clients were losing £1 million a month. We then see at 5.107:

> " We considered that DFDS's financial performance on Dover – Calais has not improved in the period since the Report and was not forecast to improve by DFDS while there were three operators on the route."

So that is the situation as it is now. We then go to para. 5.112:

"We consider that DFDS continuing to operate on Dover – Calais in the short term, given the uncertainty of the CAT appeal and the subsequent remittal, is consistent with DFDS's statement set out in the Report that [*redacted*]. It is also consistent with the statements made by Niels Smedegaard at the AGM that the outcome of the CMA inquiry is key to DFDS's continued operation on Dover – Calais."

Then, finally, the conclusions in relation to all of that at 5.114:

"We conclude that, for the reasons set out in paragraphs 5.104 to 5.113, DFDS's financial performance has not materially improved; we also do not consider that the submissions of GET and the SCOP relating to the extension of the charter of the *Molière* and various statements made in the press materially affect the conclusion in the Report that DFDS is likely to exit the Dover–Calais route . . ."

So the outlook is somewhat bleak for my clients unless there is a fairly rapid resolution of the issues that you find before you. There are two points we draw from that, the first is that it underscores the point on abuse of process that I mentioned earlier that, really, if there were points to be taken on questions of law they should have been taken a year ago and not now.

The second point is merely this: we simply respectfully ask that the Tribunal has these issues in mind when it is considering its timetable for a decision because I quite understand that the Tribunal has many demands, commitments but we say it would be deeply unfortunate if the substantial lessening of competition that the CMA is concerned about eventuated simply because my clients could no longer defend hanging on for the final outcome.

THE PRESIDENT: No, I understand.

MR. PICKFORD: Just in relation to that, I have been instructed that literally in the last few days - it happened last week - an email was sent to their existing clients saying that the ship formerly known as the *Molière*, which they had chartered, they are no longer able to charter because of the uncertainty in relation to these events, and so therefore they are actually cutting down their service in relation to these issues.

THE PRESIDENT: Yes.

MR. PICKFORD: Sir, if I may just have a moment? (After a pause) Unless I can be of any further assistance those are my submissions.

THE PRESIDENT: I think P&O has sent the Tribunal a letter saying also that it is anxious to have a rapid Judgment.

MR. PICKFORD: They did, but my client's case is particularly fragile in that regard. Would it be convenient, if the Tribunal does not have any further questions to have a short break?

THE PRESIDENT: Just one moment. (After a pause) No, we have no further questions, thank you very much, Mr. Pickford. We will take a five minute break and come back at quarter past and then I think you have half an hour each.

(Short break)

THE PRESIDENT: Yes, Mr. Beard?

MR. BEARD: (No microphone) Sir, Members of the Tribunal, what I will deal with first is the transfer of workforce points, the indemnity issue and the points that Mr. Harris makes about that indemnity, as he puts it, plugging a funding gap, because that seems to lie at the heart of his approach to the CMA's case. He obviously, on a number of occasions, referred to a lot of "thats" that got brought together, but in the end 'that and that and that and that' focus in particular on issues concerning continuity of employment, and continuity in relation to staff. So let us just focus on the issue first, therefore, of the transfer of the workforce, the issue that was highlighted by the Tribunal in relation to its proviso in paras. 116 through to 119. What we have is a situation that up until the final liquidation process around 400 employees of SeaFrance were made redundant during a protracted administration.

Then, as you can see from the report, 820 employees were made redundant by the liquidator, so you had, in the end, and after the successful GET Eurotunnel bid, less than half of those ex-SeaFrance employees who were made redundant were actually taken on. Less than a third in total of those ex-SeaFrance employees who had been made redundant during the course of both the administration and in the liquidation, no SeaFrance management managed to obtain employment with the SCOP subsequently.

Just in passing, although it is not something DFDS ever highlights, it did tell the Competition Commission (as it then was) that it had itself employed 250 ex-SeaFrance workers. You have the exact numbers of those that were actually employed by the SCOP in the report, para. 373, but the difference between the numbers in 3.73 in the report, and those 250 DFDS ex-SeaFrance workers is not huge.

Just one point further in relation to transfer of the workforce, because it really has not happened as one can see there, is the reference to TUPE. Mr. Harris kept stressing it was one factor. We have always recognised it is one factor. All we say is it is a factor that can be considered in both directions. Mr. Harris says it is only if TUPE applies that it is relevant, and we say, no, look at the statutory scheme you are dealing with, look at the underlying provisions, if it does not apply that can be a useful indicator too, because TUPE is concerned with transfers of economically active undertakings. If you do not have an economically active undertaking, so TUPE does not apply, that is a useful indicator. We are

not saying it is the be-all and end-all, but we say it is relevant and it was not properly dealt with in this report.

The overall position is really very clear. There was not transfer of the workforce and no continuity of employment. There were two points highlighted by Mr. Harris' exceptions, those were those people who were working on what is referred to as the 'hot lay-up' that is referred to in para. 3.68 in the report and mentioned in the reasoning in 3.52. He also referred to individuals who were mentioned in 3.69, various administrative staff, and he said that was the second exception, although interestingly that was not referred to or relied upon by the CMA itself in 3.52 when it is considering what it concluded was continuity of employment.

