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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1218/6/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20th September 2013

Before:

MARCUS SMITH QC
(Chairman)
WILLIAM ALLAN
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

BMI HEALTHCARE LIMITED

Applicant

- and -

COMPETITION COMMISSION

Respondent

- and -

HCA INTERNATIONAL LIMITED
SPIRE HEALTHCARE GROUP

Proposed Interveners

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HEARING

APPEARANCES

Mr. James Flynn QC and Mr. Gerard Rothschild (instructed by Shearman & Sterling LLP) appeared for Applicant.

Miss Kassie Smith QC (Instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Stephen Morris QC and Miss Patricia Edwards (instructed by Nabarro LLP) appeared for the Proposed Intervener HCA.

Miss Alison Berridge (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Proposed Intervener Spire.

1 THE CHAIRMAN: Good afternoon everyone. Mr. Flynn, before you begin, it might be of
2 assistance if we shared with you the fruits of our thinking. We have read I think most, if not
3 all, of the material that has come in in the last few days, and it may be, although we
4 recognise our understanding is pretty imperfect at the moment, particularly since we have
5 not heard substantively from the CC, we have seen obviously the correspondence from the
6 CC, but there has been no formal response to your application, that it might assist if we said
7 what we thought at the moment. First of all, a lot of it does seem to us to be quite unclear.
8 We do not have everything. In particular, we do not have a copy of the Disclosure Room
9 Rules that are referenced in the undertakings in recital 10. It would be very helpful if we
10 could have those either now or in the course of this afternoon.
11 Nevertheless, it does seem to us that para.11.3 of your client's application, Mr. Flynn,
12 namely that the inspectors are not permitted to use any data that is not own client data, is at
13 least substantively correct, particularly given the redactions that are made to the notes that
14 they took on the two days they were allowed in. Although obviously this can only be a
15 provisional view, it does seem to us to be really not, at first blush, satisfactory that parties
16 who have to respond to the CC are hampered in this way. So we are troubled.
17 We are also troubled by a certain lack of clarity in your client's application for relief.
18 Paragraph 34 does seem to be drafted in pretty broad terms in terms of the request for
19 quashing the Decision, but you do not say very clearly what you want by way of relief.
20 We are troubled on two fronts: first, a certain lack of clarity; but secondly, by the process
21 that the CC has put in place. Obviously these are very much provisional views based, no
22 doubt, on ignorance more than anything else. For what it is worth, that is where we are at
23 the moment.
24 We have debated what we can achieve today and a few points on that: we have noticed the
25 two applications to intervene. One of the points we would want to address is whether, in
26 fact, these are interventions or appeals in their own right. Provisionally it seems to us that
27 these are the latter rather than the former, in that both HCA and Spire are seeking to push a
28 consistent line with your clients, Mr. Flynn, but nevertheless their own line rather than
29 purely appearing in support of your client. Our present view is that that should not matter,
30 whether it is an intervention or an appeal, we can simply deem the notices of intervention as
31 applications to appeal and proceed on that basis. That is something we may want to discuss.
32 Next, in terms of what we can achieve today, do we have a substantive hearing today or do
33 we have one next week? We are certainly not minded to push things out beyond next week.
34 We consider that the matter is sufficiently urgent that it needs to be resolved quickly.

1 Although it involves a degree of diary juggling on our part, and I suspect diary juggling on
2 persons in front of us today, we are minded to schedule a hearing at 12 o'clock on
3 Wednesday of next week. That would give the Competition Commission until midday
4 Monday to respond to your application and to the interventions with evidence in reply, and
5 we would encourage the appellants (as I will call them) to act jointly in this regard by
6 midday Tuesday. That is how, again provisionally, we are minded to deal with it.
7 That leaves a final question on our list, which is the question of interim relief, which we
8 note is not something that is raised in your application, Mr. Flynn. Obviously it is not for us
9 to formulate what you would want. It may be, if we have a hearing next Wednesday, the
10 question simply falls by the way.

11 One of the matters we would want to address at some point, however, is what happens to
12 the 1st October deadline? Again, very much provisionally speaking, we would think that
13 every day that the parties are kept out of information that ultimately we find they should
14 see, if we find that, the deadline ought to be extended day by day. That, of course, is
15 another reason, given the CC's need to get this review concluded, that we need to proceed
16 quickly rather than slowly. But, as I say, given the hearing next week it may be that this is a
17 matter that could fall by the wayside. The final point is obviously – the point I started off
18 with – we are in a position of considerable ignorance here and it may be that you can help
19 dispel some of the points that we are ignorant on today. However, whilst we are in your
20 hands I am wondering whether we should not rise for about 15 minutes, having given you
21 some provisional indications to see if the parties can thrash something out, or whether you
22 would like to proceed now to make submissions in the light of what I have said.