The Tribunal already has the point that, in fact, what was happening here was it was the liquidator that was saying "I am going to pay you to maintain these vessels so that the value of these assets remains high", and it was the liquidator that was paying the people carrying out the central office functions who were sorting out the redundancy scheme and dealing with those matters. Just for your notes, less than half of those people who were being paid then by the liquidator were later employed by the SCOP following the acquisition, and of the people referred to in 3.69 I understand that only four were later employed by MFL.

The major point is this: those activities are entirely different from the activities of SeaFrance itself. It is maintaining the assets, it is the liquidator that is doing that, it is not SeaFrance as a business maintaining activities of any sort at that time, and therefore to say that somehow there was a transfer of workforce because the most relevant people were being used, to maintain the values of the assets is to stretch beyond any sensible breaking point this concept of transfer of a workforce.

Mr. Pickford referred to it meaning that SeaFrance was 'ticking over'. We have avoided any reference thus far to the famous 'Norwegian Blue' in Monty Python, but this gets very close to the sort of euphemism the pet shop owner would have deployed. SeaFrance was no more, it had ceased to be. It was not ticking over at all. It was an 'ex' business. It is because there was no transfer of a workforce, plainly, that the CMA then places this huge weight upon the job saving plan, and this particular aspect of it, the indemnity. It says that this is the link. This is what means there is continuity in relation to employment. We say that just does not make sense.

THE PRESIDENT: They focus on that because that was the one point the Tribunal said last time. They were with you on your first point.

MR. BEARD: Yes.

THE PRESIDENT: They said: "There is not a transfer of a workforce". But, they said, that there is this one feature which needs to be explored, and so the CMA explored it.

MR. BEARD: Yes, quite understandable. It was mentioned in passing in the previous reports, in para. 3.29, but there had been no consideration of it, and so the Tribunal, as I said previously, was saying: 'We do not know about that sort of thing. It is not the sort of matter we have had submissions on, you can go away and look at it.' Well, going away and looking at it is one thing. It amounting to the sort of continuity that gives rise to activities on the part of the SeaFrance business is just not sustainable. You have seen the plan. It gave rise to a whole range of benefits. Mr. Harris may have left you with the impression that it was only in relation to the disbursement of the indemnities to the SCOP that that plan operated. That is not the case because, as I have already illustrated, there were lots and lots of other ex-SeaFrance employees who did not get employment with the SCOP and they, depending on where they ended up or what they wanted to do, whether they wanted to redeploy, retrain, go to some other business, would get some money or other, or their employers would get some money or other. The Tribunal picked up that Mr. Harris kept referring to the SCOP giving this money. It was not SCOP money, it was SNCF money that was required to be paid, not the particular levels, those were the subject of negotiation, but those monies, the establishment of that plan was required under French labour law.

THE PRESIDENT: I do not think it is suggested anywhere French labour law required you to pay specifically if the new employer an indemnity for re-engaging ----

MR. BEARD: Absolutely not, that has never been the account. It is not that French labour law requires that. What French labour law does require is that you do put in place the sort of scheme that is exhibited in the Job Saving Plan. There are then negotiations. You can see it is the Works Council that was involved in the negotiation of settling the terms of that plan. As I put it in opening, what one sees is a range of benefits that are being afforded by a public body, SNCF, depending effectively on the social welfare that is generated by the particular re-employment, re-deployment, whatever else occurs. If you do establish a company which is going to run the vessels, the assets that are being liquidated, it is going to start a business running those vessels, and it is going to do so in a similar fashion to the fashion in which SeaFrance had done so previously, the expectation is that the catastrophic damage to the Calais area that resulted from the collapse of SeaFrance, would be mitigated. Therefore, there is a social incentive for those sorts of issues.

MISS STUART: May I just ask one question: you mentioned that DFDS took on 250 ex-SeaFrance staff. Were they also then able to get some of the indemnity that was laid out in that plan?

MR. BEARD: They would be able to get certain indemnities. I do not believe they would be able to get, for instance, the €25,000, even if they were working on the *Molière* because the *Molière* that Mr. Pickford referred to was the fourth SeaFrance ship, and it went to DFDS. I think, because of the way that DFDS operates, it meant the ex-SeaFrance employees being employed by DFDS, it would not be creating or running that business. They would not be entitled to the €25.000, I think is the position. I think they got ----

MR. HARRIS: It is para.3.94 of the Remittal Report on p.5.

MR. BEARD: 3.4 in the Job Saving Plan would have applied in relation to DFDS employees. In 3.94 you have the figures in confidential ----

PROFESSOR BEATH: You can see it is a different sum.

MR. BEARD: It is a different sum.

THE PRESIDENT: It is very significantly less.

MR. BEARD: It is very significantly less, because whether or not DFDS could have empowered the employees and run the *Molière* differently is a separate question. If they had done so, it might be that they would have been able to benefit from the larger indemnity, but that was not the way that they wanted to run their business.

THE PRESIDENT: They have to be with the SCOP effectively?

MR. BEARD: No, it would not have to be with the SCOP. It could be a different company. Effectively what you have in relation to the arrangements here is the SCOP is running these matters through MFL. The idea that you could not have an arrangement within some other ferry operator that effectively afforded the employees a degree of autonomy and lease the vessel back to them so that you could tap into that as relevant monies cannot be beyond the wit of corporate restructuring, I would suggest.