23 MR. FLYNN: Sir, a lot of what you have said is obviously encouraging, except where we have
24 left you in ignorance, culpably, and I will take instructions if you will rise and we will see
25 what we can do to assist. I was equally in your hands as to what you wanted, what the
26 Tribunal was prepared to do today, but certainly in the light of this morning's developments
27 I was here to say we would like the application to be heard today but I hear what you say
28 about moving it just slightly, but that was certainly going through my opening position ----

29 THE CHAIRMAN: Mr. Flynn, nothing that I have said should be taken as closing that out and if
30 you want to make that application in 15 minutes' time then do feel free to do so, but
31 obviously you will want to take instructions on what we have said regarding next
32 Wednesday.

33 MR. FLYNN: Thank you, sir.

1 THE CHAIRMAN: In that case we will rise for 15 minutes. If you need more then do let Mr.
2 Lusty know.

3 MR. FLYNN: Thank you.

4 (Short break)

5 THE CHAIRMAN: Mr. Flynn?

6 MR. FLYNN: On your shopping list I suppose the first and biggest point is that the applicant and
7 the interveners or other appellants whichever they may be, would be content with your
8 Wednesday suggestion; I think that is probably the biggest news. I can tell you straight
9 away that the Competition Commission is not, so that is not an agreed position.

10 In relation to the other matters which you raised, possibly logically interim relief – we have
11 not applied for it and it is not very easy to see what it might be and if that is the timetable
12 we can bump along for another few days. We do think that the principle of at least a day by
13 day extension of time for the response should be at least agreed to in some form or other,
14 and that should run, we would say, from no later than 9th September, which was last
15 Monday, which was the day that our what we have called ‘Inspectors’ were allowed into the
16 data room. Perhaps it is a small point, but we have made a copy of the Disclosure Room
17 Rules available to the Registrar.

18 THE CHAIRMAN: We have those, thank you.

19 MR. FLYNN: And that is the final form. The other thing I would say, sir, is as you will have
20 seen from this morning’s correspondence, the Competition Commission has apparently
21 made a decision yesterday, or they have taken a preliminary view or, at any rate, we are to
22 expect something on Monday and we say we should see that in any event. Furthermore, it
23 is suggested in that correspondence that revised forms of undertakings would be sent to us
24 today, and we say that should also be complied with.

25 The basis of undertaking we would say, and I think this goes partly to your question about
26 the scope of relief, but there are two forms of undertaking floating around, as you might
27 have picked up from this morning’s correspondence, and one form is that that has been
28 entered into in what is called the ‘local assessment’ context. There is a local competitive
29 assessment exercise, there is a form of confidentiality undertaking which has been entered
30 into there – not in your bundle, I am afraid, but the relevant point is there is no ‘adviser
31 restriction’ – the last paragraph, (g) – in the form of undertaking which you have seen.
32 That, we think, is an important qualification. In relation to the relief that we would be
33 seeking in our application we say at least it should be for the purpose of, as we have said,
34 being able to discuss this data amongst the advisers and prepare a response to the

1 provisional findings then a form of confidentiality undertaking in that form is what we say
2 should be necessary.

3 I think that is most of what I had noted down, and that is our position on your shopping list,
4 sir. It probably only remains to say that these issues – one reason I was going to say, had it
5 come to that, that we would be pressing the application today is that these are issues of
6 principle – important issues, I accept – but they are arising in this very investigation in
7 several other contexts, so these are ongoing discussions on a number of the topics which are
8 raised in the provisional findings and it really is important that some clarity is given, and the
9 issue as to how disclosure was to be handled has been rolling along really for some weeks
10 now, and we would like a resolution. I do not mean that as putting pressure on the Tribunal,
11 but this boil needs to be lanced, if I can put it that way.

12 I probably cannot assist further at this stage, sir, unless you have questions.

13 THE CHAIRMAN: No, Mr. Flynn, that is very helpful. Perhaps, Miss Smith, if we could hear
14 from you that would be helpful.

15 MISS SMITH: As Mr. Flynn rightly recognises, these are important issues of principle. If the
16 Tribunal takes the approach that it has indicated and if the applicants take the approach that
17 they have now indicated this goes to the very use of Disclosure Rooms generally as a means
18 of disclosing sensitive, confidential, commercial information. A very important issue, and
19 the impact of that may be that such material is not disclosed at all because the sensitive
20 commercial information cannot be adequately protected, so it is a very important issue.
21 With the greatest respect the Commission should not be bounced into addressing that issue
22 today and, in fact, in our submission – and I will explain why – the timetable that you have
23 proposed, sir, is also too short for such an important issue of principle, bearing in mind that
24 it does not just impact on BMI. The question here is not whether BMI should see document
25 X or not, it is whether Disclosure Rooms should be able to be used at all. Obviously, they
26 are here, Spire and HCA, have an interest in that. They have their own interests. They
27 have not even been given permission to intervene yet, let alone have they been given an
28 opportunity to make their statements of intervention, or put them in a form of a skeleton.
29 There has to be some provision in the timetable for that.