I do not think that matters. The fact is that DFDS wanted to do business in the particular way it did, and so it was not going to be running the vessels in a similar way to the way that MFL did with employees running them under ----

THE PRESIDENT: Does the employee not have to own a share of capital to qualify for the indemnity?

MR. BEARD: The company that is operating the vessels, yes, but you have obviously got a situation here where you establish a separate company that is under the aegis of other people and has an investment, and so on.

The point is, whether or not you can engage in that restructuring, the only point I was making was that DFDS got some benefits. They were much less per capita than the benefits that went to the MFL in these circumstances, because MFL had the involvement of the employees. It is worth stressing, of course, that the liquidator initially said, "The

arrangements that you, MFL, have involving the employees do not fulfil criterion in para.3.3.3", which is the one that sets out these matters and they had to go back to court and fight about it.

That is not saying we did not get the money, we did in the end, the point only goes to uncertainty, which I will come back to.

I do not want to get caught up with whether or not and what could have been others. Obviously there is a whole panoply of different arrangements that different people could have put in place. That was not what DFDS was looking at as its bidding either, to be absolutely clear, and we will come back to that.

The point I am making is that the idea that this Job Saving Plan was just focused on indemnities going to SCOP is just wrong, and it did not operate in that way at all.

In any event, there is a broader issue here - it is one that I highlighted to start with - which is that this was an incentive to employ people. It was not employment itself. It did not mean that ex-SeaFrance employees were guaranteed employment or had employment. Even if the SCOP was supporting the Eurotunnel bid for assets, which it was later on 2012, there was no guarantee that Eurotunnel would win. There were three bids in for the assets. There was no guarantee that Eurotunnel would win. If Eurotunnel did not win, then it is actually possible that ex-SeaFrance employees might, by other means, have ended up contributing their indemnity to the new employer, albeit that it would depend on the structure that was put in place by the winner of the bidding process.

If you are looking at it from the point of view of an ex-SeaFrance employee who has been put out of work, even if it is only in January 2012, and you are saying in January or February 2012, "Do you have continuity of employment with SeaFrance?" the answer they would give, I imagine, would be emphatic, and it would be a strong French translation of "No". In the circumstances, the idea that any one of these people had any sense that they had continuity of employment was quite wrong. What they were doing was subscribing to the SCOP in the hope that the SCOP would support a bid that would get off the ground, that the person who bought the assets out of liquidation would want to start running them and using ex-SeaFrance employees to do so. It was precisely for that reason that the SCOP did ally itself with the GET assets bids - no doubt about it.

It is also, as we will come on to, why GET, in explaining what its financing package was, said, "In thinking about our financing package, we take into account the fact that we have got these allies in the form of the SCOP, and if we take on SeaFrance employees to run our vessels, then there will be this strand of funding". That is not a funding gap for GET, that is

just a sensible way of GET looking at a source of money that it is going to get if and when it starts employing ex-SeaFrance employees.

It is just worth emphasising this point. It is a point that Mr. Harris's submissions went on about at length in relation to the indemnity plugging the funding gap. He referred to this as arising in relation to the SCOP bids. The SCOP bids were for the business of SeaFrance as a going concern - first in July 2011, and secondly in early January 2012. They did not involve GET at all. As you know from seeing those bids, they were for €1 for all of the assets. They also included a reference to a need for €50 million of capital.

It is worth just turning the relevant January judgment up that sets out some of these matters. The point is that the SCOP did not so much have a funding gap as just no funding. The gap was not quite infinite, but it was enormous.

The SCOP obviously knows about French labour law and knows that there will be a scheme in place that will give rise to redundancy monies, but there was no suggestion that any form of redundancy money was going to be plugging this chasm in terms of financing that was required. That was what the SCOP knew in relation to its bids in July and January. What it did was say, "We will pay €1 and then we will take a share of profits thereafter". It had a recognition that it needed more working finance, it did not have it, and that was why the bids failed. The SCOP is no less able to talk about redundancy monies. Of course, that was what it would have had in mind, not some specific PSE3 scheme, not some specific indemnity at a particular level, it would not have known about that. That was not covering a funding gap for SCOP at all. So there was no funding gap issue that was being filled by an indemnity in relation to either of the SCOP bids.

Then, of course, we get to the point where that administration is brought to an end by the court judgment in January 2012. It is to that which I would just ask you to turn. It is tab 6 in bundle 2. Here we have the end of the continuity of business. We have had the administration, we have had liquidation announced in November, but with an extension of continuation of business of SeaFrance. This is bringing the shutters down. We have been through the various history sections that we have talked about previously. Then we have the details on 546 of the bid by the SeaFrance co-operative. Then we start with observations made in the Judge's Chambers. This, of course, is the first intervention in any of this process by a representative of Eurotunnel, and it is by Mr. Gounon. This is the bit that is quoted and emphasised in the report. The reason why I bobbed up and asked about whether or not this was talking about PSE3 was to really clarify what was the allegation now being put, as Mr. Harris referred repeatedly to PSE3. As you see here, Eurotunnel is appearing saying, "This is a SCOP bid, but there is a possibility that we could get involved,

we can finance, the local authorities can finance, and there will be some redundancy monies".

What is important about this is that it is not actually going to this bid. Those comments are going to the adjournment issue. They are not about the bid. The bid has been put forward and is considered on its merits, such as they are, by the court. One can see this as one turns on. You have got the comments of the administrators, you have got the comments of the liquidator, you have got the report of the Bankruptcy Judge, including those paragraphs to which Mr. Harris has referred repeatedly about "not the end of the road", and so on. I will come back to those in a moment.

Then over the page at 552 the reasons for the decision of the court, one, application for adjournment submitted by SeaFrance Co-Operative Enterprise, SCOP. "Whereas 12 December this court has granted successive adjournments to allow SCOP to improve its offer, particularly with regard to financing", that has not come forward. Then third, "whereas the private investor referred to by SeaFrance Co-Operative Enterprise, Eurotunnel, has indicated in writing its interest only in taking over the assets". So Eurotunnel has said, "We are interested in getting involved, but only in taking the assets", not running the business, not maintaining any sort of continuity, just taking the assets, "whereas any other financing referred to elsewhere either relates to the cessation of business or are only letters of intention of amounts that are too low", "consequently the court must reject the application for an adjournment". In other words, the SCOP is not getting yet another chance to put together yet another bid in relation to these matters. That is nothing to do with whether or not redundancy payments fill some sort of financing gap. This is to do with whether or not broader financing can be obtained.

Then you get in two, the consideration of the SCOP's offer itself. There you see in the fourth bullet, "Whereas the candidate has itself fixed its start-up requirement at €50 million", €50 million that it simply did not have:

> "Whereas the business cannot be carried on because the company has no cash. Consequently the court will end the period of continuance of the business."

Then we get that in the order.

So the court said no, SeaFrance is then dead, but if we just turn on to tab 10, which is where we have the order in relation to June 11 2012, so after there has been a further bidding process in the liquidation for the assets, what we have is a situation where GET, Eurotunnel, has come forward, Stena has come forward and DFDS has come forward with bids for the assets. As Mr. Harris rightly said, the Eurotunnel bid was for a comprehensive integral bid for all of the assets. What you have in these circumstances is as reported at 2.731:

> "The bidder presents a comprehensive, integral bid bearing simultaneously on the ships and other tangible and intangible assets whose acquisition is proposed as part of an industrial project integrating the participation, via a SCOP[…] composed of SeaFrance's former employees."

Then you see just under the gap:

> "Financing for the cost of the ships shall be through the equity of this company lent by Groupe Eurotunnel."

So the major financing for the vessels for the assets is coming from Eurotunnel.

Then if you turn over the page to 733, what you see is - and this bit was not read, these first seven words were not read:

> "In addition to financing the three ships, the project relies on funding from SCOP's […] employees limited to about €10 million before corporate income tax and there involves additional funding from Groupe Eurotunnel in the amount of €20 million if there is no delay in implementing the plan, and €30 million if there is a six month delay."

In other words, when the plan is being put together, Eurotunnel is funding the acquisition of the vessels and all the other assets to the tune of €65 million, buying them all together, but you need working capital as well. That is coming primarily from Eurotunnel, but it is also saying, "We recognise, because we are going to be working with the SCOP and we are going to be taking on ex-SeaFrance employees, we can take into account the fact that under the indemnity scheme we will get monies". None of that - none of that - is either plugging a funding gap for Eurotunnel, or is it any basis for making a finding of any form of continuity of employment.

So Mr. Harris very elegantly elided the position of bids by SCOP and the position of bids by a separate entity, GET, in circumstances where one had no funding, so the idea of a funding gap was anathema, and the second did not have a funding gap, but was taking into account the funding that it expected it would be able to draw upon because of the indemnity scheme. That does not mean that the indemnity scheme somehow creates this link that means that there were activities continuing on the part of SeaFrance.

Just to pick up, Professor Beath, your comment about the funding being used for operation, this is the paragraph that sets that out. It is also picked up in the Tribunal's previous judgment at para.118, which may have been where you were dealing with it.

The idea that somehow the indemnity was the glue that was holding together the SeaFrance business activities from, say, January 2012 to June or July 2012 just does not stack up at all. There was no continuity, there was no momentum.

Just to pick up another point, the court here is not doing anything like that which the CMA was undertaking. At one point Mr. Harris sought to compare the position of the CMA's analysis and the position of the court's analysis as if the court were undertaking some analysis of an ongoing business. That is just not what was going on. It was a liquidation process of stripped down assets. It was an asset sale intended to benefit creditors, it was not about the labour at all.

In so far as those observations of the liquidator were concerned, I have already said why it is that those are not significant, but it is just worth noting that actually in footnote 59 in the CMA's report, p.2.290, the quotation is one of those observations from the Bankruptcy Judge, "Obviously there must be a compromise between the value of the assets, essentially the vessels, and the continuation of employment contracts". Response from the liquidator; "This last sentence has no meaning in relation to French law on insolvency procedure. It responds only to a political concern". Then you see at the bottom:

> "Article L 640-1 which defines the liquidation procedure specifies in paragraph 2: 'The liquidation procedure is intended to end the business activity or to sell the debtor's assets through a general or separate assignment of its interests and property."

So that really was the end of the road. That is really the end of the CMA's case here, because that issue concerning staffing and employment and the reliance upon the indemnity is absolutely critical and central to all of their reasoning and it does not stack up.