30 Other parties as well, particularly those parties whose information was contained in the
31 Disclosure Room should also be given an opportunity to make submissions and on that it
32 might be helpful if I give you some of the background to the application. It is important to
33 note two issues. First, the nature of the material that we are talking about and the

1 background to the setting up of the Disclosure Room; that is the first issue it is very
2 important to understand, sir.

3 The second is the access to and use of the material which BMI have already had. We are
4 not talking about refusing to disclose this material to BMI. Some confidential material has
5 been disclosed to them but subject to these constraints which we say are necessary in the
6 circumstances.

7 So the nature of the material that is in issue is described in the undertakings, which is
8 perhaps most usefully seen at p.10 of the notice of application bundle.

9 THE CHAIRMAN: Those are the drafts, we were looking at ----

10 MISS SMITH: Sorry, Summary tab 3, p.10, the exhibit. There are a number of undertakings but
11 it is at recital 8, it is described from recital 5 through to recital 8. In summary, essentially
12 what it is there are two types of information. First, what has been described as the “Insured
13 Prices Analysis” which is described in V(a), and that involves data relating to not only
14 patient data and invoice data, it is data on, as you see in VI “Insured Price Levels and
15 Rankings” disaggregated by insurer and operator.

16 Just to give you an example, at tab 4 in the provisional findings report, what we are talking
17 about, the section starts at para. 6.203, which is on p.211. So you see the heading towards
18 the bottom of the page 211, “Insured prices”. This section goes through to para. 6.248. If
19 you look at p.218, table 6.3, you see a table where there have been redactions from the
20 report and these give the insured revenue per admission for each of the hospital operators –
21 BMI, HCA, Nuffield, Ramsey and Spire, to each of the insurers – BUPA, AXA etc. They
22 are given insured revenue per admission in pounds for each of the operators to each of the
23 insurers. Effectively, what is being given are the insured price levels and rankings for BMI
24 and all of its competitor hospital operators. So the competitors are being told what their
25 average price was to each of these operators and their rankings. That is very sensitive
26 commercial information and will impact on, or could impact on substantially any
27 subsequent commercial negotiations that are carried out between the hospital operators and
28 the insurers. I will come back to this but the whole point of the Disclosure Room protection
29 is to try to prevent that material getting into the hands of the people who will be engaged in
30 the commercial negotiations in future with the insurers. It is very sensitive price
31 information between the competitors. That is the insured prices’ analysis.

32 The second type of material, if you flip back to Annex 3, p.10, is what is described as
33 national bargaining analysis and that is explained in recital V(b), and recital VII and recital
34 VIII(ii). What that is, is an analysis of the bargaining that has actually taken place between

1 the insurers, primarily BUPA, and each of the hospital operators, and the material contained
2 in the Disclosure Room with regard to that type of material you can see it is referred to in
3 Annex 4, paras. 6.145 to 6.189. Paragraph 6.145 starts on p. 194 of Annex 4. That is
4 bargaining between PMIs and hospital operators. Just to give you an example, if you go to
5 p.204 you see in para. 6.180: “BUPA told us” – and then it is in general terms what BUPA
6 told the CC. Then in 6.181 there is a redaction. The material that we are concerned with
7 that was disclosed in the Disclosure Room is BUPA’s account to the Commission about
8 how it negotiated with the hospital operators, what it said in those negotiations, what was
9 successful and what was not successful in those negotiations, and not just what BUPA told
10 the Commission but BUPA’s own internal documents relating to the negotiations. That is
11 the material that was in the Disclosure Room. That, as you can appreciate, is highly
12 sensitive data.

13 As I understand what happened, take, for example, BMI – BMI’s nominated inspectors
14 were given access to BUPA’s submissions and BUPA’s internal negotiating documents
15 relating to the negotiations between BUPA and BMI. It is telling BMI what was going on
16 behind the scenes when they were negotiating the prices with BUPA. As you can
17 understand, that is highly confidential and sensitive information that BUPA at the very least
18 do not want to leak to those individuals within BMI who might in future be engaged in the
19 same negotiations with them.

20 Sir, I think it is important that we understand what sort of material we are dealing with.

21 THE CHAIRMAN: Miss Smith, that is very helpful, but you can take it that we do appreciate
22 that there is a reason why the CC has put in place the measures that it has done, and I do not
23 understand any of the other parties to be gainsaying that this is not very sensitive material
24 which requires some form of special treatment.

25 MISS SMITH: I think it is important that we appreciate that - sorry, sir.

26 THE CHAIRMAN: Indeed, we have that well in mind.

27 MISS SMITH: If I may, the second point, and I will try not to labour this point too much, we are
28 not talking here about this material not being disclosed. BMI were able to nominate three
29 individuals to have access to this material. They chose those individuals. They nominated
30 one lawyer and two economists to go into the Disclosure Room. Those individuals were
31 able to look at the data and the material and they are able to make submissions to the
32 Commission on the basis of that material. This is where the notice of application may not
33 have been as clear, in my submission, as it could have been. They are not stopped from
34 making submissions on the basis of that material. What they cannot do is repeat it in the

1 submissions they make, thereby in effect taking it out of the Disclosure Room by repeating
2 it.