This is not us taking some kind of fine grade or spurious precision definition of "activities", we are saying the definition of "activities" simply cannot encompass the situation you have in January, February, March, April, May, June of 2012, and that was what was being acquired by GET in the form of the assets on 2nd July, and the subsequent acquisition of ex-SeaFrance employees - subsequent acquisition, which is what the Tribunal found under Ground 2 in the previous judgment - in August does not mean that there were prior activities.

That is perhaps the key issue.

On assets, which were obviously the other key element, Mr. Harris started off referring to para.7 of the previous CAT judgment where those assets were listed. It is a slightly double-edged citation for him, because of course the CAT then had in mind that all of those assets were at issue and, notwithstanding that, decided that those were not sufficient to reach the conclusion that there was any merger situation. He referred to annex B. It is a long list of assets. Some of those assets that he particularly chose to emphasise - for instance,

SeaFrance logos, to which a notional amount was attributed in the global €65 million - they were never used.

Indeed, as soon as we will come on to briefly, SeaFrance was a toxic brand by this stage. You wanted to distance yourself, you paid good money to distance yourself from SeaFrance. What we see in para.3.225 of the report is the SCOP saying:

> We are concerned that sometimes people think of us as being like SeaFrance, that is really bad for us, we have to work hard to say we are nothing to do with SeaFrance, SeaFrance is long dead, we are the new operator.

As I say, on various occasions Mr. Harris said, "If you add that and that to that and put them together you get something more substantial". At one point in the transcript he actually said the assets, or part of the assets of a business. I know that was a slip, but, in fact, that actually captures what "that and that and that put together" did do. It put together the assets of a business, not the activities of a business. To use the CAT's guiding principle, the Tribunal's guiding principle from para.105, you can put all of them together, you still get no outputs, it does not matter whether it is IT, whether it is logos, the customer lists were of absolutely no value, they were no use at all, but nonetheless even Mr. Harris suggests that those are relatively trivial.

What the CMA's approach does not properly grapple with is the CAT's exhortation in 106(b)(ii) of its judgment - just for your notes that is at 3B, tab 29, p.3.113:

> "The statutory test is not satisfied if the acquiring entity reconstructs a business that was once conducted by a different entity, even if the assets of that entity were used to do so."

That is not a relevant merger situation, but that is precisely what was going on here.

Just to clarify, why did Eurotunnel buy these assets? It is dealt with the liquidator's opinion, and I will just point out one matter in relation to that. It is in tab 10 of bundle 2, 2.737, about 12 lines from the bottom:

> "Indeed, this transfer would provide for using the assets, which appears possible in terms of a maritime activity to be created *ex nihilo*."

From nothing. That was what was being considered here.

Mr. Harris referred to them being "hyperspecialised assets". Well, they might be assets, the vessels of particularly suitability, but it does not make them more than assets. It might make them valuable assets, but it is also a point which sits rather ill with the fact that DFDS did not have these hyperspecialised assets and were up and running relatively quickly in February 2012.

All of these ships needed lots of work. Mr. Harris emphasised that there was six weeks of "immense busyness" getting the ships ready, training people up, and so on. Again, it was starting afresh in relation to these matters.

I have dealt with hot lay-up. It does not add to matters at all. I would just refer you to the Remittal Report, appendix C, paras.9 to 11, where guidance was received that suggests that in hot lay-up normally a vessel can be re-operated within a week. Obviously there was much more work done here. From cold lay-up it is normally re-commissioned within three weeks. Of course, here there was much more work done because we were starting again.

The points about Pilotage Exemption Certificates - in fact, none of the officers working for MFL who had previously been employed by SeaFrance had certificates necessary to sail between Dover and Calais when they joined MFL, but it does not matter, these are all assets issues or they relate to the acquisition of staff in August. These people were not operating, they were not active, there was no activity of a business prior to July.

The same with Navigation Certificates.

I have mentioned goodwill, para.3.225. Actually, what you see there is the submission by SCOP that they spent their time distancing themselves.

Just to finish off, a couple of quick legal issues. We have seen *Thames Water*, we have seen *South Yorkshire*. We see we are not trying to engage in some sort of spurious precision exercise here, we have given you the relevant definition of "activities", the ordinary language meaning of "activities". It is not a hard edged test, but it is still a legal test. The Tribunal in its judgment in 105 where we see the guiding principle that I have referred to about transforming inputs into outputs, those parameters there, it is not defining all of the limits of the legal term "activities". That is not the exercise it is engaged with. So the submission that so long as you have got a Tribunal judgment that has talked about the term "activities", there is no other legal issue to be discussed, is just not right. We are not taking issue today with the terms of 105. As I say, we have referred to the guiding principle.

The discussion about appeal issues was vis-à-vis the provisos. I dealt with that yesterday. The fact that there has been a direction of law and it is referred to by the CMA does not mean they have made no error. They clearly have made an error here. They have strained too hard to try and maintain the previous Decision against the clear facts that existed.