3 Can I just make the point by reference to the report that the Inspectors made, which has
4 been redacted ----

5 THE CHAIRMAN: Miss Smith, can I pause you there just for a moment. I do not want to stop
6 you making the point, but I am quite keen not to move too far from what is not intended to
7 be a substantive hearing this afternoon.

8 MISS SMITH: Sir, the point I am trying to make is - can I just show you, sir, because there was a
9 lot of disbelief expressed in response to what I just said, annex 1 to the notice of
10 application.

11 MR. FLYNN: Sir, I am sure Miss Smith has this well in mind, but of course the bits that are
12 unredacted may be confidential to BMI. I am sure Miss Smith has that well in mind.

13 MISS SMITH: That simply makes my point for me. I will not read it out. These are obviously
14 materials that are very sensitive, and these have not been disclosed to HCA and Spire
15 because of what Mr. Flynn said. BMI asked for 14 days in which to provide the Tribunal
16 with a redacted version. They obviously were not thinking this was terribly urgent when
17 they asked for that period of time. If you look at p.1 of annex 1 there is an underlined
18 heading which I will not read out just under the first hole punch ----

19 THE CHAIRMAN: With the initials "RBS".

20 MISS SMITH: Indeed, and there a reference is made to a specific paragraph of an appendix.
21 This has not been redacted by the CC. A submission is made on that evidence. The CC
22 obviously know what is in that appendix, so do BMI, because they have seen it under the
23 constraints of the Disclosure Room, and they are making a submission on it, which they say
24 undermines the CC's case against BMI. So they are able to make submissions.
25 Sir, we say overall this was a fair procedure, but these are incredibly important points.
26 We have a number of problems with the timetable that you have proposed. First of all,
27 there is an outstanding Decision to be given by the CC. You will have seen from the note I
28 prepared that the CC redacted the report produced by BMI's inspectors, and have, since
29 then, gone back and looked at those redactions, went through them line by line yesterday
30 with the group, as a result of which the redactions have been reduced. A revised redacted
31 report is being prepared as we speak, and will be issued to BMI on Monday.
32 One might have thought that they would have wanted to be given the opportunity to
33 reconsider their application in the face of that, but if they are going to maintain that this is

1 an issue of principle that needs to be considered then they should indicate that that is the
2 case.

3 We also have outstanding applications to intervene that have not been considered, and there
4 is no indication from Mr. Flynn as to how that is going to fit into this timetable for a hearing
5 by Wednesday. We need to consider the applications to intervene, and we need to decide
6 on what basis the interveners are going to be able to make submissions.

7 Sir, you indicated that you were not sure whether these were applications to intervene or
8 separate appeals. We also were not clear from the applications to intervene if that was the
9 case. Spire, for example, in para.12 of their application for permission to intervene refer to
10 a point which is certainly not part of BMI's application, which is (a) the material made
11 available is insufficient. That is certainly not part of the notice of application. It is not clear
12 from these applications to intervene how far the interventions are going to go. If they are
13 going to go beyond BMI's notice of application then we would oppose the applications to
14 intervene, but if the applications to intervene are going to be granted, then we do submit, sir,
15 first of all, that the interveners need to see the notice of application which they have not
16 seen yet, as I understand it. They need to see confidential versions of annex 1. They need
17 to be able to make submissions in the light of that.

18 We need to develop a full defence in the light of having seen not only the notice of
19 application, but also the position of the interveners. We also need to see, if they are going
20 to take a position, the position to be taken by someone like BUPA. They need to be given
21 the opportunity as well because if we are going to deal with this issue as an issue of
22 principle then they need as well, those people whose material is being protected, to be able
23 to make submissions to the Tribunal and need to be heard by the Tribunal before you are
24 able to make a decision on principle of the principle of Disclosure Rooms.

25 The third and perhaps not so important point is that I cannot do a hearing on Wednesday. If
26 this is going to be heard as a matter of principle - it is a serious point, sir, my junior can
27 come along and do it, but, as I have said, this is issue of principle as to whether Disclosure
28 Rooms should be able to be used at all by the CC, and it is an important issue of principle.
29 What we are saying is that we could - I have not heard from the interveners, so I am not
30 sure how quickly they can get their statements or what their position is.

31 THE CHAIRMAN: No, Miss Smith, we jumped to you straight away because we understood you
32 were the only person objecting to a Wednesday hearing, so it seemed right.

33 MISS SMITH: I am not sure how we can proceed or how the interveners can agree to that
34 timetable if they have not even been given permission to intervene yet.

1 THE CHAIRMAN: We will obviously hear from them.

2 MISS SMITH: Sir, I could do a hearing on Monday, 30th September, which is what we suggested
3 in the draft consent order and work back from that. That then takes us to the question of the
4 deadlines for submissions on the provisional findings. The Competition Commission is
5 subject to a statutory deadline. We have to report by 4th April. We need to keep a tight
6 timetable. What we would propose is that the 1st October date be kept for submissions to be
7 made on the provisional findings in so far as they can be, because, of course, the applicant
8 and the interveners are able to make submissions on all the other issues which are not
9 covered by those two categories of material. They are, in fact, able to make submissions on
10 those two categories insofar as those submissions do not involve repetition of what is in the
11 Disclosure Room, so we would ask that that 1st October date is kept for submissions, insofar
12 as they can be made on the provisional findings and the notice of possible remedies,
13 because a lot can be said without reference to the Disclosure Room material. Also, that the
14 applicants be given a further opportunity to make comments on any further material that is
15 unredacted in effect as a result of the application that is before you.

16 We would say that obviously that time will have to run from the date of a Tribunal
17 Judgment because the CC will have to reach a decision as to whether or not this matter
18 should be redacted or not, so I cannot give you a date at the moment because it all depends
19 on the Tribunal Judgment. We would submit it would only need to be a matter of a few
20 days from a Tribunal Judgment for the following reasons. First, BMI's advisers have
21 already seen all the material in the Data Room. They have already produced a report on the
22 basis of that material which includes submissions on its impact on the CC's case. What
23 they want to do with the material is actually very limited. If you look at the notice of
24 application, para. 3 what they say they want to do with this material, if and when it is
25 unredacted: "They wish to liaise with other of the Applicant's advisers" and then use that to
26 formulate a response. So what they want to do is: (1) liaise with other applicant's advisers;
27 and (2) refer to it explicitly in any response. You have already seen they can make
28 submissions on it without repeating it, but I think what they are trying to say is that they
29 want to talk about it with some of the other lawyers and economists and then they might
30 want to repeat it.

31 This submission goes to the fact that actually it should not take very long to make any
32 further submissions on the material if and when it is unredacted from the reports, so we
33 would suggest two or three days after the Tribunal Judgment, bearing in mind the strict and
34 stringent statutory deadlines that we are working under.

1 I think it is also important to note that certain parties chose not to go into the Disclosure
2 Room, BMI, Spire and HCA chose to do so subject to the restraints contained in the
3 undertaking they signed up to.

4 THE CHAIRMAN: Well, that is subject to an express reservation by Mr. Flynn's client.

5 MISS SMITH: The reservation is at the top of the report. But, sir, I have gone about it in a rather
6 roundabout way but I think it is important to not rush into this because they are very
7 important issues of principle. It is about protecting very sensitive data and doing so in a
8 way that we say is reasonable and proportionate, and we need to have a proper opportunity
9 to argue that, and the Tribunal, in order to come to the right decision on this issue of
10 principle, needs to be able to have before it properly thought out submissions – not just
11 from us but from all the other parties who are affected by this.

12 I have not worked out a timetable working back from Monday 30th September, but we need
13 to hear from ----

14 THE CHAIRMAN: We will deal with the dates first and then work back.

15 MISS SMITH: -- the Interveners as well on that point.

16 THE CHAIRMAN: Thank you, Miss Smith. Can I just ask you two points? First, you say this is
17 about Data Rooms generally, but is it not actually about the rules that have been put in place
18 by the CC in respect of this particular Data Room, and whilst I take your point that it
19 involves general questions of how this Data Room operates, it is not really about Data
20 Rooms in general, all we are talking about is whether the rules that have been put in place
21 by the CC in this specific instance are satisfactory given the competing, and both very
22 important considerations of confidentiality and protection of sensitive information on the
23 one hand, and the ability to make one's case on the other.

24 MISS SMITH: Sir, you drew attention to the point at para. 11(3) of the Notice of Application,
25 which says that:

26 "the Applicant's inspectors were not permitted to use any Data that was not own
27 client data in any response to the PFs."

28 That, as I understand it, is we were not permitted to refer to and cite that data in our
29 response to the PFs. Of course, as I have explained to you BMI are permitted to make
30 submissions without repeating explicitly the data that was given. But what this is about is
31 effectively if BMI does reproduce the Disclosure Room data in its response to the PFs, the
32 Disclosure Room data has left the Data Room, and that is the whole point of a Data Room,
33 that the data does not leave it. So, you say "yes", it is just one of the rules that was applied
34 to this Data Room, but I cannot see a Data Room that would be set up without that rule

1 being applied. The whole point of this Data Room is that the data does not leave them,
2 because if the data leaves them there is a risk that it is leaked and that it gets into the hands
3 of those involved in commercial negotiations, and it is sensitive commercial information
4 which should not be in the hands of those people, and that is the whole point of Data Room.
5 So, yes, it is a rule that is applied but no Data Room is going to be set up without that rule
6 being in place.