In relation to questions of irrationality, I would refer you to the *ex parte Balchin* case in our notice of application, para.42(b). On the relevant test in *AAH*, you have our submissions on that, that the central issue remains whether or not they are continuing activities. Closure of a business means that you are looking at exceptional circumstances. There were prior

arrangements there of a single day planned shutdown, continuity of employment in a business, but it was still considered an exceptional case. As I said, we accept that it is an objective test, but where people are putting in place prior arrangements essentially to formally shut down a business and restart it, that is highly relevant to whether or not there is actually continuity of the activities. So the objective test still applies.

Our fundamental submission is that SeaFrance was not working, it had no practical operation, and if I may I will finish off by just referring the Tribunal to bundle 1, tab 2, p.1.67. Just under para.77 there is a diagram. The line on the left is the business of SeaFrance falling off a graphical cliff and ending in December 2011.

THE PRESIDENT: What is the scale on the left?

MR. BEARD: It is percentage market share across the short sea. As Mr. Williams points out it is just in the heading.

The line on the right starting slowly in August 2012, that is MFL slowly beginning. The line in the middle, the beginning of February 2012, that is DFDS taking off pretty rapidly after the demise of SeaFrance. Nothing in the CMA's report or its submissions justifies a conclusion that that gap between December 2012 and August 2012 was one where there were activities of a business of SeaFrance. Nothing does that. The indemnity does not do it. The fact that valuable assets were maintained at higher values via the activities of particular individuals does not change the fact that the SeaFrance did not have activities.

In those circumstances, you do not have the coming together of two enterprises by the acquisition of the assets in July 2012 and subsequently the acquisition of employees. There was nothing by way of continuity and momentum, which is the key concept that the CMA seeks to deploy, that enables any finding that there was a relevant merger situation here.

Unless I can assist the Tribunal further, those are the submissions on behalf of the SCOP.

THE PRESIDENT: Thank you very much. Mr. Gordon?

MR. GORDON: Sir, we have reduced our reply for the most part to writing to shorten matters at the end of the day, but can I, before handing a note up and going through that very briefly, invite the Tribunal to look at the case from the perspective of a route map. The first question that one has to consider is the one that our submission largely focuses on, which is, is there a guiding principle in cases of this kind?

The second question is, even if there is not a guiding principle of law, are there some factors in a case such as the present that are so highly legally material that to misinterpret them, to get them wrong, not to consider them, is an error of law? Into that category, having heard Mr. Beard's eloquent submissions, one may feel that TUPE is one such example, and I will

come back to it with my main submission. We say that the question of customers is absolutely central.

The third broad question is, even if there is not a clear legal principle, even if there are not some considerations so highly legally material as to be compelling in a case of this kind in terms of legal error, is the conclusion, having regard to the facts of this case, irrational? Irrationality is a submission made by the SCOP, but we nonetheless endorse it and support it.

That is the legal template that we respectfully submit is the way that the Tribunal should look at this case.

Having made that point, and just before I come to the note, may I also invite the Tribunal to take a step back and just ask this question - it is a forensic question, or at least it was when I wrote it down: how can you have a business without customers? I said it was a forensic question, but fortunately Mr. Pickford answered it at about three o'clock when he said any business has to have customers. We respectfully endorse that statement. Indeed, the examples that Mr. Pickford gave of businesses where the customer was not central - the seasonal café, the power generating station - are simply examples that deconstruct any suggestion that any business does not have to have customers. The power generator is going to have access to the grid and has a captive customer base. The café, the seasonal café, has a monopoly, not because of its location in the abstract, but because that location attracts customers.

Even Mr. Harris's example of the corner shop in his attempt to deconstruct our analysis by reference to the cases in the clip, a corner shop will attract customers who have used that shop and come to that shop and know that shop. It does not have customer contracts, and perhaps there has been some confusion in this case, certainly on my learned friend Mr. Harris's part, about our submission. We are not submitting in any shape, size or form that one has to have customer contracts. Indeed, as he points out, that was not the position in the *AAH* case. The absence of customer contracts does not mean that you must not look for customers as the kernel or the essence of a business. You do it by, using those words I used earlier, other means.

So it simply makes no sense to say that a business does not have to have customers. That is what we respectfully submit *AAH* plainly says.

May I hand up our note and go through that briefly, because it makes the attempt to give a principled structure to what a case such as this is all about? (Same handed) The first five paragraphs of this note are devoted to the course of this case up until lunch time yesterday. Our Ground 1, para.1, is that the CMA erred in law in finding that there was a transfer of

enterprise. That is not an irrationality claim. It is an error of law claim. In order to succeed, we have to identify the legal principle which the CMA misapplied. The Tribunal has the way we put it in para.26 of our skeleton argument, and I can read half way down that extract, the question is whether the purchaser acquired much of the benefit of acquiring the assets as a going concern by acquiring a substantial part of the vendor's customer base. We, as I think I submitted yesterday, drew sustenance for that proposition from *AAH*. Mr. Harris, when he came to address the Tribunal, we have got the extract in the transcript, contended that the Tribunal's judgment did not refer to a customer base. It would have done so expressly had it been a key factor, or the key factor, for the CMA to consider. Therefore, he says we must be wrong.

In echoing that submission this afternoon, Mr. Pickford used the words in relation to our submissions that they are and were "flatly inconsistent with the first Tribunal ruling". What we have attempted to do here is explain, by reference to the words, what the Tribunal did, not merely from their reference back to *AAH*, but from the actual central principle, how that endorses the approach for which we contend.