7 THE CHAIRMAN: Right, thank you, Miss Smith. We will hear from the interveners. Mr.
8 Morris, are you first?

9 MR. MORRIS: Yes. Just a few short points to note. The first point to make is that our
10 intervention on behalf of HCA is limited to this narrow issue of the use of the evidence that
11 has already been seen by our inspectors in the Disclosure Room; it is not any wider than
12 that, it is within the ambit of the appeal, and the point of principle which you, sir, have
13 identified.

14 The second point I would make is this, that we are in the Tribunal's hands as to whether
15 procedurally we should be interveners or self-standing applicants, and we would leave it
16 there. If you wish us to be applicants we would do that if you think that is preferable, and
17 we would support your suggestion of our request for intervention to stand as our applicant's
18 notice.

19 The third point, and I do not need to make it any more than has already been made, because,
20 sir, you have it well in mind. It would be our submission that this point in issue is not as
21 complicated as Miss Smith indicates. The rhetorical question one asks oneself is: what was
22 the purpose of giving access to this information in the Disclosure Room if it cannot be used.
23 Now, of course, Miss Smith says that you can make a submission based on it but you cannot
24 refer to it. That may be a relevant distinction, we say it is a relevant distinction but, in any
25 event the point itself is a relatively short point and, in due course, we would develop
26 submissions to support that position.

27 As far as the timetable is concerned, we are aligned with Mr. Flynn, we think that this can
28 be dealt with in that timetable by Wednesday. We would obviously abide by any alternative
29 timetables that the Tribunal had in mind, and we would throw in our voice on what the steps
30 would be in between.

31 The significant point that we would also wish to emphasise is that, of course, every day that
32 the hearing goes back we would wish there to be ample allowance for the extension of time
33 for submissions in response to the CC. To be honest, I have not taken instructions on what
34 Miss Smith has come up with, and I would want to take instructions on that, about whether

1 or not we could put in a partial response and then have additional submissions afterwards. I
2 think my position immediately now on that is that, no, we would wish to stick by the day by
3 day extension, so if it becomes resolved 14 days after the Data Room then there should be
4 the extension of 14 days, but I would want to take instructions on how feasible it would be
5 to divide the various aspects of the response.

6 THE CHAIRMAN: Is that something you can take instructions on now, or is that going to require
7 us to rise?

8 MR. MORRIS: Yes, I can indeed.

9 THE CHAIRMAN: Then perhaps you should do so, Mr. Morris.

10 MR. MORRIS: (After a pause) My instructions are this, and I am not surprised and, of course, I
11 have not developed the point, the relevant evidence in our case is the insured prices
12 analysis. In our position it is a central finding in the PFs and the data is central to the case
13 that we would wish to make on that central issue and, for that reason, it would not be
14 practical to divide the submissions up – even to make the submissions on the pricing issue
15 would itself be inappropriate to divide it up and add in a bit more in the light of what further
16 information we get.

17 One further point to make is this: we have not had a letter along the lines that the Treasury
18 Solicitor wrote to BMI today. We are not, at the moment, applicants, and that is
19 understandable. I understand, however, that a response about our specific position is in the
20 course of preparation and built into any timetable we would obviously want that to be
21 provided to us on our specific report, at the same times as any response is given to BMI and,
22 presumably, to Spire. But I just put that down as a marker.

23 Unless I can help you any further, sir, those are the points I would wish to make.

24 THE CHAIRMAN: Thank you, Mr. Morris, no, nothing further. Miss Berridge?

25 MISS BERRIDGE: Thank you. I have a few very short points to make. First, we are in very
26 much the same position as Mr. Morris in terms of intervention versus appeal. We are
27 content for you to treat the Statement of Intervention as a Notice of Application if that is
28 what you prefer.

29 Just on timetable and procedure. I think Mr. Flynn and Mr. Morris have said a lot of
30 important things. I just want to clarify, for the avoidance of doubt, that the points Mr. Flynn
31 made about the day by day extension, and also having a decision from the Commission on
32 Monday should also apply to Spire, and also to endorse what Mr. Morris said about the
33 problem of any attempt to split up the submissions – my client very much endorses that – it
34 does need to be treated as a whole.

1 Finally, I thought I might just be able to assist Miss Smith and the Tribunal on para. 12,
2 which seems to have caused a bit of confusion.

3 THE CHAIRMAN: Paragraph 12 of which document, Miss Berridge?

4 MISS BERRIDGE: Of our application to intervene. Miss Smith submitted that this appeared to
5 be an attempt to go wider than the points raised in this application itself. It is possible that
6 that may have been an imperfection of drafting. I would just like to make clear that I think
7 the difference arises, and perhaps it could be put like this: questions about what went into
8 the Data Room, and what goes out of the Data Room and on what terms, and the application
9 is really about what comes out of the Data Room on what terms. I think para. 12 looks as
10 though it might be bringing in the question of what went into the Data Room, and I just
11 want to make clear that it is not intended to; that is not an issue that I wanted to raise in
12 these proceedings in any event, so we are content for that to be understood, and we could
13 amend it if that would be helpful.