THE PRESIDENT: You say it had no customers because there were no sailings?

MR. GORDON: Absolutely.

THE PRESIDENT: Therefore, no freight, no passengers.

MR. GORDON: They have gone.

THE PRESIDENT: That is absolutely plain, is it not?

MR. GORDON: Yes.

THE PRESIDENT: So completely inappropriate to have remitted? That was plain last time. There is nothing that has happened, is there, to review this remarkable fact. It was obvious to everyone in the last hearing.

MR. GORDON: Can I explain? We do come to it in this note. If I can just go through the note in sequence, what we say is that the Tribunal certainly did adopt the approach for which we contend, but they did not use the lexicon, the language, of "customer base" - we accept that. It should be para.105, not 106 at para.7 of this note, but in that passage, which is the familiar passage stating what the guiding principle was in relation to an enterprise:

> "An enterprise takes inputs (assets of all forms), and by combining them transforms those inputs into outputs that are provided for gain or reward. … It is in this combination of assets that the essence of an enterprise lies."

The point about that combination, just from the plain words used by the Tribunal, is that it is not merely a collection or combination of assets *simpliciter*. It is a combination of assets

that has a transformational effect. The assets are the inputs. The transformational effect is to convert the inputs into outputs. That is the test laid down by the Tribunal.

My learned friend Mr. Harris (I am at para.8 of the note) yesterday morning said that the essence of an enterprise lay in the combination of assets. We heard him say it in so many points in his address to this Tribunal, he said it even today, you take a bit of this and a bit of that, like a cook, and we would respectfully say a cook without a menu, still less a dish. That is his approach. You have got lots of assets, lots, therefore, of combinations and that is it.

You, Sir, in a question to Mr. Harris, which is, in fact, at p.78 of the transcript from yesterday, pointed out, and Mr. Harris fairly accepted this, that the Tribunal was not discussing combination of assets in the abstract, but their reference to the central principle, the guiding principle that it had laid down, referring to a combination that "takes inputs, (assets of all forms), and by combining them transforms those inputs into outputs that are provided for gain or reward".

As I indicated earlier, the Tribunal described that as the guiding principle. What does that tell us about an enterprise? It tells us two things. First of all, it tells us that an enterprise is something which is commercially active, it takes inputs, combines them, transforms them - a very material word - into outputs and sells them. That is the gain or reward. It uses that combination of assets, that is why they have this transformational effect, that are provided for gain or reward.

The Tribunal also ruled, and we know that from paras.105 and 106, that a business could remain an enterprise even if it temporarily stopped trading, but if the business ceased to be an enterprise its assets could be bought by somebody who uses them to emulate the form of business without thereby acquiring an enterprise.

What is really difficult about a case such as the present and what has not been grappled with in any of the submissions that we have heard from Mr. Harris or Mr. Pickford is how you distinguish those two categories identified by the Tribunal in paras.105 and 106. How do you distinguish the emulator from someone who is acquiring a business even though it has stopped trading? That is by reference - it has to be, it can only be - to the guiding principle, that an enterprise is commercially active providing outputs for gain or reward read with its direction that it is necessary to identify what over and above their assets the acquiring entity obtained.

At para.13 we attempt to capture what we believe the relevant principle, the guiding principle, leads to in terms of identifying a business. A business which has ceased trading - that is this case - remains an enterprise if (a) in commercial reality - that was a word used in

an interchange just now - it has never ceased being engaged in commercial activities so that it can be said never to have stopped trading. We give the very example that I think you, Sir, put to Mr. Pickford a little earlier and he slightly struggled with in his tracks, e.g. if the cessation of trading is a device to avoid the application of UK merger control. That is what led to the debate about whether it was an objective test or not.

Then, (b), if simply by restarting trading and reopening, it is able to provide outputs for gain or reward because a substantial of the old customers quickly return? We say it is more than the sum of its asset parts, its inputs, however valuable they may be, because, to quote from the words in *AAH* that the Tribunal itself set out in para.104, the assets carry with them much of the benefit of an acquisition as a going concern, even though the business has stopped trading. This is the something else, over and above bare assets, that the acquiring entity obtain.

This distinction perhaps does need to be made very, very forcefully. You do not have something more than a collection of assets merely because you combine the assets. It is very tempting, as a matter of linguistics, to think you do - that if you have a lot of assets that have something over and above in terms of value, you have somehow met the Tribunal test. You have not. You have got to have the transformation into outputs, and that is what the analysis of Mr. Harris and the CMA and Mr. Pickford entirely omit.

By contrast, and this is the distinction, a purchaser of bare assets - by "bare assets", of course, that means something not over and above - must start as a new entrant. It is not able to sell outputs for gain or reward simply by restarting trading. Merely reopening the door would not enable it to provide outputs for gain or reward because the old customers would not return quickly in substantial numbers. What it has done is to acquire assets which it must begin to use to provide commercial activities to try and win business afresh. It has not acquired anything else in law above and beyond those assets.

We say that that approach is consistent with the Act and all six of the cessation trading cases that are before the Tribunal - that is *AAH* and the five retail cases. What is telling about these cases, and the cases we have not heard about that, is that Mr. Harris, with the team he has, has not identified a single other case from the hundreds, if not thousands of cases handled by the CMA and its predecessors in which an enterprise was found without any transfer of customers.