14 THE CHAIRMAN: Thank you very much, Miss Berridge. Before I ask Mr. Flynn to respond,
15 Miss Smith, I am conscious that you have a row of people lined up against you, do you have
16 anything else that you want to say? I am not encouraging you to say anything, but if there is
17 anything else you want to say then do say so before I ask Mr. Flynn to reply.

18 MISS SMITH: Simply that it is not clear from what Mr. Morris and Miss Berridge said as to
19 whether they want the opportunity to clarify what is in their applications to intervene,
20 having seen the Notice of Application, but my point is in light of what Miss Berridge said it
21 is not clear how far they are going and we, for one – the Commission – would like to see
22 clarifications from them as to how far their interventions go and what their interventions
23 actually involve. Miss Berridge took you to para.12 in Spire’s application to intervene. If
24 one looks at HCA’s application to intervene, para.19, for example, HCA also appears to go
25 substantially beyond BMI’s case. It says explicitly in relation to national bargaining
26 analysis their position is not the same, and the particular evidence they want to use is not the
27 same.

28 That then leaves the point at 23(e), which appears to suggest that HCA want to make
29 submissions on particular aspects of the evidence that they want to use over and above
30 points that are made by BMI.

31 In any event, sir, we simply say from our position, and maybe the Tribunal’s position, we
32 would be greatly assisted by, if and when permission is given to HCA and Spire to
33 intervene, having seen the notice of application, because they have not yet seen the notice of
34 application, as I understand it ----

1 MR. MORRIS: We have been provided with it. Our application refers to the fact.

2 MISS SMITH: Sorry, I only got that in my hand as I walked in, so I have not read it in detail.

3 We would be greatly assisted by statements of intervention, which may also stand as their
4 skeletons, but we would be greatly assisted by that, and I think the Tribunal would as well,
5 before we put in our defence/skeleton argument. So I would want provision to be made in
6 the timetable for that.

7 THE CHAIRMAN: What we had in mind if we go down the route that was mentioned when we
8 first came in was that the notice of intervention would simply stand, as Mr. Morris said,
9 formally as appeals, but obviously we will bear that in mind when we retire to consider this.
10 Mr. Flynn?

11 MR. FLYNN: Sir, yes, may I make just a few points in response on some of the submissions that
12 Miss Smith has made before we get into timetable. Briefly, just a point of housekeeping,
13 we have located a copy of the local assessment undertakings and we will leave that with the
14 Registrar at the end of the hearing.

15 Yes, the issues are important, but I think, as Mr. Morris says, they are not actually all that
16 difficult. They are points of principle balancing undoubted confidentiality of commercial
17 information against something that Miss Smith mentioned rather less, which is the essential
18 fairness of the procedure and the ability of the parties facing, as you will have seen,
19 extremely intrusive remedies to know what the case is against them and meet it. That is
20 actually what this is about, and I find it extraordinary to think that if the Tribunal finds that
21 this has not been very well handled, the result apparently, according to Miss Smith, is that
22 there will not be disclosure at all. That, if I may say, seems the least likely outcome of all.
23 Miss Smith says that the CC is not to be bounced into responding on these issues. Frankly,
24 it has had ages to think about them. It has had a period that you could measure in weeks, if
25 not months, in this particular case, and it is an issue of principle that ought to be sorted out.
26 As I mentioned, we understand that the group met yesterday to consider not only the
27 disclosure issues in our case, but also those that arise, as I said, in other contexts within this
28 proceeding and it appears the parties to my left, whether they are interveners or appellants,
29 and some issues concerning disclosure to them.

30 The issue is basically how can BMI properly defend itself against the CC's provisional
31 findings?

32 One point I do wish to emphasise very strongly is that the document at the first annex, the
33 redacted document, which, just for the avoidance of any doubt, has not gone to the
34 interveners, is most certainly not a submission. They are notes knocked up after two days

1 of reviewing documents by the three advisers who went into the Data Room, namely a
2 junior lawyer and two economists. They are definitely not submissions, and the CC cannot
3 take anything from them. They are simply notes which, ideally, will form part of reporting
4 back and discussions with people who are actually responsible for formulating the case.

5 We would say that certain of the points of principle at issue in this case seem to have been
6 conceded in the letter today, although given the imprecision and the lack of detail about
7 what the CC has actually decided, it is hard to tell, but apparently it may be, and I may be
8 anticipating too much, the restriction on data other than own client data coming out of the
9 Data Room may be being, to some extent, lifted, we do not actually know.

10 On the timetabling, if we may come back to that, the proposition in respect of the
11 interventions, I think I must leave that largely to my friends, but it seems perfectly sensible,
12 in so far as they are making points which go beyond strictly what are ours but are equivalent
13 points in their own interests, it seems entirely sensible to treat those as notices of application
14 and for those to stand as skeletons in the same that our application does. It is very short, it
15 is self-contained, the Tribunal will not have any difficulty understanding what we are
16 saying, subject to the points you have raised, sir.

17 As to the idea that we should turn this into another mini-inquiry into how to handle their
18 Disclosure Room, that is a different process. We are here in judicial review in front of the
19 Tribunal. BUPA and others had their chance to intervene, you published it on your website.
20 They have not turned up, there is absolutely no need to wait for them.

21 Sir, we say Wednesday we should go. I understand Miss Smith's personal difficulties. I
22 say to the Tribunal mine are none less, but if it is Wednesday we will be there, but I think
23 we are probably in your hands as to how you think it should be handed.

24 THE CHAIRMAN: Do you take the same line as Mr. Morris on the day by day extension and the
25 alternative advanced by Miss Smith regarding a partial response?

26 MR. FLYNN: Yes, sir, you are right to draw that to my attention. I have a note here in capitals
27 which I forgot to read and it says "Whole thing". We do not see how you can possibly cut
28 this up like this, and, as I have said, it is not actually only the disclosure issues that are at
29 issue in our application. There are other things where we may be in a similar difficulty and
30 that is why I say it is points of principle, but, as you rightly said, sir, in the particular
31 context of this Disclosure Room, these undertakings, this particular procedure chosen, and
32 we say mistakenly chosen by the CC.

33 THE CHAIRMAN: Thank you, Mr. Flynn. We will rise and consider what course to take.

34 (Short break)

1 THE CHAIRMAN: Thank you very much, we have considered the appropriate course, and we
2 order as follows: first, the notices of intervention of HCA and Spire stand as applications.
3 We make the point that as regards all three applicants, we anticipate that only points of
4 principle are going to be articulated as to how the Data Room is to work. We do not expect
5 to hear from the parties on specific documents. If such points emerge then they are likely to
6 be hived off to a separate hearing than the hearing we are contemplating now, and for that
7 reason we see no need to address questions of a confidentiality ring in the case of this
8 particular set of hearings.

9 The applicants are to prepare and distribute by 9.30 am on Monday non-confidential
10 versions of their applications.

11 We abridge time to 2 pm on Monday for any interventions in the two new applications that
12 we have now before us.

13 We also give permission, and we do so on the basis that it is completely academic, for all
14 three parties to cross-intervene in each other's appeals.

15 We are very sympathetic to the submissions made by the applicants that they be able to
16 make a global response rather than a bifurcated response to the CC, and we therefore
17 consider that whatever date of hearing we choose, there will have to be an extension of
18 1st October deadline by the CC. We make no order to that effect today, though we suggest
19 that the applicants write to the CC seeking an extension of 14 days from the date on which
20 the CAT hands down judgment in this matter. Should that request be refused, then the issue
21 can be swept up in this appeal and we will deal with it then.

22 Subject to that point, we are minded to give Miss Smith what she wants - that is to say a
23 hearing on 30th September. I want to make it absolutely clear that this is a date that is fixed
24 at the CC's request and that everyone else, including the Tribunal, could have done a date
25 some days earlier on 25th September. However, having heard Miss Smith, we will sit at
26 10.30 am on 30th September.

27 On the basis of that date, we are going to order that the CC serve its evidence - that
28 evidence, plus any submissions on law that it is minded to make - by 12 o'clock midday on
29 Wednesday, 25th September, the response by the applicants be served by 5 pm on Thursday.
30 Finally, and by way of peripheral point, we understand that there is an application from
31 BMI to amend its application to include a sentence dealing with costs. We did not hear
32 about this before. I do not know if it is contentious. Miss Smith, could you let us know if it
33 is and we will hear submissions, but if it is not then we would be minded to allow that
34 amendment, and that can be served with the applications at 9.30 on Monday.

1 Before we rise, is there anything that I have forgotten or the parties think should be raised
2 today? Miss Berridge?

3 MISS BERRIDGE: One small matter, we understand that the CC is coming to some decisions
4 around these issues and we have talked about those being with us on a particular timetable.
5 You have not, as I understand it, set out a time for that. We think it would be helpful if you
6 would do so.

7 THE CHAIRMAN: We are not minded to require the CC to do anything that we consider should
8 be formalised in an order. It seems to us that is for Miss Smith's clients to decide the course
9 they are going to take. It would be sensible obviously for the CC to continue the course that
10 it has suggested to the parties it is going to take according to that timetable, but we are not
11 minded, at least today, to be drawn into laying down how the CC should deal with matters
12 other than the timetable that we have laid down for the hearing of these applications.

13 Mr. Morris?

14 MR. MORRIS: May I just take instructions for a moment? (After a pause) I am grateful, sir, I
15 do not have any further submissions. I was making enquiries of those instructing me about
16 what we would want to do by Monday at 9 am, but I am clear on that now.

17 THE CHAIRMAN: Mr. Flynn, did you have anything to add?

18 MR. FLYNN: No, sir, I might have risen to say what Miss Berridge says, but having heard what
19 you say that needs to be taken no further.

20 THE CHAIRMAN: I am grateful. Thank you everyone for attending at such short notice. We
21 will see you on the hearing date. Thank you very much.

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