Let me put it this way: if customers are not determinative, they are such a highly material consideration that that issue has to be grappled with absolutely centrally, and it has not been.

In the rest of that paragraph we deal with the other cases. We indicate at para.16, or suggest, that it is also supported by the CMA guidelines. Whilst Mr. Harris said those guidelines do not refer to the transfer of a customer base, that 4.8 talks about IP rights alone that would amount, or might amount, to the transfer of an enterprise if it was associated with turnover. That is common sense because turnover comes from making supplies to customers. The checklist in 4.10 also refers to goodwill, ongoing customer relationships, and we have tried to breakdown and analyse in footnote 5 what goodwill means in this context.

We also deal with the status of the guidelines. These guidelines, of course, are guidelines which came into force after the first Tribunal judgment, so they cannot, by their own bootstraps, answer the challenges here.

THE PRESIDENT: You are not criticising them?

MR. GORDON: We are not, no.

Paragraph 17, this approach gives a principled basis, we respectfully submit, for deciding whether a purchaser of assets that were part of a business that has ceased trading has acquired an enterprise in circumstances where Parliament intended the two stage test. The CMA merger control jurisdiction should be limited to cases in which two or more enterprises cease to be distinct.

We also submit that the way we put it here, which is unequivocally by reference to the CAT judgment in para.105, is entirely consistent with the way in which we put the case yesterday. It does not rely on the reference back to *AAH*, but it undoubtedly goes to the central guiding principle in para.105.

My learned friend Mr. Harris said that the present case was analogous to the acquisition of a dormant or seasonal company. That clearly is not the case. Ferry companies operate year round, freight customers in particular expect to have regular sailings each day, and they switch rapidly to other suppliers if services are not available.

That is different from, say, a ski company because self-evidently people do not go skiing in June, unless they ----

THE PRESIDENT: It depends which hemisphere you are on!

MR. GORDON: I think I need to be careful! Mr. Harris also said it was important that the period of cessation of trading was due to the order of the French court, but the question under the Act is whether GET acquired an enterprise, not whether there was a good legal reason why the business had ceased its activities by the time of the purchase.

We also refer to the 9th January judgment of the Paris court under which SeaFrance was required to cease any commercial activities as part of the liquidation procedure. It is

accepted that from that judgment until GET's acquisition the acquired assets were not commercially active. That is why, and that is the link, there were no customers or customer base available to be acquired by GET. We say that is fatal to the CMA's case in itself. Rather than identifying whether GET acquired a substantial part of the customer base or assets that were commercially active, the CMA wrongly identifies the "something else", and this is a point I made earlier, but this is now cemented here. It does it by reference to the number or value of assets acquired - the little bit of this, the little bit of that that Mr. Harris referred to - or whether the assets were able in the same form from third parties in the market.

I have to grapple with the next point, and I do grapple with it. The argument before the Tribunal was that the seven and a half month period was a number that could not be transfer of an enterprise. That is what everybody was focused on. The question of what beyond bare assets would turn a purchase of non-trading assets into a purchase of an enterprise was not argued, which may explain why the Tribunal ruled in the general terms that it did. However, the general terms in which it ruled were undoubtedly terms which we did not need to appeal because we entirely endorse them. They are not flatly inconsistent with the approach for which we contend.

As I say, the CMA has looked at the number and value of assets, whether they are available in the same form for third parties, whether they enable the purchaser to start a business more quickly. That is the very distinction I have sought to draw between the new entrant and the dead business with assets that no doubt confer some advantage or some value. Again, the CMA focus on whether the assets were commercially operable, that is not the issue; whether the purchaser used the assets to emulate the vendor's former business, that is the same point in a sense as new entrant.

All of these factors, we say, go to the quantity or nature of assets. That is why Mr. Harris has placed so much emphasis at the start of his address on the assets. The Tribunal did not require that exercise. The Tribunal required the exercise of identifying what in law over and above the assets was acquired, and in law the CMA has not identified, we respectfully submit, anything that amounts in law to over and above the assets.

THE PRESIDENT: "No assets" was the expression that they used.

MR. GORDON: The Tribunal was saying you have got your bare assets, your inputs, you transform those into outputs. That is what the combination is all about. It is not just combining assets. That was the test. We say if that test had been applied, as a matter of law the CMA would have to have found that the enterprise test was not satisfied as GET acquired nothing beyond bare assets as a matter of legal analysis.

As I say, we have endeavoured, in presenting our analysis, not to displace - I think this was Mr. Pickford's suggestion - Mr. Beard's analysis, but to supplement it, because Mr. Beard himself said, yes, there are exceptional cases. We have simply attempted to approach principled arguments for why an enterprise that has ceased trading may not be the be all and end all and may require further analysis. We accept that. It does not alter the conclusion we submit for in this case.

I will just check if I have any further instructions. Sir, unless I can assist the Tribunal further, those are our submissions.

THE PRESIDENT: No, thank you very much, Mr. Gordon.

MR. GORDON: Thank you, Sir.

THE PRESIDENT: Thank you for your written note. We are very conscious of the fact that everyone is anxious for a decision as quickly as possible. I cannot say exactly when it will come, but it will certainly be before Christmas.

Thank you all very much.

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